
SEPARATION OF POWERS
AS ORDINARY INTERPRETATION

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The Supreme Court applies the structural provisions of the Constitution by relying on an overarching framework of “separation of powers.” Its cases reflect two distinct visions of the doctrine. Functionalist decisions presuppose that Congress has plenary authority to compose the government under the Necessary and Proper Clause, subject only to the requirement that a particular governmental scheme maintain a proper overall balance of power. Formalist opinions, in contrast, assume that the constitutional structure adopts a norm of strict separation which may sharply limit presumptive congressional power to structure the government. This Article contends that, to the extent that these theories each rely on a freestanding separation of powers principle derived from the structure of the document as a whole, both contradict the idea that the Constitution is a “bundle of compromises” that interpreters must respect if they are to show fidelity to the constitutionmaking process. The historical record reveals that the founding generation had no single baseline against which to measure what “the separation of powers” would have required in the abstract. The U.S. Constitution, moreover, not only separates the powers of the three branches, but also blends them in order to provide mutual checks among the branches. In so doing, it strikes many different balances and expresses its purposes at many different levels of generality. When a provision carefully specifies which branch will exercise a given power and in what manner, interpreters must respect that specific compromise by prohibiting alternative means of exercising that power. Conversely, when the Constitution speaks indeterminately to a particular question, constitutionmakers should not rely on abstract notions of separation of powers to displace Congress’s assigned power to compose the federal government. Rather than invoking any overarching separation of powers theory, interpreters should apply tools of ordinary textual interpretation to construe the particular clauses that make up the constitutional structure.

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INTRODUCTION

The Supreme Court routinely decides whether particular governmental arrangements contravene “the separation of powers.”¹ Such cases touch on questions as diverse and important as the validity of a one-house legislative veto,² the extent of congressional authority to limit presidential removal power,³ the scope of executive privilege,⁴ the requirements for Article III standing to sue,⁵ the capacity of non-Article III courts to conduct Article III business,⁶ and countless other issues relating to the operation of the modern federal government. Because every statutory scheme entails some choice about the distribution of power between or among branches, the composition of virtually any federal instrumentality potentially raises questions under the separation of powers doctrine.

Although the Court does not describe its work in this area in categorical terms, legal academics have accurately discerned two basic approaches to separation of powers doctrine. In one set of cases, the Court takes a functionalist approach. In that mode, it rejects the idea “that the Constitution contemplates a complete division of authority between the three branches,”⁷ stressing instead “that the separation of powers contemplates the integration of dispersed powers into a workable Government.”⁸ Cases applying a functionalist approach assume that the constitutional text itself answers very little about the allocation of governmental power among the branches.⁹ Instead, functionalists tend to take a consciously purposive approach in which the prima-

¹ See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3151 (2010) (“We hold that the dual for-cause limitations on the removal of Board members contravene the Constitution’s separation of powers.”); *Bowsher v. Synar*, 478 U.S. 714, 723 (1986) (“A direct congressional role in the removal of officers charged with the execution of the laws . . . is inconsistent with separation of powers.”).

² See *INS v. Chadha*, 462 U.S. 919, 944–59 (1983).

³ See, e.g., *Morrison v. Olson*, 487 U.S. 654, 685–93 (1988); *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 626–32 (1935); *Myers v. United States*, 272 U.S. 52, 107–64 (1926).

⁴ See, e.g., *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 443 (1977); *United States v. Nixon*, 418 U.S. 683, 705–13 (1974).

⁵ See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–60 (1992); *Allen v. Wright*, 468 U.S. 737, 750 (1984).

⁶ See, e.g., *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 853–58 (1986); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 64 (1982) (plurality opinion).

⁷ *Nixon*, 433 U.S. at 443.

⁸ *Mistretta v. United States*, 488 U.S. 361, 386 (1989).

⁹ See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 597 (1984).

ry concern is whether a challenged governmental scheme “disrupts the proper balance between the coordinate branches.”¹⁰

Resting as it does upon a freestanding separation of powers principle,¹¹ this approach tends to privilege general constitutional purpose over specific textual detail. For example, given their overarching view of the document’s elasticity, functionalists are loath to draw conventional negative implications from specific texts that condition the exercise of particular powers (such as the enactment of legislation) upon compliance with carefully detailed constitutional procedures (such as bicameralism and presentment).¹² Rather, because the Necessary and Proper Clause gives Congress express authority to enact legislation “necessary and proper” to implement not only its own powers but also “all other Powers” vested in the federal government,¹³ functionalists believe that Congress has substantially free rein to innovate, as long as a particular scheme satisfies the functional aims of the constitutional structure, taken as a whole.

In a second set of cases, the Court takes a formalist approach. This approach generally presupposes that the Constitution draws sharply defined and judicially enforceable lines among the three distinct branches of government.¹⁴ The conventional wisdom assumes that formalists reach this conclusion by applying standard textualist approaches.¹⁵ And in important ways they do. Consistent with usual rules of textual implication, some formalist decisions enforce the detailed procedural requirements of specific texts such as the Appoint-

¹⁰ *Nixon*, 433 U.S. at 443; *see also, e.g., Mistretta*, 488 U.S. 361; *Morrison v. Olson*, 487 U.S. 654 (1988); *Schor*, 478 U.S. 833. As Justice White wrote in his dissenting opinion in *Bowsher v. Synar*, 478 U.S. 714 (1986), “the role of this Court [in separation of powers cases] should be limited to determining whether the [challenged] Act [of Congress] so alters the balance of authority among the branches of government as to pose a genuine threat to the basic division [of power].” *Id.* at 776 (White, J., dissenting).

¹¹ *See, e.g., Mistretta*, 488 U.S. at 380 (“In applying the principle of separated powers in our jurisprudence, we have sought to give life to Madison’s view of the appropriate relationship among the three coequal Branches.”); *Morrison*, 487 U.S. at 693 (“The final question to be addressed is whether the Act, taken as a whole, violates the principle of separation of powers by unduly interfering with the role of the Executive Branch.”).

¹² *See* section I.A.2.b, pp. 1955–58.

¹³ U.S. CONST. art. I, § 8, cl. 18; *see also, e.g., Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3165 (2010) (Breyer, J., dissenting) (“[T]he Necessary and Proper Clause affords Congress broad authority to ‘create’ governmental ‘‘offices’’ and to structure those offices ‘as it chooses.’” (quoting *Buckley v. Valeo*, 424 U.S. 1, 138 (1976) (per curiam))); *INS v. Chadha*, 462 U.S. 919, 984 (1983) (White, J., dissenting) (“It is long settled that Congress may ‘exercise its best judgment in the selection of measures, to carry into execution the constitutional powers of the government,’ and ‘avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances.’” (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415–16, 420 (1819))).

¹⁴ *See* Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CALIF. L. REV. 853, 859–60 (1990) (explaining the theory of formalism).

¹⁵ *See* sources cited *infra* note 96.

ments Clause or the Bicameralism and Presentment Clauses.¹⁶ Subject to wrinkles discussed below, formalists similarly resist efforts to reallocate power outright from the particular branch to which a given Vesting Clause has assigned it.¹⁷ In such cases, formalists merely seek to enforce what they regard as the text's formal lines of separation.

Less well known is the fact that formalists *also* assume that the Constitution embodies a freestanding separation of powers doctrine.¹⁸ This aspect of formalism makes itself felt in so-called "encroachment" cases, which deal with the claim that Congress has violated the separation of powers through its regulation or oversight of the executive or judicial powers. Because the Necessary and Proper Clause, as noted, gives Congress at least some authority to prescribe — and thus to shape and channel — the means by which *all* the branches carry their powers into execution,¹⁹ one cannot demonstrate impermissible legislative encroachment merely by showing that a statute regulates or structures the exercise of another branch's powers. Rather, the challenged arrangement must somehow affect those powers in a manner or to a degree that the Constitution otherwise prohibits. Formalists sometimes locate that prohibition not in any specific understanding of a discrete structural clause, but rather in a general norm of strict separation derived from the document as a whole. In so doing, they reason from general structural inferences to specific limitations on legislative power.

This Article contends that, contrary to these understandings of functionalism and formalism, the Constitution adopts *no freestanding principle of separation of powers*. The idea of separated powers unmistakably lies behind the Constitution, but it was not adopted wholesale. The Constitution contains no Separation of Powers Clause.²⁰ The historical record, moreover, reveals no one baseline for inferring what a reasonable constitutionmaker would have understood "the separation of powers" to mean in the abstract. Rather, in the Constitu-

¹⁶ See, e.g., *Chadha*, 462 U.S. at 944–59 (Bicameralism and Presentment); *Buckley*, 424 U.S. at 125–26 (Appointments Clause).

¹⁷ See, e.g., *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 859 (1986) (Brennan, J., dissenting) ("On its face, Article III, § 1, seems to prohibit the vesting of *any* judicial functions in either the Legislative or the Executive Branch."); see also U.S. CONST. art. I, § 1 (vesting "[a]ll legislative Powers herein granted" in Congress); *id.* art. II, § 1 (vesting "[t]he executive Power" in the President); *id.* art. III, § 1 (vesting "[t]he judicial Power" in the federal courts). From the standpoint of ordinary textual interpretation, the Vesting Clauses pose some challenge because of their relative indeterminacy. See section III.B, pp. 2017–24. These considerations, however, do not render the Vesting Clauses meaningless, but merely serve as a caution against reading them overconfidently. See section III.C, pp. 2024–39.

¹⁸ See *infra* p. 1959.

¹⁹ See *supra* p. 1943; see also *infra* pp. 1960, 1988.

²⁰ See, e.g., E. Donald Elliott, *Why Our Separation of Powers Jurisprudence Is So Abysmal*, 57 GEO. WASH. L. REV. 506, 508 (1989).

tion, the idea of separation of powers, properly understood, reflects many particular decisions about how to allocate and condition the exercise of federal power. Indeed, the document not only separates powers, but also blends them in many ways in order to ensure that the branches have the means and motives to check one another.²¹ Viewed in isolation from the constitutionmakers' many discrete choices, the concept of separation of powers as such can tell us little, if anything, about where, how, or to what degree the various powers were, in fact, separated (and blended) in the Philadelphia Convention's countless compromises.

Of particular importance, like most political compromises, the ones evident in the first seven articles of the Constitution find expression at many different levels of generality. Some provisions — such as the Bicameralism and Presentment Clauses,²² the Appointments Clause,²³ or the Impeachment Clauses²⁴ — speak in specific terms, both about the locus of a given power and about the manner in which it is to be exercised. Other provisions are more open-ended, perhaps leaving some play in the joints. Most prominently, the Vesting Clauses speak in general terms about the legislative, executive, and judicial powers,²⁵ and say nothing about how these clauses intersect with Congress's broad coordinate power to compose the government under the Necessary and Proper Clause. Like most bargained-for texts, the Constitution's structural provisions thus leave many important questions unaddressed. Because the structural provisions come in many shapes and sizes, no one-size-fits-all theory can do them justice.

It is precisely this feature of the Constitution that functionalists and formalists misapprehend when they imagine that the document embraces any overarching separation of powers doctrine. By blessing schemes that preserve an adequate overall balance of power, functionalists undervalue the *specificity* with which the Constitution makes certain assignments of power or prescribes procedures for its exercise. By invalidating schemes on the ground that they offend a freestanding norm of strict separation, formalists undervalue the *indeterminacy* of the Vesting Clauses relative to Congress's authority to shape government under the Necessary and Proper Clause. In so doing, formalists attribute to parts of the document a specificity of purpose that the text may not support.

²¹ See M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1155–82 (2000) (explaining that the Constitution embraces competing intellectual traditions of separation and balance of powers).

²² U.S. CONST. art. I, § 7.

²³ *Id.* art. II, § 2, cl. 2.

²⁴ *Id.* art. I, § 2, cl. 5; *id.* § 3, cl. 6–7.

²⁵ See section III.B.1, p. 2017–21.

Both sides come by this generality shifting honestly. Drawing broad purposive inferences from the overall constitutional structure represents an important interpretive tradition. Professor Charles Black famously urged that constitutional adjudication should properly rest upon “the method of inference from the structures and relationships created by the constitution in all its parts or in some principal part.”²⁶ In its broad form, this approach lies squarely within the tradition of reading legal texts to implement their overall “spirit,” even when the resultant interpretation transcends what the detailed “letter” of the law specifically requires.²⁷ As Professor Thomas Merrill has put it, the Court’s separation of powers doctrine assumes that “the Constitution contains an organizing principle that is more than the sum of the specific clauses that govern relations among the branches.”²⁸ Within that framework, what counts for functionalists is the apparent background purpose of balance among the branches. What counts for formalists is the apparent background purpose of strict separation.

This wholesale approach to separation of powers law is ripe for reconsideration. In the past quarter century, the Court’s statutory interpretation cases have raised fresh questions about the legitimacy of inferring a broad overall purpose from the specific provisions of an enacted text. The Court has emphasized that lawmaking necessarily entails compromise, and that no enacted law can therefore be expected to pursue its main purposes at all costs.²⁹ Because lawmakers must agree to the means as well as the ends of legislation, judges should respect the specific choices legislators have made about how to implement a law’s background purposes.³⁰ An interpreter, in other words, must not invoke background purpose as a way to convert rules into standards or standards into rules.³¹ Any approach that tries to elevate a general separation of powers doctrine above the many specifics of the Constitution’s power-allocating provisions contradicts that principle.

Of course, an important, perhaps dominant, strain of constitutional theory holds that the norms governing statutory interpretation — especially those norms that insist upon close attention to statutory detail — do not translate comfortably into constitutional law. The Constitution is a broad charter of government that was meant for the ages.

²⁶ CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 7 (1969).

²⁷ See, e.g., *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459–62 (1892) (arguing that a statute should be construed to fulfill its purpose and to suppress the mischief that gave rise to its enactment); *Heydon’s Case*, 76 Eng. Rep. 637 (1584) (same).

²⁸ See Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 225.

²⁹ See *infra* pp. 1973–74.

³⁰ See *infra* p. 1974.

³¹ See *infra* p. 1974.

By design, moreover, the document is nearly impossible to amend. Hence, the “living Constitution” theory holds that one should read the Constitution as a broad statement of principle rather than as a detailed code.³²

Whatever the arguments for or against the living Constitution in general, several considerations suggest that the Court’s modern insights about reading statutory texts translate well into the Constitution’s structural provisions.³³ First, rather than embracing an overarching separation of powers principle, the document, as noted, reflects countless context-specific choices about how to assign, structure, divide, blend, and balance federal power.³⁴ Second, constitutionmakers expressly provided for the living Constitution problem by adopting the Necessary and Proper Clause.³⁵ In doing so, however, they neither gave Congress free rein to innovate nor subjected it to a strict, unenumerated norm of separation.³⁶ Third, even if one wished to read into the document an unwritten separation of powers principle, it would be difficult, if not impossible, to identify a universally agreed-upon external template for the appropriate mix of separation and blending. Founding-era political theory and governmental practice suggest that a wide array of arrangements was thought to satisfy the requirement of adopting a system of separated powers.³⁷

To say that there is no freestanding separation of powers doctrine is not to say that the Constitution contains no judicially enforceable separation of powers. Rather, this position insists merely that the Court must focus on the meaning of particular structural clauses by reference to conventional theories of textual interpretation, rather than try to impose some grand theory upon the document. As Professor William Van Alstyne writes, “the separation of powers to be respected is that which the Constitution itself establishes.”³⁸ Where the Constitution is specific, the Court should read it the way it reads all specific texts. If the Appointments Clause supplies a precise method of appointing “Officers of the United States,” the Court should not permit Congress to adopt a contrary approach under the more general authority it pos-

³² See *infra* pp. 1976–77.

³³ See, e.g., John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663 (2004) [hereinafter Manning, *Eleventh Amendment*]; John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2037–47 (2009) [hereinafter Manning, *Federalism*].

³⁴ See section II.B, pp. 1978–85.

³⁵ See *infra* note 245 and accompanying text.

³⁶ See section II.C, pp. 1985–93.

³⁷ See section II.D, pp. 1993–2005.

³⁸ William W. Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, LAW & CONTEMP. PROBS., Spring 1976, at 119.

sesses under the Necessary and Proper Clause.³⁹ Conversely, where no specific clause speaks directly to the question at issue, interpreters must respect the document's indeterminacy. If legislation regulating the powers of the coordinate branches neither contradicts an identifiable background understanding of one of the Vesting Clauses nor effectively reallocates power from its specified branch, interpreters should not invalidate such legislation by reading abstract notions of the separation of powers into those otherwise open-ended clauses.⁴⁰

Apart from harmonizing the method of constitutional interpretation with the process of constitutionmaking that produced the original Constitution, a clause-centered approach would also break the stalemate between formalists and functionalists. Because neither fully articulates its position at a level of generality at which the constitutional structure is expressed, neither has a firm basis for identifying its level of generality as superior.⁴¹ A clause-centered approach would sidestep this problem by refocusing the inquiry onto the specific ways in which

³⁹ See *Buckley v. Valeo*, 424 U.S. 1, 134–35 (1976) (per curiam) (so holding); see also section III.A.1, pp. 2008–13.

⁴⁰ Although my analytical framework categorically distinguishes detailed or specific clauses from open-ended or indeterminate ones, the relative precision of the various constitutional provisions obviously runs along a continuum. In addition, even the most precise of structural clauses will have some significant areas of indeterminacy. See, e.g., *Buckley*, 424 U.S. at 125–26 (grappling with what “Officer of the United States” means in the context of the detailed requirements of the Appointments Clause). The most open-ended of them, in turn, may be determinate in some applications. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (finding it “emphatically” clear that Article III judicial power encompasses law declaration authority). For present purposes, it is nonetheless useful to sort those structural provisions which are relatively detailed from those which are more broadly drawn.

It is worth noting, moreover, that because the analysis here examines specificity and indeterminacy as they relate to the particular history and content of the document's structural provisions, it is unnecessary to engage the emerging debate among contemporary originalists about whether fundamentally different rules should govern the reading of precise versus open-ended constitutional texts in general. Compare, e.g., RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* 118–31 (2004) (arguing that constitutional adjudication properly relies on “interpretation” — the excavation of semantic meaning — when dealing with relatively precise clauses, but “construction” — the resort to external principles — when dealing with generally worded clauses), and KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION* 5–9 (2001) (same), with John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 772–80 (2009) (arguing that the interpretation-construction dichotomy rests on an artificial distinction with no basis in our constitutional traditions). In particular, to the extent that such scholars maintain that open-ended clauses invite judges to draw upon external values such as the separation of powers to particularize meaning, see BARNETT, *supra*, at 125, 128, that position would run afoul of the specific premise, developed here, that neither the document nor its historical context supports the existence of a separation of powers doctrine in the abstract. See sections II.B–D, pp. 1978–2005.

⁴¹ See Stephen F. Williams, *Rule and Purpose in Legal Interpretation*, 61 U. COLO. L. REV. 809, 811 (1990) (“Notice that as soon as the analysis of purpose is divorced from the means selected, all limits are off. Every purpose can always be restated at a higher level of generality.”).

constitutionmakers did, and did not, resolve structural issues in the bargained-for constitutional text.

This Article elaborates on the idea of reading structural constitutional provisions, not through an overarching theory of separation of powers, but rather through clause-centered methods of textual interpretation that track the diverse levels of generality at which constitutionmakers framed the structural provisions. Part I discusses functionalism and formalism, offering examples of the Court's use of broadly purposive reasoning under each approach. Examining the text, structure, and history of the structural provisions, Part II argues that the Constitution does not adopt a freestanding separation of powers doctrine. Part III suggests preliminary criteria for a more clause-centered approach to the document's structural provisions.

* * * *

Before I turn to the analysis, two caveats are needed. First, functionalism and formalism describe the approaches of many judges and scholars. No canonical form of either approach exists. In describing methodological difficulties with each approach, I do not suggest that all functionalists or formalists always commit the generality-shifting errors I identify.⁴² Rather than attempt a compendious survey of both philosophies, I try to distill the essential characteristics of the modern judicial opinions that make these tendencies most evident.

Second, by referring to "ordinary interpretation," I do not mean to suggest that there is any agreed-upon version of what judges should do when they interpret statutes, much less when they interpret the Constitution. Rather, I use "ordinary interpretation" here to distinguish between reliance on some overarching theory of the document and more clause-specific interpretation. In drawing that contrast, the analysis invokes some techniques — most prominently, certain forms of negative implication — that represent conventional and deeply rooted, but still contested, methods of textual exegesis. Obviously, I do not expect

⁴² In particular, I would note that many academic functionalists pay considerable attention to the questions whether and to what extent particular clauses of the Constitution address a given practice. See, e.g., Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 67 (1994); Strauss, *supra* note 9, at 597–604. Similarly, many academic formalists exhaustively examine the precise historical meanings of particular clauses of the Constitution before determining that a legislative practice is out of bounds. See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267 (1996); Michael B. Rappaport, *The Selective Nondelegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and Its Implications for Clinton v. City of New York*, 76 TUL. L. REV. 265 (2001).

the reader to agree with every detail of the interpretive framework I apply here. Rather, my aim is to show how a generality-shifting or penumbral approach compares with one that, by some set of conventional standards, seeks to excavate the historically understood meanings of particular clauses, read in context.

I. MODERN SEPARATION OF POWERS DOCTRINE

Analysis of formalism and functionalism typically stresses the differences between them. Functionalism emphasizes standards. Formalism favors rules. Functionalism looks primarily at constitutional purposes. Formalism draws more upon constitutional text and original understanding. This Part tries to show that focusing upon these differences, however real, overlooks an important tendency that the two approaches have in common: in some contexts, each approach relies on a freestanding separation of powers doctrine that transcends the specific meaning of any given provision of the Constitution. Perceiving a broad constitutional purpose to achieve checks and balances among the branches, functionalists tend to validate schemes as long as they preserve an appropriate balance, even if doing so entails rejecting the detailed procedural requirements of a discrete structural provision. Formalists tend to do better along those particular dimensions — typically insisting on the fine points of the document’s specific assignments of power and specifications of procedure. But they also invoke a freestanding separation of powers doctrine when they rely on a background norm of strict separation to displace Congress’s presumptive authority to make laws “necessary and proper” to “carry[] into Execution” all the powers conferred upon the federal government.⁴³

This Part explores the purposive, generality-shifting elements of both approaches. Section I.A examines the generality-shifting nature of functionalism. Section I.B attempts to show that freestanding separation of powers doctrine also plays some role in formalist jurisprudence.

A. *Functionalism*

1. *A Sketch of Functionalist Principles.* — No canonical definition of functionalism exists. But with forgivable oversimplification, it is possible to identify some recurrent themes. Functionalists believe that the Constitution’s structural clauses ultimately supply few useful details of meaning. Professor Peter Strauss thus writes:

One scanning the Constitution for a sense of the overall structure of the federal government is immediately struck by its silences. Save for some

⁴³ U.S. CONST. art. I, § 8, cl. 18.

aspects of the legislative process, it says little about how those it names as necessary elements of government — Congress, President, and Supreme Court — will perform their functions, and it says almost nothing at all about the unelected officials who, even in 1789, would necessarily perform the bulk of the government’s work.⁴⁴

Given the document’s many “silences,” functionalists believe that almost all important aspects of “the job of creating and altering the shape of the federal government” fall within the authority granted to Congress by the Necessary and Proper Clause.⁴⁵ That clause, as noted, gives Congress the power to make laws that are “necessary and proper for carrying into Execution” not only its own powers, but also “all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”⁴⁶ Functionalists thus argue that “the text on its own terms contemplates that Congress will determine how [the government’s] powers are best exercised.”⁴⁷

In light of those starting premises, functionalists view their job as primarily to ensure that Congress has respected a broad background purpose to establish and maintain a rough balance or creative tension among the branches.⁴⁸ As Professor Kathleen Sullivan once put it, under a functionalist approach, “Congress’s choice of demonstrated social benefits” in a particular institutional arrangement prevails over the formalities of separation of powers, “as long as the policies underlying the original structure are satisfied.”⁴⁹ In this regard, functional-

⁴⁴ Strauss, *supra* note 9, at 597. In more recent writing, Professor Strauss seems to ascribe greater determinacy to the Constitution’s structural clauses. See, e.g., Peter L. Strauss, *Overseer, or “The Decider”? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 703–32 (2007) (inferring from various provisions of Article II that the President has a role as overseer but not decider in administrative law).

⁴⁵ Strauss, *supra* note 9, at 598.

⁴⁶ U.S. CONST. art. I, § 8, cl. 18.

⁴⁷ Flaherty, *supra* note 42, at 1800.

⁴⁸ See, e.g., Harold H. Bruff, *The Incompatibility Principle*, 59 ADMIN. L. REV. 225, 226 (2007) (arguing that “[f]unctionalists stress the blending of powers in the Constitution and the Framers’ arguments for checks and balances”); Thomas O. Sargentich, *The Contemporary Debate About Legislative-Executive Separation of Powers*, 72 CORNELL L. REV. 430, 433 (1987) (“Functionalism is closely allied with the vision of checks and balances among the branches of government.”); Mark Tushnet, *The Sentencing Commission and Constitutional Theory: Bowls and Plateaus in Separation of Powers Theory*, 66 S. CAL. L. REV. 581, 583 (1992) (“When the Court uses a functional approach, . . . the discussion tends to center on balance-of-powers considerations.”).

⁴⁹ Kathleen M. Sullivan, *The Supreme Court, 1994 Term — Comment: Dueling Sovereignties: U.S. Term Limits, Inc. v. Thornton*, 109 HARV. L. REV. 78, 93–94 (1995). For a similar view, see Strauss, *supra* note 9, which contends:

So long as separation of powers is maintained at the very apex of government, a checks-and-balances inquiry into the relationship of the three named bodies to the agencies and each other seems capable in itself . . . of preserving the framers’ vision of a government

ists emphasize that the founders created a “governmental structure . . . [that] embodies both separated powers and interlocking responsibilities.”⁵⁰ That is, the Constitution not only separates powers, but also establishes a system of checks and balances through power-sharing practices such as the presidential veto, senatorial advice and consent to appointments, and the like.⁵¹ In light of that complex structure, functionalists view the Constitution as emphasizing the balance, and not the separation, of powers.⁵²

This emphasis, I submit, results in a systematic overvaluation of the *general* purposes of the Constitution and a systematic undervaluation of the *specific* requirements of particular structural clauses. As explained below, when an enacted text establishes a new power and specifies a detailed procedural framework for that power’s implementation, conventional principles of textual exegesis suggest that the resultant specification should be treated as exclusive of any other alternative.⁵³ (Why would constitutionmakers go to the trouble to spell out in exquisite detail the procedures for enacting legislation, appointing federal officers, or impeaching those officers if they viewed alternative procedures as equally acceptable?) If so, then the Constitution’s “silences” about alternative assignments of power or forms of procedure may, at times, reflect a negative implication, and not the sort of indeterminacy that leaves Congress free to innovate under the Necessary and Proper Clause.⁵⁴ In functionalist jurisprudence, those specific textual implications yield as long as the general balance of powers is intact.

2. *Examples of Functionalist Generality Shifting.* — The Court has applied a functionalist approach to numerous separation of powers questions, ranging from the validity of statutory restrictions on presidential removal power⁵⁵ to the scope of extratextual doctrines of ex-

powerful enough to be efficient, yet sufficiently distracted by internal competition to avoid the threat of tyranny.

Id. at 639.

⁵⁰ Strauss, *supra* note 9, at 602.

⁵¹ See U.S. CONST. art. I, § 7, cl. 2–3 (Bicameralism and Presentment Clauses); *id.* art. II, § 2, cl. 2 (Appointments Clause).

⁵² See Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 496 (1989) (describing the functionalist premise that “through the carefully orchestrated disposition and sharing of authority, restraint would be found in power counterbalancing power”).

⁵³ See *infra* pp. 2006–07.

⁵⁴ See section III.A.1, pp. 2008–13.

⁵⁵ See *Morrison v. Olson*, 487 U.S. 654, 685–93 (1988) (applying a balancing test to determine the validity of a restriction on presidential removal of an independent prosecutor); *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 629–32 (1935) (using functionalist reasoning to sustain independent regulatory agencies).

ecutive and legislative privilege.⁵⁶ Rather than catalogue them all here, this subsection discusses two prominent functionalist opinions that typify the generality-shifting tendencies of that approach. The first — a majority opinion — uses functionalist reasoning to uphold the reallocation of (what the Court described as) “core” Article III business to a non–Article III tribunal. The second — one of Justice White’s canonical functionalist dissents⁵⁷ — illustrates his use of functionalism to validate a one-house legislative veto despite the specific requirements of the Bicameralism and Presentment Clauses.

(a) *Underreading a Vesting Clause.* — In *Commodity Futures Trading Commission v. Schor*,⁵⁸ the Court sustained a statute that had reallocated core Article III business to an administrative agency lacking Article III protections of life tenure and salary protection.⁵⁹ Schor, an investor in commodity futures, had filed an action before the Commodity Futures Trading Commission (CFTC) alleging that his broker had violated the Commodity Exchange Act⁶⁰ (CEA). The broker, in turn, brought a state common law counterclaim for debt, seeking unpaid brokerage fees.⁶¹ Both the parties and the Court assumed that the CEA claim involved a so-called “public right” — that is, a category of disputes that our constitutional tradition has, since the early days of the Republic, treated as appropriate matters for executive, as well as judicial, disposition.⁶² In contrast, the Court viewed the

⁵⁶ See, e.g., *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 441–46 (1977) (using functionalist reasoning to sustain the Presidential Recordings and Materials Preservation Act, Pub. L. No. 93–526, 88 Stat. 1695 (1974) (codified as amended at 44 U.S.C. § 2111 note (2006)), which instructed the Administrator of General Services to take custody of President Nixon’s presidential records and Oval Office tape recordings, *id.* § 101, 88 Stat. 1695 (codified as amended at 44 U.S.C. § 2111 note)); *United States v. Nixon*, 418 U.S. 683, 707 (1974) (arguing that granting the President an absolute privilege for confidential information “would upset the constitutional balance of ‘a workable government’ and gravely impair the role of the courts under Art. III”); *Gravel v. United States*, 408 U.S. 606, 616–17 (1972) (citing functional reasons for holding that legislative aides are protected by the Speech or Debate Clause, U.S. CONST. art. I, § 6, cl. 1, even though the express terms of the clause extend only to “Senators and Representatives,” *id.*).

⁵⁷ During the formative years of modern separation of powers doctrine, Justice White was the Court’s most influential functionalist voice, playing a key role in defining and justifying that approach. See, e.g., Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1020 n.169 (2006) (discussing Justice White’s influence); Laura S. Fitzgerald, *Cadenced Power: The Kinetic Constitution*, 46 DUKE L.J. 679, 711 n.127 (1997) (“Although he wrote none of the majority opinions in which the Court itself adopted a functionalist approach, Justice White is nonetheless credited with its essential definition.”).

⁵⁸ 478 U.S. 833 (1986).

⁵⁹ See *id.* at 858–59.

⁶⁰ Pub. L. No. 74–675, 49 Stat. 1491 (1936) (codified as amended at 7 U.S.C. §§ 1–25 (2006)).

⁶¹ *Schor*, 478 U.S. at 837–38.

⁶² See *infra* pp. 2020–21.

state common law counterclaim as “core” Article III business.⁶³ Accordingly, by its own reckoning, the Court was faced with a statutory scheme that reassigned core Article III business to a non-Article III agency.

From that starting point, one might have thought the case relatively straightforward.⁶⁴ Applying conventional principles of negative implication, Justice Brennan observed in dissent: “On its face, Article III, § 1, seems to prohibit the vesting of *any* judicial functions in either the Legislative or the Executive Branch.”⁶⁵ Constitutionmakers vested “[t]he judicial Power” in federal courts having specified characteristics — namely, judges with life tenure and salary protection.⁶⁶ In that light, the Court had long made clear that Congress may not “withdraw from [Article III] judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.”⁶⁷ In other words, matters “at the core of the historically recognized judicial power” had to remain within the purview of an Article III adjudicator.⁶⁸

In classical functionalist reasoning, however, *Schor* explained that the validity of the scheme hinged, not on the terms of Article III’s Vesting Clause, but rather on “the purposes underlying the requirements of Article III.”⁶⁹ Under this approach, the Court found that, for several reasons, “the congressional authorization of limited CFTC jurisdiction over a narrow class of common law claims as an incident to the CFTC’s primary, and unchallenged, adjudicative function does not create a substantial threat to the separation of powers.”⁷⁰ First, the CFTC exercised narrow authority over Article III counterclaims in a “particularized area of law.”⁷¹ Second, the scheme left Article III courts with considerable authority to check the agency’s decisions and

⁶³ See *Schor*, 478 U.S. at 853 (explaining that the state common law counterclaim against *Schor* was “a claim of the kind assumed to be at the ‘core’ of matters normally reserved to Article III courts”).

⁶⁴ There was one wrinkle that did not long detain the Court. In the Court’s view, *Schor* had impliedly waived his Article III objection by bringing the CEA action before the agency and by seeking to dismiss a district court action for debt brought against him by his broker. See *id.* at 849–50. Although *Schor* waived his “personal” right to an Article III tribunal, the Court held that *Schor* could still assert a nonwaivable “structural” interest in an Article III forum. See *id.* at 850–51.

⁶⁵ *Id.* at 859 (Brennan, J., dissenting).

⁶⁶ U.S. CONST. art. III, § 1.

⁶⁷ *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856).

⁶⁸ *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 70 (1982) (plurality opinion).

⁶⁹ *Schor*, 478 U.S. at 847.

⁷⁰ *Id.* at 854.

⁷¹ *Id.* at 852 (quoting *Northern Pipeline*, 458 U.S. at 85) (internal quotation marks omitted).

denied the agency certain key attributes of Article III power.⁷² Third, invocation of the agency forum depended wholly on the initiative of the parties, mitigating concerns about any intrusion upon Article III.⁷³

Finally, the Court — with no apparent hint of irony — took into account “the concerns that drove Congress to depart from the requirements of Article III.”⁷⁴ If brokers could not bring counterclaims before the CFTC, then customers faced with such counterclaims would have to bring their CEA actions in federal court if they wished to avoid litigation in two fora.⁷⁵ And this outcome, the Court said, would defeat Congress’s intention “to create an inexpensive and expeditious alternative forum [the CFTC] through which customers could enforce . . . the CEA against professional brokers.”⁷⁶

Having concluded that “the magnitude of any intrusion on the Judicial Branch can only be termed *de minimis*,”⁷⁷ the Court found “no genuine threat” to “separation of powers principles” from the challenged scheme.⁷⁸ Even if the reallocation of common law adjudication to an agency technically violated Article III’s text, what counted was the broader purpose of Article III in the overall scheme of separation of powers.

(b) *Specific Procedures and General Purposes.* — Justice White’s dissent in *INS v. Chadha*⁷⁹ provides another classic example of functionalist generality shifting. Under the Immigration and Nationality Act of 1952⁸⁰ (INA), one house of Congress could “veto” the Attorney General’s exercise of delegated authority to suspend an order of deportation.⁸¹ Because the one-house veto altered “the legal rights, duties, and relations” of persons outside the legislative branch, the Court held that it constituted legislation that did not comply with the “[e]xplicit and unambiguous provisions” of the Bicameralism and Presentment

⁷² For example, a claimant could enforce a favorable CFTC order only by petitioning a district court for enforcement. *See id.* at 853. In such actions, reviewing courts evaluated the CFTC’s factfinding under a relatively exacting “weight of the evidence” standard and conducted de novo review of questions of law. *See id.* In contrast with an earlier scheme condemned by the Court, moreover, the agency did not exercise traditional judicial functions such as conducting jury trials or issuing writs of habeas corpus. *See id.*

⁷³ *See id.* at 855.

⁷⁴ *Id.* at 851.

⁷⁵ *See id.* at 843–44.

⁷⁶ *Id.* at 855.

⁷⁷ *Id.* at 856.

⁷⁸ *Id.* at 857.

⁷⁹ 462 U.S. 919 (1983).

⁸⁰ Pub. L. No. 82–414, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101–1537 (2006)).

⁸¹ *See Chadha*, 462 U.S. at 925. The relevant statute had authorized the Attorney General to suspend deportation when the deportee satisfied certain durational residency requirements and was “a person of good moral character” whose deportation “would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship” to various identified people. 8 U.S.C. § 1254(a)(2) (1994) (repealed 1996).

Clauses of Article I, Section 7.⁸² Whatever its other merits or demerits, the one-house veto's inconsistency with the Constitution's "express procedures . . . for legislative action" was, for the Court, the end of the matter.⁸³

Justice White's dissent typifies modern functionalism. He wrote that "[t]he Constitution does not directly authorize or prohibit the legislative veto."⁸⁴ Accordingly, Justice White concluded that the relevant question is whether "the legislative veto is consistent with the purposes of Art. I and the principles of separation of powers which are reflected in that Article and throughout the Constitution."⁸⁵ Indeed, given that Congress routinely delegates broad rulemaking authority to administrative agencies,⁸⁶ Justice White maintained that the legislative veto actually promoted the balance of powers prescribed by the constitutional structure:

Without the legislative veto, Congress is faced with a Hobson's choice: either to refrain from delegating the necessary authority, leaving itself with a hopeless task of writing laws with the requisite specificity to cover endless special circumstances across the entire policy landscape, or in the alternative, to abdicate its law-making function to the Executive Branch and independent agencies. To choose the former leaves major national problems unresolved; to opt for the latter risks unaccountable policymaking by those not elected to fill that role.⁸⁷

In other words, in modern society, the legislative veto served as "an important if not indispensable political invention."⁸⁸ For Justice White, it thus clearly fell within Congress's broad authority under the Necessary and Proper Clause.⁸⁹

While Justice White did invoke the text of the Constitution — to argue that it did not speak to the legislative veto — his reliance on

⁸² *Chadha*, 462 U.S. at 945, 952.

⁸³ *Id.* at 958.

⁸⁴ *Id.* at 977 (White, J., dissenting).

⁸⁵ *Id.* at 977–78.

⁸⁶ *See, e.g.*, *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 85 (1932) (approving broad delegation as inevitable in a complex modern society); *Union Bridge Co. v. United States*, 204 U.S. 364, 387 (1907) (same). In only two cases, both decided the same year, did the Court invalidate a legislative delegation on the ground that it impermissibly transferred legislative power to the executive. *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935). For further discussion of delegation, see *infra* pp. 2019–20.

⁸⁷ *Chadha*, 462 U.S. at 968 (White, J., dissenting). Indeed, Justice White argued that since administrative agencies exercise broad lawmaking power outside the context of bicameralism and presentment, it was conceptually difficult to condemn the legislative veto while sustaining traditional delegations. *See id.* at 989. As discussed below, however, several considerations relevantly distinguish legislative self-delegation from delegation to administrative agencies. *See infra* note 397.

⁸⁸ *Chadha*, 462 U.S. at 972 (White, J., dissenting).

⁸⁹ *Id.* at 983–87.

general constitutional purpose, in fact, displaced the specific requirements of the Bicameralism and Presentment Clauses. It is perhaps true that those clauses do not “directly” speak to the legislative veto,⁹⁰ but only in the most crassly literal sense.⁹¹ Justice White’s characterization of the text overlooks the standard implication of exclusivity that interpreters conventionally draw from specific procedural texts such as the Bicameralism and Presentment Clauses.⁹² In the absence of the INA’s legislative veto provision, Congress surely could not have nullified the Attorney General’s exercise of suspension authority without passing legislation.⁹³ If Congress could delegate to itself the power to alter legal rights and duties through means short of legislation, it could freely circumvent the procedural conditions that constitutionmakers attached to Congress’s exercise of its “legislative Powers.”⁹⁴ Accordingly, in the face of an elaborately detailed set of procedural requirements for enacting legislation, Justice White’s invocation of general constitutional purposes did not fill a gap in the document, but rather trumped the specific textual implications of discrete constitutional provisions.

Of course, one might say that Justice White’s overlooking a negative implication (if that is what he did) merely reflects ordinary interpretation gone awry, and not the sort of generality-shifting functionalism that is of concern here.⁹⁵ But to draw such a conclusion would be to minimize the systematic influence of functionalist premises in the dissent’s reasoning. Given his view that the Constitution’s central purpose is to blend and balance power, Justice White predictably un-

⁹⁰ *Id.* at 977.

⁹¹ *Cf.* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 474–75 (1897) (describing a Vermont justice of the peace who dismissed a case involving destruction of a “churn” because “he had looked through the statutes and could find nothing about churns”).

⁹² *See* section III.A.1, pp. 2008–13.

⁹³ *See Chadha*, 462 U.S. at 952–55.

⁹⁴ *Id.* at 956–58. In order to prevent Congress from circumventing bicameralism and presentment by relabeling legislation as something else, Article I, Section 7 includes a catch-all provision stating that “[e]very Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States.” U.S. CONST. art. I, § 7, cl. 3; *see also* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1334–35 (2001) (discussing the origins of clause 3). Justice White acknowledged the force of this clause, but concluded “that the Framers were concerned [only] with limiting the methods for enacting new legislation” — a concern that, in his view, did not apply to the legislative veto. *Chadha*, 462 U.S. at 981–82 (White, J., dissenting). It is not clear, however, why the displacement of a duly adopted agency regulation does not constitute the making of “new” law. *See id.* at 954–55 (majority opinion) (noting that congressional decisions to displace the exercise of delegated authority traditionally required legislation). Indeed, if one were to take Justice White’s reasoning to its logical conclusion, Congress presumably would not be enacting “new” legislation if it employed a one-house veto to reject judicial interpretations of existing statutes.

⁹⁵ I am grateful to my colleague, Professor Mark Tushnet, for bringing this concern to my attention.

derstated the preclusive effect of the sharp-edged specification of legislative procedure in Article I, Section 7. His failure even to acknowledge the possibility of a negative implication was not, therefore, a random interpretive misstep, but rather one born of a larger philosophy of the constitutional structure.

B. Formalism

1. *A Sketch of Formalist Principles.* — Formalist theory presupposes that the constitutional separation of powers establishes readily ascertainable and enforceable rules of separation. Perhaps because of this emphasis, scholars commonly associate formalism with textualist interpretive approaches, which insist upon a close adherence to rules reflected in the public meaning of some authoritative text, such as a statute or the Constitution.⁹⁶ Conventional wisdom further holds that, in contrast with functionalism, formalism calls upon interpreters to adhere to the conventional meaning of the text *instead of* resorting to the broad purposes underlying it.⁹⁷

That characterization accurately describes important elements of formalist reasoning. In particular, many formalist decisions simply enforce the apparent exclusivity of the detailed procedures specified in provisions such as the Bicameralism and Presentment Clauses or the Appointments Clause.⁹⁸ Also within the tradition of ordinary textual interpretation (though perhaps more challenging in practice⁹⁹) are formalist opinions resisting the perceived reassignment of a power from one branch to another, contrary to the allocation originally effected by one of the Vesting Clauses.¹⁰⁰

⁹⁶ See, e.g., MARTIN H. REDISH, *THE CONSTITUTION AS POLITICAL STRUCTURE* 6–10 (1995) (advancing a text-based defense of formalism); Lawson, *supra* note 14, at 859 (arguing that “formalism is inextricably tied to both textualism and originalism”); see also Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1523 (1991) (arguing that formalists “posit that the structural provisions of the Constitution should be understood solely by their literal language and the drafters’ original intent”).

⁹⁷ See, e.g., Magill, *supra* note 21, at 1138 (“For the formalist, questions of horizontal governmental structure are to be resolved by reference to a fixed set of rules and not by reference to some purpose of those rules.”).

⁹⁸ See, e.g., *Clinton v. City of New York*, 524 U.S. 417, 439 (1998) (Bicameralism and Presentment Clauses); *Chadha*, 462 U.S. at 956–58 (same); *Buckley v. Valeo*, 424 U.S. 1, 124–37 (1976) (per curiam) (Appointments Clause); see also *supra* pp. 1955–56 (discussing the majority’s approach in *Chadha*).

⁹⁹ See section III.B.1, pp. 2017–21.

¹⁰⁰ See, e.g., *Touby v. United States*, 500 U.S. 160, 164–65 (1991) (“The Constitution provides that ‘[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.’ From this language the Court has derived the nondelegation doctrine: that Congress may not constitutionally delegate its legislative power to another branch of Government.” (alteration in original) (citation omitted) (quoting U.S. CONST. art. I, § 1)); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 57–76 (1982) (plurality opinion) (invalidating the assignment of core Article

Rather than focus on such cases (to which this Article later returns),¹⁰¹ the analysis here examines an important but overlooked category of cases in which formalists risk relying on generality-shifting purposivism. Like functionalists, formalists subscribe to the idea that the Constitution adopts a freestanding separation of powers doctrine.¹⁰² Bereft of any express Separation of Powers Clause, formalists derive their position not from any identifiable provision of the Constitution, but rather from the overall structure of the Vesting Clauses and other clauses suggesting a purpose to separate powers.¹⁰³ As one leading formalist scholar put it:

Formalists treat the Constitution's three "vesting" clauses as effecting a complete division of otherwise unallocated federal governmental authority among the constitutionally specified legislative, executive, and judicial institutions. Any exercise of governmental power, and any governmental institution exercising that power, must either fit within one of the three formal categories thus established or find explicit constitutional authorization for such a deviation. The separation of powers principle is violated whenever the categorizations of the exercised power and the exercising institution do not match and the Constitution does not specifically permit such blending.¹⁰⁴

Starting from the premise that "[t]he declared purpose of separating and dividing the powers of government . . . was to 'diffus[e] power the better to secure liberty,'"¹⁰⁵ formalists favor unyielding enforcement of what they see as a strict norm of separation even where the resultant

III business to non-Article III bankruptcy courts). For further discussion of the nondelegation doctrine, see *infra* pp. 2019–20.

¹⁰¹ See sections III.A–B.1, pp. 342–409.

¹⁰² See, e.g., *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 255 (1991) ("The principal question presented is whether this unusual statutory [arrangement] violates the constitutional principle of separation of powers . . ."); *Bowsher v. Synar*, 478 U.S. 714, 723 (1986) ("A direct congressional role in the removal of officers charged with the execution of the laws beyond [the impeachment power] is inconsistent with separation of powers."); In a famous formalist dissent, Justice Scalia lamented that the Court had gotten it "backwards" by devoting "most of its attention to such relatively technical details as the Appointments Clause and the removal power, addressing briefly and only at the end of its opinion the separation of powers." *Morrison v. Olson*, 487 U.S. 654, 703–04 (1988) (Scalia, J., dissenting); see also section I.B.2.b, pp. 1965–71.

¹⁰³ See, e.g., *Chadha*, 462 U.S. at 946 ("The very structure of the Articles delegating and separating powers under Arts. I, II, and III exemplifies the concept of separation of powers . . ."); see also *Bowsher*, 478 U.S. at 722–23 (deriving the separation of powers from the allocation of authority effected by the first three articles, as well as from the apparent import of the Incompatibility Clauses, the Impeachment Clauses, and the Appointments Clause).

¹⁰⁴ Lawson, *supra* note 14, at 857–58 (footnotes omitted).

¹⁰⁵ *Bowsher*, 478 U.S. at 721 (second alteration in original) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

separation might yield inefficiencies.¹⁰⁶ Of particular interest here, formalists carry the norm of separation beyond the (previously described) enforcement of the allocations of power effected by the Vesting Clauses. Perhaps reflecting the founders' special concern about the potential for legislative usurpation of other branches' powers,¹⁰⁷ formalists are quick to equate certain forms of legislative regulation or oversight of executive or judicial functions with *encroachment* on the coordinate branches.¹⁰⁸ It is in this context that formalists are most attracted to generality shifting.

To understand the nature of this generality shifting, it is necessary to say a few preliminary words about the Necessary and Proper Clause, to which the analysis returns in greater detail below.¹⁰⁹ As noted, the clause gives Congress express authority to make laws for "carrying into Execution" all the powers vested "in the Government of the United States, or in any Department or Officer thereof."¹¹⁰ While the scope of and limits upon this power are contested, it is hard to deny that the clause contemplates at least some congressional authority to shape and structure the way the coordinate branches carry their functions into execution.¹¹¹ To be sure, any resulting laws must be "necessary and proper" for executing a constitutional power,¹¹² limitations that seem to require at least that implemental statutes not be otherwise unconstitutional. Whatever the precise scope of those limitations may be,¹¹³ because the Necessary and Proper Clause expressly empowers Congress to implement the executive and judicial powers, one cannot condemn an instance of legislative regulation or oversight

¹⁰⁶ See *Chadha*, 462 U.S. at 959 (concluding that the separation of powers "impose[s] burdens on governmental processes that often seem clumsy, inefficient, even unworkable"); see also *id.* at 944.

¹⁰⁷ See, e.g., *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 221 (1995) (citing Madison's "famous description of the process by which '[t]he legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous vortex'" (alteration in original) (quoting THE FEDERALIST NO. 48, at 333 (James Madison) (Jacob E. Cooke ed., 1961))); *Buckley v. Valeo*, 424 U.S. 1, 129 (1976) (per curiam) ("[T]he debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches.").

¹⁰⁸ See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3153–55 (2010) (holding that a two-tiered restriction on the President's removal power violates the separation of powers); *Plaut*, 514 U.S. at 217–30 (relying on the purposes of separating legislative from judicial power to hold that a retroactive extension of a statute of limitations violated the separation of powers insofar as the new limitations period allowed plaintiffs to reopen final judgments); *Bowsher*, 478 U.S. at 721–27 (holding that Congress can reserve to itself no authority, however limited, to remove an officer exercising delegated power).

¹⁰⁹ See section II.C, pp. 1985–93.

¹¹⁰ U.S. CONST. art. I, § 8, cl. 18.

¹¹¹ See *infra* p. 1988.

¹¹² U.S. CONST. art. I, § 8, cl. 18.

¹¹³ For contrasting views of the Necessary and Proper Clause, see *infra* p. 1987 (discussing functionalist and formalist positions).

simply because it applies to “executive” or “judicial” functions. Rather, there must be some additional basis for concluding that the Constitution does not allow the particular form of regulation.¹¹⁴

Formalist opinions, however, sometimes lack that additional step. Instead of showing that some identifiable background understanding of “[t]he executive Power”¹¹⁵ or “[t]he judicial Power”¹¹⁶ would have contradicted a particular form of legislative regulation or oversight, formalists may deem the legislation objectionable simply because it touches functions belonging to another branch of government and because the Constitution adopts a separation of powers. In such cases, formalists reason from a general principle of separation of powers to quite specific prohibitions against particular governmental practices. No particular clause is the source of the proscription; rather, an abstract norm of strict separation, derived from the structure of the Constitution as a whole, supplies the rule of decision. When operating in that fashion, formalists are, in short, insufficiently formalistic.

2. *Examples of Formalist Generality Shifting.* — The following cases illustrate the generality-shifting aspects of the anti-encroachment strand of formalism. In both, the opinion moves from a general structural inference of strict separation to a highly specific conclusion that a given institutional arrangement violates the Constitution. As in the previous section, I illustrate the generality-shifting problem with one prominent majority opinion and one canonical dissent by a leading proponent of the approach — in this case, Justice Scalia.¹¹⁷

¹¹⁴ By suggesting that the challenger must show an affirmative source of unconstitutionality beyond the identification of a power as executive or judicial, I am not addressing the seemingly related question whether an act of Congress is entitled to the usual strong presumption of validity when the separation of powers is at issue. The basic presumption runs deep in U.S. constitutional history. See, e.g., *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 436 (1827) (Marshall, C.J.) (“It has been truly said, that the presumption is in favour of every legislative act, and that the whole burthen of proof lies on him who denies its constitutionality.”). But Justice Scalia has suggested that this presumption should not apply in separation of powers disputes between Congress and the President:

[W]here the issue pertains to separation of powers, and the political branches are . . . in disagreement, neither can be presumed correct. The reason is stated concisely by Madison: “The several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers”

Morrison v. Olson, 487 U.S. 654, 704–05 (1988) (Scalia, J., dissenting) (quoting THE FEDERALIST NO. 49, at 314 (James Madison) (Clinton Rossiter ed., 1961)). The broader question of the appropriate burden of persuasion in structural cases is for another day. For present purposes, I address only the more limited question whether a challenger may establish the invalidity of an act of Congress merely by showing that it regulates an executive or judicial function. The text of the Necessary and Proper Clause forecloses such a possibility.

¹¹⁵ U.S. CONST. art. II, § 1, cl. 1.

¹¹⁶ *Id.* art. III, § 1.

¹¹⁷ See Merrill, *supra* note 28, at 227 n.10 (arguing that Justice Scalia is “the Court’s most consistent champion of formalism”); Sullivan, *supra* note 49, at 93 (explaining that Justice Scalia is

(a) *Freestanding Limits on Legislative Oversight.* — In *Bowsher v. Synar*,¹¹⁸ the Court invalidated deficit reduction legislation because the act permitted Congress to control the execution of the laws. To deal with a burgeoning deficit, the Gramm-Rudman-Hollings Act¹¹⁹ provided in part that, if Congress did not meet deficit reduction targets specified in the statute, the President was to issue a sequestration order implementing spending reductions that the Comptroller General specified pursuant to a statutory formula.¹²⁰ The plaintiffs, who faced cuts in federal benefits under the statute, alleged that Congress violated the separation of powers by assigning an essentially executive function to the Comptroller General, who was subject to congressional control. In particular, although the President appointed the Comptroller General by and with the advice and consent of the Senate, Congress reserved limited authority to remove that official — through ordinary legislation — for “permanent disability,” “inefficiency,” “neglect of duty,” “malfeasance,” or “a felony or conduct involving moral turpitude.”¹²¹

Reasoning that the Comptroller General’s preparation of binding budget reductions constituted law execution,¹²² the Court applied a classically formalist conception of separation of powers to invalidate the scheme:

Even a cursory examination of the Constitution reveals the influence of Montesquieu’s thesis that checks and balances were the foundation of a structure of government that would protect liberty. The Framers provided a vigorous Legislative Branch and a separate and wholly independent Executive Branch, with each branch responsible ultimately to the people. The Framers also provided for a Judicial Branch equally independent . . .¹²³

From that general starting point, the Court drew the specific conclusion that “[a] direct congressional role in the removal of officers charged with the execution of the laws . . . is inconsistent with separation of powers.”¹²⁴

“the leading and sometimes lonely advocate of horizontal separation-of-powers formalism on the [Supreme] Court”).

¹¹⁸ 478 U.S. 714 (1986).

¹¹⁹ Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1038 (codified as amended at 2 U.S.C. §§ 900–907d, 922 (2006)).

¹²⁰ See *Bowsher*, 478 U.S. at 717–18. The Comptroller General’s report, in turn, built upon budget estimates and spending reductions prepared by the Office of Management and Budget, an executive agency, and the Congressional Budget Office, a congressional entity. See *id.* at 718.

¹²¹ 31 U.S.C. § 703(e)(1)(B) (2006).

¹²² *Bowsher*, 478 U.S. at 733 (“Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of ‘execution’ of the law.”). For further discussion of the classification of powers, see section III.B.1, pp. 2017–21.

¹²³ *Bowsher*, 478 U.S. at 722.

¹²⁴ *Id.* at 723.

Although I suggest below a clause-centered justification for the result in *Bowsher*,¹²⁵ the Court's decision did not rest on an established understanding of *any* particular constitutional clause. Rather, the Court gleaned the purpose of strict separation from the overall structure of, and relationship among, the Vesting Clauses — from the simple fact that the document divides power three ways. The Court reinforced that inference with the rather general observation that “[t]he debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches.”¹²⁶ Indeed, the Court cited particular clauses of the Constitution *only* to reinforce the general inference that the Constitution adopted a separation of powers¹²⁷ and to show that nothing in the document affirmatively contemplated a general role for Congress in the appointment and removal of executive officers.¹²⁸ Thus, it reasoned from a high-level inference (the separation of powers) to a very specific one — that, in a system of separated powers, the legislature cannot exercise removal authority, however limited, over any official performing an executive function.

That specific inference, however, does not necessarily follow from the general proposition. Congress has considerable authority to influence law execution, inter alia, through its powers under both the Necessary and Proper Clause and the Spending Clause.¹²⁹ Congress can adjust an agency's budget to affect enforcement priorities or to express approval or disapproval of the agency's policymaking initiatives.¹³⁰ Indeed, as Professor Charles Black once wrote, without violating the

¹²⁵ See *infra* pp. 2008–09.

¹²⁶ *Bowsher*, 478 U.S. at 727 (quoting *Buckley v. Valeo*, 424 U.S. 1, 129 (1976) (per curiam)) (internal quotation marks omitted).

¹²⁷ See *id.* at 722. For example, the Court cited the Incompatibility Clause, U.S. CONST. art. I, § 6, cl. 2, which prohibits members of Congress from also serving in the executive or judicial branches, thereby preventing the development of a parliamentary model of government. *Bowsher*, 478 U.S. at 722. The Court also noted that, in contrast with parliamentary systems, the U.S. Constitution does not make the executive directly accountable to the legislature; rather, the Impeachment Clauses provide only limited legislative authority to remove the President. See *id.* (discussing U.S. CONST. art. I, § 3 and U.S. CONST. art. II, § 4).

¹²⁸ The Court noted that the Appointments Clause, U.S. CONST. art. II, § 2, cl. 2, gives the President the initiative in appointing “Officers of the United States,” limiting Congress’s role to providing the “Advice and Consent of the Senate.” *Bowsher*, 478 U.S. at 722–23. The Court added that “the Constitution explicitly provides for removal of Officers of the United States by Congress only upon impeachment by the House of Representatives and conviction by the Senate.” *Id.* at 723 (discussing U.S. CONST. art. II, § 4). A conventional reading of the Impeachment Clauses might alone have supplied a sufficient basis for the Court’s opinion. See *infra* pp. 2008–09.

¹²⁹ See U.S. CONST. art. I, § 8, cl. 1 (Spending Clause); *id.* cl. 18 (Necessary and Proper Clause).

¹³⁰ See Randall L. Calvert, Matthew D. McCubbins & Barry R. Weingast, *A Theory of Political Control and Agency Discretion*, 33 AM. J. POL. SCI. 588, 600–04 (1989).

Constitution, Congress “could at the start of any fiscal biennium reduce the president’s staff to one secretary for answering social correspondence.”¹³¹ More directly, Congress can and does attach substantive riders to appropriations bills, restricting the ways agencies may spend appropriated money.¹³² Congress can even use its appropriations authority to compel the executive to settle claims that the executive thinks unmeritorious.¹³³ If Congress can permissibly influence the execution of the law in those ways without violating the separation of powers as such, it is at least not self-evident why that general principle should condemn Congress’s reserving the option to influence law administration through the threat of removal, at least when it can do so only for carefully circumscribed reasons and only through bicameralism and presentment. At a minimum, to reason from a general purpose of “separation” to the specific result of “no legislative removal” requires the introduction of an extra step that *Bowsher*’s reasoning did not identify.

Nowhere did the Court establish a specific, antecedent understanding of “legislative” or “executive” power that would preclude such removal. Nor is it utterly obvious that constitutionmakers, in fact, would have subscribed to such an understanding.¹³⁴ Accordingly, the Court ultimately rested its decision upon general principles of separation of powers, rather than the specific historical meaning of any particular clause.¹³⁵

¹³¹ Charles L. Black, Jr., *The Working Balance of the American Political Departments*, 1 HASTINGS CONST. L.Q. 13, 15–16 (1974).

¹³² See Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 85–89 (2006). For a summary of scholarship concerning congressional means of influencing agency behavior, see JOHN F. MANNING & MATTHEW C. STEPHENSON, *LEGISLATION AND REGULATION* 473–76 (2010) (collecting sources).

¹³³ See *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 612–13 (1838).

¹³⁴ Although removal was surely considered an attribute of executive power, many state legislatures at the time of the founding also exercised the power to remove executive and sometimes judicial officers. See, e.g., *Myers v. United States*, 272 U.S. 52, 118 (1926) (acknowledging that “in state and colonial governments at the time of the Constitutional Convention, power to make appointments and removals had sometimes been lodged in the legislatures or in the courts”); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 161 (1969) (discussing the power of some legislatures in revolutionary-era states to remove judges). As discussed below, state constitutional practice does not necessarily provide meaningful guidance for understanding the federal constitutional structure. See *infra* pp. 1997–99. At a minimum, however, state practice shows that mere invocation of the “separation of powers” cannot establish the prescription that the Court derived.

¹³⁵ To be sure, the Court did invoke one *specific*, historical understanding of the “legislative” power when it referred to the so-called “Decision of 1789” — the famous debate in the First Congress over the removability of executive officers, which the Court had previously read to establish illimitable presidential removal power. See *Bowsher v. Synar*, 478 U.S. 714, 723–24 (1986). To the extent that such early legislative constructions of the Constitution are capable of clarifying the original understanding of a particular clause or clauses, see section III.C.2, pp. 2028–34, this move fits comfortably within the rubric of ordinary interpretation. But, for two reasons, the invocation

(b) *Overreading a Vesting Clause.* — In *Morrison v. Olson*,¹³⁶ the Court divided over the proper method of considering the constitutionality of Congress's efforts to establish an independent counsel for the investigation and prosecution of specified serious crimes by top government officials. Enacted in the wake of the Watergate scandal, the Ethics in Government Act¹³⁷ sought to insulate high-level prosecutions from complete presidential control. To ensure impartiality, once the Attorney General determined that it was necessary to appoint an independent counsel to investigate a covered case, he or she applied to a Special Division of the U.S. Court of Appeals for the D.C. Circuit, which made the appointment and defined the independent counsel's jurisdiction.¹³⁸ Once appointed, the independent counsel could be removed "only by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties."¹³⁹

Theodore Olson, then a target of an independent counsel investigation, challenged both the appointment and removal provisions of the Act. Relevant here is the removal question. Using quintessentially functionalist reasoning, the Court held that the restriction on removal passed muster because the majority did "not see how the President's need to control the exercise of that discretion is so central to the functioning of the Executive Branch as to require as a matter of constitu-

of the Decision of 1789 in this case does not change the essentially generality-shifting character of the Court's decision.

First, much of the Court's reasoning does not depend on the Decision of 1789. The Court discussed the Decision of 1789 because it "made clear" what the Court had already found to be required by freestanding separation of powers doctrine. See *Bowsher*, 478 U.S. at 723. Second, the Court's treatment of the Decision of 1789 is so superficial as to make it seem like a post hoc rationalization rather than a genuine ground of decision. The Decision of 1789 addressed the source and extent, if any, of presidential removal power. The First Congress was deeply divided on the question, and the implications of the debate, properly understood, were highly ambiguous and prone to overreading. See *infra* pp. 2030–31. One point, however, is clear: the First Congress addressed legislative removal power only insofar as a majority of the House rejected the position that the Constitution *itself* required senatorial advice and consent before the President could remove a federal officer. See Edward S. Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 COLUM. L. REV. 353, 368–69 (1927). The debate said nothing about Congress's authority under the Necessary and Proper Clause to reserve for itself limited power to remove an official who performed some executive functions. Accordingly, it is hard to see the Court's passing reliance on the Decision of 1789 as a substantial enough ground of decision to negate the conclusion that the opinion rests primarily upon freestanding separation of powers principles.

¹³⁶ 487 U.S. 654 (1988).

¹³⁷ Pub. L. No. 95-521, 92 Stat. 1824 (1978) (codified as amended in scattered sections of 2 and 28 U.S.C.).

¹³⁸ *Morrison*, 487 U.S. at 661 (discussing 28 U.S.C. §§ 592(b)(1), 592(d), 593(b) (Supp. V 1987)).

¹³⁹ *Id.* (quoting 28 U.S.C. § 596(a)(1) (Supp. V. 1987)).

tional law that the counsel be terminable at will by the President.”¹⁴⁰ The Court made clear that the independent counsel exercised only limited powers and jurisdiction, and that the President retained some meaningful supervisory authority over the prosecution by virtue of the Attorney General’s ability to remove the independent counsel for “good cause.”¹⁴¹ Viewed in that light, the degree of the removal limitation did not “interfere impermissibly with [the President’s] constitutional obligation to ensure the faithful execution of the laws.”¹⁴²

Of interest here, Justice Scalia’s dissent stands as one of the most prominent formalist opinions in the U.S. Reports. It is often cited for its deft institutional analysis of the practical dangers of overreaching implicit in a scheme of independent prosecution.¹⁴³ For present purposes, however, the opinion merits attention because it helps to frame the often subtle distinctions between generality-shifting reliance on a Vesting Clause and ordinary interpretation of such a clause.

On its face, Justice Scalia’s dissent purported to engage in ordinary interpretation of Article II’s Vesting Clause. He emphasized that the clause does not assign the President “*some of* the executive power, but *all of* the executive power.”¹⁴⁴ He added that, in contrast with the other Vesting Clauses, Article II, Section 1 vests “[t]he executive power” in a single actor — “*a President of the United States*”¹⁴⁵ — and that the records of the Philadelphia Convention confirm that this choice of words reflected a conscious design to create a unitary rather than a plural executive.¹⁴⁶ Noting that no party had disputed the executive character of criminal prosecution,¹⁴⁷ Justice Scalia found it impermiss-

¹⁴⁰ *Id.* at 691–92.

¹⁴¹ *See id.*

¹⁴² *Id.* at 693.

¹⁴³ *See, e.g.*, Joseph E. diGenova, *The Independent Counsel Act: A Good Time to End a Bad Idea*, 86 GEO. L.J. 2299, 2300–02 (1998); Cass R. Sunstein, *Bad Incentives and Bad Institutions*, 86 GEO. L.J. 2267, 2286 n.3 (1998); *see also Morrison*, 487 U.S. at 727–32 (Scalia, J., dissenting) (discussing the dangers of unaccountable prosecution and the ways in which the statute weakens the executive relative to Congress).

¹⁴⁴ *Morrison*, 487 U.S. at 705 (Scalia, J., dissenting).

¹⁴⁵ *Id.* at 699 (quoting U.S. CONST. art. II, § 1 (emphasis added)) (internal quotation marks omitted).

¹⁴⁶ *Id.* (“Proposals to have multiple executives, or a council of advisers with separate authority were rejected.”).

¹⁴⁷ In the aftermath of *Morrison*, some commentators have suggested that, in historical terms, federal prosecution was not necessarily a core executive function. *See, e.g.*, Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 290–303 (1989); Lessig & Sunstein, *supra* note 42, at 15–16. Others have taken the contrary position. *See, e.g.*, Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 552–96 (2005). It is unnecessary here to enter that historical debate. Even if prosecution is a quintessentially executive function, that conclusion does not preclude all congressional regulation of the way that function is implemented.

ible to “deprive[] the President of exclusive control over that quintessentially executive activity.”¹⁴⁸

Despite the obvious effort to tie his analysis to a discrete clause, however, Justice Scalia’s reading of Article II’s Vesting Clause could not alone justify his position that Congress may not regulate the tenure of an independent counsel. To be sure, if Congress assigned the executive power to an official wholly beyond the President’s control, Justice Scalia’s reading of the Vesting Clause would suffice. For that arrangement *would* separate the President from the executive power and create a plural executive.¹⁴⁹ But for a statutory scheme that constrains and structures — but does not cut off — the President’s relationship with a prosecutor, an additional step is necessary to establish unconstitutionality.

The reason lies, again, in the Necessary and Proper Clause. Because that clause, as noted, expressly grants Congress at least some authority to structure the way the executive and judicial powers are “carr[ie]d] into Execution,”¹⁵⁰ one cannot establish a constitutional violation simply by showing that Congress has constrained the way “[t]he executive Power” is implemented.¹⁵¹ To conclude otherwise would be to condemn familiar statutes that structure and constrain the implementation of executive authority, for example, by prescribing administrative procedures for executive agencies,¹⁵² setting term limits

¹⁴⁸ *Morrison*, 487 U.S. at 706 (Scalia, J., dissenting).

¹⁴⁹ Interestingly, when the Court in *Bowsher v. Synar*, 478 U.S. 714 (1986), rejected Congress’s reservation of limited authority to remove the Comptroller General, it gave no attention to the seemingly related question whether *the President* retained any authority to remove the Comptroller General when the latter performed executive functions under the Gramm-Rudman-Hollings Act. Indeed, the Court specifically distinguished the case before it from cases involving limitations on presidential removal power. *See id.* at 725 n.4. Had the Court found that the relevant statutory scheme wholly divested the President of control over an official exercising executive power, that conclusion might have provided an alternative basis for the Court’s decision. For another potential ground for *Bowsher*, see *infra* pp. 2008–09 (justifying the result under the Impeachment Clauses, U.S. CONST. art. I, § 2, cl. 5; *id.* § 3, cl. 6–7; *id.* art. II, § 4).

¹⁵⁰ U.S. CONST. art. I, § 8, cl. 18.

¹⁵¹ *See supra* pp. 1960–61; *see also* section II.C.2, pp. 1991–93.

¹⁵² Perhaps the most important and generic statute of this kind is the Administrative Procedure Act (APA), 5 U.S.C. §§ 551–559 (2006), which prescribes detailed procedures for agency rulemaking and adjudication. *See id.* § 553 (prescribing procedures for informal rulemaking); *id.* §§ 554, 556–557 (prescribing procedures for formal adjudication and formal rulemaking). The APA applies to executive as well as independent agencies. *See id.* § 551(1) (defining “agency” broadly to mean “each authority of the Government of the United States”). And the Court has made clear that “[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of ‘execution’ of the law,” *Bowsher*, 478 U.S. at 733 — a characterization that describes the classic regulatory functions of rulemaking and adjudication. In addition, Congress frequently includes action-forcing provisions in agency organic acts, requiring agencies to implement delegated authority on particular timetables and through particular means. *See* Jerry L. Mashaw, *Improving the Environment of Agency Rulemaking: An Essay on Management, Games, and Accountability*, 57 LAW & CONTEMP. PROBS., Spring 1994, at 185, 205 (discussing action-forcing

for their officers,¹⁵³ or protecting executive functionaries from various forms of discrimination.¹⁵⁴ Thus, to invalidate a legislative regulation of executive power (such as the “good cause” provision at issue in *Morrison*), an interpreter must be able to articulate reasons why the particular constraint shifts from permissible regulation to impermissible intrusion upon “[t]he executive Power.”

In his dissent, Justice Scalia tried to supply this missing element by moving from general separation of powers principles to the specific conclusion that a “good cause” restriction on removal was unconstitutional.¹⁵⁵ Rather than focus on the semantic question of whether “[t]he executive Power” was a term of art that dealt with the removal question as such, he emphasized that “the principle of separation of powers, and the inseparable corollary that each department’s ‘defense must . . . be made commensurate to the danger of attack,’ . . . determines the appropriate scope of the removal power.”¹⁵⁶ Starting from that premise, Justice Scalia noted that the founders sought to prevent the gradual concentration of power in any one branch by giving each “the necessary constitutional means and personal motives to resist encroachments of the others.”¹⁵⁷ Given the tendency of the legislature to predominate, he reasoned that the founders

provisions in statutes). For an exhaustive catalogue of tools available to Congress for purposes of structuring administrative decisionmaking, see generally Beermann, *supra* note 132.

¹⁵³ In some cases, Congress has prescribed term limits for quintessentially executive offices. See, e.g., 28 U.S.C. § 532 note (providing that “the term of service of the Director of the Federal Bureau of Investigation shall be ten years”); *id.* § 541(b) (“Each United States attorney shall be appointed for a term of four years.”); 29 U.S.C. § 153(d) (“There shall be a General Counsel of the [National Labor Relations] Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years.”). It routinely sets term limits for independent agencies that perform some executive functions. See, e.g., 15 U.S.C. § 41 (providing that Federal Trade Commissioners “shall be appointed for terms of seven years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the Commissioner whom he shall succeed”).

¹⁵⁴ See, e.g., 29 U.S.C. § 633a(a) (prohibiting age discrimination “in executive agencies”); 42 U.S.C. § 2000e-16(a) (forbidding “any discrimination based on race, color, religion, sex, or national origin” in employment “in executive agencies”).

¹⁵⁵ Justice Scalia mentioned the more specific textual authority of the Take Care Clause, but only in a fleeting reference. See *Morrison v. Olson*, 487 U.S. 654, 726 (1988) (Scalia, J., dissenting) (“If the removal of a prosecutor, the virtual embodiment of the power to ‘take care that the laws be faithfully executed,’ can be restricted, what officer’s removal cannot?” (quoting U.S. CONST. art. II, § 3)).

¹⁵⁶ *Id.* at 704 (first omission in original) (quoting THE FEDERALIST NO. 51 (James Madison), *supra* note 114, at 322). He added: “The Court devotes most of its attention to such relatively technical details as the Appointments Clause and the removal power, addressing briefly and only at the end of its opinion the separation of powers. . . . I think that has it backwards.” *Id.* at 703–04. Justice Scalia has since rejected the technique of relying on separation of powers in the abstract, emphasizing that the Court must consider the document’s structural provisions on an individualized basis. See *infra* note 209.

¹⁵⁷ *Morrison*, 487 U.S. at 698 (quoting THE FEDERALIST NO. 51 (James Madison), *supra* note 114, at 321–22).

sought to fortify the executive, in part, by ensuring plenary presidential control over the executive branch.¹⁵⁸ In that light, he found that *any* limitation on the President's control over criminal prosecution obviously threatened the "equilibrium of power" established by the first three articles of the Constitution.¹⁵⁹

In contrast, consider the way Chief Justice Taft approached the removal question in his opinion for the Court in *Myers v. United States*,¹⁶⁰ which invalidated a statute conditioning the removal of an executive officer upon the advice and consent of the Senate.¹⁶¹ Although classically formalist in the sense that it sought to enforce sharp lines of demarcation in the constitutional structure, the Court's analysis did not read "[t]he executive Power" in light of broader separation of powers principles, but rather focused on whether the technical meaning of that term, in historical context, embraced the concept of an illimitable removal power. The opinion, which occupies seventy-two pages in the U.S. Reports, is too extensive to permit full examination of its reasoning. Three aspects of its analysis, however, suffice to illustrate Chief Justice Taft's efforts to determine whether the technical semantic meaning of Article II historically addressed the removal question.

First, the *Myers* Court argued that, because the common law concept of "executive" power included the removal power, the founders would have understood such authority to be an inherent attribute of what Article II, Section 1 vested in the President.¹⁶² Second, the Court

¹⁵⁸ *Id.* at 698–99.

¹⁵⁹ *Id.* at 699. In particular, Justice Scalia famously wrote:

Frequently, an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf.

Id. In a subsequent passage addressing the Court's functional analysis of the "good cause" limitation, Justice Scalia elaborated on the precise mechanism through which exclusive presidential control over prosecution would preserve the separation of powers against legislative encroachment:

Before [the independent counsel] statute was passed, the President, in taking action disagreeable to the Congress, or an executive officer giving advice to the President or testifying before Congress concerning one of those many matters on which the two branches are from time to time at odds, could be assured that his acts and motives would be adjudged — insofar as the decision whether to conduct a criminal investigation and to prosecute is concerned — in the Executive Branch, that is, in a forum attuned to the interests and the policies of the Presidency. That was one of the natural advantages the Constitution gave to the Presidency, just as it gave Members of Congress (and their staffs) the advantage of not being prosecutable for anything said or done in their legislative capacities.

Id. at 712 (referring to the Speech or Debate Clause, U.S. CONST. art. I, § 6, cl. 1).

¹⁶⁰ 272 U.S. 52 (1926).

¹⁶¹ *Id.* at 176.

¹⁶² *See id.* at 118. In particular, Chief Justice Taft argued that "[i]n the British system, the Crown, which was the executive, had the power of appointment and removal of executive offi-

found that, in setting up the federal government in the shadow of the Constitution's adoption, the First Congress expressed the explicit understanding that the text of Article II encompassed an illimitable removal power.¹⁶³ Third, drawing on the context of surrounding provisions of Article II, the Court emphasized that, if the grant of "executive Power" did not confer exclusive removal authority upon the President, it would be impossible for the chief executive to fulfill his or her related Article II duty to "take Care that the Laws be faithfully executed."¹⁶⁴

Whether or not one could find grounds for disagreement with aspects of Chief Justice Taft's interpretive approach (a question discussed in greater detail below¹⁶⁵), the crucial point is that his analysis sought to ascertain the *specific* historical meaning of Article II's text in relation to the precise question at issue — whether the President has exclusive power to remove executive officials.¹⁶⁶ In contrast with the

cers, and it was natural, therefore, for those who framed our Constitution to regard the words 'executive power' as including both." *Id.* (citing *Ex parte Grossman*, 267 U.S. 87, 110 (1925)). He also drew a negative implication from the fact that the Appointments Clause, U.S. CONST. art. II, § 2, cl. 2, expressly required advice and consent for appointment while nothing in Article II imposed limitations on the background power of removal. *See Myers*, 272 U.S. at 118; *see also infra* note 434. Because removal ran with appointment at common law, others have drawn different implications from the qualification of the appointment power. *See infra* p. 2027. For present purposes, the important point is that the Court's analysis sought to excavate the specific technical meaning of the relevant text on the precise question of the removal power; it did not rely on broad principles of separation of powers to infer a specific presidential removal power.

¹⁶³ *See Myers*, 272 U.S. at 111–14. The Court relied on the legislative deliberations about the removal power in connection with Congress's establishing the Department of Foreign Affairs. *See id.* at 111; *see also supra* note 135. Chief Justice Taft concluded that a series of motions associated with that legislation conveyed a contemporaneous legislative understanding that Article II conferred removal power on the President. *See Myers*, 272 U.S. at 114. For a critique of the Court's use of the so-called "Decision of 1789," *see infra* pp. 2030–31.

¹⁶⁴ U.S. CONST. art. II, § 3; *see Myers*, 272 U.S. at 122 ("[W]hen the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal."). Especially when interpreting a particularly "elastic" word or phrase, the Court routinely "construe[s] language in its context and in light of the terms surrounding it." *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004); *see also* section III.C.3, pp. 2034–39 (discussing clause-specific structural inferences).

¹⁶⁵ *See infra* pp. 2026–28, 2030–31, 2036–37.

¹⁶⁶ In an article written soon after the publication of his *Morrison* dissent, Justice Scalia described Chief Justice Taft's opinion in similar terms:

The objective of the Chief Justice's lengthy opinion was to establish the meaning of the Constitution, in 1789, regarding the presidential removal power. He sought to do so by examining various evidence, including not only, of course, the text of the Constitution and its overall structure, but also the contemporaneous understanding of the President's removal power . . . , the background understanding of what "executive power" consisted of under the English constitution, and the nature of the executive's removal power under the various state constitutions in existence when the federal Constitution was adopted.

Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 852 (1989).

Morrison dissent, the *Myers* Court did not read specific limits on congressional power into the open-ended language of Article II based on general principles of “the separation and equilibration of powers.”¹⁶⁷

II. THE CONSTITUTIONAL STRUCTURE AS COMPROMISE

As the previous discussion suggests, important elements of formalism and functionalism thus rely on a freestanding separation of powers doctrine. Methodologically, both schools employ Professor Charles Black’s technique of constructing constitutional meaning through “the method of inference from the structures and relationships created by the constitution in all its parts or in some principal part.”¹⁶⁸ More precisely, both approaches sometimes apply a free-form, generality-shifting version of this approach. Rather than focusing exclusively on the way discrete clauses allocate and condition the exercise of federal power, proponents of both functionalism and formalism also assume that the structure of the Constitution as a whole reflects some overarching purpose, which has legal force beyond the specific meaning of the discrete clauses from which that purpose is derived.¹⁶⁹

This form of structural inference employs the same method that defined the tradition of strongly purposive interpretation used by the Court for many years in statutory cases. The technique rests on the straightforward premise that a lawmaker enacts a law to fulfill a purpose.¹⁷⁰ But because legislatures pass statutes in haste and with lim-

¹⁶⁷ *Morrison v. Olson*, 487 U.S. 654, 704 (Scalia, J., dissenting). The Court’s recent decision in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138 (2010), displays some generality-shifting features of the *Morrison* dissent and some of the specificity of the Court’s opinion in *Myers*. The *Free Enterprise Fund* Court invalidated a two-tiered removal restriction — one that made an “Officer of the United States” removable only for “good cause” by another officer whom the President could, in turn, remove only for some form of good cause. *Id.* at 3148–49. The Court held, in part, that these restrictions violated Article II’s Vesting Clause, *id.* at 3154, and “the separation of powers,” *id.* at 3151. An important element of this analysis reasoned from the broad purposes of the separation of powers to the specific conclusion that the two-tiered removal restriction was impermissible. *See id.* at 3156–57 (arguing that a two-tiered removal restriction would tip the balance of power sharply toward Congress and emphasizing the structural objective of giving each branch “the necessary constitutional means, and personal motives, to resist encroachments of the others,” *id.* at 3157 (quoting THE FEDERALIST NO. 51 (James Madison), *supra* note 107, at 349) (internal quotation marks omitted)). At the same time, the Court made some reference to founding-era statements specifically addressing the question of executive removal power. *See id.* at 3151–52, 3155. More importantly, it also relied on the implications of the Take Care Clause, U.S. CONST. art. II, § 3, which may provide a more specific and textually grounded basis for inferring presidential removal power. *See Free Enter. Fund*, 130 S. Ct. at 3154; *see also* section III.C.3, pp. 2034–39.

¹⁶⁸ BLACK, *supra* note 26, at 7.

¹⁶⁹ *See* Part I, pp. 1950–71.

¹⁷⁰ Professor Max Radin captured the prevailing sentiment when he wrote that “[t]he legislature that put [a] statute on the books had the constitutional right and power to set [the statute’s]

ited foresight, enacted texts — especially as applied over time — will never perfectly capture the purposes that inspired the enactment.¹⁷¹ Since the lawmaker selected the words “primarily to let us know the statutory purpose,”¹⁷² interpreters show respect for legislative supremacy by implementing the purpose rather than the letter of the law when the two diverge.¹⁷³

This strongly purposive approach was the Court’s standard operating procedure in statutory cases during the period in which modern functionalism and formalism took root in constitutional adjudication.¹⁷⁴ And its premises are evident, though unacknowledged, in both lines of cases. Functionalists sacrifice specific textual commitments when a scheme sufficiently respects the background purpose of checks and balances, abstracted from the text as a whole.¹⁷⁵ In such cases, the spirit permits what the letter would otherwise proscribe. By the same token, formalists, at times, rely on freestanding principles of separation of powers as the basis for inferring specific limits on Congress’s express power to compose the government under the Necessary and Proper Clause.¹⁷⁶ In such cases, the spirit proscribes what the letter would otherwise permit.

New thinking about the legitimacy of strongly purposive reasoning reveals difficulties with the approach that underlies both strands of modern separation of powers doctrine. For reasons that I will argue are relevant to separation of powers law, the Court has of late rethought the relative priority it gives to letter and spirit in statutory cases. The modern view is that enacted texts do not adopt purposes in the abstract; they prescribe means as well as ends.¹⁷⁷ Because legislation entails difference-splitting compromise, the means ultimately agreed upon by lawmakers cannot be expected to correspond fully to the background purposes that inspired the legislation. To enforce the spirit over the letter of the law thus risks upsetting such compromises.

purpose as a desirable one for the community, and the court or administrator has the undoubted duty to obey it.” Max Radin, *A Short Way with Statutes*, 56 HARV. L. REV. 388, 398 (1942).

¹⁷¹ See, e.g., *Friedrich v. City of Chicago*, 888 F.2d 511, 514 (7th Cir. 1989) (Posner, J.) (observing that “language is a slippery medium in which to encode a purpose” and that “legislatures . . . often legislate in haste, without considering fully the potential application of their words to novel settings”), *vacated*, 499 U.S. 933 (1991).

¹⁷² Radin, *supra* note 170, at 400.

¹⁷³ The leading case for this proposition is *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892), which held that “a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.” *Id.* at 459.

¹⁷⁴ See, e.g., *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 452–54 (1989); *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 284 (1987); *United Steelworkers v. Weber*, 443 U.S. 193, 201–02 (1979); *United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 849 (1975).

¹⁷⁵ See section I.A, pp. 1950–58.

¹⁷⁶ See section I.B, pp. 1958–71.

¹⁷⁷ See *infra* pp. 1973–74.

In particular, doing so threatens to overlook an often crucial aspect of legislative choice — namely, the level of generality at which lawmakers could agree on a particular policy. Treating a precise text as a placeholder for a more general background purpose or treating a broadly framed text as the placeholder for a more precise rule negates the lawmaker’s ability to determine the appropriate level(s) of generality at which to frame diverse provisions of law.

This Part lays out the argument for applying similar principles to the interpretation of structural constitutional provisions. Section A briefly discusses the modern critique of the strongly purposive interpretive method that underlies separation of powers doctrine, and offers reasons for extending that critique from statutory to constitutional adjudication. Section B then seeks to establish that the intricate detail within the constitutional structure in fact reflects the fruits of quite particular compromises over how to divide and structure the various powers. No overarching theory of separation of powers can explain the document’s many elaborately specified procedures. Section C explores the implications of the generally worded provisions of the structural constitutional provisions, with special emphasis on the Vesting Clauses and the Necessary and Proper Clause. Finally, section D argues that no meaningful baseline would have existed had the founders included in the document an express Separation of Powers Clause. Accordingly, to understand our constitutional structure, judges must interpret it at a retail rather than wholesale level.

A. Levels of Generality in Statutory and Constitutional Law

In recent years, the Supreme Court’s statutory cases have shifted away from the idea that interpreters properly focus not upon the content of specific statutory provisions, but rather upon general background purposes abstracted from those provisions. Although conventional wisdom suggests that principles of constitutional interpretation do not generally track the interpretive norms used in the very different context of statutes, the particular reasons underlying the shift in the Court’s statutory cases apply in full measure to the Constitution’s structural provisions.¹⁷⁸

The relevant shift in attitude — which has been championed by the Court’s textualists but embraced by the Court somewhat more generally¹⁷⁹ — reflects the basic idea that all lawmaking entails difference-

¹⁷⁸ See Manning, *Eleventh Amendment*, *supra* note 33, at 1701–20; Manning, *Federalism*, *supra* note 33, at 2013–20, 2037–40.

¹⁷⁹ See Manning, *Federalism*, *supra* note 33, at 2014–15 (discussing the relevant shift and the line-up of Justices who subscribe to it). Conventional wisdom treats Justices Scalia and Thomas as the Court’s most committed textualists and counts Justice Kennedy as a fellow traveler. *See*,

splitting compromise, which cannot be expected to capture fully the background purposes that inspired lawmakers to act. Accordingly, as a unanimous Court explained a quarter century ago:

Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises. Invocation of the "plain purpose" of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise¹⁸⁰

In other words, because "[n]o legislation pursues its purposes at all costs," "the very essence of legislative choice" lies not merely in the identification of an appropriate policy goal, but in the determination of "what competing values will or will not be sacrificed to the achievement of a particular objective."¹⁸¹ Accordingly, the Court regards itself as "bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes."¹⁸²

If one takes seriously the premise that legislative decisionmaking involves choices about statutory means as well as ends, then respect for legislative supremacy requires interpreters to hew closely to the level of generality at which Congress has spoken. This conclusion follows because a provision's level of generality constitutes an important signal about how the legislature wants its handiwork implemented. As Judge Easterbrook has explained:

A legislature that seeks to achieve Goal *X* can do so in one of two ways. First, it can identify the goal and instruct courts or agencies to design rules to achieve the goal. In that event, the subsequent selection of rules implements the actual legislative decision, even if the rules are not what the legislature would have selected itself. The second approach is for the legislature to pick the rules. It pursues Goal *X* by Rule *Y*. The selection of *Y* is a measure of what Goal *X* was worth to the legislature, of how best to achieve *X*, and of where to stop in pursuit of *X*. Like any other rule, *Y* is bound to be . . . over- and under-inclusive. This is not a good reason for a court, observing the inevitable imprecision, to add to or subtract from Rule *Y* on the argument that, by doing so, it can get more of Goal *X*. The judicial selection of means to pursue *X* displaces and directly overrides the

e.g., William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 657 n.137 (1990). To substantiate the proposition that the Court's new attitude toward freestanding purposivism reaches beyond the Court's textualists, this section identifies the opinion's author for each statutory interpretation decision discussed.

¹⁸⁰ Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp., 474 U.S. 361, 374 (1986) (Burger, C.J.).

¹⁸¹ Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 646-47 (1990) (Blackmun, J.) (quoting *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam)) (internal quotation mark omitted).

¹⁸² MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 231 n.4 (1994) (Scalia, J.).

legislative selection of ways to obtain X. It denies to legislatures the choice of creating or withholding gap-filling authority.¹⁸³

When interpreters rely on “an imputed ‘spirit’ to convert one approach into another,” they “dishonor[] the legislative choice as effectively as expressly refusing to follow the law.”¹⁸⁴

In a related vein, once an interpreter begins to abstract from the specific means prescribed by a statutory text to the ultimate purposes that apparently inspired the statute, there is no principled stopping point for identifying the appropriate level of generality at which to attribute the relevant policy to the enacting legislature. As legal realist Max Radin once wrote, legislatures may enact laws to achieve a purpose, but “nearly every end is a means to another end.”¹⁸⁵ And if one abstracts from the “immediate” purposes suggested by precise textual provisions to the “ultimate” purposes that inspired them, it becomes necessary to acknowledge that “the avowed and ultimate purposes of all statutes, because of all law, are justice and security.”¹⁸⁶ Hence, when a court abstracts from the specific to the general, the level of generality at which it enforces statutory policy reflects *judicial*, and not *legislative*, choice.¹⁸⁷

It is, of course, not self-evident that these statutory interpretation principles have application to constitutional questions concerning the separation of powers. At the most fundamental level, a prominent strain of academic thought holds that because the Constitution is very old and almost impossible to amend, seeking to enforce the decisions embedded in its text illegitimately subjects the current polity to the rule of generations long dead.¹⁸⁸ Rather than starting from that question of first principle, however, I proceed here from the more conventional assumption that constitutional interpretation entails recovering or reconstructing the historically situated meaning of the constitutional text.¹⁸⁹ That framework, which links interpretation to the constitu-

¹⁸³ Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 546–47 (1983) (footnotes omitted).

¹⁸⁴ Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 68 (1994).

¹⁸⁵ Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 876 (1930). Radin later became a convert to purposivism. See Radin, *supra* note 170.

¹⁸⁶ Radin, *supra* note 185, at 876.

¹⁸⁷ See *id.* at 880.

¹⁸⁸ See, e.g., Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 225 (1980) (arguing that today's society “did not adopt the Constitution, and those who did are dead and gone”); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 880 (1996) (“Following a written constitution means accepting the judgments of people who lived centuries ago in a society that was very different from ours.”).

¹⁸⁹ See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST* 3 (1980) (“[T]he Court has always, when plausible, tended to talk an interpretivist line.”); Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 383 (1981) (“In virtually every instance, the court has made

tionmaking process of Articles V and VII,¹⁹⁰ describes the Court's standard interpretive method in cases of first impression,¹⁹¹ including separation of powers cases.¹⁹² And even those who reject the binding authority of the constitutional text tend to find its meaning at least relevant¹⁹³ — as a common point of reference for coordinating social activity,¹⁹⁴ as a source of values for further reasoning,¹⁹⁵ and the like.¹⁹⁶ Accordingly, it remains worthwhile to consider the most accurate way

an effort — often strained, to be sure — to find an acceptable textual home for its results [in constitutional cases].”).

¹⁹⁰ Unless an interpreter attempts to ascertain the historically situated meaning of the text — the way it would reasonably have been understood at the time of its adoption — meaning has no connection to the lawmaking process. Joseph Raz, *Intention in Interpretation*, in *THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM* 249, 258 (Robert P. George ed., 1996) (suggesting that if the meaning applied by interpreters is not related to the meaning understood by lawmakers, it would not “matter who the members of the legislature are, whether they are democratically elected or not, whether they represent different regions of the country, or classes in the population, whether they are adults or children, sane or insane”).

¹⁹¹ See, e.g., *District of Columbia v. Heller*, 128 S. Ct. 2783, 2788 (2008) (“In interpreting this [constitutional] text, we are guided by the principle that “[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.” (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931))); *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 275–76 (1989) (“We shall not ignore the language of the Excessive Fines Clause, or its history, or the theory on which it is based, in order to apply it to punitive damages.”); *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 721 (1838) (concluding that the meaning of the Constitution “must necessarily depend on the words of the constitution [and] the meaning and intention of the convention which framed and proposed it for adoption and ratification to the conventions of the people of and in the several states”). As noted, all of the foregoing cases involved questions of first impression. I do not address here the many complex questions surrounding the appropriate role of stare decisis in constitutional law. Compare, e.g., Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 748–67 (1988) (articulating and defending a robust view of constitutional stare decisis), with Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL’Y 23, 26–28 (1994) (arguing that courts must enforce constitutional meaning rather than a judicial decision when the two conflict).

¹⁹² See Part I, pp. 1950–71.

¹⁹³ See, e.g., Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1766 (1997) (“[V]irtually all practitioners of and commentators on constitutional law accept that original meaning has some relevance to constitutional interpretation.”); Strauss, *supra* note 188, at 880–81 (“Everyone agrees that the text of the Constitution matters. Virtually everyone would agree that sometimes the text is decisive.” (footnote omitted)).

¹⁹⁴ See Strauss, *supra* note 188, at 906–24 (discussing the “conventionalist” justification for sometimes adhering to the text of the Constitution).

¹⁹⁵ See, e.g., Dorf, *supra* note 193, at 1799–1800 (“Resort to historical context enables the non-originalist judge to root normative arguments in values that derive from the Constitution’s text.”).

¹⁹⁶ See, e.g., PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 11–22 (1991) (finding the text to be one factor among many that our tradition recognizes as relevant to constitutional adjudication); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1244–46 (1987) (same).

to identify the judgments that constitutionmakers embedded in the constitutional text.¹⁹⁷

Even within an interpretive framework predicated on fidelity to the outcomes of the constitutionmaking process, however, a deeply rooted theory of interpretation — the “living Constitution” approach — suggests that interpreters should read the Constitution more flexibly and purposively than they would read statutes. As relevant here, this approach simply purports to offer a superior way to show fidelity to a text that has the special features that the Constitution possesses. Because the Constitution seeks to prescribe a frame of government for a large and complex nation, one should not expect constitutionmakers to have designed the document itself to provide for all of the detailed questions that will arise in its lifetime.¹⁹⁸ Moreover, because constitutions are so much more difficult to amend than are statutes, true fidelity to the underlying purposes embedded in the text might be difficult, if not impossible, to achieve over time if interpreters read a constitution with the same strictness as a statute.¹⁹⁹ In other words, in the constitutional context, one may show greater fidelity to the constitutionmaking process by attending to the purposes rather than the textual details of the document.²⁰⁰

¹⁹⁷ Cf. Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENT. 191, 195 (2001) (“What people do with the Constitution’s meaning once they have it is their own business.”).

¹⁹⁸ See, e.g., *The Legal Tender Case*, 110 U.S. 421, 439 (1884) (“A constitution, establishing a frame of government, declaring fundamental principles, and creating a national sovereignty, and intended to endure for ages and to be adapted to the various crises of human affairs, is not to be interpreted with the strictness of a private contract.”).

¹⁹⁹ See, e.g., Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606, 619 (2008) (emphasizing that “Article V’s stringency is a potential explanation for creative judicial ‘interpretation’ of the text in a pinch”); Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1046 (1981) (“The amendment process established by [A]rticle V simply will not sustain the entire burden of adaptation that must be borne if the Constitution is to remain a vital instrument of government.”).

²⁰⁰ Chief Justice Marshall famously expressed this basic idea in his opinion for the Court in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819):

A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language. . . . [W]e must never forget, that it is a *constitution* we are expounding.

Id. at 407. In other words, because the Constitution was not — and could not be — drafted the way a statute would be, interpreters should not read it as if it had been. See Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 11 n.25 (1998) (tracing the living Constitution idea to *McCulloch*).

Whatever the merits or demerits of such a position in general,²⁰¹ this broadly purposive approach is out of place where the structural provisions of the Constitution are concerned. Its premises simply do not describe what constitutionmakers did. First, the Constitution's structural provisions do not have a one-size-fits-all quality. The separation of powers is implemented through a combination of some highly specific and some more open-ended provisions. To treat them all as if they were just markers for broad statements of principle — be it the functionalist principle of balance or the formalist principle of strict separation — is to ignore the true character of the document.²⁰² Second, constitutionmakers made express provision for adaptation and innovation; they gave Congress power under the Necessary and Proper Clause to “carry[] into Execution” all the powers of government. But in doing so, they struck a balance that, while itself rather Delphic, seems neither to give Congress unlimited power over the structure of government, nor to hamstring Congress with preconceived separation of powers limitations. Third, even if one wanted to attribute a free-standing separation of powers doctrine to the Constitution, historians have shown that no canonical version of the doctrine has ever existed. Hence, in the absence of any widely shared baseline, every detail of the American separation of powers had to be bargained for.

*B. Implementing the Separation of Powers:
The Specifics*

The original U.S. Constitution is, as Max Farrand wrote, a “bundle of compromises.”²⁰³ Indeed, compromise is inevitable whenever law-

²⁰¹ In previous writings, I have argued that despite these special concerns about constitutional law, respect for a lawmaker's choices about the appropriate level of textual generality is at least as important in the constitutional as it is in the statutory setting. See Manning, *Eleventh Amendment*, *supra* note 33, at 1701–20; Manning, *Federalism*, *supra* note 33, at 2037–47.

²⁰² See, e.g., Arnold I. Burns & Stephen J. Markman, *Understanding Separation of Powers*, 7 PACE L. REV. 575, 578–79 (1987) (arguing that the document adopts no theory of separation of powers in the abstract); Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1582 n.121 (2000) (“There is no freestanding ‘Separation of Powers Clause’ that contains its own statute-invalidating set of rules or standards; there is only the collection of texts that make up the system.”).

²⁰³ MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 201 (1913). The Constitution reflects the end product of a bargaining process carefully designed to give specified stakeholders the power to withhold their consent to the document or to insist upon compromise as the price of consent. At the Philadelphia Convention, the delegates agreed that each state delegation would vote as a unit, with each having an equal vote. See *id.* at 57. When the Pennsylvania delegates sought an arrangement more favorable to the large states, others successfully opposed the idea, arguing that it might cause the constitutionmaking project to unravel. See *id.* In addition, although the Convention did not determine the ground rules for ratification until near the end of their deliberations, it is fair to assume that the delegates bargained on the assumption that they would need to secure the assent of a supermajority, if not all, of the states.

making reflects “the product of a multimember assembly, comprising a large number of persons of quite radically differing aims, interests, and backgrounds.”²⁰⁴ Even when lawmakers share a broad consensus about their basic goals, they must still decide how broad a problem to tackle, whether to use rules or standards to effectuate their aims, what remedial mechanisms to employ, and countless other questions. Accordingly, the “specific provisions” of almost any significant law will reflect “the result of compromise and line-item voting.”²⁰⁵ As I have explained in greater detail in earlier writing, these principles apply fully to the making of the U.S. Constitution, whose precise contours emerged only after state delegations at the Philadelphia Convention cast thousands of individual votes on its contents.²⁰⁶

Fine-grained compromise is evident in the detail with which the constitutional text allocates power among the branches.²⁰⁷ Many of these provisions reflect breathtakingly exact judgments about how to allocate and condition the exercise of federal power. The precise character of these judgments, moreover, contradicts key elements of the functionalist and formalist theories of the constitutional structure. Through their specificity, they undermine the functionalist premise that the Constitution reflects an overall principle of balanced government but very little by way of structural detail. By making quite explicit judgments about how much to separate and how much to blend and check the coordinate powers of government, the structural provisions also belie the formalist claim that the document contains any discernible norm of strict separation.²⁰⁸ Rather, as the Court has stated (but not always honored), “[t]he principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it

See JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 102–04 (1996).

²⁰⁴ JEREMY WALDRON, *LAW AND DISAGREEMENT* 125 (1999).

²⁰⁵ *Id.*

²⁰⁶ See Manning, *Federalism*, *supra* note 33, at 2043–45; see also, e.g., CALVIN C. JILLSON, *CONSTITUTION MAKING: CONFLICT AND CONSENSUS IN THE FEDERAL CONVENTION OF 1787*, at 22 (1988) (“Madison and his colleagues knew that, even though the broad principles of republican government were widely accepted within the Convention, they faced many dangerous battles and confrontations over . . . potentially divisive ‘particulars.’”); Jon Elster, *Arguing and Bargaining in Two Constituent Assemblies*, 2 U. PA. J. CONST. L. 345, 363 (2000) (explaining that the dynamics of the Philadelphia Convention involved shifting coalitions “rather than the operation of crowd psychology” and that the delegations cast an estimated 5000 votes on the document’s contents).

²⁰⁷ See Stephen L. Carter, *Constitutional Improprieties: Reflections on Mistretta, Morrison, and Administrative Government*, 57 U. CHI. L. REV. 357, 367 (1990) (“The 1787 Constitution reflects the enormous energy that the Founders expended on designing the structure of the federal government . . .”).

²⁰⁸ I address below the contention that when read alongside the three Vesting Clauses, the provisions blending power in targeted ways constitute the exception that proves the formalists’ rule. See *infra* pp. 2014–17.

was woven into the document that they drafted in Philadelphia in the summer of 1787.”²⁰⁹

Without trying to catalogue all of the many ways in which the Constitution implements the separation of powers,²¹⁰ I think it helpful to identify some of the specific ways the document does and does not separate powers. First, the Constitution ensures that the three branches play a carefully circumscribed — but far from nonexistent — role in selecting one another. For instance, each House of Congress answers to a different constituency, and neither depends upon the other — or upon any other branch — for its election.²¹¹ Article II provides that the President will be chosen by electors appointed state-by-state “in such Manner as the Legislature thereof may direct.”²¹² The House, however, still plays a contemplated role, standing in reserve to act if no candidate receives a majority of the electoral votes cast.²¹³ Finally, the President appoints federal judges by and with the advice and consent of the Senate.²¹⁴ But Article III compensates for the judiciary’s initial dependence on the other branches by providing that members of the federal judiciary “shall hold their Offices during good

²⁰⁹ *Buckley v. Valeo*, 424 U.S. 1, 124 (1976) (per curiam). Or as Justice Scalia recently wrote in a separate opinion:

The “fundamental separation-of-powers principles” that the Constitution embodies are to be derived not from some judicially imagined matrix, but from the sum total of the individual separation-of-powers provisions that the Constitution sets forth. Only by considering them one-by-one does the full shape of the *Constitution’s* separation-of-powers principles emerge. It is nonsensical to interpret those provisions themselves in light of some general “separation-of-powers principles” dreamed up by the Court.

Boumediene v. Bush, 128 S. Ct. 2229, 2297 (2008) (Scalia, J., dissenting).

²¹⁰ One omission from the analysis here bears particular mention. The Constitution obviously makes a number of rather specific choices about the allocation of military and foreign affairs powers among the branches. *Compare, e.g.*, U.S. CONST. art. II, § 2, cl. 1 (designating the President as “Commander in Chief”), *and id.* § 3 (providing that the President “shall receive Ambassadors and other public Ministers”), *with id.* art. I, § 8, cl. 11 (assigning Congress power “[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water”), *and id.* cl. 12–13 (authorizing Congress “[t]o raise and support Armies” and “[t]o provide and maintain a Navy”). While the basic interpretive principles advanced in this Article apply no less to these important areas, the particular questions involved in these contexts are specialized enough to warrant separate treatment. Accordingly, this Article will reserve its focus for those issues that tend to arise in the composition of the modern administrative state, rather than the modern national security state.

²¹¹ *See id.* art. I, § 2, cl. 1; *id.* § 3, cl. 1. Nowadays, of course, the Constitution provides for direct election of Senators by the people of the several states. *See id.* amend. XVII. Article I also states that “[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members.” *Id.* art. I, § 5, cl. 1.

²¹² *Id.* art. II, § 1, cl. 2; *see also id.* amend. XII.

²¹³ *Id.* art. II, § 1, cl. 3. The House of Representatives has not selected a President since 1824. *See* Robert W. Bennett, *The Peril that Lurks in Even Numbers*, 7 GREEN BAG 2D 113, 113 (2004). Apart from that power, the Constitution gives Congress authority to “determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.” U.S. CONST. art. II, § 1, cl. 4.

²¹⁴ U.S. CONST. art. II, § 2, cl. 2.

Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”²¹⁵ As Madison wrote, “it is evident” from the constitutional design “that each department should have a will of its own; and consequently should be so constituted that the members of each should have *as little agency as possible* in the appointment of the members of the others.”²¹⁶ The document, in other words, strikes a variety of balances in prescribing the manner of selecting the principals in each branch.

Second, the Constitution sharply circumscribes — but does not wholly foreclose — interbranch removal authority. It supplies no mechanism for the President or the federal judiciary to exercise coercive power over members of Congress. To the contrary, the organizational provisions of Article I expressly assign each House the power to expel or discipline its own Members,²¹⁷ and the Speech or Debate Clause ensures that “for any Speech or Debate in either House, [members of both Houses] shall not be questioned in any other Place.”²¹⁸ Similarly, the Constitution provides no express mechanism for Congress to remove a sitting President or civil officers in his or her administration, except through the highly cumbersome process of impeachment by the House and conviction by two-thirds of the Senate.²¹⁹ Nor does the judiciary have any assigned role in the removal of a President, except insofar as the Impeachment Clauses expressly provide that “[w]hen the President of the United States is tried, the Chief Jus-

²¹⁵ *Id.* art. III, § 1.

²¹⁶ THE FEDERALIST NO. 51, at 318 (James Madison) (Clinton Rossiter ed., 2003) (emphasis added). Because I do not think that *The Federalist* has any claim to represent an authoritative account of constitutional meaning, I cite it throughout only where, as here, I think it *persuasively* accounts for features of the constitutional structure. See John F. Manning, *Textualism and the Role of The Federalist in Constitutional Adjudication*, 66 GEO. WASH. L. REV. 1337, 1350–54 (1998).

²¹⁷ Article I thus provides that “[e]ach House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.” U.S. CONST. art. I, § 5, cl. 2.

²¹⁸ *Id.* § 6, cl. 1. The Speech or Debate Clause further provides that members of both Houses “shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same.” *Id.* The Court has written that the Speech or Debate Clause was designed “to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary.” *Gravel v. United States*, 408 U.S. 606, 617 (1972) (citing *United States v. Johnson*, 383 U.S. 169, 181 (1966)). For discussion of the historical origins of the clause, see Léon R. Yankwich, *The Immunity of Congressional Speech — Its Origin, Meaning and Scope*, 99 U. PA. L. REV. 960 (1951).

²¹⁹ U.S. CONST. art. I, § 2, cl. 5 (“The House of Representatives . . . shall have the sole Power of Impeachment.”); *id.* § 3, cl. 6 (“The Senate shall have the sole Power to try all Impeachments. . . . [N]o Person shall be convicted without the Concurrence of two thirds of the Members present.”); see also *id.* art. II, § 4 (providing that “all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors”).

tice shall preside.”²²⁰ Finally, although many early state constitutions provided express mechanisms for legislatures to remove members of the judiciary, the U.S. Constitution, as noted, guarantees judicial tenure during good behavior and provides no procedure for removing judges, except through impeachment.²²¹ Accordingly, the ability of any branch to exert direct control over the others is both carefully defined and severely curtailed.²²²

Third, the Bicameralism and Presentment Clauses carefully divide statuemaking power among three institutions — the House, the Senate, and the President — which are elected at different times and answer to different constituencies.²²³ By carving up the lawmaking power in this way, that intricately designed process appears to promote several overlapping interests: it makes it harder for self-interested factions to capture the legislative process for private advantage;²²⁴ it re-

²²⁰ *Id.* art. I, § 3, cl. 6. The Court has held, moreover, that the federal judiciary cannot review the outcome of a trial of impeachment, reasoning that such matters constitute nonjusticiable political questions beyond the judiciary’s ken. *See* *Nixon v. United States*, 506 U.S. 224 (1993) (reasoning, *inter alia*, that Article I vests authority over impeachment trials exclusively in the Senate).

²²¹ Some believe that mechanisms other than impeachment are available for the removal of federal judges. *See* Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 *YALE L.J.* 72 (2006) (arguing that Congress could authorize removal of federal judges in ordinary courts upon a finding that the judge did not satisfy the “good behavior” criterion). The conventional wisdom is to the contrary. *See, e.g.*, James E. Pfander, *Removing Federal Judges*, 74 *U. CHI. L. REV.* 1227, 1230–34 (2007) (collecting founding-era evidence suggesting that the prevailing view treated impeachment as the exclusive mechanism for removing judges); Martin H. Redish, *Good Behavior, Judicial Independence, and the Foundations of American Constitutionalism*, 116 *YALE L.J.* 139 (2006) (contesting Prakash and Smith).

²²² To similar effect, the Constitution restricts Congress’s ability to influence the other branches’ conduct by altering the salaries of their principals. *See* U.S. CONST. art. II, § 1, cl. 7 (“The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.”); *id.* art. III, § 1 (ensuring that federal judges’ salaries “shall not be diminished during their Continuance in Office”). Although this guarantee did not preclude judicial salary increases, Hamilton suggested that such an arrangement would have been infeasible for judges because “the fluctuations in the value of money . . . rendered a fixed rate of compensation” too burdensome during often-lengthy terms of judicial service. *THE FEDERALIST NO.* 79 (Alexander Hamilton), *supra* note 216, at 471–72.

²²³ *See* U.S. CONST. art. I, § 7, cl. 2–3.

²²⁴ *See, e.g.*, 2 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 882, at 348 (Boston, Hilliard, Gray & Co. 1833) (“[T]he [veto] power . . . establishes a salutary check upon the legislative body, calculated to preserve the community against the effects of faction, precipitancy, unconstitutional legislation, and temporary excitements, as well as political hostility.”); *THE FEDERALIST NO.* 62 (James Madison), *supra* note 216, at 377 (arguing that bicameralism “doubles the security to the people by requiring the concurrence of two distinct bodies in schemes of usurpation or perfidy, where the ambition or corruption of one would otherwise be sufficient”).

strains momentary passions by promoting caution and deliberation;²²⁵ and it gives special protection to residents of small states through the states' equal representation in the Senate.²²⁶ It achieves these — and perhaps other specific goals — through the prescription of exquisitely detailed legislative procedures. For example, the Bicameralism and Presentment Clauses provide that the President may veto legislation but that Congress may override a veto by a two-thirds vote of each House.²²⁷ The clauses also carefully specify the exact number of days (ten, excluding Sundays) the President has to sign or veto a bill and the legal consequences of Congress's sending the President legislation fewer than ten days before adjournment.²²⁸ Notice that, as with the areas discussed above, the Bicameralism and Presentment Clauses also involve fine judgments about how far to separate and how far to blend Congress's and the President's roles in the legislative process.

Fourth, Article II carefully divides the traditionally executive power of appointment between the President and Congress. In particular, the Appointments Clause subjects to senatorial advice and consent the President's power to appoint "Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for."²²⁹ This shared authority evidently "serves both to curb Executive abuses of the appointment power and 'to promote a judicious choice of [persons] for filling the offices of the union.'"²³⁰ At the same time, however, "foreseeing that when offices became numerous, and sudden removals necessary, this mode might be inconvenient,"²³¹ the

²²⁵ See, e.g., *INS v. Chadha*, 462 U.S. 919, 951 (1983) ("The division of the Congress into two distinctive bodies assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings.")

²²⁶ See U.S. CONST. art. I, § 3, cl. 1 (establishing equal representation of states in the Senate); see also Clark, *supra* note 94, at 1371–72 (explaining the Senate's special role in the legislative process).

²²⁷ See U.S. CONST. art. I, § 7, cl. 2.

²²⁸ See *id.*; see also *The Pocket Veto Case*, 279 U.S. 655, 678 (1929) (arguing that it is an "essential . . . part of the constitutional provisions, guarding against ill-considered and unwise legislation, that the President, on his part, should have the full time allowed him for determining whether he should approve or disapprove a bill, and if disapproved, for adequately formulating the objections that should be considered by Congress").

²²⁹ U.S. CONST. art. II, § 2, cl. 2. At common law, executive and judicial appointments would have been a prerogative of the Crown. See 1 WILLIAM BLACKSTONE, COMMENTARIES *269, *271–72. In similar fashion, the Treaty Clause provides that the President shall have the power "to make Treaties, provided two thirds of the Senators present concur." U.S. CONST. art. II, § 2, cl. 2. Apparently, the treaty-making prerogative had been exclusively executive at common law. See 1 BLACKSTONE, *supra*, at *257.

²³⁰ *Edmond v. United States*, 520 U.S. 651, 659 (1997) (alteration in original) (citation omitted) (quoting THE FEDERALIST NO. 76, at 386–87 (Alexander Hamilton) (Max Beloff ed., 2d ed. 1987)).

²³¹ *United States v. Germaine*, 99 U.S. 508, 510 (1879).

Appointments Clause also includes an Excepting Clause, which provides that “the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”²³² Notice the carefully calibrated judgments reflected in the relevant text: the Excepting Clause’s “obvious purpose is administrative convenience — but that convenience was deemed to outweigh the benefits of the more cumbersome procedure only with respect to the appointment of ‘inferior Officers.’”²³³

Fifth, the Constitution prescribes an explicit — and carefully circumscribed — separation of personnel. The Incompatibility Clause provides that “no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.”²³⁴ This provision of course precludes the development of a parliamentary-style government in which legislators serve as senior executive officers, as well as any system in which legislators play a judicial role, as in the British House of Lords.²³⁵ Note, however, that the separation of personnel implicit in that clause is a targeted one. The clause does not preclude interbranch service between the personnel in the executive and judicial branches,²³⁶ and American constitutional practice from the beginning of the Republic includes countless examples of dual service by individuals acting simultaneously in high-level judicial and executive roles.²³⁷

These examples just scratch the surface of a document that defines the governmental structure in painstaking detail. The constitutional text makes numerous particular decisions about *when, how, and to what extent* to divide governmental power among the three designated branches. Rather than implementing an overarching “separation of powers” doctrine, the document shows that constitutionmakers made countless choices about how to implement that broad principle in the

²³² U.S. CONST. art. II, § 2, cl. 2.

²³³ *Edmond*, 520 U.S. at 660 (citation omitted).

²³⁴ U.S. CONST. art. I, § 6, cl. 2.

²³⁵ See Bruff, *supra* note 48, at 229 (noting that the clause precludes parliamentary government); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 60 n.239 (2001) (noting that the clause prevents legislators from serving as judges). *But see* Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1062–77 (1994) (arguing that the Incompatibility Clause intended merely to prevent the President from corrupting Congress).

²³⁶ See *Mistretta v. United States*, 488 U.S. 361, 397–408 (1989) (holding that service by sitting judges in the executive branch does not violate the Incompatibility Clause, which bars interbranch service only by legislators).

²³⁷ See, e.g., WILLIAM N. CASTO, *THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH* 71–72, 74–75, 97–98, 148–49 (1995) (cataloguing the extrajudicial activities of early Justices).

U.S. Constitution — including many about when to blend rather than separate powers as a way of checking governmental authority.²³⁸

*C. Implementing the Separation of Powers:
The Generalities*

The foregoing discussion shows that the Constitution implements many aspects of the separation of powers with a great degree of detail. But not all structural provisions speak with that level of specificity. Rather, at least two of the Vesting Clauses speak in quite general terms, using open-ended referents such as “[t]he executive Power” and “[t]he judicial Power.” (Article I’s Vesting Clause is only somewhat more determinate, assigning Congress “[a]ll legislative Powers herein granted.”²³⁹) In addition, perhaps the most central of the document’s structural clauses — the Necessary and Proper Clause — merely instructs that Congress may enact laws which “shall be necessary and proper” to “carry[] into Execution” all the powers vested in the government.²⁴⁰ The document tells us nothing about what should count as “necessary and proper” and what should not.²⁴¹

I will have more to say about the Vesting Clauses below, when I discuss what “ordinary interpretation” might entail for structural constitutional provisions.²⁴² For now, it is worth previewing simply that they obviously reflect meaningful indeterminacy. That characteristic, of course, is not surprising in a document of the Constitution’s complexity. It is a common drafting strategy to elide disagreement or deal with hard-to-predict futures by writing some provisions in general terms — that is, to strike a bargain that, implicitly or explicitly, leaves much to be decided by those charged with implementing the provi-

²³⁸ Among other things, if the Constitution truly embraced a comprehensive separation of powers principle, it is hard to explain why constitutionmakers included the Bill of Attainder Clause, U.S. CONST. art. I, § 9, cl. 3. Although the concept is obscure today, “[a] bill of attainder,” as the Court has explained, “is a legislative act which inflicts punishment without a judicial trial.” *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323 (1866). Accordingly, the constitutionmakers sought to “implement[] . . . the separation of powers” by providing “a general safeguard against legislative exercise of the judicial function, or more simply — trial by legislature.” *United States v. Brown*, 381 U.S. 437, 442 (1965). That the constitutionmakers thought it necessary to address the topic directly may suggest that they did not think any freestanding principle of separation of powers covered it.

²³⁹ U.S. CONST. art. I, § 1.

²⁴⁰ *Id.* § 8, cl. 18.

²⁴¹ See, e.g., J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. ILL. L. REV. 581, 587 (“[T]he language employed failed to clarify the precise scope of [the] implied powers [granted by the clause.]”); Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 CASE W. RES. L. REV. 243, 249–67 (2004) (using close textual analysis of the Necessary and Proper Clause to show that its words cannot illuminate the scope of power the clause conferred on Congress).

²⁴² See sections III.B–C, pp. 2017–39.

sions in question.²⁴³ In the case of the Vesting Clauses, their indefiniteness means that they may ultimately not have resolving significance for many separation of powers issues. If, for example, “[t]he executive Power,” in historical context, says little about the power of removal, then that clause, standing alone, cannot determine the validity of statutory removal restrictions. At the same time, where the Vesting Clauses, read in historical context, do have discernible content, they cannot be treated as mere inkblots. Broadly worded compromises may leave an interpreter more discretion than do specific ones. But unless they are worded so broadly that there is “no law to apply,”²⁴⁴ such compromises will set some limits on the way Congress can compose the government.

This observation leads to the second large generality of interest here — the text of the Necessary and Proper Clause. That clause is both generally worded and ultimately rather opaque. But it is centrally important to understanding the set of bargains that implement the constitutional structure. In some important sense, the Necessary and Proper Clause represents the constitutionmakers’ explicit (though far from pellucid) judgment about how to deal with the problem of a living Constitution.²⁴⁵ That clause is the one and only provision of the Constitution that directly addresses the establishment of the federal government. It gives the relevant power expressly to Congress, but conditions its exercise upon satisfaction of the requirement that any resulting law be “necessary and proper” for carrying into execution the powers granted by the Constitution. It should come as little surprise

²⁴³ This type of compromise commonly underlies delegation to administrative agencies. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (explaining that Congress may adopt open-ended provisions, inter alia, because it wishes to leave the specifics to the institution charged with implementing the statute or because legislators simply could not come to terms at a more specific level of generality).

²⁴⁴ I borrow this concept from administrative law. Under the APA’s preclusion-of-review provision, if Congress frames a statute in broad enough terms that there is, in effect, no law to apply to a contested matter, a reviewing court simply has no basis to disturb the agency’s judgment. See *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (holding that agency action is “committed to agency discretion” and thus unreviewable under 5 U.S.C. § 701(a) (2006) when there is “no law to apply” (quoting S. REP. NO. 79-752, at 26 (1945)) (internal quotation mark omitted)). This standard, in other words, reflects the idea that one cannot beat something with nothing.

²⁴⁵ Indeed, when Chief Justice Marshall articulated the theory of constitutionalism that came to be associated with the living Constitution approach, he did so in the course of interpreting the Necessary and Proper Clause. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407, 411–25 (1819); see also Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1124 (1998) (“There is that famous phrase: ‘we must never forget, that it is a *constitution* we are expounding.’ But now you see its context: not to assert that law is mush, but to say that the Constitution allows the living legislature to govern.” (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 407)).

that both functionalists and formalists claim that this broadly worded clause has significant implications for the separation of powers debate.

Functionalists say that the lack of detail in the Vesting Clauses and the apparent breadth of power conferred by the Necessary and Proper Clause, considered together, give Congress virtually limitless room to innovate as long as the overall balance of power is maintained.²⁴⁶ “In almost all significant respects,” they contend, “the job of creating and altering the shape of the federal government was left to the future — to the congressional processes suggested by Congress’s authority” under the Necessary and Proper Clause.²⁴⁷

Similarly, formalists see in the broad language of the Necessary and Proper Clause a textual hook for enforcing a background principle of separation of powers.²⁴⁸ In a famous article, Professor Gary Lawson and Patricia Granger thus argued that in late eighteenth-century usage, the first definition of “proper” connoted a *jurisdictional* propriety that fit tightly with the structural subject matter of the Necessary and Proper Clause.²⁴⁹ To them, this means that a “proper” law is one that is “peculiarly within Congress’s domain or jurisdiction” — that is, one that does not violate “principles of separation of powers, principles of federalism, and unenumerated individual rights.”²⁵⁰ In a relatively recent case, the Court signaled its agreement with the material elements of this account.²⁵¹

²⁴⁶ See *supra* pp. 1950–52.

²⁴⁷ Strauss, *supra* note 9, at 598–99; see also Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions — A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 526 (1987).

²⁴⁸ See Lawson, *supra* note 197, at 199 (“The [Necessary and Proper] Clause is precisely (in part) just such a ‘Separation of Powers Clause.’”).

²⁴⁹ See Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 291–97 (1993). In particular, Lawson and Granger note that the primary definition of “proper” was “[p]eculiar; not belonging to more; not common,” and that this definition “was widely in use around the time of the Framing in contexts involving the allocation of governmental powers.” *Id.* at 291 (quoting 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, W. Strahan et al., 7th ed. 1785); 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, W. Strahan 1755)) (internal quotation mark omitted). From that starting point, they concluded that “a ‘proper’ law is one that is within the peculiar jurisdiction or responsibility of the relevant governmental actor.” *Id.* (emphasis omitted).

²⁵⁰ *Id.* at 271–72 (emphasis omitted).

²⁵¹ The issue arose in a federalism case. In *Printz v. United States*, 521 U.S. 898 (1997), the Court held that a law is not “proper” within the meaning of the Necessary and Proper Clause if it “violates the principle of state sovereignty reflected in . . . various constitutional provisions.” *Id.* at 924. In so holding, the Court invoked Lawson and Granger’s analysis. See *id.* (citing Lawson & Granger, *supra* note 249, at 297–326, 330–33). Although the Court has yet to address the question in the context of a separation of powers opinion, if “proper” establishes the requirement of jurisdictional propriety that Lawson and Granger suggest, there is little basis for distinguishing the jurisdictional limits imposed by the separation of powers from those imposed by federalism.

There is an important grain of truth in both stories. But neither alters the basic point that the Constitution does not adopt a separation of powers doctrine in the abstract. A full examination of the historical meaning of the Necessary and Proper Clause would require its own article.²⁵² Still, it is possible here to sketch in brief why this broadly worded clause, although reflecting a different kind of bargain from the ones discussed above,²⁵³ does not alter the conclusion that the separation of powers consists of the document's many discrete decisions about the allocation of federal power, and not one overarching doctrine. It is helpful to consider the functionalist and formalist positions, in turn.

1. *The Functionalist Position.* — Functionalists are doubtless correct to assume that the Necessary and Proper Clause gives Congress primary responsibility for composing the government, including the institutions of the executive and judiciary. That much is clear from the fact that the clause empowers Congress to pass laws "necessary and proper" to "carry[] into execution" not only the legislative powers, but also "all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."²⁵⁴ This responsibility means that Congress presumptively wields the government-composing power, unless there is something precluding it from adopting a particular arrangement.²⁵⁵

How far this power goes is another question. For those who care about the legislative history of the Philadelphia Convention, it is worth observing that the clause was added by the Committee on Detail late in the Convention, and that the legislative history is too sparse to shed meaningful light on any bargains that might have underlain the clause.²⁵⁶ The debates that followed in the ratification campaign and in the controversies that came early in the Republic dealt, for the most part, with the federalism-related question of how to read the word "necessary" — and, in particular, how tightly or directly the means

²⁵² I do not, for example, consider to what extent the phrase "necessary and proper," read in historical context, places other forms of limitations upon congressional power to compose the government. See *infra* pp. 1989, 1991–92 (referring to historical scholarship suggesting that the clause imposed certain requirements of means-ends fit or of agency law upon the exercise of federal power). If the clause imposed widely understood conditions on the exercise of federal power, the enforcement of those conditions would itself constitute ordinary interpretation. I argue here merely that the clause does not support the strong readings attached to it by either functionalists or formalists.

²⁵³ See section II.B, pp. 1978–85.

²⁵⁴ U.S. CONST. art. I, § 8, cl. 18.

²⁵⁵ See Lessig & Sunstein, *supra* note 42, at 67.

²⁵⁶ See Mark A. Graber, *Unnecessary and Unintelligible*, 12 CONST. COMMENT. 167, 168 (1995) ("The records of the Constitutional Convention provide no help. The Committee on Detail gave no hint why it chose the language it did, and the Convention in turn apparently perceived these particular alterations to prior drafts as merely stylistic . . .").

prescribed by implemental legislation must fit with the ends drawn from one of Congress's enumerated powers.²⁵⁷ Accordingly, those early materials reveal precious little about how the clause structures Congress's horizontal relationship with the coordinate branches.²⁵⁸ On that score, the bargain seems to have been to identify Congress as the responsible actor but to leave matters concerning the precise scope of the power to be worked out later.²⁵⁹

Even an indeterminate bargain, however, has boundaries.²⁶⁰ In this case, it is most unlikely that reasonable constitutionmakers would have understood the Necessary and Proper Clause to give Congress the authority to vary from the precise allocations of power or procedural requirements set forth elsewhere in the Constitution, even if the resulting legislation advanced some apparent purpose of preserving a balance of powers. This conclusion, moreover, does not depend upon acceptance of the Lawson and Granger position, which, while elegant, is also heavily contested.²⁶¹ Rather, three distinct considerations cut

²⁵⁷ The fault lines are familiar. See, e.g., Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183, 185–208 (2004) (canvassing competing historical positions on the meaning of “necessary”); Beck, *supra* note 241, at 586–614 (same). Proponents of broad congressional power typically argued that “*necessary* often means no more than *needful, requisite, incidental, useful, or conducive to.*” Alexander Hamilton, Opinion on the Constitutionality of a National Bank (Feb. 23, 1791), in LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES 95, 97 (M. St. Clair Clarke & D.A. Hall eds., Augustus M. Kelley 1967) (1832). To treat “necessary” as meaning indispensable “would beget endless uncertainty and embarrassment” because it would set an almost unattainable standard. *Id.* at 98. Proponents of narrower power, in contrast, argued that unless legislation enacted pursuant to the clause was “limited to means necessary to the end, and incident to the nature of the specified powers,” then the constitutional objective of a government of “limited and enumerated powers[] would be destroyed.” 1 ANNALS OF CONG. 1947 (1791) (Joseph Gales ed., 1834) (statement of Rep. Madison). Although very important to understanding how the clause interacts with Congress's express powers, the question of means-ends fit implicit in that debate does not translate into the separation of powers debate. In such cases, there is rarely a question whether Congress has enumerated power to address the subject matter of the legislation. Rather, the question is typically whether the means contradict some structural norm implicit or explicit in the Constitution.

²⁵⁸ See Van Alstyne, *supra* note 38, at 116 (arguing that the clause's meaning relative “to the role of Congress and the amplification of executive power has been much neglected . . . because so much of the original debate and so much of the subsequent litigation of this clause were preoccupied with its vertical effect [on federalism and individual rights]”).

²⁵⁹ See JOSEPH M. LYNCH, NEGOTIATING THE CONSTITUTION 25 (1999) (“The ambiguity of the language that the committee proposed and that the convention approved enabled both sides not only to approve its inclusion in the Constitution but also to argue afterwards that their construction was in accord with the framers' intent.”).

²⁶⁰ See Manning, *Federalism*, *supra* note 33, at 2053–54.

²⁶¹ See, e.g., Beck, *supra* note 241, at 638 (“[T]he historical evidence for treating the propriety requirement as an external limitation on congressional power seems relatively thin.”); Evan H. Caminker, “*Appropriate*” Means-Ends Constraints on Section 5 Powers, 53 STAN. L. REV. 1127, 1138 n.47 (2001) (“This revisionist view of ‘proper’ is textually, analytically and historically incorrect, and the textual hook it claims for aggressive judicial review is chimerical.”); Natelson, *supra* note 241, at 261–65 (arguing that Lawson and Granger do not “come fully to grips with the fact

against reading the Necessary and Proper Clause in the strongest form one might attribute to the functionalists.

First, nothing in the language of the clause supports the idea that Congress can prescribe alternatives to the assignments of power or procedures set forth elsewhere in the Constitution. If anything, the text of the clause cuts slightly the other way.²⁶² It gives Congress the power to “carry[] into Execution” its own powers and those of the coordinate branches. That formulation surely cannot mean that Congress is bereft of power to shape and structure the way the other branches exercise their constitutionally granted powers.²⁶³ But it does strongly suggest that Congress must work from the template that the document has laid out, and cannot start from scratch. Because this argument is not a knockout, however, it leaves room for consideration of purpose, available maxims, and practical considerations.

Second, constitutional drafters do not generally “hide elephants in mouseholes.”²⁶⁴ The constitutional text reflects — and the records of the Philadelphia Convention confirm — that constitutionmakers bar-

that the founding generation commonly — indeed, usually — employed ‘proper’ and its derivatives in different and broader ways,” *id.* at 263).

²⁶² Among other things, the clause provides Congress with power to pass laws which “*shall be necessary and proper*” for carrying into execution governmental powers. U.S. CONST. art. I, § 8, cl. 18 (emphasis added). This wording contrasts with other clauses that more obviously vest a decision in the judgment and discretion of the branch exercising the power. *See, e.g., id.* art. II, § 2, cl. 2 (providing that “the Congress may by Law vest the Appointment of such inferior Officers, *as they think proper*, in the President alone, in the Courts of Law, or in the Heads of Departments” (emphasis added)); *id.* § 3 (providing that the President “shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures *as he shall judge necessary and expedient*” (emphasis added)). This distinction in phrasing seems to suggest, at least, that questions arising under the Necessary and Proper Clause impose justiciable limits on congressional authority. *See, e.g.,* Barnett, *supra* note 257, at 208; Lawson & Granger, *supra* note 249, at 276; Natelson, *supra* note 241, at 250.

²⁶³ Some scholars believe that the authority to “carry[] into Execution” a power does not include the authority to place any meaningful limits on it. *See, e.g.,* David E. Engdahl, *Intrinsic Limits of Congress’ Power Regarding the Judicial Branch*, 1999 BYU L. REV. 75, 101 (arguing that “while the clause imports a great deal of discretion, that is only discretion ‘for carrying into Execution’ the Constitution’s design, not for altering or countermanding it” (footnote omitted)); Gary Lawson, *The Constitution’s Congress*, 89 B.U. L. REV. 399, 400 (2009) (“Congress can, of course, pass laws ‘necessary and proper for carrying into Execution’ the powers vested in executive or judicial actors, but those laws must aid rather than hinder the exercise of those powers . . .” (footnote omitted)). But the authority to prescribe laws for “carrying into Execution” a power necessarily implies at least some authority to specify the terms and conditions on which those powers will be carried into execution. *See* Beermann, *supra* note 132, at 75–76. Any law specifying the way a power was to be carried into execution would predictably say something about the entity responsible for the relevant program, the scope of the authority conferred, and the manner of its implementation.

²⁶⁴ This phrase is borrowed from *Whitman v. American Trucking Ass’ns*, 531 U.S. 457 (2001), which observed that “Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions — it does not, one might say, hide elephants in mouseholes.” *Id.* at 468.

gained and fought over the details, establishing elaborate procedures for legislation, appointments, impeachment, and the like.²⁶⁵ They also assigned what they obviously took to be distinct powers to distinct branches, each of which had unique and carefully chosen attributes (such as unity in the executive, bicameralism in the legislature, and life tenure in the judiciary).²⁶⁶ It would be odd, to say the least, to read into an ambiguous phrase such as “necessary and proper” the power to remake all of the bargains that were struck elsewhere in the Constitution. Certainly, one should not attribute such a design to constitutionmakers if other readings of the clause are available.

Third, the Necessary and Proper Clause is the quintessential “general” power. The bargain struck provides Congress, in vague terms, with some broadly applicable power over literally every aspect of government. Yet, as discussed below, it is a basic principle of interpretation that the specific governs the general.²⁶⁷ If the Constitution’s Appointments Clause prescribes and structures a *specific* power to appoint federal officers, then the standard interpretive presumption would hold that lawmakers cannot use an otherwise applicable *general* power in a way that varies from — and, therefore, negates the balance struck by — the more specific one. Even though Chief Justice Marshall first articulated the premises of what was to become the “living Constitution” theory as a way of justifying an expansive vision of the Necessary and Proper Clause,²⁶⁸ he surely did not suggest that something could be “necessary and proper” if it contradicted other provisions of the Constitution. To the contrary, as he put it, “[l]et the end be legitimate, let it be within the scope of the constitution, and all means . . . which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”²⁶⁹

2. *The Formalist Position.* — The formalist take on the general clauses likewise has a kernel of truth, but it also ultimately reads too much into the Vesting Clauses and the Necessary and Proper Clause. For purposes of this analysis, I will assume that Lawson and Granger are correct in concluding that “proper” refers to laws that stay within the jurisdictional boundaries appropriate to Congress. Others have suggested that “proper” might mean that a statute must have an “appropriate” fit with the *particular* type of congressional power being executed,²⁷⁰ or that the phrase “necessary and proper” was a term of art importing agency principles about how to imply incidental powers

²⁶⁵ See section II.B, pp. 1978–85; section II.D.3, pp. 1999–2004.

²⁶⁶ See *infra* pp. 2009–10.

²⁶⁷ See *infra* pp. 2012–13.

²⁶⁸ See *supra* notes 200 and 245.

²⁶⁹ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

²⁷⁰ See Beck, *supra* note 241, at 641–44.

needed to carry out a delegated task.²⁷¹ It is unnecessary to adjudicate this complex historical question here because, even if Lawson and Granger are correct, their position cannot supply the needed textual hook for a freestanding separation of powers doctrine.

First, even if one accepts every one of their premises, Lawson and Granger's argument is circular as constructed.²⁷² As widely used at the time of the founding, the word "proper" referred to jurisdictional propriety; a law enacted pursuant to the Necessary and Proper Clause is, therefore, "proper" only if Congress has respected the jurisdictional limits placed on it by the Constitution; since those limits include the separation of powers, a law is "proper" only if it respects the separation of powers. Even if one grants each step in the argument, it does not tell us what to look for when we are trying to determine what limits the separation of powers places on Congress. Does it refer to the specific allocations of power and prescriptions of procedure found in the many particular clauses that compose the constitutional structure? Or is it, as Lawson and Granger suggest, an unenumerated but widely understood side constraint? In the absence of further evidence, Lawson and Granger's reading of the text thus gives us no basis for inferring that the Necessary and Proper Clause embraces a generalized principle of separation of powers.

Second, the elephants-in-mouseholes problem is not unique to the functionalists. If constitutionmakers had wished to adopt an extant background norm of separation of powers, slipping the word "proper" into the Necessary and Proper Clause would have been an oblique way to do so. It might be different if there were evidence suggesting that "proper" not only referred to the general proposition of jurisdictional propriety, but also constituted a term of art containing well-settled criteria for such a determination.²⁷³ In that case, using the word "proper" would be the same as instructing interpreters to apply accepted theories of separation of powers. But Lawson and Granger do not purport to identify any historical evidence of such a proposi-

²⁷¹ See Natelson, *supra* note 241, at 273–317.

²⁷² See *id.* at 263 (arguing that, even if taken at face value, Lawson and Granger's position "mostly reaffirms the rather obvious point that Congress may not pass an unconstitutional law"); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1728 n.20 (2002) (arguing that under the formalists' theory of "proper," the word "has no work to do unless the relevant constitutional principle can be traced to some other valid source of constitutional law").

²⁷³ Professor Ernest Young makes a similar point about the application of Lawson and Granger's theory of the term "proper" to background principles of federalism. See Ernest A. Young, *Alden v. Maine and the Jurisprudence of Structure*, 41 WM. & MARY L. REV. 1601, 1629 (2000) ("Lawson and Granger do not assert that the meaning of 'proper' can itself give content to those principles.").

tion. Nor could they, without also identifying a discernible benchmark for giving content to their putative term of art.

Third, other than the precise allocations of power and prescriptions of procedure effected by the constitutional text, there is no plausible baseline for reading a separation of powers doctrine into the word “proper.” Formalists, as noted, infer a strict norm of separation from the juxtaposition of the Vesting Clauses. Since that juxtaposition itself tells us little, if anything, about the nature or extent of any resulting restrictions on Congress’s express power to regulate or oversee the coordinate branches under the Necessary and Proper Clause, the restrictions must come — if from anywhere — from an agreed-upon principle of separation of powers external to the document itself.²⁷⁴ The difficulty, however, is that no such baseline existed.²⁷⁵ It is to that question that the analysis now turns.

D. The Missing Separation of Powers Baseline

If one wished to tease from the constitutional text an unenumerated separation of powers doctrine that transcends the details of particular provisions, then one would have to identify a meaningful template for that doctrine and demonstrate that constitutionmakers embraced it. Three considerations, however, suggest that no such template existed. First, the intellectual history of the separation of powers reveals no single canonical version that could have served as the necessary baseline. Second, antecedent English and state practice suggests that within a very broad range, a diverse array of arrangements would have been thought consistent with the separation of powers principle. Third, although the records of the Philadelphia Convention, in my view, merit virtually no weight as evidence of the intended meaning of particular clauses, some may find it relevant that the debates about institutional arrangements mainly hinged on practical, context-specific considerations, and not on compliance with some generally agreed-upon conception of the separation of powers.

1. *Intellectual History.* — An extensive account of the intellectual history of the separation of powers is beyond the scope of this inquiry. Classic expositions of this history, however, make clear that founding-era separation of powers theory supplied no single formula for the de-

²⁷⁴ See Lawson, *supra* note 197, at 204 (arguing that “there are certain background principles that define the ‘proper’ allocation of powers in the absence of direct constitutional specification”). For discussion of Professor Lawson’s approach to deriving the necessary background principles, see *infra* note 414.

²⁷⁵ See Beck, *supra* note 241, at 640 (“Absent a neutral and principled methodology for defining the content of the term ‘proper,’ the word constitutes an empty glass into which one may pour whatever social, economic or political theory one desires.”).

tails of a properly composed government.²⁷⁶ By the late eighteenth century a complex separation of powers tradition already stretched back a century and a half.²⁷⁷ Running through the work of thinkers as wide-ranging as “Harrington, Nedham, Locke, Bolingbroke, Montesquieu, Blackstone, Rousseau, Sieyès, Adams, Jefferson, and Madison,” the collected wisdom on the subject ultimately “reflected diverse political, constitutional, and theoretical concerns.”²⁷⁸

In that light, one prominent historian of the subject has shown that by the time of the founding, at least five distinct — and sometimes conflicting — purposes were associated with different strands of the doctrine:

- (1) to create greater governmental efficiency; (2) to assure that statutory law is made in the common interest; (3) to assure that the law is impartially administered and that all administrators are under the law; (4) to allow the people’s representatives to call executive officials to account for the abuse of their power; and (5) to establish a balance of governmental powers.²⁷⁹

This diversity of aims makes it difficult, if not impossible, to reason backward from the “purpose of the separation of powers” to the doctrine’s specific requirements.²⁸⁰ In addition, while theorists may have agreed in broad terms about the need to separate the major branches of governmental power, there was significant divergence, even among the most prominent theorists (Blackstone, Locke, and Montesquieu), about how to characterize and classify the powers to be divided.²⁸¹

²⁷⁶ These expositions include GERHARD CASPER, *SEPARATING POWER* (1997); W.B. GWYN, *THE MEANING OF THE SEPARATION OF POWERS* (1965); and M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* (2d ed. 1998).

²⁷⁷ CASPER, *supra* note 276, at 8.

²⁷⁸ *Id.*

²⁷⁹ GWYN, *supra* note 276, at 127–28.

²⁸⁰ This indeterminacy, however, does not foreclose the possibility that discrete structural features might be associated with particular separation of powers traditions. For example, at the time of the founding, the separation of lawmaking from judging had been prominently associated with the rule-of-law ideal of promoting the enactment of transparent laws that constrain judicial discretion. See Manning, *supra* note 235, at 67–68; Paul R. Verkuil, *Separation of Powers, the Rule of Law, and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 308 (1989). Evidence of a specific tradition of that sort might well help interpreters decipher the meaning of constitutional provisions that embody the structural feature with which the relevant tradition is associated. Still, this possibility does not alter the absence of any single, overarching benchmark for determining precisely what structural features would be required in a proper system bearing the separation of powers label.

²⁸¹ Locke saw three distinct powers of government: “legislative,” “executive,” and “federative.” See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 188–90 (Mark Goldie ed., Everyman 1993) (1690). The “federative” power was, roughly, the relatively unbounded prerogative power to conduct foreign affairs, while the “executive” power included what would today be considered the distinct “judicial” power. See VILE, *supra* note 276, at 65–67. Montesquieu, by contrast, divided the three powers into “that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.” *Id.* at 95 (quoting MONTESQUIEU, *THE SPIRIT OF THE LAWS* bk.

Even if one were to focus exclusively on the writings of Montesquieu — whom Madison described as “[t]he oracle who is always consulted and cited on this subject”²⁸² — one would not find a reliable baseline for a freestanding separation of powers doctrine. It is true that Montesquieu was the first theorist to urge a tripartite division of power along the lines embraced by the U.S. Constitution.²⁸³ But his approach confusingly invoked not only separation of powers theory, but also English conceptions of balance among the three estates.²⁸⁴ As one historian has written:

Montesquieu’s approach did lead to a good deal of confused speculation about his own loyalties. Was he advocating monarchy as the best system of government, or did he believe in a mixed system, or was he a good republican? Evidence for all these points of view can be found in his great work, and, indeed, it was the very fact that the *De l’Esprit des Loix* can be pressed into service in support of widely differing views that added to its influence. By the end of the eighteenth century Montesquieu was being quoted as an authority in England, France, and America, as conclusive evidence of the rightness of very different systems of government.²⁸⁵

XI, ch. 6, at 152 (Thomas Nugent trans., Hafner Pub. 1949) (1748)) (internal quotation marks omitted). Using this formulation, “between them Locke and Montesquieu state at least *four* functions of government, not three: the legislative, the executive, the ‘prerogative,’ and the judicial.” *Id.* at 96. Finally, whereas Locke had not seen the judicial power as distinct and Montesquieu had thought the judicial power would be exercised by ad hoc juries in republican regimes, Blackstone proclaimed the “necessity for an independent judicial power” exercised by professional judges. *Id.* at 113–14. This is not to say that significant agreement did not exist among the major separation of powers theorists most familiar to the constitutionmakers. Rather, it simply demonstrates that the major theorists differed regarding the details of the division of powers.

²⁸² THE FEDERALIST NO. 47 (James Madison), *supra* note 216, at 298. Certainly, other theorists influenced the founding generation. Many historians, however, regard Montesquieu as the most influential. *See, e.g.*, CASPER, *supra* note 276, at 8 (noting that Montesquieu was “perhaps the most frequently cited” theorist of the separation of powers); William Seal Carpenter, *The Separation of Powers in the Eighteenth Century*, 22 AM. POL. SCI. REV. 32, 37 (1928) (“The writings of Montesquieu were accepted at Philadelphia as political gospel.”); Farina, *supra* note 52, at 488 (observing that “the idea of a government structured by the separation of powers came to the Americans principally through the writings of Montesquieu”).

²⁸³ *See* GWYN, *supra* note 276, at 101–02; WOOD, *supra* note 134, at 152.

²⁸⁴ A traditional theory of English government held that liberty was preserved because the three estates — the monarchy, the aristocracy, and the commons — checked one another. *See* CASPER, *supra* note 276, at 9. Sometimes political theorists conflated the English theory of mixed or balanced government with the separation of powers, even though the two represent distinct governmental strategies. *See id.* The uncertain relationship between the two doctrines complicated the task of isolating a definitive version of what the separation of powers required. *See* WOOD, *supra* note 134, at 151 (noting that “separation of powers continued to possess many meanings, especially since it easily became combined with the very different theory of mixed government, that is, the balancing of the estates of the society into three parts of the legislature”). Indeed, in an influential article, Professor Elizabeth Magill has argued that this “fusion” of the competing conceptions of separation and balanced government is largely responsible for the muddled state of modern separation of powers doctrine. *See* Magill, *supra* note 21, at 1161–82.

²⁸⁵ VILE, *supra* note 276, at 85.

Accordingly, while the work established the modern idea of tripartite government, the overall analysis was too complex and open to varying interpretations to produce a meaningfully determinate blueprint for government at the level of detailed implementation.²⁸⁶

2. *Antecedent Governmental Practice.* — Unsurprisingly, the constitutional landscape in the late eighteenth century confirms the absence of a single, determinate baseline for what a separation of powers doctrine might require. Given the collection of governments most familiar to the founding generation, our constitutionmakers must have regarded the separation of powers as consistent with a variety of structural arrangements, the precise content of which was a matter for debate and negotiation.

For example, the unwritten English constitution — the most obvious focal point shared by the founders and the model Montesquieu himself identified for the separation of powers doctrine — separated and blended powers quite differently from the manner in which the U.S. Constitution did.²⁸⁷ The upper house of Parliament — the House of Lords — sat as the supreme judicial tribunal for the nation.²⁸⁸ And judges still assisted Parliament and the Crown in drafting legislation.²⁸⁹ In contrast with the President, the Crown had an absolute veto, but had not exercised it since the beginning of the eighteenth century.²⁹⁰ Similarly, the Crown had the prerogative to make appointments without advice and consent.²⁹¹ The list goes on.²⁹² If this very different structure also represented an acceptable version of the separation of powers, a constitutionmaker presumably would have had a hard time thinking that any hard-and-fast formula described the allowable degree of blending under a system flying that banner.

²⁸⁶ Gerhard Casper has described Montesquieu as perhaps “the most confused and confusing of the writers on separation of powers.” CASPER, *supra* note 276, at 8; *see also* WOOD, *supra* note 134, at 152 (noting that while Montesquieu did establish the modern conception of tripartite government, his work “also spoke of the mixed constitution of England and came close to confusing the balancing of estates with the separation of powers”).

²⁸⁷ *See* THE FEDERALIST NO. 47 (James Madison), *supra* note 216, at 298–99. Madison wrote that “[t]he British Constitution was to Montesquieu what Homer has been to the didactic writers on epic poetry.” *Id.* at 298. Madison added that Montesquieu “appears to have viewed the Constitution of England as the standard, or to use his own expression, as the mirror of political liberty.” *Id.*

²⁸⁸ *See* J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 64 (1971); F.W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 350–51 (1908).

²⁸⁹ *See* DAVID LINDSAY KEIR, THE CONSTITUTIONAL HISTORY OF MODERN BRITAIN SINCE 1485, at 29 (6th ed. 1960) (noting that judges “advised as to the drafting . . . of legislation, answered questions addressed to them by the executive, and on assize acted as political as well as judicial representatives of the central authority”).

²⁹⁰ *See* MAITLAND, *supra* note 288, at 422–23.

²⁹¹ *See* Corwin, *supra* note 135, at 383.

²⁹² *See* THE FEDERALIST NO. 47 (James Madison), *supra* note 216, at 299 (summarizing the differences between the British constitution and the proposed U.S. Constitution).

Experience with state constitutions prior to the Philadelphia Convention would have reinforced this impression.²⁹³ A number of states had explicit separation of powers provisions;²⁹⁴ others signaled their subscription to the doctrine by organizing their governments along tripartite lines, prohibiting plural officeholding, or both.²⁹⁵ Still, with respect to most details, a variety of practices took shape. For example, most states provided for legislative election of the executive, but three states vested that power in the voters.²⁹⁶ State constitutions were divided and often ambiguous on both the extent of and proper means of exercising the power of impeachment.²⁹⁷ Most but not all states embraced bicameralism.²⁹⁸ A small minority of states gave the chief executive a veto power, but most left the legislature unfettered.²⁹⁹ Most states vested the appointments authority in the legislature (either exclusively or in conjunction with the executive), but some either divided the responsibility over different sets of offices between the two branches or vested appointments authority exclusively in the governor, or in the governor and an executive council.³⁰⁰ Finally, early states had a variety of provisions dealing with control over the judiciary, with many constitutions providing for legislative power to control judicial salary and, in some instances, to remove judges.³⁰¹ Especially

²⁹³ The Articles of Confederation merit only passing mention. As Professor Martin Flaherty has explained, “[c]ompared to the state constitutions, the Articles of Confederation were not a source to which contemporaries often turned to draw lessons about government.” Flaherty, *supra* note 42, at 1771. Perhaps the lack of attention reflected the fact that “one [could] hardly view the Confederation as possessing the characteristics of a tripartite government.” CASPER, *supra* note 276, at 16. Accordingly, the Confederation would not have been a plausible baseline for the separation of powers.

²⁹⁴ The Massachusetts Constitution of 1780 famously incorporated the following provision:
In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws and not of men.

MASS. CONST. art. XXX. Several other early constitutions included similar provisions. *See, e.g.*, GA. CONST. of 1777, art. I; N.H. CONST. pt. 1, art. 37 (adopted in 1784); N.C. DECLARATION OF RIGHTS of 1776, art. IV; VT. CONST. of 1786, ch. II, § 6.

²⁹⁵ *See* CASPER, *supra* note 276, at 12–13; VILE, *supra* note 276, at 147.

²⁹⁶ *See* CASPER, *supra* note 276, at 13. The three were New York, Massachusetts, and New Hampshire; the latter two provided for legislative appointment if no candidate received a majority of the popular vote. *See id.*

²⁹⁷ *See* WOOD, *supra* note 134, at 141–42.

²⁹⁸ *See* VILE, *supra* note 276, at 155.

²⁹⁹ *See* CASPER, *supra* note 276, at 13; CHARLES WARREN, *THE MAKING OF THE CONSTITUTION* 185 (1929).

³⁰⁰ *See, e.g.*, WARREN, *supra* note 299, at 177–78 (discussing powers of appointment); WOOD, *supra* note 134, at 148 & n.41 (same); Flaherty, *supra* note 42, at 1769–70 (same).

³⁰¹ *See, e.g.*, WOOD, *supra* note 134, at 161 & n.65 (describing various methods of state legislative control over state court judges); Martha Andes Ziskind, *Judicial Tenure in the American*

when one compares these diverse arrangements with those of the British constitution that preceded them or the U.S. Constitution that followed, it becomes fully apparent that the details of a system of separated powers were, at least within a broad range of acceptability, a matter of political choice rather than a logical deduction from some background political theory.³⁰²

To be fair, the early state constitutions, particularly those adopted in the immediate aftermath of independence, reflected a common theme of placing primary faith in the people to control the excesses of government — an approach that tended to yield dominant legislatures, weak governors, dependent judiciaries, and thus largely formal separations of legislative, executive, and judicial powers.³⁰³ And most historians agree that later state constitutions — and, more importantly, the U.S. Constitution — represented a reaction *against* the perceived deficiencies that flowed from legislative dominance over the other branches and, more generally, from the absence of internal checks on the exercise of government power.³⁰⁴ Surely, this historical context may help modern interpreters, at the margin, to understand the point and, thus, the meaning of some specific structural provisions actually included in the U.S. Constitution.³⁰⁵ But that possibility does not alter the fundamental point that state constitutionmakers differed from one another, from their English forebears, and from U.S. constitu-

Constitution: English and American Precedents, 1969 SUP. CT. REV. 135, 138 (“Drafters of early state constitutions . . . disagreed over the best way to control judges.”).

³⁰² Along these lines, Professor M.J.C. Vile has written:

[T]he exact importance of the separation of powers varied considerably from State to State. It would be very difficult to frame generalizations which would fit Pennsylvania, Virginia, and Connecticut in the revolutionary period. . . . [I]t was the internal politics of the particular States which influenced the extent to which the doctrine played a part in their efforts at constitution-making.

VILE, *supra* note 276, at 149; *see also, e.g.*, WOOD, *supra* note 134, at 153 (“Because the doctrine of separation of powers was vague and permissive it was easily exploited by different persons for different purposes.”).

³⁰³ *See, e.g.*, CASPER, *supra* note 276, at 13 (“The most distinct feature of the [state] constitutions . . . was the dependence of the executive on the legislative branch . . .”); VILE, *supra* note 276, at 146–61 (arguing that early state constitutions depended heavily on the concept of “delegation of power from the people,” *id.* at 150, which was inconsistent with erecting strong checks on the people’s representatives); John A. Fairlie, *The Separation of Powers*, 21 MICH. L. REV. 393, 397 & n.10 (1923) (acknowledging legislative dominance).

³⁰⁴ *See, e.g.*, WOOD, *supra* note 134, at 446–53 (describing the growing reaction against state constitutional arrangements that, in practical terms, concentrated power in legislatures); Flaherty, *supra* note 42, at 1767–71 (explaining the way certain later state constitutions built in more effective checks against the power of representative assemblies). Madison captured the mood when he wrote that “dependence on the people is, no doubt, the primary control on the government; but experience has taught . . . the necessity of auxiliary precautions.” THE FEDERALIST NO. 51 (James Madison), *supra* note 216, at 319.

³⁰⁵ *See, e.g.*, *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219–25 (1995) (reasoning that Article III’s design reflected, in part, a reaction against the intermingling of legislative and judicial powers in certain state constitutions).

tionmakers in the details they believed the separation of powers required. Nor does the knowledge that U.S. constitutionmakers reacted against particular features of state constitutionalism tell us what a freestanding separation of powers doctrine ought to entail or “[j]ust how strong . . . the [accompanying] checks [were] to be, and what form . . . they [should] take.”³⁰⁶

3. *Records of the Convention.* — Although the records of the Philadelphia Convention — which were not released until after ratification — can shed little, if any, light on the public’s understanding of what the document meant at the time of ratification,³⁰⁷ the structure of the Convention’s deliberations lends at least collateral support to the idea that eighteenth-century Americans lacked any meaningful baseline for what the separation of powers required. Certainly, the records of the Convention make clear that establishing a separation of powers constituted a central objective of key delegates.³⁰⁸ But the records also show deep and widespread disagreement about how to implement — how to make concrete — that abstract goal. They also reveal that, in working out the details, other objectives — such as identifying and recruiting qualified public officials, providing workable procedures, and devising an acceptable political relationship among large and small states — often influenced the choices made. Even a partial sketch of some prominent examples — impeachment, bicameralism and presentment, and appointments — suffice to illustrate the point.

(a) *Impeachment.* — The impeachment power produced broad differences of opinion about what the separation of powers requires in practice. The delegates, for example, differed sharply over whether the executive should be subject to impeachment at all.³⁰⁹ Some believed that impeachment was essential, as Madison put it, to “defend[] the Community [against] the incapacity, negligence or perfidy of the chief Magistrate.”³¹⁰ Others feared that it would “hold [the

³⁰⁶ VILE, *supra* note 276, at 169.

³⁰⁷ See Monaghan, *supra* note 191, at 725.

³⁰⁸ See, e.g., JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 56 (Adrienne Koch ed., 1966) [hereinafter MADISON’S NOTES] (John Dickinson) (arguing “that the Legislative, Executive, & Judiciary departments ought to be made as independent as possible”); *id.* at 312 (James Madison) (deeming it “absolutely necessary to a well constituted Republic that [the legislative and executive powers should] be kept distinct & independent of each other”).

³⁰⁹ See WARREN, *supra* note 299, at 658–61.

³¹⁰ MADISON’S NOTES, *supra* note 308, at 332; see also, e.g., *id.* (Benjamin Franklin) (arguing that impeachment would “be the best way . . . to provide in the Constitution for the regular punishment of the Executive where his misconduct should deserve it, and for his honorable acquittal when he should be unjustly accused” (footnote omitted)); *id.* at 331 (George Mason) (“No point is of more importance than that the right of impeachment should be continued. Shall any man be above Justice?”).

executive] in such dependence that he will be no check on the Legislature.”³¹¹

Then there was the matter of which institution should conduct trials of impeachment, if authorized. The judiciary offered one attractive possibility, but vesting that power in the courts raised questions of impartiality because the President would have a hand in appointing the very judges who would try the impeachments.³¹² But the prime alternative — the Senate — would arguably render the President “improperly dependent” on the legislature.³¹³ A special committee on postponed matters (the so-called “Committee of Eleven”) successfully hammered out a compromise — one that both authorized the President’s impeachment and assigned the trial of impeachments to the Senate, but guarded against dependency by requiring “the concurrence of two thirds of the members present” for conviction.³¹⁴ These debates reflected a wide diversity of opinion at the level of implementation and produced a precise, difference-splitting compromise that cannot be traced back to any ideal conception of the separation of powers.

(b) *Bicameralism and Presentment.* — The Convention debated numerous questions before settling upon the familiar form of bicameralism and presentment. The fight over the precise contours of American bicameralism³¹⁵ — and the Great Compromise prescribing equal representation of the states in the Senate — is too well known to require detailed recitation.³¹⁶ Less well known is the fact that the veto power also produced a contentious debate. One line of thought opposed any veto power; another (less widespread) position favored an

³¹¹ *Id.* at 324 (Gouverneur Morris); *see also, e.g., id.* at 334 (Rufus King) (arguing that impeachment “would be destructive of [the executive’s] independence and of the principles of the Constitution”).

³¹² *See* WARREN, *supra* note 299, at 662; *see also, e.g.,* MADISON’S NOTES, *supra* note 308, at 605 (Gouverneur Morris) (“The supreme Court were too few in number and might be warped or corrupted.”); *id.* at 606 (Roger Sherman) (arguing that the “Supreme Court [was] improper to try the President, because the Judges would be appointed by him”).

³¹³ *Id.* at 605 (James Madison); *see also, e.g., id.* at 333 (Charles Pinckney) (arguing that impeachments “ought not to issue from the Legislature who would in that case hold them as a rod over the Executive and by that means effectually destroy his independence”).

³¹⁴ *Id.* at 574. Even then, delegates had to hammer out remaining disagreements about the criteria for impeachment. As reported by the Committee of Eleven, the Constitution authorized impeachment and removal of the President *only* “for Treason, or bribery.” *Id.* at 575. Believing that these categories would not “reach many great and dangerous offences,” George Mason proposed adding “maladministration” to the list of impeachable offenses. *Id.* at 605. Madison replied that “[s]o vague a term will be equivalent to a tenure during the pleasure of the Senate.” *Id.* Mason then withdrew “maladministration” and successfully proposed “other high crimes & misdemeanors [against] the State.” *Id.*

³¹⁵ The delegates had little disagreement over the need for two Houses. *See* WARREN, *supra* note 299, at 158–59.

³¹⁶ *See, e.g.,* FARRAND, *supra* note 203, at 91–112 (describing the circumstances leading up to the Great Compromise); WARREN, *supra* note 299, at 305–12 (same).

absolute veto.³¹⁷ Between these two poles, moreover, lay many variations, including the qualified veto that was ultimately adopted.³¹⁸ There was also disagreement about *who* should exercise the power. Delegates as prominent as Madison and Wilson favored a Council of Revision, in which the President and members of the judiciary shared the veto power; many others favored a presidential veto.³¹⁹

Although the delegates certainly discussed which of the various alternatives better comported with background principles of separation of powers,³²⁰ the arguments were, again, mainly pragmatic. Would an absolute veto enable the President to extract private advantage from Congress, or would such checking power be necessary to resist the legislature's inevitably expansive impulses?³²¹ Was a Council of Revision essential to ensure an effectual power to resist legislative encroachments and to constrain the President's otherwise unfettered veto power?³²² Or did it achieve those ends only at the unacceptable expense of compromising the adjudicative impartiality of the judiciary?³²³ The

³¹⁷ James Wilson and Alexander Hamilton, for example, moved to "give the Executive an absolute negative on the laws," reasoning that "[t]here was no danger . . . of such a power being too much exercised." MADISON'S NOTES, *supra* note 308, at 61–62. The states unanimously rejected that proposal. *Id.* at 66. Gunning Bedford, in contrast, "was opposed to every check on the Legislative," reasoning that it would give sufficient protection to the other branches "to mark out in the Constitution the boundaries to the Legislative Authority." *Id.* at 64.

³¹⁸ Early in the proceedings the Committee of the Whole voted to authorize the override of vetoes by "2/3 of each branch." *Id.* at 66. That ratio was repeatedly reaffirmed. *See, e.g., id.* at 116, 314. At one point, Hugh Williamson successfully moved to increase the proportion required for override to three-quarters. *See id.* at 465. Subsequently, the convention restored the two-thirds requirement. *See id.* at 627–30.

³¹⁹ *See infra* notes 322–323.

³²⁰ For example, critics saw the Council of Revision as inconsistent with the separation of powers. *See, e.g.,* MADISON'S NOTES, *supra* note 308, at 81 (John Dickinson) (suggesting that it "involved an improper mixture of powers"). Defenders argued the opposite. *See, e.g., id.* at 340 (James Madison) ("Instead . . . of contenting ourselves with laying down the Theory in the Constitution that each department ought to be separate & distinct, [the Council of Revision] was proposed to add a defensive power to each which should maintain the Theory in practice.").

³²¹ For example, drawing upon experience in Pennsylvania, Benjamin Franklin argued against an absolute veto: "The negative of the Governor was constantly made use of to extort money. No good law whatever could be passed without a private bargain with him." *Id.* at 62. Conversely, Wilson thought an absolute veto necessary because "there might be tempestuous moments in which animosities may run high between the Executive and Legislative branches, and in which the former ought to be able to defend itself." *Id.* at 63.

³²² Madison and Wilson believed that the Council of Revision would enable the judiciary to defend itself against legislative self-aggrandizement. *See, e.g., id.* at 79 (James Madison) (arguing that the proposal would equip the judiciary "the better to defend itself agst. Legislative encroachments"); *id.* at 336 (James Wilson) ("The Judiciary ought to have an opportunity of remonstrating agst. projected encroachments on the people as well as on themselves.").

³²³ There were two stated grounds for concern. First, some opponents of the Council of Revision questioned involving judges in policymaking. *See, e.g., id.* at 61 (Elbridge Gerry) (deeming it "quite foreign from the nature of ye. office to make [members of the judiciary] judges of the policy of public measures"). Second, some thought it would compromise impartiality for judges to interpret and apply laws they had participated in making. *See, e.g., id.* at 338 (Caleb Strong) ("The

ultimate resolution of this debate — which produced a qualified presidential veto, subject to override by two-thirds of both Houses of Congress — again reflects compromise over the appropriate means to a common end, not a logical deduction from a fixed conception of what the separation of powers entails in the abstract.

(c) *The Appointments Clause.* — The Appointments Clause grew out of diverse proposals about where the power should reside. From nearly the outset of the Convention until its final phase, the default position was to vest in the executive the authority “to appoint to offices in cases not otherwise provided for.”³²⁴ Accordingly, all of the key bargaining centered on proposals concerning whether and to what extent to vest appointment power in other branches.

The most prominent instance of this problem involved the question of who should appoint judges. The Virginia Plan initially assigned the power to the “National Legislature” — an approach that mimicked the practice of most states.³²⁵ Early on, however, Madison argued that members of the National Legislature (later, Congress) would be “too much influenced by their partialities” and, thus, would opt for legislative cronies rather than skilled lawyers.³²⁶ Reasoning that the Senate is “a less numerous & more select body,” he successfully moved to shift the appointment of judges to that institution.³²⁷ Others, however, urged shifting the power yet again — this time to the executive, either on its own authority or with some form of senatorial advice and consent.³²⁸

The competing arguments were highly practical — turning on such considerations as relative institutional competence to identify fit char-

Judges in exercising the function of expositors might be influenced by the part they had taken, in framing the laws.” (footnote omitted).

Proponents acknowledged these objections, but argued that the danger of legislative encroachment outweighed the risk of combining functions in this way. See, e.g., *id.* at 343 (James Wilson) (arguing that the “evil” of mixing legislation and exposition “would be overbalanced by the advantages promised by the expedient”).

³²⁴ *Id.* at 47. The earliest drafts were vague about the executive’s appointment authority. See WARREN, *supra* note 299, at 177–79.

³²⁵ See MADISON’S NOTES, *supra* note 308, at 32; see also WARREN, *supra* note 299, at 640 (noting that under all state constitutions other than those of New Hampshire, Massachusetts, and New York, state legislatures appointed their respective state judiciaries).

³²⁶ MADISON’S NOTES, *supra* note 308, at 112.

³²⁷ *Id.* at 113.

³²⁸ The New Jersey Plan, for example, proposed “that a federal Judiciary be established to consist of a supreme Tribunal the Judges of which to be appointed by the Executive.” *Id.* at 120. Nathaniel Gorham was the first to propose appointment by the executive by and with the advice and consent of the Senate — the approach that had long prevailed in his home state of Massachusetts. See *id.* at 314. James Madison urged appointment by the President, subject to rejection by two-thirds of the Senate within a fixed number of days. See *id.* at 317, 343.

acters,³²⁹ the potential for conflicts of interest arising from certain connections between the appointment and impeachment powers,³³⁰ and the effect of different modes of appointment on the fair distribution of judicial appointments among the states.³³¹ In the end, the special committee on postponed matters struck a compromise, vesting the authority over appointments of all officers in the President of the United States, subject to the advice and consent of the Senate.³³² Despite reservations expressed about the Senate's extensive role under the Constitution, the Convention embraced the compromise.³³³

* * * *

The records thus suggest that, rather than settling on some abstract principle of separation of powers, the relevant constitutionmakers disagreed, debated, and then compromised about the details of how to give that principle concrete form in the U.S. Constitution. In so doing, they had to decide in what ways and to what degree to separate federal powers from one another. While not conclusive of constitutional meaning, these deliberations suggest reasonable people of that era not

³²⁹ See, e.g., *id.* at 344 (James Madison) (arguing that presidential appointment with some form of advice and consent was superior because "it secured the responsibility of the Executive who would in general be more capable & likely to select fit characters" and because the Senate would stand ready to reject nominees "in case of any flagrant partiality or error"); *id.* (Edmund Randolph) (opposing Senate appointment power because "[a]ppointments by the Legislatures have generally resulted from cabal, from personal regard, or some other consideration than a title derived from the proper qualifications"); *id.* (Charles Pinckney) ("The Executive will possess neither the requisite knowledge of characters, nor confidence of the people for so high a trust.").

³³⁰ When the power to try impeachments was vested in the judiciary, concern arose about the executive's appointment of officials who might try his or her impeachment. See, e.g., *id.* at 315 (George Mason) ("If the Judges were to form a tribunal for [the purpose of impeaching the executive], they surely ought not to be appointed by the Executive."). When it appeared that the Senate might have the power to try impeachments, concerns about conflicts of interest also shifted. *Id.* at 517 (Gouverneur Morris) ("If Judges were to be tried by the Senate . . . [,] it was particularly wrong to let the Senate have the filling of vacancies which its own decrees were to create.").

³³¹ See, e.g., *id.* at 315 (Roger Sherman) (arguing that vesting power in the Senate, rather than the executive, would better insure that judges would come from many states); *id.* (Nathaniel Gorham) ("As the Executive will be responsible in point of character at least, for a judicious and faithful discharge of his trust, he will be careful to look through all the States for proper characters."); *id.* at 316 (Gunning Bedford) (vesting the appointment power in the executive "would put it in his power to gain over the larger States, by gratifying them with a preference of their Citizens"). In arguing for presidential appointment with advice and consent of the Senate, Madison noted that since the Senate was "now to be composed of equal votes from all the States, the principle of compromise" suggested that the joint appointment of judges by the President and the Senate would mitigate concerns about sectional bias in appointment. *Id.* at 344.

³³² *Id.* at 575; see also WARREN, *supra* note 299, at 642 (describing the compromise).

³³³ See WARREN, *supra* note 299, at 642 (describing reservations expressed by James Wilson, Charles Pinckney, and Elbridge Gerry about the powers of the Senate under the plan proposed by the Committee of Eleven).

only could but did differ about what the separation of powers entailed and about how far to pursue it.

4. *Summary.* — Perhaps the best summary of eighteenth-century separation of powers doctrine, such as it was, came from Madison himself during the ratification debates. In response to the Antifederalist charge that the Constitution's many instances of interbranch blending made it inconsistent with the separation of powers,³³⁴ Madison did not argue that the constitutional structure satisfied some Platonic ideal of separation. Rather, the tenor of his responses in *The Federalist* suggested that, at least within a very broad range, no such ideal existed, and that constitutionmakers had good reason to blend, as well as to separate, Montesquieu's three powers.

In *The Federalist No. 47*, Madison explained that while Montesquieu was correct in saying that the separation of the legislative, executive, and judicial powers was essential to liberty, that conclusion did not purport to tell us how strict the resultant separation had to be.³³⁵ Certainly, "where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted."³³⁶ But nothing in Montesquieu's work suggested "that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other."³³⁷ The British constitution (viewed by Montesquieu as "the standard"³³⁸) and the constitutions of the several states showed that many different arrangements — including many forms and degrees of blending — were thought consistent with the broad goal of separation of powers.³³⁹ Indeed, as elaborated in his equally famous *Federalist No. 51*, Madison emphasized that a certain degree of blending might, in fact, help to maintain the long-term independence of the three branches by providing means for each to check the power of the others — that is, by "giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."³⁴⁰

³³⁴ See THE FEDERALIST NO. 47 (James Madison), *supra* note 216, at 297 (noting that "[o]ne of the principal objections . . . to the Constitution is its supposed violation of the political maxim that the legislative, executive, and judiciary departments ought to be separate and distinct").

³³⁵ See *id.* at 298–300.

³³⁶ *Id.* at 299.

³³⁷ *Id.*

³³⁸ *Id.* at 298.

³³⁹ See *id.* at 298–304. While conceding that he could not vouch for the consistency of every state constitution with the "fundamental principle under consideration," Madison nonetheless wished to make clear that the claimed deficiency of the proposed Constitution on that dimension could be established "neither by the real meaning annexed to that maxim by its author, nor by the sense in which it has hitherto been understood in America." *Id.* at 304.

³⁴⁰ THE FEDERALIST NO. 51 (James Madison), *supra* note 216, at 319.

Madison's essays reflect what the intellectual history, government practice, and constitutional drafting history tell us: that there was no singular version of the maxim, external to the document, that could itself tell us whether a legislative veto, a restriction on presidential removal power, judicial review of legislation, an interbranch appointment, or virtually any other arrangement violates the separation of powers doctrine. Rather, by the late eighteenth century, it was clear that a sound constitutional structure should contain elements of separation and of blending, and that the separation of powers was consistent with diverse mixes of both. Because the separation of powers principle could be implemented in any number of ways, it is impossible to attribute to the Constitution an approach to the doctrine at any level of generality other than the one actually adopted.

III. READING THE CONSTITUTION'S STRUCTURAL ARTICLES

In the absence of any meaningful separation of powers baseline, interpreters must take seriously the particular compromises reflected in the adopted text, including the diverse levels of generality at which the document expresses its structural policies. When the Constitution adopts a specific rule about how to implement a given power, interpreters should read that provision as creating a hard and fast limit on congressional authority to adopt a contrary arrangement. In such a case, where the compromise reflects precise decisions about what institution is to exercise a power and the appropriate procedures for its doing so, the interpreter's job is to protect the balance struck. This conclusion raises questions about important aspects of functionalism.

Conversely, when the Constitution adopts provisions that speak in large, round, indefinite terms, the Court should not read them as if they reflect clear rules. In many respects, the content of the legislative, executive, and judicial powers is relatively indeterminate. Because the Necessary and Proper Clause gives Congress express power to prescribe the means by which both the executive and judicial powers are carried into execution, the presence of indeterminacy in the Vesting Clauses of Articles II and III has implications for congressional power. One cannot beat something with nothing. If a piece of implemental legislation does not contradict a particular understanding of the "executive" or "judicial" powers, then constitutional interpreters have no basis for displacing Congress's default authority under the Necessary and Proper Clause to compose the government. This conclusion calls into question certain aspects of formalism.

This Part considers what conventional rules of textual exegesis have to tell us about functionalism and formalism.³⁴¹ Section A discusses how courts should interpret specifically worded clauses. Section B discusses the principles that apply to relatively indefinite clauses, such as the Vesting Clauses. Without attempting to give a comprehensive account of the tools of “ordinary interpretation,” section C concludes by examining several of the tools that the Court has used to draw meaning from otherwise open-ended structural clauses — namely, common law understandings of terms of art, post-ratification practical constructions of the document, and structural inferences from related textual provisions. Section C suggests that although complications inherent in each of these sources of meaning require interpreters to proceed with care, such tools focus the Court on the right question: whether the background meaning of a discrete constitutional clause has anything particular to say about a challenged governmental practice.

A. *Respecting Specificity*

As discussed, lawmakers can strike compromises of many kinds. When a compromise is more standard-like — when it elides disagreement or addresses uncertainty by specifying little — it is fair to assume that the lawmaker has left it to interpreters to work out the details. When a compromise is more rule-like — when it strikes a particular balance by prescribing detailed means of implementing the underlying policy being embraced — it is fair to assume that the lawmaker has agreed to the new policy on the basis of the conditions specified. The latter assumption is reflected in a venerable principle of negative implication, holding that when an enacted text establishes a new power and specifies a detailed procedure for carrying that power into effect, interpreters should read the resultant specification as exclusive. This convention — which I call “the exclusivity maxim” — is well entrenched in the law of statutory interpretation,³⁴² but also has deep

³⁴¹ I focus here on conventional rules of textual interpretation because, as noted, I start from the premise that fidelity to the lawmaking process adopted by our constitutional structure entails close attention to the lines of compromises embedded in the adopted text. See Manning, *Eleventh Amendment*, *supra* note 33, at 1713–20; Manning, *Federalism*, *supra* note 33, at 2040–47. While some have argued that interpreters should strictly adhere to whatever interpretive conventions prevailed at the time of the founding, see McGinnis & Rappaport, *supra* note 40, at 752, this Article brackets the complex question of how founding-generation lawyers would have practiced interpretation (if, indeed, there was anything approaching a uniform view). I have previously argued that insofar as late eighteenth-century interpretation relied on atextual and purposive techniques, such methods may have reflected the structural assumptions of common law systems (that is, English and state constitutions) that did not map onto the quite distinct assumptions about judicial power underlying the U.S. Constitution. See Manning, *supra* note 235, at 56–102.

³⁴² HENRY CAMPBELL BLACK, *HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS* § 72, at 221 (2d ed. 1911) (explaining that “when a statute gives . . . a new

roots in our constitutional tradition.³⁴³ Grounded in a commonsense approximation of how people use language, the principle reflects the idea that a lawmaker would not generally take the trouble to spell out elaborate procedures for the exercise of a granted power if alternative procedures would do just as well.³⁴⁴ Put another way, it presupposes that departing from the particulars of a precise power-granting provision might well upset a compromise upon which agreement to that provision — and, in some cases, perhaps the document as a whole — may have rested.

This principle of negative implication has at least two important consequences for how to read particular structural clauses. First, it confirms some important results associated with formalism, rather than functionalism. In particular, the document's specification of procedures for carrying out a power impliedly excludes the legislative prescription of other means for doing so. More controversially, to the extent that the legislative, executive, or judicial powers embody some core meaning (a caveat explored more fully below), the assignment of each power to a different branch having singular characteristics suggests an implied negation of legislative power to mix and match powers and branches.³⁴⁵ Second, because all principles of negative implication operate only as rough rules of thumb — axioms of experience about the way people use language in practice — interpreters must also recognize that ascertaining the applicability and scope of any negative implication is not a mechanical process. Like any form of interpretation, such an inquiry requires careful attention to context; the

power, and provides a specific, full, and adequate mode of executing the power . . . , the fact that a special mode is prescribed will be regarded as excluding, by implication, the right to resort to any other mode of executing the power"); *see also, e.g.*, *Gomez v. United States*, 490 U.S. 858, 872 (1989) (explaining that a "carefully defined grant of authority . . . should be construed as an implicit withholding of [unspecified] authority"); *Raleigh & Gaston R.R. Co. v. Reid*, 80 U.S. (13 Wall.) 269, 270 (1872) ("When a statute limits a thing to be done in a particular mode, it includes a negative of any other mode.").

³⁴³ *See, e.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) ("Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them or they have no operation at all."); 1 STORY, *supra* note 224, § 448, at 434 ("There can be no doubt, that an affirmative grant of powers in many cases will imply an exclusion of all others."); *see also, e.g.*, THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 77 (Boston, Little, Brown & Co. 5th ed. 1883) (noting that, under accepted rules of implication, "where the means for the exercise of a granted power are given, no other or different means can be implied" (quoting *Field v. People ex rel. McClerland*, 3 Ill. (2 Scam.) 79, 83 (1839))).

³⁴⁴ *See* Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1241–43 (1995).

³⁴⁵ A related principle giving priority to specific over general laws confirms why the Necessary and Proper Clause does not authorize the adoption of alternative assignments of power or procedures for its exercise. *See infra* pp. 2011–13.

history of a given clause or its relationship to other provisions may indicate that specification does not imply exclusivity. This caution, I suggest, rules out an important negative implication that might otherwise support the strongest implications of formalism — the idea that the document’s specification of express forms of interbranch checks impliedly excludes legislative power to prescribe *any* additional ones. Each point merits brief elaboration.

1. *Specific Compromise and Maxims of Negative Implication.* — The exclusivity maxim’s focus on the fruits of particular compromise points toward strict enforcement of the Constitution’s specific procedures. As discussed, those procedural provisions — such as the ones prescribing impeachment, bicameralism and presentment, and the appointment of federal officers — all reflect the outcome of compromise among people of diverse views about the best way to handle the subjects.³⁴⁶

So, for example, on a functionalist view, the adoption of a one-house legislative veto might enhance checks and balances by reinserting a legislative constraint upon inevitable delegations to administrative agencies.³⁴⁷ Still, if the bicameralism and presentment provisions strike a precise balance concerning the appropriate means by which Congress can make or alter legal rights and duties, then authorizing a one-house legislative veto, which displaces existing regulatory law, does an end run around the requirements agreed upon in Article I, Section 7.³⁴⁸ As the Court put it in *Chadha*, “the prescription for legislative action in Art. I, §§ 1, 7, represents the Framers’ decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.”³⁴⁹ A similar framework of analysis would govern all of the other specific procedures prescribed by the Constitution.³⁵⁰

Interestingly, focusing more tightly on the specific compromises struck by the Constitution’s structural provisions might supply an alternative, and sounder, basis for the Court’s holding in *Bowsher*, which relied on general separation of powers principles to invalidate a statute permitting Congress to remove an executive officer for various

³⁴⁶ See section II.B, pp. 1978–85; section II.D.3, pp. 1999–2004.

³⁴⁷ See *INS v. Chadha*, 462 U.S. 919, 967–68 (1983) (White, J., dissenting); see also *supra* p. 1956.

³⁴⁸ See U.S. CONST. art. I, § 7 (prescribing the procedure for Congress to make “a Law”).

³⁴⁹ *Chadha*, 462 U.S. at 951.

³⁵⁰ *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), is another prominent example of this principle. In strictly enforcing the terms of the Appointments Clause, U.S. CONST. art. II, § 2, cl. 2, against legislative innovation that arguably enhanced the checks on administrative power, the Court reasoned “that a compromise had been made” carefully dividing the authority to appoint “Officers of the United States” between the President and Senate. See *Buckley*, 424 U.S. at 131.

forms of cause.³⁵¹ As noted, the Constitution carefully allocates and conditions the exercise of the power of impeachment. Article II specifies that “all civil Officers of the United States” may be removed only after impeachment and conviction of “Treason, Bribery, or other high Crimes and Misdemeanors.”³⁵² Article I, in turn, specifies that the House has the “sole Power of Impeachment,”³⁵³ and that the Senate has the “sole Power to try all Impeachments.”³⁵⁴ In addition, “no Person shall be convicted [by the Senate] without the Concurrence of two thirds of the Members present.”³⁵⁵ These provisions obviously reflect fine judgments about the degree to which Congress should possess authority to remove executive officers — a carefully struck balance between separation and mutual checks.³⁵⁶ If Congress could prescribe for itself the authority to remove an executive officer by simple majority vote — and without even a hint of “Treason, Bribery, or other high Crimes and Misdemeanors” — this assertion of authority would negate all the safeguards that the constitutionmakers negotiated in granting Congress removal power in the first place.

Although, as discussed below, the relative generality of the Vesting Clauses may temper the practical implications of the point that follows,³⁵⁷ there is a respect in which principles of negative implication also apply to the assignments of power made by those clauses. Even though the powers vested may themselves be generally worded, constitutionmakers chose to assign those powers to branches that have very specific and carefully chosen characteristics relating to their composition, their modes of selection, their terms of office, and their methods of operation. In other words, while a largely open-ended compromise is reflected in the unspecified content of the Vesting Clauses, the more particular compromise is evident in the decision to associate whatever uniquely identifiable functions each power may connote with its own intricately designed branch of government. To that extent, the previously discussed principles of negative implication would seem to apply.

For example, recall the Court’s starting assumption in *Schor* — namely, that certain claims (there, state common law claims) do constitute “core” Article III business.³⁵⁸ If that assumption is correct, then

³⁵¹ *Bowsher v. Synar*, 478 U.S. 714, 726 (1986); *see also* section I.B.2.a, pp. 1962–64.

³⁵² U.S. CONST. art. II, § 4.

³⁵³ *Id.* art. I, § 2, cl. 5.

³⁵⁴ *Id.* § 3, cl. 6.

³⁵⁵ *Id.*

³⁵⁶ For those who think them relevant, the proceedings of the Philadelphia Convention amply confirm this conclusion. *See* section II.D.3.a, pp. 1999–2000.

³⁵⁷ *See* section III.B.1, pp. 2017–21.

³⁵⁸ *See Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 853 (1986); *see also* section I.A.2.a, pp. 1953–55.

under conventional principles of negative implication, it is difficult to justify upholding legislative authority to reallocate such cases to non-Article III tribunals, even if doing so would not disrupt the overall balance of power among the branches. Article III assigns “[t]he judicial Power” to a branch having unique characteristics — namely, one staffed by decisionmakers who have life tenure and salary protection and whose specified authority consists of deciding “Cases” or “Controversies.”³⁵⁹ When constitutionmakers assigned specific powers or duties to an officer possessing unique attributes, it is fair to assume that such assignments were conditioned upon exclusivity.³⁶⁰

To be sure, this conclusion is far from airtight. Principles of negative implication require no small measure of judgment; their application is invariably contextual rather than mechanical.³⁶¹ Sometimes it is obvious that the specification of one thing means the exclusion of others. If a parent tells a young child who has asked for a drink, “you may have orange juice,” it almost surely means that the child may not grab a Mountain Dew from the refrigerator.³⁶² In other circumstances, it is equally obvious that specification warrants no negative implication. For instance, to ask a housemate to “‘get milk, bread, peanut butter and eggs at the grocery’ probably does not mean ‘do not get ice cream.’”³⁶³ Ultimately, the inquiry depends on whether a reasonable

³⁵⁹ U.S. CONST. art. III, § 1; *id.* § 2, cl. 1.

³⁶⁰ This premise, of course, applies no less to the Vesting Clauses of Articles I and II. Each branch has unique characteristics that are too familiar to require extended recitation. For example, Congress’s powers can be exercised only upon the concurrence of two Houses, each elected at different times, in different ways, and by very different constituencies. *See id.* art. I, § 2, cl. 1, 3 (specifying the terms and manner of electing members of the House); *id.* § 3, cl. 1–2 (specifying the terms and manner of electing the Senate); *id.* amend. XVII (altering the manner of electing the Senate). In addition, by requiring equal representation of the states in the Senate, constitutionmakers ensured that the interests of small states would receive protection disproportionate to their populations. *See id.* art. I, § 3, cl. 1; *see also* Clark, *supra* note 94, at 1371–72 (discussing this aspect of the constitutional design). In contrast, “[t]he executive power” is vested in a single person, and the President alone is chosen by a nationwide election. *See* U.S. CONST. art. II, § 1 (vesting executive power in “a President of the United States” and specifying the manner of election by the Electoral College); *id.* amend. XII (refining the manner of election). The conventional wisdom, at least, is that the design of the Electoral College gives the President a uniquely national perspective, making him or her better suited than Congress to resist the call of faction. *See, e.g.*, Frank H. Easterbrook, *The State of Madison’s Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1341 (1994) (arguing that the President serves a national constituency); Cass R. Sunstein, *Paradoxes of the Regulatory State*, 57 U. CHI. L. REV. 407, 427 (1990) (arguing that presidential control helps agencies resist factions). *But see* Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217 (2006) (arguing that the President is, in fact, more susceptible to parochial factions). Whatever the particulars, it is clear that each branch has unique features that resulted from careful design.

³⁶¹ *See* EARL T. CRAWFORD, *THE CONSTRUCTION OF STATUTES* § 195, at 334–37 (1940).

³⁶² This hypothetical is an adaptation of one found in Harold Hongju Koh, *The President Versus the Senate in Treaty Interpretation: What’s All the Fuss About?*, 15 YALE J. INT’L L. 331, 335 (1990).

³⁶³ *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1313 (9th Cir. 1992).

person would read a particular specification as exclusive of any others in the circumstances in which the specification was uttered.³⁶⁴

That factor alone makes it impossible to be more certain of the inferences I draw above, particularly those respecting the Vesting Clauses. The U.S. Constitution does not contain a specific Separation of Powers Clause of the kind that some of its state antecedents did.³⁶⁵ In the absence of such a clause, one cannot wholly rule out the possibility that the particular structural clauses are mere default positions — initial prescriptions of power pending Congress’s later determination that another set of arrangements would produce a better government or, at least, one better suited to changing circumstances that constitution-makers could not have foreseen. Indeed, functionalists might argue that, contrary to my earlier contentions, the Necessary and Proper Clause at least casts significant doubt on the applicability of the exclusivity principle by assigning Congress such broad, express power to compose the federal government.³⁶⁶

While these considerations certainly cannot be discounted, the exclusivity maxim does a better job capturing the realities of the decisionmaking process. Even though the powers assigned by the Vesting Clauses themselves have an open-ended quality, the careful and intricate design of each branch makes it difficult to think of the accompanying assignments of power as merely provisional.³⁶⁷ Moreover, it is

³⁶⁴ See, e.g., *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 81 (2002) (emphasizing that a negative implication is warranted only when the “circumstances” surrounding a specification “support[] a sensible inference that the term left out must have been meant to be excluded”); see also Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 455 (1989) (noting that an item’s omission from a statute “may reflect inadvertence, inability to reach consensus, or a decision to delegate the decision to the courts, rather than an implicit negative legislative decision on the subject”).

³⁶⁵ See *supra* note 294 and accompanying text.

³⁶⁶ See *supra* p. 1987.

³⁶⁷ The principles of negative implication discussed here further suggest that while the lines among the branches may be difficult to draw at the margins, see section III.B.1, pp. 2017–21, federal governmental functions necessarily fall somewhere within at least one of the three categories of power identified by the Constitution. The federal government of course possesses only “[t]he limited and enumerated powers” conferred by the Constitution. *Alden v. Maine*, 527 U.S. 706, 713 (1999); see U.S. CONST. amend. X. Because the document specifies only three forms of power, those categories presumably represent the exclusive means of carrying into execution the authority delegated to the federal government by the people of the several states. Accordingly, when the Court in *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935), justified modern administrative functions as “quasi-legislative” or “quasi-judicial” powers, *id.* at 624, its reasoning contradicted the apparent specifications of power found in the Constitution. See *FTC v. Ruberoid Co.*, 343 U.S. 470, 487–88 (1952) (Jackson, J., dissenting) (famously criticizing *Humphrey’s Executor’s* categories). Indeed, the Court has since abandoned the novel classifications employed in *Humphrey’s Executor*; modern jurisprudence would treat the classic regulatory functions at issue in that case as “executive.” See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3155 (2010) (concluding that a regulatory agency performing rulemaking and adjudication functions was exercising “executive” power); *Morrison v. Olson*, 487 U.S. 654, 689 n.28 (1988)

clear from the self-conscious detail of the prescribed procedures that constitutionmakers both bargained over and made difficult choices about permissible modes of doing business. In that light, it is difficult, to say the least, to imagine the document's being proposed or adopted if the specific bargains reflected in its elaborate text had been mere jumping-off points for legislative innovation. Thus, treating the Necessary and Proper Clause as an all-purpose grant of authority to prescribe alternatives to the document's specific grants and procedures would make hash of countless particular bargains that apparently made it possible for constitutionmakers to come to terms.³⁶⁸

This intuition finds strong support in a deeply rooted and normatively attractive principle of negative implication that implements the exclusivity principle. This related principle — which I call the “specificity maxim” — holds, quite simply, that “the specific governs the general.”³⁶⁹ If two enacted laws arguably cover the same subject, the one more specifically addressing the shared topic governs, displacing whatever authority the more general statute might have provided on the question.³⁷⁰ The justification, again, relates to the protection of specific legislative compromise. The specificity maxim seeks to ensure that a “narrow, precise, and specific” law will not be “submerged” by the invocation of another law that deals with “a more generalized spectrum.”³⁷¹ Presumably, the specific statute better reflects Congress's “detailed judgment” about how to “accommodate” competing policy

(“[I]t is hard to dispute that the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered ‘executive,’ at least to some degree.”); see also *infra* p. 2019. Contrary to this view, Professors Lawrence Lessig and Cass Sunstein have argued that the founding generation may have recognized and relied on more than the three explicit categories of power enumerated by the Constitution. See Lessig & Sunstein, *supra* note 42, at 70–78. An assessment of their detailed historical claims lies beyond the scope of this Article. For present purposes, it suffices to say that, under conventional principles of negative implication, the document's articulation of only three forms of power casts a heavy burden of persuasion on those, like Lessig and Sunstein, who would classify federal power in other ways.

³⁶⁸ See section II.D.3, pp. 1999–2004.

³⁶⁹ See, e.g., *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) (“Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.” (quoting *Morton v. Mancari*, 417 U.S. 535, 550–51 (1974)) (internal quotation marks omitted)); *Clifford F. MacEvoy Co. v. United States ex rel. Calvin Tomkins Co.*, 322 U.S. 102, 107 (1944) (“However inclusive may be the general language of a statute, . . . [s]pecific terms prevail over the general in the same or another statute which otherwise might be controlling.” (quoting *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932))).

³⁷⁰ The canon is also accurately described as follows: “[T]he general and specific in legal doctrine may mingle without antagonism, the specific being construed simply to impose restrictions and limitations on the general; so that general and specific provisions in the laws, both written and unwritten, may stand together, the latter qualifying and limiting the former.” JOEL PRENTISS BISHOP, COMMENTARIES ON THE WRITTEN LAWS AND THEIR INTERPRETATION § 112a, at 106–07 (Boston, Little, Brown & Co. 1882).

³⁷¹ *Radzanower*, 426 U.S. at 153.

concerns on the precise question at issue.³⁷² Accordingly, because the Necessary and Proper Clause provides the most *general* kind of legislative authority — governing the composition of all federal government institutions — the specificity maxim would suggest that it does not provide authority, for example, to prescribe an alternative to Article I, Section 7’s *specific* prescription of legislative procedures or Article III, Section 1’s *specific* assignment of “[t]he judicial Power” to life-tenured judges with salary protection.³⁷³

2. *Questions of Scope.* — The contextual nature of negative implication extends not merely to determining whether the principle properly applies in a given context, but also to identifying the appropriate *scope* of any resultant negative implication. For example, even if the compromises surrounding impeachment preclude the adoption of variant removal procedures within their domain, it remains necessary to identify the extent of that preclusion. I suggested above that the relevant bargain precludes *Congress* from removing executive officers outside the specified procedures. But since the Impeachment Clauses contain the Constitution’s only reference to removal of any kind, why not read them to govern the removal question more generally and preclude removal of all civil officers by the President as well? Indeed, in the First Congress’s great debate over the President’s constitutional power to remove the Secretary of Foreign Affairs, at least a few members of the House argued that impeachment supplied the only constitutionally authorized mechanism for removing officers.³⁷⁴

Like any other form of interpretation, determining the scope of a negative implication turns necessarily on contextual matters that cannot be identified in advance. Did impeachment coexist with executive removal power at common law? Did early Congresses, Presidents, or

³⁷² *United States v. Estate of Romani*, 523 U.S. 517, 532 (1998).

³⁷³ The process concerns underlying this principle of statutory interpretation apply no less to precise constitutional texts than to statutory texts. The ground rules set by the Philadelphia Convention gave each state an equal vote in shaping the proposed Constitution, thereby giving residents of small states a disproportionate right to block proposals. The delegates also bargained in the shadow of an apparently shared understanding that a large proportion, perhaps all, of the states would have to approve whatever the convention proposed. *See supra* note 203 and accompanying text. To assign a political minority the power to block change is also to give it the power to extract compromise from the majority. *Cf.* Manning, *supra* note 235, at 77–78 (explaining why supermajority requirements place a premium on respecting legislative compromise). When a process of that sort produces a carefully specified text, respect for the minority veto suggests that interpreters “should hew closely to the lines actually drawn, lest they disturb some unrecorded concession insisted upon by the minority or offered preemptively by the majority as part of the price of assent.” Manning, *Eleventh Amendment*, *supra* note 33, at 1735–36. Reading the general terms of the Necessary and Proper Clause to allow Congress to vary from the specifics agreed to elsewhere in the document threatens to undermine the process of compromise that gave rise to the text.

³⁷⁴ CHARLES C. THACH, JR., *THE CREATION OF THE PRESIDENCY, 1775–1789*, at 144 (1969); Corwin, *supra* note 135, at 361.

federal courts regard it as an exclusive form of removal?³⁷⁵ Has a particular understanding of the scope of exclusivity of the impeachment power become firmly embedded in our constitutional culture and thus withstood the test of time? Finally, if the scope of the bargain is uncertain, what reading of the Impeachment Clauses makes more sense in light of the Constitution's other structural features?³⁷⁶ These considerations make the inquiry difficult, but not impossible.

The question of scope has particular bearing on an encompassing negative implication that formalists might otherwise draw from the structure as a whole. As discussed, formalists have relied on a free-standing separation of powers doctrine to condemn interbranch oversight or regulation that does not run afoul of any particular clause — or at least none identified by their analysis. To justify that approach, formalists might assert the following negative implication: if the background allocation of power in the Vesting Clauses is the default, one might view the express checks and balances — the veto, advice and consent, impeachment, and the like — as limited exceptions, whose specification precludes any other form of check on a branch's exercise of its assigned power. On that view, every unspecified check that one branch exerts on the power of another would count as an encroachment upon the power thus checked. This framework would reflect a process of negative implication writ very large. Given the Constitution's structure, the reading has at least a ring of plausibility to it, and in the First Congress a figure no less weighty than Madison urged the embrace of such a universal rule of construction.³⁷⁷

Still, at that broad level of generality, such a negative implication cannot be justified. The Court has made clear that the relevant maxim — *expressio unius est exclusio alterius* — “does not apply to every . . . listing or grouping; it has force only when the items expressed are members of an ‘associated group or series,’ justifying the inference that items not mentioned were excluded by deliberate choice,

³⁷⁵ The First Congress decisively rejected the view that impeachment supplied the exclusive means of removing executive officers. See THACH, *supra* note 374, at 152.

³⁷⁶ If impeachment supplies the only basis for removal, the President might not, for example, be able to fulfill his or her specific duties to serve as “Commander in Chief” of the armed forces or to “take Care that the Laws be faithfully executed.” U.S. CONST. art. II, § 2, cl. 1; *id.* § 3. In addition, if impeachment constituted the only means for removing executive officers, that result might effectively give them tenure during good behavior — a protection that the Constitution specifies only for federal judges. See *id.* art. III, § 1. For further discussion of such structural inferences, see section III.C.3, pp. 2034–39.

³⁷⁷ 1 ANNALS OF CONG. 517 (1789) (“I think . . . when we review the several parts of this constitution, when it says that the legislative powers shall be vested in a Congress of the United States under certain exceptions, and the executive power vested in the President with certain exceptions, we must suppose they were intended to be kept separate in all cases in which they are not blended . . .”).

not inadvertence.”³⁷⁸ If the structure and history of the Constitution tell us anything, it is that the checks and balances — the particular ways in which constitutionmakers blended power — do not constitute a coherent listing or grouping. Rather, if the constitutional structure resulted from a series of particular compromises,³⁷⁹ then it is difficult to describe the specification of particular checks and balances in particular contexts as evidence of a broader, but unexpressed, intention to exclude all others. Because the Constitution was not animated by a shared overall theory of the appropriate balance between separation and interbranch checks, it would be unwarranted to sneak such a theory into the document through a universal rule of construction.

No clause of the Constitution instructs interpreters to read the set of checks in the document as the only ones that are consistent with a system of separated powers, properly understood. And it is not as though the idea never occurred to anyone. Constitutionmakers of that era obviously understood how to prescribe limiting rules of construction for the Constitution’s structural provisions. For example, by underscoring that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people,” the Tenth Amendment seems to instruct interpreters to read the enumeration of federal powers as exclusive.³⁸⁰ More specifically, many prominent state constitutions of that era contained explicit instructions to treat their allocations of legislative, executive, and judicial power as exclusive.³⁸¹ Yet when Representative Madison moved in the First Congress to add a like provision to the Bill of Rights, his motion passed the House but, for unknown reasons, failed in the Senate.³⁸² Of course, one can never place too much weight on a lawmaker’s decision not to adopt a provision; such an omission might, after all, reflect a judgment that such a provision was unnecessary rather than undesirable. But this history at least reinforces the hesitation one might already feel about superimpos-

³⁷⁸ *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (quoting *United States v. Vonn*, 535 U.S. 55, 65 (2002)).

³⁷⁹ See section II.B, pp. 1978–85; section II.D.3, pp. 1999–2004.

³⁸⁰ U.S. CONST. amend. X. I have argued elsewhere that although the Tenth Amendment adopts such a rule of construction, it does not otherwise adopt any freestanding federalism norm. See Manning, *Federalism*, *supra* note 33, at 2063–65.

³⁸¹ See *supra* note 294.

³⁸² Madison moved to add the following language to the Bill of Rights:

The powers delegated by this constitution, are appropriated to the departments to which they are respectively distributed: so that the legislative department shall never exercise the powers vested in the executive or judicial; nor the executive exercise the powers vested in the legislative or judicial; nor the judicial exercise the powers vested in the legislative or executive departments.

12 THE PAPERS OF JAMES MADISON 202 (Charles F. Hobson & Robert A. Rutland eds., 1979).

ing a one-size-fits-all rule of construction upon a document composed of countless local compromises.

Finally, adopting a universal rule prohibiting unspecified checks would require interpreters to make impossibly fine distinctions about which interbranch checks are explicitly authorized. Think of judicial review. It is nowhere specified in the document. To some, the separation of powers would be thought “incompatible with the idea that one branch can interfere with the functions of another to the extent of invalidating its acts.”³⁸³ In *Marbury v. Madison*,³⁸⁴ however, Chief Justice Marshall thought judicial review implicit in “[t]he judicial Power” to decide cases or controversies — indeed, Marshall thought judicial review implicit in the very fact of a written constitution.³⁸⁵ But would that reasoning suffice if a universal rule of construction precluded the erection of any checks that the document did not *explicitly* adopt?³⁸⁶ Similarly, Congress has long subjected agencies to oversight hearings and investigations — practices that impose significant checks upon executive power.³⁸⁷ Those interbranch checks, too, seem to be at least fairly implicit in Congress’s legislative powers, but nothing in the Con-

³⁸³ VILE, *supra* note 276, at 173.

³⁸⁴ 5 U.S. (1 Cranch) 137 (1803).

³⁸⁵ *Id.* at 176–77.

³⁸⁶ Many scholars have offered textual and historical defenses of the institution of judicial review. See generally PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* (2008); Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 *YALE L.J.* 502 (2006); John Harrison, *The Constitutional Origins and Implications of Judicial Review*, 84 *VA. L. REV.* 333 (1998). Others see it as more of an innovation. See, e.g., 2 WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 938–75 (1953). Even assuming *Marbury*’s correctness, one could hardly conclude that the authorization for judicial review was express.

A similar question arises with respect to the more recent practice of judicial review of agency action. By providing for such review, Congress has given the judiciary broad authority to determine whether the executive has engaged in reasoned decisionmaking. See 5 U.S.C. § 706 (2006); see also, e.g., *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42–43 (1983) (spelling out the reasoned-decisionmaking requirement); *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416–20 (1971) (same). Congress presumably has the power to create rights of action and to vest jurisdiction in the federal courts to decide cases or controversies arising under the laws of the United States. See U.S. CONST. art. I, § 8, cl. 9; *id.* art. III, §§ 1–2. But nothing in the Constitution, in terms, authorizes Congress to exercise that authority to interpose a judicial check over the way executive agencies execute the law.

³⁸⁷ Among other things, congressional oversight committees hold hearings on agency conduct (at which senior agency officials may have to testify) and conduct investigations into agency activities. See, e.g., JOEL D. ABERBACH, *KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT* 195–96 (1990); Beermann, *supra* note 132, at 122–27. Congress has also authorized its agent, the Comptroller General, to inspect and audit the books of executive agencies. See 31 U.S.C. § 3523(a) (2006) (“Except as specifically provided by law, the Comptroller General shall audit the financial transactions of each agency.”); *Bowsher v. Synar*, 478 U.S. 714, 741–46 (1986) (Stevens, J., concurring in the judgment) (outlining the respects in which the Comptroller General has traditionally acted as an agent of Congress in performing his or her auditing functions).

stitution makes them express.³⁸⁸ A rule barring all unenumerated checks either would require the rejection of such well-settled constitutional practices or would compel courts to engage in the impossible task of determining how clear is clear enough to find “express” constitutional authorization for a challenged interbranch check. These consequences counsel hesitation before applying the principle of negative implication so broadly.

B. *Respecting Indeterminacy*

Just as specificity sends an important signal to interpreters, so does the adoption of vague or open-ended standards. And just as functionalism gives insufficient weight to constitutional specificity, formalism at times undervalues constitutional indeterminacy. By inferring a strict norm of separation from the structure of and relationship among the three Vesting Clauses, formalists sometimes find implied limits on congressional power that are not grounded in the historical meaning of any specific clause of the Constitution. By treating as settled what constitutionmakers, in fact, left undecided — or, more accurately, left for Congress to decide — formalism too risks upsetting the lines of compromise in the document. In particular, that approach risks disturbing apparent decisions about the level of generality at which the Vesting Clauses were framed and adopted.

This section first lays out a preliminary framework for analysis of the Vesting Clauses. It then explains the ways in which formalists’ reliance on a freestanding separation of powers doctrine sometimes leads them to ascribe unwarranted determinacy to those clauses.

1. *The Generality of the Vesting Clauses.* — Before turning to the proper way to interpret the Vesting Clauses, it is helpful first to say a few words about the Clauses’ relative indeterminacy. Starting from the (well-settled but not universally accepted) assumption that the Vesting Clauses, in fact, assign identifiable powers to the branches they designate,³⁸⁹ there will remain significant indeterminacy about

³⁸⁸ As the Court explained in *McGrain v. Daugherty*, 273 U.S. 135 (1927), “there is no [constitutional] provision expressly investing either house with power to make investigations and exact testimony.” *Id.* at 161. Such investigative authority, however, seems to be fairly implicit in the broader authority to legislate. *See id.*

³⁸⁹ Not everyone shares that assumption. Rather, some scholars view those clauses as mere placeholders, identifying the actors (Congress, the President, and the federal courts) that will exercise the particular powers specified in the enumerations found in the balance of the first three articles of the Constitution. *See, e.g.,* Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 551 (2004) (contending that viewing the Vesting Clause as a broad power grant “cannot explain some of Article II’s specific grants of foreign affairs authority, and . . . sits uneasily with the Constitution’s enumerated powers structure”); A. Michael Froomkin, *The Imperial Presidency’s New Vestments*, 88 NW. U. L. REV. 1346, 1363 (1994) (arguing that the Vesting Clauses of Articles II and III are “‘empty vessels’ that the remainder of those articles then fill”). Others argue that those clauses also embody at least some

what those powers entail.³⁹⁰ From the beginning of the Republic, prominent analysts of the Constitution thus recognized that the lines among the branches would prove hard to define with any precision. Madison famously wrote:

Experience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces — the legislative, executive and judiciary; or even the privileges and powers of the different legislative branches. Questions daily occur in the course of practice which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science.³⁹¹

And after decades of experience implementing the Constitution, Chief Justice Marshall seconded that view:

independent content associated with traditional conceptions of legislative, executive, or judicial power. See, e.g., Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377, 1378–1400 (1994) (making textual, structural, and historical arguments for the proposition that the Vesting Clauses independently grant power); Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 714–16 (same).

I confess that I find the “placeholder” theory a rather unlikely reading of the text, at least as applied to Articles II and III. Article I’s Vesting Clause operates upon “[a]ll legislative Powers *herein granted*.” U.S. CONST. art. I, § 1 (emphasis added). In contrast, the Vesting Clauses of Articles II and III refer, respectively, to “[t]he executive Power,” *id.* art. II, § 1, and “[t]he judicial Power,” *id.* art. III, § 1 — formulations that are obviously not internally referential. I do not, however, take a firm position here on the complex and elaborate historical and structural arguments that define the debate over this question.

Instead, I assume for the sake of argument that the Vesting Clauses have some content independent of the enumerations that follow. If the Vesting Clauses *are* mere placeholders, as some suggest, then the previously discussed exclusivity and specificity maxims would apply in a straightforward way to the enumerated powers picked up by each Vesting Clause. The analysis here thus addresses the more difficult and interesting question of how to interpret legislative, executive, and judicial power if the clauses do have independent content. That inquiry is worth undertaking, in any case, because the independent content assumption accords with longstanding premises of our legal tradition. See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3151–52 (2010) (finding a grant of removal power in the Vesting Clause of Article II); *Morrison v. Olson*, 487 U.S. 654, 689–90 (1988) (same); *Myers v. United States*, 272 U.S. 52, 161 (1926) (same); *United States v. Klein*, 80 U.S. 128, 147 (1872) (holding that “[t]he judicial power” includes the power to announce the rule of decision in constitutional cases); *Marbury*, 5 U.S. (1 Cranch) at 177 (deriving judicial review from the judicial power “to say what the law is”).

³⁹⁰ For a particularly thoughtful account of this problem, see M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 608–26 (2001). Magill argues that “the Constitutional terms are far from self-defining” and that “no well-accepted doctrine or theory . . . offers a way to identify the differences among the governmental functions in contested cases.” *Id.* at 612. Perhaps the most prominent academic formalist has acknowledged this definitional difficulty. See Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1238 n.45 (1994) (“The problem of distinguishing the three functions of government has long been, and continues to be, one of the most intractable puzzles in constitutional law.”). See also William B. Gwyn, *The Indeterminacy of the Separation of Powers in the Age of the Framers*, 30 WM. & MARY L. REV. 263, 267–68 (1989).

³⁹¹ THE FEDERALIST NO. 37 (James Madison), *supra* note 216, at 224.

The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law; but the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a Court will not enter unnecessarily.³⁹²

These observations should come as no surprise, given the diversity of opinion among the founders' favorite separation of powers theorists and the variety of state practice regarding the proper business of each branch.³⁹³

Indeed, deeply rooted constitutional understandings confirm that multiple branches can often bring about very nearly the same result, provided that they do so in a manner consistent with the operating procedures prescribed by the document. If Congress wants to adopt a per se rule of antitrust liability for horizontal price fixing, it can of course do so if it enacts a statute through the procedures of bicameralism and presentment.³⁹⁴ The executive, however, could adopt a similar per se rule pursuant to broadly worded delegations of rulemaking power from Congress, as long as Congress has supplied an intelligible principle.³⁹⁵ Even though the resulting agency regulation would look like a statute and carry the same legal force as one,³⁹⁶ nothing in the text of the Constitution compels the conclusion that the agency is thereby exercising delegated "legislative Power[]." ³⁹⁷ Rather, it would

³⁹² *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 46 (1825).

³⁹³ See sections II.D.1–2, pp. 1993–99.

³⁹⁴ See U.S. CONST. art. I, § 7.

³⁹⁵ See *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) (articulating the "intelligible principle" test).

³⁹⁶ See *Ariz. Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 284 U.S. 370, 386 (1932) (noting that an agency exercising delegated authority "speaks as the legislature, and its pronouncement has the force of a statute"); see also, e.g., VILE, *supra* note 276, at 153 (quoting A.B., PA. GAZETTE, Apr. 28, 1784) (identifying certain characteristics of legislative power); BLACK'S LAW DICTIONARY 899 (6th ed. 1990) (stating that the term "legislation" means, among other things, "[f]ormulation of rule[s] for the future").

³⁹⁷ *But see Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 487–90 (2001) (Stevens, J., concurring in part and concurring in the judgment) (arguing that delegation permissibly transfers legislative power to agencies). Of course, one might further contend that such delegations circumvent the specific requirements of bicameralism and presentment by allowing agencies to promulgate statute-like rules pursuant to vaporous statutory standards. *Cf. Loving v. United States*, 517 U.S. 748, 757–58 (1996) (suggesting that delegation threatens the goals of bicameralism and presentment). However, three considerations cast doubt on the degree to which delegations of authority to executive agencies conflict with the requirements of bicameralism and presentment. First, as the Court has acknowledged, "[a] certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action." *Whitman*, 531 U.S. at 475 (quoting *Mistretta v. United States*, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting) (emphasis omitted)) (internal quotation marks omitted). Accordingly, as a practical matter, all lawmaking cannot run through Congress. Second, as discussed, in applying tools of negative implication, one must always consider questions of scope. See *supra* pp. 2013–14. In light of the long tradition of delegation, it is relatively easy to conclude

be no less accurate to say that when an agency implements an organic act by promulgating rules pursuant to an intelligible principle, that agency is, in fact, executing the law.³⁹⁸ There is at least some support for that position, moreover, in the common law understanding of executive power,³⁹⁹ as well as in the long tradition of delegated rulemaking authority in this country.⁴⁰⁰ Whatever the “right” answer, if any, to that question, it is surely not clear that such an arrangement involves any delegation of legislative power.⁴⁰¹

A similar story might be told about the so-called “public rights” doctrine. From the beginning of the Republic, Congress has called upon the executive to apply law to fact to determine certain matters denominated as “public rights” cases.⁴⁰² These cases, which the Court has distinguished from “core” Article III business such as common law or admiralty claims, tend to involve questions over which Congress has Article I jurisdiction — such as “interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions and payments to veterans.”⁴⁰³ Within the historically defined category of public rights,⁴⁰⁴ “Congress may reserve to

that the bicameralism and presentment requirements of Article I, Section 7, prescribe the exclusive means only for Congress to make law. Third, as Justice Stevens wrote in a different context:

If Congress were free to delegate its policymaking authority to one of its components, or to one of its agents, it would be able to evade “the carefully crafted restraints spelled out in the Constitution.” That danger — congressional action that evades constitutional restraints — is not present when Congress delegates lawmaking power to the executive or to an independent agency.

Bowsher v. Synar, 478 U.S. 714, 755 (1986) (Stevens, J., concurring in the judgment) (footnote omitted) (quoting *INS v. Chadha*, 462 U.S. 919, 959 (1983)). In other words, if Congress can delegate authority to an agent under its own control, rather than to an agency or court under the control of another branch of government, Congress will have both the incentive and the means to evade a process designed to constrain the way *it* makes law.

³⁹⁸ See, e.g., *Bowsher*, 478 U.S. at 733 (majority opinion) (“Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of ‘execution’ of the law.”).

³⁹⁹ Indeed, if one looks at relevant common law understandings, there was a long tradition of royal power allowing the Crown to issue proclamations that had binding legal effect, as long as they could be said to implement an act of Parliament. See 1 BLACKSTONE, *supra* note 229, at *270; see also LOCKE, *supra* note 281, at 198.

⁴⁰⁰ See, e.g., KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE* 47–48 (1969).

⁴⁰¹ Compare Posner & Vermeule, *supra* note 272, at 1725–41 (so arguing), with Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine’s Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1304–28 (2003) (arguing that delegation does involve the impermissible alienation of “legislative” authority).

⁴⁰² Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 235, 246–47 (1990).

⁴⁰³ *Crowell v. Benson*, 285 U.S. 22, 51 (1932).

⁴⁰⁴ The precise historical and functional contours of the “public rights” category have proven notoriously hard to define. See RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER’S THE FEDERAL COURTS & THE FEDERAL SYSTEM 332–33 (6th ed. 2009) [hereinafter HART & WECHSLER]. The appropriate technique of identifying the contents of that category lies beyond the scope of this Article.

itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals.”⁴⁰⁵ On one view, this line of cases creates the puzzle of why Congress may assign substantial elements of “[t]he judicial Power” — the application of federal law to disputed questions of fact — to non–Article III tribunals.⁴⁰⁶ On another view, the same line of cases merely recognizes the inevitability that executive officers, in implementing the law, will perform *executive* functions that resemble adjudication and that would constitute proper Article III business if assigned to the courts.⁴⁰⁷ If the latter position is correct, some non–Article III tribunals may be legitimate simply because the line between executive and judicial power is — at least where the implementation of federal statutes is concerned — too indistinct to justify disturbing Congress’s longstanding reliance on non–Article III adjudicators.

None of this analysis is meant to suggest that the Vesting Clauses lack any ascertainable, limiting content.⁴⁰⁸ Rather, it is meant to suggest that their content frequently will not be obvious — and will *never* be evident from the raw text of the Vesting Clauses themselves. Formalists acknowledge this reality up to a point.⁴⁰⁹ Because of their subscription to the freestanding norm of strict separation described above, however, formalists risk attributing excessive determinacy to the Vesting Clauses in certain types of cases.

2. *Indeterminacy and Interbranch “Encroachment.”* — Formalism’s major generality-shifting shortcoming lies in the expansiveness with which its judicial adherents sometimes apply the concept of interbranch “encroachment.” In exercising its authority under the Necessary and Proper Clause, Congress may wish to structure or regulate the way another branch carries its powers into execution. For example, Congress might seek to reserve for itself limited authority to oversee an official who mainly conducts legislative functions, but also exer-

⁴⁰⁵ *Crowell*, 285 U.S. at 50–51 (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929)) (internal quotation mark omitted).

⁴⁰⁶ See generally Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915 (1988).

⁴⁰⁷ See Bator, *supra* note 402, at 264 (“Every time the Commission of Internal Revenue makes a determination that, on *X* facts, the Tax Code requires the collection of *Y* tax, and issues a tax assessment on that basis, or the Immigration Service determines that *Z* is a deportable alien and issues an order to deport, an implicit adjudicatory process is going on.”).

⁴⁰⁸ See section III.C, pp. 2024–39.

⁴⁰⁹ At least some prominent formalists recognize this indeterminacy problem and act accordingly. See, e.g., *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 475 (2001) (Scalia, J.) (upholding a broad delegation on the ground that “[a] certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action” (quoting *Mistretta v. United States*, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting))); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 65–69 (1989) (Scalia, J., concurring in part and concurring in the judgment) (acknowledging and rationalizing the “public rights” doctrine).

cises some executive power. Or where it fears that the President might have a conflict of interest, Congress might attempt to regulate the circumstances in which the President may remove a prosecutor. In sorting out which of these arrangements constitute permissible structuring, regulation, or oversight and which do not, formalists do not always ask whether a particular statutory arrangement contradicts some specific background understanding implicit in a particular Vesting Clause. Rather, relying on a generalized norm of separation of powers, they may, at times, treat legislative regulation as encroachment on a coordinate branch simply because the action in question constrains the exercise of an “executive” or “judicial” power. For three related reasons, this approach systematically understates the document’s indeterminacy.

First, as the prior discussion of the Vesting Clauses suggests, their content will rarely, if ever, be evident from the surface meaning of the clauses themselves. Second, as noted, because the Necessary and Proper Clause gives Congress some authority to enact legislation “carrying into Execution” *all* federal powers,⁴¹⁰ one cannot condemn congressional oversight or regulation simply because it structures the way another branch performs its constitutionally assigned functions.⁴¹¹ To read the Vesting Clauses to exclude *all* such forms of legislation would contradict not only the text of the Necessary and Proper Clause, but also widespread and longstanding legislative practice under that clause.⁴¹² Third, because the Constitution struck a novel balance be-

⁴¹⁰ U.S. CONST. art. I, § 8, cl. 18; *see also supra* p. 1988.

⁴¹¹ *See supra* pp. 1960–61.

⁴¹² I have discussed above familiar legislation structuring the implementation of executive power. *See supra* pp. 1967–68. It is worth noting that Congress also routinely enacts legislation regulating the exercise of “[t]he judicial Power.” For example, from the earliest days of the nation, the Court recognized that Congress has proper authority to regulate fundamental aspects of judicial procedure. In *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825), Chief Justice Marshall thought that such power was an obvious implication of the Necessary and Proper Clause:

The constitution concludes its enumeration of granted powers, with a clause authorizing Congress to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof. The judicial department is invested with jurisdiction in certain specified cases, in all which it has power to render judgment.

That a power to make laws for carrying into execution all the judgments which the judicial department has power to pronounce, is expressly conferred by this clause, seems to be one of those plain propositions which reasoning cannot render plainer.

Id. at 22 (upholding Congress’s authority to prescribe rules for the execution of judgments by the federal courts). Consistent with that premise, the Judiciary Act of 1789 extensively regulated the federal courts’ modes of proceeding. *See, e.g.*, Judiciary Act of 1789, ch. 20, § 19, 1 Stat. 73, 83 (“[I]t shall be the duty of circuit courts, in causes in equity and of admiralty and maritime jurisdiction, to cause the facts on which they found their sentence or decree, fully to appear upon the record either from the pleadings and decree itself, or a state of the case agreed by the parties, or their counsel, or if they disagree by a stating of the case by the court.”); *id.* § 30, 1 Stat. at 88

tween the norm of separation and the impulse to provide mutual checks on federal power,⁴¹³ there is no overarching principle that can determine when congressional regulation of the business of other branches crosses the line from permissible structuring into impermissible encroachment upon the powers of a coordinate branch.⁴¹⁴

Taken together, these considerations suggest that formalists understate the document's indeterminacy when they rely primarily on general separation of powers principles to read into the Vesting Clauses specific limitations on Congress's government-composing authority. Recall that in *Bowsher*, the Court relied mainly on the separation of powers, writ large, to condemn legislation reserving for Congress limited power to remove an official performing primarily legislative oversight functions, but also certain executive functions as well.⁴¹⁵ Putting aside other potential grounds for the decision,⁴¹⁶ nothing intrinsic in the concepts of "legislative Power[]" or of the separation of

("[T]he mode of proof by oral testimony and examination of witnesses in open court shall be the same in all the courts of the United States, as well in the trial of causes in equity and of admiralty and maritime jurisdiction, as of actions at common law."). And in the Rules of Decision Act, which dates to the Judiciary Act of 1789, Congress instructed the federal courts on what law to apply in diversity cases. 28 U.S.C. § 1652 (2006). More recently, Congress has enacted rules of evidence that structure the way Article III courts conduct their factfinding function. See Michael Teter, *Acts of Emotion: Analyzing Congressional Involvement in the Federal Rules of Evidence*, 58 CATH. U. L. REV. 153, 157–61 (2008) (explaining how Congress came to be involved in the enactment of the Federal Rules of Evidence and the amendments to those rules).

⁴¹³ See section II.D, pp. 1993–2005.

⁴¹⁴ In a thoughtful article, Professor Gary Lawson seeks to give content to the relevant line-drawing process in the context of evaluating the validity of legislative regulation of the judicial function. See Lawson, *supra* note 197, at 211. Noting that the separation of powers suggests a background principle of "departmental independence," he argues that Congress violates the Constitution when it enacts "statutes concerning the selection of materials for consideration (principles of legal admissibility), statutes concerning the weight or relevance to be given to various materials (principles of significance) or statutes concerning the amount of proof needed . . . to establish the legal truth of a proposition (standards of proof)." *Id.* In contrast, he argues that "[p]rocedural rules concerning such matters as forms of pleading, methods for executing judgments, empanelling of juries, etc. are surely precisely the kinds of laws 'for carrying into Execution' the judicial power that the [Necessary and Proper] Clause is designed to authorize." *Id.* at 224. In the absence of a firm historical line between permissible and impermissible regulation, Lawson relies, in part, on Professor Martin Redish's observation that "procedural rules would be unconstitutional if they 'so interfere with the courts' performance of the judicial function . . . as to invade the courts' 'judicial power' under Article III." *Id.* at 225 (omission in original) (quoting Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697, 725 (1995)). Lawson acknowledges that his position requires "the exercise of judgment based on shades and degrees," and that a sort of "circularity is common, and unavoidable, in many separation-of-powers contexts." *Id.* Lawson's account thus confirms rather than avoids the difficulty of relying on abstract principles of separation of powers to identify concrete limits on permissible governmental arrangements. See Michael Stokes Paulsen, *Lawson's Awesome (Also Wrong, Some)*, 18 CONST. COMMENT. 231, 238–41 (2001) (raising a similar concern).

⁴¹⁵ See *Bowsher v. Synar*, 478 U.S. 714, 722 (1986); see also section I.B.2.a, pp. 1962–64.

⁴¹⁶ I argue, above, that a negative implication from the Impeachment Clauses justifies the particular holding in *Bowsher*. See *supra* pp. 2008–09.

powers can tell us whether the reservation of such checking authority is permissible.⁴¹⁷ Rather, in order to conclude that Congress exceeded its presumptive Article I power to compose the government, the Court should have asked whether a *specific* historical understanding of the theory and practice of legislative power would preclude that form of oversight of executive officers.

One might raise similar questions about Justice Scalia's reliance on the separation of powers in his dissent in *Morrison*. As discussed, to condemn Congress's authority to impose a "good cause" limitation on the President's power to remove a special prosecutor, it is not enough to observe that prosecution is, by tradition, a quintessentially executive function⁴¹⁸ or that Article II vests "*all* of the executive power" in the President.⁴¹⁹ Again, given the surface indeterminacy of Article II's Vesting Clause and of the separation of powers,⁴²⁰ one would at least have to inquire into whether "[t]he executive Power" reflected a *specific* background understanding that not only encompassed prosecution, but also contradicted this particular mode of regulating that function.

C. Ordinary Interpretation?

To sharpen the contrast between ordinary interpretation and reliance upon the separation of powers in the abstract, this Part closes with a few words about familiar tools used by the Court to particularize the historical meaning of the structural clauses. Rather than try to develop an exhaustive catalogue of appropriate tools of textual interpretation,⁴²¹ this section focuses upon three commonly used forms of evidence that illustrate what the Court looks for when it tries to excavate the detailed technical connotations that constitutionmakers may

⁴¹⁷ Indeed, the historical record suggests that at least some state legislatures may have exercised interbranch removal authority in the period leading up to the Philadelphia Convention. *See supra* note 134.

⁴¹⁸ *Morrison v. Olson*, 487 U.S. 654, 705–06 (1988) (Scalia, J., dissenting).

⁴¹⁹ *Id.* at 705; *see also* section I.B.2.b, pp. 1965–71.

⁴²⁰ As Justice Breyer recently wrote, in determining the scope of presidential removal power, "we cannot look to more specific constitutional text, such as the text of the Appointments Clause or the Presentment Clause, upon which the Court has relied in other separation-of-powers cases." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3166 (2010) (Breyer, J., dissenting).

⁴²¹ This section does not join broader debates about the legitimacy and probative value of more generic tools of construction such as the records of the Philadelphia Convention, the ratification debates, or the founders' expectations about the way the document would be applied. *See, e.g.*, William N. Eskridge, Jr., *Should the Supreme Court Read The Federalist but Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301 (1998); Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569 (1998); Vasani Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113 (2003); Lawrence B. Solum, *Heller v. District of Columbia and Originalism*, 103 NW. U. L. REV. 923 (2009). Consideration of the merits and demerits of these and other interpretive tools for ascertaining the meaning of particular constitutional texts must await another day.

have associated with the otherwise open-ended Vesting Clauses. First, this section examines the Court's efforts to identify relevant common law understandings that may have informed the way early Americans viewed the three powers. Second, it considers whether and to what extent post-ratification practical constructions of the document may shed light on the precise way contemporaries understood the structural clauses. Third, it looks at the established technique of drawing structural inferences from the relationship between the Vesting Clauses and the more precise clauses that, with them, create the constitutional structure.

These sources of evidence are most commonly associated with formalism (perhaps because each played such a salient role in Chief Justice Taft's much-discussed formalist opinion in *Myers*⁴²²). This section argues, however, that such tools provide the sort of evidence that all interpreters should utilize. While each such technique presents inherent complexities against which interpreters must guard, the tools of construction discussed below all share the crucial trait of asking whether some *specific* background understanding associated with the language of a Vesting Clause would have precluded the particular governmental practice under consideration. That kind of inquiry defines the proper object of ordinary interpretation — and supplies an appropriate benchmark for determining what other tools of construction an interpreter might properly apply.

I. Common Law Meaning. — Conventional methods of textual exegesis instruct interpreters to read legal terms of art in light of their technical meanings.⁴²³ The original Constitution is a lawyer's document. Even a quick perusal of the document confirms that it is packed with legalese,⁴²⁴ and the Court has often read it with that understanding in mind. Accordingly, if an established common law understanding of "[t]he executive Power" included (for instance) an *il-limitable* removal power, that specific understanding might constrain Congress's more general authority under the Necessary and Proper Clause.

⁴²² See *Myers v. United States*, 272 U.S. 52, 111–15, 117, 118 (1926); see also *supra* pp. 1969–70.

⁴²³ See, e.g., *Morissette v. United States*, 342 U.S. 246, 263 (1952) (“[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken.”); Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947) (“Words of art bring their art with them. . . . [I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.”).

⁴²⁴ See, e.g., U.S. CONST. art. I, § 8, cl. 11 (authorizing Congress “[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water”); *id.* § 10, cl. 1 (prohibiting states from passing “any Bill of Attainder” or “ex post facto Law”); *id.* art. II, § 2, cl. 1 (authorizing the President “to grant Reprieves and Pardons”).

In using such tools, however, interpreters must be sensitive to the reality that broad concepts such as executive power do not translate seamlessly from common law into U.S. constitutional law.⁴²⁵ With particularized concepts (such as “pardons”), it is hard to know why a constitutionmaker would incorporate the technical term, except to import its technical meaning.⁴²⁶ But with a broader concept, such as the legislative, executive, or judicial powers, the relevance of the common law becomes more complex. Consider, for example, the Court’s assertion, in *Myers*, that “[i]n the British system, the Crown, which was the executive, had the power of appointment and removal of executive officers, and it was natural, therefore, for those who framed our Constitution to regard the words ‘executive power’ as including both.”⁴²⁷ That statement does not fully account for large differences between the American and British systems of government.

To be sure, strong evidence suggests that U.S. constitutionmakers used Blackstone’s description of the royal prerogatives as the starting point from which they defined many traditional executive powers in Article II’s enumeration and reassigned many others to Congress.⁴²⁸ And one might reasonably infer from this history that any prerogative that was left alone remained part of “[t]he executive Power.”⁴²⁹ But to

⁴²⁵ By “common law,” I refer here to English constitutional practice. I have discussed above why the diversity of approaches to the separation of powers in pre-1787 state constitutional practice makes the states an unlikely source for a common understanding of the distribution of federal powers. *See supra* pp. 1997–99. Although I explain below why English common law understandings do not themselves provide an invariably applicable source of relevant meaning, *see infra* pp. 2027–28, such understandings at least provided a common starting point of reference for the founders, who began their lives as English subjects and were raised on the common law. *See Manning, supra* note 235, at 27. Presumably, if one could identify instances in which early state practice reflected a uniform understanding of some aspect of government, such practice might provide an additional common point of reference. Even in such instances, however, interpreters would have to exercise significant caution in relying on state practice as a model for federal institutions, given the significant differences between state and federal constitutional structures and the reality that much of the early design of the U.S. Constitution reflected a reaction against perceived deficiencies in state constitutional design. *See supra* pp. 1998–99.

⁴²⁶ Chief Justice Marshall made this point in *United States v. Wilson*, 32 U.S. (7 Pet.) 150 (1833):

As [the pardon] power had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it.

Id. at 160.

⁴²⁷ 272 U.S. at 118.

⁴²⁸ *See, e.g.*, 1 CROSSKEY, *supra* note 386, at 428.

⁴²⁹ *See* Scalia, *supra* note 166, at 859–60 (raising without necessarily endorsing that argument). This question now occupies the attention of scholars of foreign relations. *Compare, e.g.*, MICHAEL D. RAMSEY, *THE CONSTITUTION’S TEXT IN FOREIGN AFFAIRS* 61–65 (2007) (arguing that “[t]he executive Power” would have been understood to include the foreign affairs powers of the Crown, except to the extent that the text expressly reassigned or modified them),

adopt such a presumption wholesale would overlook the reality that many of the Crown's prerogatives reflected monarchical premises, or were rooted in background institutional arrangements, that did not translate into the very different structural context of the U.S. Constitution.⁴³⁰ As the Court put it (in rejecting the contention that the President inherited the royal prerogative of conquest), "there is such a wide difference between the power conferred on the President of the United States, and the authority and sovereignty which belong to the English crown, that it would be altogether unsafe to reason from any supposed resemblance between them."⁴³¹

Accordingly, when using the common law understanding of executive power as a point of reference, interpreters must consider whether any particular prerogative of the Crown, when examined in its structural and historical context, fits within the very different U.S. constitutional structure. To return to the removal question, Professor Edward Corwin has noted that the Crown's power over "the appointment and removal of officers" grew out of "a much wider prerogative in the creation of offices."⁴³² If so, then one must at least ask whether the removal power reflects the vestige of an obsolete constitutional practice that our constitutionmakers consciously declined to embrace.⁴³³ Similarly, to the extent that the Crown's unfettered power to remove was associated with a coordinate power to appoint, translating the common law power of removal would require interpreters to account for the fact that the U.S. Constitution does not give the President unilateral appointment power.⁴³⁴

with Bradley & Flaherty, *supra* note 389, at 560–71 (arguing that varying views of political theorists and recent changes in British constitutional practice would have made it difficult to identify a determinate baseline for an "executive" power of foreign relations). The intricacies of that rich debate lie beyond this Article's scope.

⁴³⁰ See, e.g., Lessig & Sunstein, *supra* note 42, at 13 ("It is an important truism that the framers were quite skeptical of broad executive authority, a notion that they associated with the tyrannical power of the King."); Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 17–18 (1993) (arguing that the founders disclaimed the prerogatives of the Crown as a model for the presidency); Scalia, *supra* note 166, at 858–59 ("[T]he proponents of the Constitution during the ratification campaign felt constrained to emphasize the important differences between British royal prerogative and the powers of the presidency.")

⁴³¹ *Fleming v. Page*, 50 U.S. (9 How.) 603, 618 (1850).

⁴³² Corwin, *supra* note 135, at 383.

⁴³³ Constitutionmakers of course assigned Congress the power to create offices pursuant to the Necessary and Proper Clause. U.S. CONST. art. I, § 8, cl. 18.

⁴³⁴ The Constitution expressly vests the power to appoint "Officers of the United States" in the President and Senate. U.S. CONST. art. II, § 2, cl. 2. That express sharing of power makes it more complex to make sense of the fact that the common law understanding of executive power included the removal power. On the one hand, in light of the common law understanding that the power to remove accrued to the entity having the power to appoint, one might conclude, as Hamilton did, that the Constitution's qualification of the appointment power also implicitly qualified the removal power. See, e.g., THE FEDERALIST NO. 77 (Alexander Hamilton), *supra* note 216, at 458 ("The consent of [the Senate] would be necessary to displace as well as to appoint."). On

In short, while the common law baseline for legislative, executive, and judicial powers may provide a meaningful starting point for reasoning, it can never alone provide a conclusive end point. Certainly, those who framed and ratified the U.S. Constitution “were born and brought up in the atmosphere of the common law, and thought and spoke in its vocabulary.”⁴³⁵ But given the vast differences in the structures and guiding political assumptions that divide the two constitutional systems, the Court has, on many occasions, quite properly rejected the premise that the Vesting Clauses incorporate by reference a particular common law understanding of the powers vested.⁴³⁶ Accordingly, interpreters who invoke common law practice to particularize the technical meaning of the Vesting Clauses must always temper their reliance with careful consideration of “the origin and nature of that practice, the structural assumptions that underlay it, and the potentially contradictory assumptions of the American constitutional structure.”⁴³⁷

2. *Practical Constructions.* — The Court has relied on early practical constructions to determine the meaning of the constitutional structure.⁴³⁸ In general, since meaning depends on the way members

the other hand, one might conclude, as Chief Justice Taft did, that the express qualification of appointments, without any mention of removal, could be understood to leave intact the common law assumption concerning removal. *See Myers v. United States*, 272 U.S. 52, 118–22 (1926). (In support of that position, Chief Justice Taft noted, *inter alia*, that the requirement of advice and consent for appointments was specifically designed to prevent the larger states from dominating appointments — an interest that could be fully served without similarly qualifying removals. *See id.* at 119–20.) Whatever the merits of the competing positions as an original matter, the law has long settled around the view that the Appointments Clause does not require the President to seek advice and consent for removals. *See id.* at 118. The important point for present purposes is that common law background assumptions do not always translate straightforwardly from English practice to American constitutional law.

⁴³⁵ *Ex parte Grossman*, 267 U.S. 87, 109 (1925).

⁴³⁶ *See, e.g., Langford v. United States*, 101 U.S. 341, 342–43 (1880) (noting that the English maxim that the Crown can do no wrong “cannot apply to [the President], because the Constitution admits that he may do wrong, and has provided, by the proceeding of impeachment, for his trial for wrong-doing, and his removal from office if found guilty,” *id.* at 343); *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 32 (1812) (rejecting federal common law crimes despite the prevalence of the practice at common law); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (attributing judicial review, in part, to the judicial power “to say what the law is,” despite the absence of analogous English judicial power). In addition, although the Crown had the power to request advisory opinions from judges, the Justices early in the Republic rejected the President’s claim of similar authority. *See Letter from Chief Justice John Jay and the Associate Justices to President George Washington* (Aug. 8, 1793), *in HART & WECHSLER, supra note 404*, at 52, 52.

⁴³⁷ Manning, *supra note 235*, at 29.

⁴³⁸ In this vein, Madison wrote that “[a]ll new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.” THE FEDERALIST NO. 37 (James Madison), *supra note 216*, at 225 (emphasis omitted); *see also, e.g., Caleb Nelson, Originalism and Interpretive Conventions*, 70

of a linguistic community use language, interpretations of a text by those who have familiarity with the relevant context and linguistic conventions may supply valuable evidence of its meaning.⁴³⁹ In particular, the Court has stressed that early American officials “must have had a keen appreciation of the influences which had shaped the Constitution and the restrictions which it embodied, since all questions which related to the Constitution and its adoption must have been, at that early date, vividly impressed on their minds.”⁴⁴⁰ Early practical constructions may also acquire legitimacy to the extent that they come to reflect society’s settled judgment, over time, about the Constitution’s meaning.⁴⁴¹

This interpretive practice, however, also poses certain predictable risks. For example, to the extent that the Court relies on the views of the early Congresses as proxies for constitutional meaning, it runs the risk that those Congresses held systematically different preferences from constitutionmakers, opening the door for strategic (re)interpretations of the document’s meaning.⁴⁴² If constitutionmakers were animated, in part, by a newfound suspicion of unchecked legislative power,⁴⁴³ those who served in the First Congress might have had systematically different views of such dangers.⁴⁴⁴ More generally, to the extent that legislative decisionmaking is prone to opacity, path dependence, and preference cycling,⁴⁴⁵ “decisions” by Congress may

U. CHI. L. REV. 519, 526–36 (2003) (discussing founding-era understandings about fixing constitutional meaning through practical construction); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 910 (1985) (same).

⁴³⁹ See Kent Greenawalt, *The Nature of Rules and the Meaning of Meaning*, 72 NOTRE DAME L. REV. 1449, 1451 (1997).

⁴⁴⁰ Knowlton v. Moore, 178 U.S. 41, 56 (1900).

⁴⁴¹ See, e.g., Schell’s Ex’rs v. Fauché, 138 U.S. 562, 572 (1891) (“In all cases of ambiguity, the contemporaneous construction, not only of the courts but of the departments, and even of the officials whose duty it is to carry the law into effect, is universally held to be controlling.” (citations omitted)); Stuart v. Laird, 5 U.S. (1 Cranch) 299, 309 (1803) (“[P]ractice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible [sic] answer, and has indeed fixed the construction.”).

⁴⁴² For example, one historian has shown that the early Congresses had a disproportionately nationalist tilt, relative to the ratifiers. See THORNTON ANDERSON, *CREATING THE CONSTITUTION* 174–83 (1993).

⁴⁴³ See, e.g., WOOD, *supra* note 134, at 403–13 (discussing the shift in attitude about legislative power in the years leading up to the Philadelphia Convention).

⁴⁴⁴ *But cf.* Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915 (2005) (arguing that government institutions do not have a natural tendency to aggrandize their own power).

⁴⁴⁵ For an excellent discussion of these phenomena, see DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 38–39 (1991).

supply ambiguous or even misleading evidence about early understandings of the document.⁴⁴⁶

Consider, in this regard, perhaps the most famous practical construction of the Constitution — the so-called “Decision of 1789,” in which Congress debated the President’s authority to remove the Secretary of Foreign Affairs. Chief Justice Taft’s opinion for the Court in *Myers* read the outcome of that debate as embodying a judgment by the First Congress that the President has *illimitable* power to remove executive officers.⁴⁴⁷ In particular, the Court noted that Representative Madison and his allies had taken the lead in arguing that “[t]he executive power” and the Take Care Clause gave the President such authority.⁴⁴⁸ There was much debate on the issue, with some early legislators arguing that Congress had power to determine the President’s removal power and some arguing that the Constitution required the Senate’s advice and consent for removal.⁴⁴⁹ But the Court found that Madison and his allies had ultimately prevailed through a sequence of motions that was designed to — and, when passed, did — make clear that the First Congress understood the President to have an exclusive removal power.⁴⁵⁰

Whatever the virtues of practical construction in principle, Chief Justice Taft’s use of the Decision of 1789 raises cautions about its ap-

⁴⁴⁶ See, e.g., Note, *Should the Supreme Court Presume that Congress Acts Constitutionally? The Role of the Canon of Avoidance and Reliance on Early Legislative Practice in Constitutional Interpretation*, 116 HARV. L. REV. 1798, 1806–12 (2003).

⁴⁴⁷ *Myers v. United States*, 272 U.S. 52, 111–15 (1926).

⁴⁴⁸ See *id.* at 115, 117.

⁴⁴⁹ See *id.* at 119, 125 (describing those arguments).

⁴⁵⁰ Initially, the bill creating the Department of Foreign Affairs had stated that the Secretary was “[t]o be removable from office by the President of the United States.” 1 ANNALS OF CONG. 473 (1789). Madison and his allies feared that this phraseology would imply that the President’s removal authority depended upon a congressional grant, but they were unable to muster the votes to delete it. See *Myers*, 272 U.S. at 112. Then, the Madison contingent found a way to achieve their objective in two steps. See *id.* at 112–14. A key Madison ally first successfully moved to add language that would *imply* the existence of a plenary presidential removal power. 1 ANNALS OF CONG. 601 (1789) (statement of Rep. Benson) (moving to add language designating an officer to take custody of the department’s records “whenever the said principal officer shall be removed from office by the President”). Next, Madison’s ally again moved to strike out the express provision, which he said “appeared somewhat like a grant.” *Id.* The House approved both motions in separate votes. See *Myers*, 272 U.S. at 114. The Senate approved the bill as written by an equally divided vote, with the Vice President breaking the tie. See *id.* at 115. In light of the apparent victory by the Madisonian faction, Chief Justice Taft concluded “that the vote was, and was intended to be, a legislative declaration that the power to remove officers appointed by the President and the Senate vested in the President alone.” *Id.* at 114; see also, e.g., *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839) (“[I]t was very early adopted, as the practical construction of the Constitution, that this power [to remove principal officers] was vested in the President alone. And such would appear to have been the legislative construction of the Constitution [in 1789].”); *Military Power of the President to Dismiss from Serv.*, 4 Op. Att’y Gen. 1, 1 (1842) (“Whatever I might have thought of the power of removal from office, if the subject were *res integra*, it is now too late to dispute the settled construction of 1789.”).

plication in practice. Soon after *Myers* appeared, Corwin wrote a detailed historical critique of its reasoning, arguing that the debates in the First Congress revealed “fairly equal” support in the House for (1) illimitable removal power, (2) congressional authority to prescribe standards of removal, and (3) a constitutional requirement that officials appointed with advice and consent be removed with advice and consent.⁴⁵¹ Apparently, Madison and his allies succeeded in their motions not because a majority of the House subscribed to the Madisonian view of presidential power, but rather because their strategic sequencing of motions allowed them to build coalitions on particular points with proponents of the other constitutional positions.⁴⁵² If this account is correct, then the Decision of 1789 does not reflect anything like the judgment that Chief Justice Taft attributed to it.⁴⁵³

The Court’s overreading of the Decision of 1789 thus raises cautionary flags about the proper use of this form of practical construction as a tool of ordinary interpretation. Modern public choice theory predicts that legislative outcomes will not always represent a frictionless translation of majority opinion into legislation.⁴⁵⁴ Rather, statutes frequently represent the end product of shifting coalitions, logrolling, and other (often unseen) strategic behavior that may make it unreliable to

⁴⁵¹ Corwin, *supra* note 135, at 361.

⁴⁵² As Professor David Currie has explained:

[T]he two halves of [the] proposal were put to the House separately. The members first voted thirty to eighteen [in favor of the first motion]. All those who had spoken in favor of presidential removal voted aye, whether they thought that Article II settled the question or left the matter to Congress. The House then voted thirty-one to nineteen to drop the phrase “to be removable by the President.” The numbers were virtually identical, but it was a different majority. For on this question, the proponents of Article II power prevailed only because they were joined by a substantial number of members who had opposed presidential removal altogether.

DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801*, at 40–41 (1997).

⁴⁵³ Relying on newly excavated archival material, Professor Saikrishna Prakash has sought to revive the *Myers* Court’s reading of the Decision of 1789. See generally Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021 (2006). After painstaking analysis of the available positions of particular legislators in the debates over the creation of three federal departments, Professor Prakash concludes that a majority of legislators — including many of those commonly thought to have subscribed to legislative control over the removal question — “likely . . . felt comfortable with the executive-power theory, at least to the extent of voting for bills that apparently endorsed it.” *Id.* at 1067. As Professor Prakash acknowledges, however, the debates “never squarely addressed” the further question of whether Congress could regulate the default executive removal power, thereby making it “difficult to conclude that a majority of the House implicitly opposed the idea.” *Id.* at 1072. Whatever the correct reading of the Decision of 1789, the entire episode suggests that interpreters should approach early legislative constructions of the Constitution with caution.

⁴⁵⁴ For a summary of this literature — and of objections to the strong version of the public choice position — see John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2412–17 (2003).

reason backward from the outcome to any single guiding rationale.⁴⁵⁵ In addition, practical constructions will tend to provide evidence of what Congress thought it permissible to do.⁴⁵⁶ If a practice was widely thought to be impermissible, then the most likely evidence of that attitude would be the historical *absence* of the practice in question.⁴⁵⁷ Silence, however, is not a terribly reliable basis for inferring a constitutional prohibition.⁴⁵⁸

Of course, these complications will not arise with every instance of practical construction of the Constitution. Rather, where early practical constructions reflect an apparent consensus that some arrangement contradicts accepted understandings of a given Vesting Clause, the Court should not hesitate to credit that evidence, even if not all of it points in the same direction. For example, it is now well settled that “[t]he judicial Power” does *not* include the power to fashion a common law of federal crimes.⁴⁵⁹ In the 1790s, however, many circuit courts assumed that the federal judiciary had inherited traditional common law powers to recognize crimes where necessary to protect sovereign interests.⁴⁶⁰ That early assumption became a matter of intense political controversy. In the congressional debates over the Sedition Act,⁴⁶¹ Federalists defended the adoption of a statutory crime of seditious libel on the ground that the proposed legislation merely reaffirmed — and, in fact, mitigated the severity of — an extant common law crime.⁴⁶²

⁴⁵⁵ See *id.* at 2413.

⁴⁵⁶ See, e.g., *Marsh v. Chambers*, 463 U.S. 783, 791 (1983) (using early practical constructions to establish constitutionally acceptable practices); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 420 (1821) (same); *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803) (same).

⁴⁵⁷ In *Printz v. United States*, 521 U.S. 898 (1997), the Court held that Congress’s commandeering of state executive officers to implement federal law had violated principles of federalism. *Id.* at 935. In so holding, the Court relied, in part, on “an absence of executive-commandeering statutes in the early Congresses” and “in our later history as well, at least until very recent years.” *Id.* at 916.

⁴⁵⁸ In other contexts, the Court has said that failure to enact legislation has little probative value because “[a] bill can be proposed for any number of reasons, and it can be rejected for just as many others.” *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 170 (2001). By the same token, the failure to enact a certain type of legislation at all tells us little, if anything, about whether those who did not enact it thought that they would be acting unconstitutionally if they did.

⁴⁵⁹ See HART & WECHSLER, *supra* note 404, at 439.

⁴⁶⁰ See, e.g., *Williams’ Case*, 29 F. Cas. 1330 (C.C.D. Conn. 1799) (No. 17,708) (punishing expatriate hostilities against the United States); *Henfield’s Case*, 11 F. Cas. 1099 (C.C.D. Pa. 1793) (No. 6,360) (punishing a violation of U.S. neutrality). *But see* *United States v. Worrall*, 28 F. Cas. 774, 779 (C.C.D. Pa. 1798) (No. 16,766) (Chase, Circuit J.) (rejecting federal common law crimes as inappropriate to our system of government).

⁴⁶¹ Act of July 14, 1798, ch. 74, 1 Stat. 596 (expired 1801).

⁴⁶² See Stewart Jay, *Origins of Federal Common Law* (pt. 1), 133 U. PA. L. REV. 1003, 1075–83 (1985); Gary D. Rowe, Note, *The Sound of Silence: United States v. Hudson & Goodwin, The Jeffersonian Ascendancy, and the Abolition of Federal Common Law Crimes*, 101 YALE L.J. 919, 936–39 (1992).

In a protracted debate that continued long after the Act's passage, Jeffersonians rejoined that, if the federal judicial power extended to the recognition of nonstatutory crimes, it would expand the understood scope of the judicial power and undermine the enumerated limits on federal power.⁴⁶³

Many historians believe that the issue played a pivotal role in the election of Jefferson in 1800.⁴⁶⁴ Once the Jeffersonians took the White House and Congress, they entrenched their position on federal common law crimes through various legislative and executive acts, including Jefferson's decision to halt the prosecution of common law crimes.⁴⁶⁵ When the Supreme Court confronted the issue for the first time in 1812, it rejected a federal common law of crimes, in part, on the ground that "the general acquiescence of legal men shews the prevalence of opinion in favor of the negative of the proposition."⁴⁶⁶

Accordingly, despite an initial diversity of opinion on federal common law crimes, history suggests that when early American society consciously focused on and debated whether "[t]he judicial Power" included the authority to recognize federal common crimes, a meaningful consensus developed that it did not.⁴⁶⁷ Even if a modern interpreter were to reach a different conclusion from the Jeffersonians' based on the same materials, the fact that pivotal institutions came to consensus on the issue should carry substantial weight in determining what "[t]he judicial Power" entails. As Judge Easterbrook has explained, "a legal interpretation adopted soon after . . . [the adoption of a text] may be the best evidence of the meaning the words carried in the legal profession at the time," in part because "[a]lterations in the legal and cultural landscape may make the meaning hard [for future generations] to recover."⁴⁶⁸ In addition, the understanding made prevalent by the Jef-

⁴⁶³ See Jay, *supra* note 462, at 1090–91; see also *Madison's Report on the Virginia Resolutions (1799–1800)*, in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 546, 565–66 (photo. reprint 1987) (Jonathan Elliot ed., New York, Burt Franklin 1888) (arguing that the power to recognize federal common law crimes "would confer on the judicial department a discretion little short of a legislative power," *id.* at 566, and would permit the judiciary to make an end run around the limited and enumerated powers prescribed by Article I, § 8).

⁴⁶⁴ See, e.g., 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 158–68, 185–230 (1926); Arthur E. Wilmarth, Jr., *Elusive Foundation: John Marshall, James Wilson, and the Problem of Reconciling Popular Sovereignty and Natural Law Jurisprudence in the New Federal Republic*, 72 GEO. WASH. L. REV. 113, 187–88 (2003).

⁴⁶⁵ See, e.g., Jay, *supra* note 462, at 1083–1111; Rowe, *supra* note 462, at 939–41; see also Kathryn Preyer, *Jurisdiction to Punish: Federal Authority, Federalism and the Common Law of Crimes in the Early Republic*, 4 LAW & HIST. REV. 223, 237–38 (1986).

⁴⁶⁶ *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 32 (1812).

⁴⁶⁷ See Bradford R. Clark, *Constitutional Structure, Judicial Discretion, and the Eighth Amendment*, 81 NOTRE DAME L. REV. 1149, 1171–82 (2006).

⁴⁶⁸ *Atchison, Topeka & Santa Fe Ry. Co. v. Peña*, 44 F.3d 437, 445 (7th Cir. 1994) (en banc) (Easterbrook, J., concurring).

fersonianians in the early nineteenth century has withstood the test of time.⁴⁶⁹

Of course, because history is neither linear nor unambiguous, even the clearest of early practical constructions present complications. Putting to one side difficult questions about how to tell when a consensus is sufficiently clear to bind later interpreters, reliance on practical interpretations will always raise questions about the scope of what early interpreters have decided. Should one read the Jeffersonians' victory as having relevance only for the federal common law of crimes or for all federal common law?⁴⁷⁰ Does the early rejection of an inherent "judicial Power" to recognize federal common law crimes preclude Congress from delegating to federal courts the power to craft such a common law?⁴⁷¹ Despite these complications, early constitutional practice, if read with an appropriate skepticism, has the potential to shed useful light on particular ways in which early Americans understood the Vesting Clauses' broad terms.

3. *Structural Inferences.* — The final, and perhaps most promising, way to lend determinacy to the Vesting Clauses is to read them in the light of surrounding constitutional terms. Although full consideration of the many shades of structural inference is for another day, one conventional understanding of the idea holds that when one part of a text is semantically indeterminate, interpreters can clarify its meaning by considering how it fits within the context of related provisions.⁴⁷² Judges do this not because they necessarily believe that the "precise

⁴⁶⁹ A similar story might be told about "[t]he judicial Power" to issue advisory opinions. Early federal judges commonly issued such opinions in varied contexts. See CASTO, *supra* note 237, at 178–79. In 1793, however, the Justices of the Supreme Court declined to give advice requested by Secretary of State Jefferson on a number of legal questions bearing on treaty interpretation and the nation's obligations under the law of nations. See Letter from Chief Justice John Jay and the Associate Justices to President George Washington, *supra* note 436, at 52. Although the question did not immediately become settled, our legal culture later came to consensus around the idea that advisory opinions fall outside federal judges' Article III power. See DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888*, at 12–13 (1985).

⁴⁷⁰ Compare, e.g., *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 658 (1834) (rejecting a common law of copyright and declaring that "there can be no common law of the United States"), *with* *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 545–46 (1828) (recognizing judicial authority to decide "admiralty and maritime" cases, *id.* at 546, based on the law of nations).

⁴⁷¹ If the early history of Article III does not rule out such legislative authority, the Necessary and Proper Clause would seem to permit Congress to grant such power. Cf. Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 347–48 (arguing that such delegations have been commonplace since the First Congress).

⁴⁷² See Bradford R. Clark, *Federal Lawmaking and the Role of Structure in Constitutional Interpretation*, 96 CALIF. L. REV. 699, 720 (2008) (arguing that the context of a constitutional text may include "the structure created by the text"); Henry P. Monaghan, *The Supreme Court, 1974 Term — Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 13 n.72 (1975) ("[T]he traditional method of 'interpreting' textual provisions is hardly inconsistent with taking into account structural considerations. The former are often simply the textual embodiment of the latter.").

accommodative meaning is what the lawmakers must have had in mind,” but rather because interpreters operating within a range of indeterminacy may appropriately opt to pick a point that “make[s] sense rather than nonsense out of the *corpus juris*.”⁴⁷³

Consider the following examples. “The judicial Power” vested by Article III has long been understood to include the power to “say what the law is” as part of the assigned judicial role in deciding cases or controversies.⁴⁷⁴ Neither the Vesting Clause nor any other part of the Constitution, however, says a word about what judges should do in performing that function. Yet Article I of the same document prescribes a rule of recognition stating that “a Law” must pass both Houses of Congress and secure the President’s signature (or a two-thirds vote in each House to override a presidential veto).⁴⁷⁵ Accordingly, a rule of construction providing that “post-enactment interpretations of statutes by originating legislative committees count as authoritative evidence of legislative intent” would establish an understanding of the Court’s law-declaration power that contradicts — or, at least, circumvents — the related requirements of bicameralism and presentment.⁴⁷⁶ Notwithstanding the surface indeterminacy of Article III, any such rule of construction would be impermissible because it would make nonsense of another provision of the document.

From that starting premise, one can say a few final words about the removal question. One cannot sensibly determine whether Article II’s Vesting Clause confers illimitable presidential removal power without reading its open-ended text in light of more specific surrounding texts. For example, one might think it odd to read such broad directory authority into “[t]he executive Power,” given the related clause in Article II granting the President authority “to require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices.”⁴⁷⁷ If the President can fire executive officers for any reason or no reason at all, then he or she can presumably get an opinion in writing without an express grant of constitutional power to do so. What-

⁴⁷³ *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 100–01 (1991).

⁴⁷⁴ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

⁴⁷⁵ U.S. CONST. art. I, § 7.

⁴⁷⁶ In particular, that rule of construction would permit Congress to pass bare-bones legislation and then prescribe the detailed rules of decision after the fact through committee action falling far short of bicameralism and presentment. See John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 714 (1997) (discussing the risks of circumventing bicameralism and presentment).

⁴⁷⁷ U.S. CONST. art. II, § 2, cl. 1; see also Flaherty, *supra* note 42, at 1795 (arguing that the Opinion Clause cannot be squared with a strong version of presidential control over law execution); Strauss, *supra* note 44, at 717.

ever the ultimate merits of this reading,⁴⁷⁸ it seems clear that one cannot determine how Article II's Vesting Clause bears on the removal question without taking into account the implications of the more specific Opinion Clause.

Of equal relevance to the removal question is, of course, the provision of Article II stating that the President "shall take Care that the Laws be faithfully executed."⁴⁷⁹ Since well-settled rules of implication suggest that the imposition of a duty implicitly connotes a grant of power minimally sufficient to see that duty fulfilled,⁴⁸⁰ the Take Care Clause seems straightforwardly to call for the recognition of sufficient "executive Power" to allow the President to remove subordinates who, in his or her view, are not faithfully implementing governing law.⁴⁸¹ To be sure, this inference, although well grounded in standard premises of textual exegesis, is not utterly beyond question.⁴⁸² And the pre-

⁴⁷⁸ Professors Steven Calabresi and Saikrishna Prakash argue that "the Opinions Clause empowers the President to obtain information in writing on government matters precisely so he will be able to issue binding orders to his subordinates." Calabresi & Prakash, *supra* note 42, at 584; see also Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1206 (1992) ("The history of the Clause is sparse and suggests that it was intended to augment the unified, hierarchical executive created by Article II, Section 1, and not to insulate executive officers from presidential control."). That explanation, however, cannot account for why constitutionmakers thought it *necessary* to include such an express grant.

Professor Akhil Reed Amar suggests that the Opinion Clause was meant not to grant a new power, but rather to impose limitations on what would otherwise have been inherent presidential authority to request opinions more generally. See Akhil Reed Amar, *Some Opinions on the Opinion Clause*, 82 VA. L. REV. 647 (1996). He argues, for example, that by authorizing the President to seek opinions from *executive* departments, the clause denied the President the Crown's authority to request advisory opinions from judges. See *id.* at 656. I take no position on whether Amar is correct in suggesting that the primary purpose of what seems to be an affirmative grant of power was, in fact, to limit presidential authority by implication. If his historical premise is correct, then of course the Opinion Clause would not carry the strong negative implication suggested in text. That conclusion, however, would not alter the basic necessity of examining the meaning of that clause when determining the related content of Article II's Vesting Clause.

⁴⁷⁹ U.S. CONST. art. II, § 3.

⁴⁸⁰ See COOLEY, *supra* note 343, at 77 ("It is . . . established as a general rule, that when a constitution gives a general power, or enjoins a duty, it also gives, by implication, every particular power necessary for the exercise of the one or the performance of the other."). Constitutional scholars thus read too much into the undeniable fact that the Take Care Clause is framed as a duty rather than as a power. See, e.g., Mary M. Cheh, *When Congress Commands a Thing to Be Done: An Essay on Marbury v. Madison, Executive Inaction, and the Duty of the Courts to Enforce the Law*, 72 GEO. WASH. L. REV. 253, 275 (2003) ("The Framers obviously knew how to choose words that conferred power or, alternatively, imposed obligations.").

⁴⁸¹ See John F. Manning, *The Independent Counsel Statute: Reading "Good Cause" in Light of Article II*, 83 MINN. L. REV. 1285 (1999).

⁴⁸² For example, some evidence suggests that the clause grew out of a purpose to ensure that the President did not inherit the royal prerogative of dispensation — a discretionary power historically invoked by monarchs to forbear from enforcing acts of Parliament. See GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY* 47 (2004). Under settled principles of interpretation, however, the reach of an adopted text may extend beyond the principal concerns of its drafters. See, e.g., *Oncale v.*

cise scope of any removal power that might be needed to fulfill the President's duties under the Take Care Clause, of course, raises its own set of interpretive questions (which would require its own paper to answer).⁴⁸³ The crucial point, however, is that because the Take Care Clause speaks directly to the President's responsibilities over law execution, principles of ordinary interpretation suggest that the extent of any "executive Power" of removal should be determined in light of the duties imposed by the more specific clause, and not by reference to abstract principles of separation of powers.⁴⁸⁴

This approach, like the others, is not without its complexities. In particular, because it pulls meaning from the relationship among multiple clauses, it bears at least a family resemblance to the reasoning that teased the separation of powers from the constitutional structure as a whole. I have argued elsewhere, however, that clause-bound

Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998) ("[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."). Accordingly, even if the clause was adopted in order to foreclose a particular presidential claim of prerogative, the crucial question is whether the text adopts a duty that is broader than the objective that inspired it. See Edward T. Swaine, *Taking Care of Treaties*, 108 COLUM. L. REV. 331, 360–61 (2008) (arguing that the text of the clause does have a broader import).

A further question arises from the fact that the Take Care Clause "was taken almost verbatim from the New York constitution of 1777, which none the less gave the executive of that state very little voice in either appointments or removals." Corwin, *supra* note 135, at 385. As discussed, however, it is not clear that state practice provides an apt model for understanding the U.S. Constitution, which in many ways reflects a reaction against early state constitutionalism. See *supra* pp. 1998–99.

⁴⁸³ For example, what does it mean to ensure "faithful" execution of the laws? At a minimum, the text and history of the Take Care Clause make clear that the clause does not authorize the President to direct subordinate executive officers to violate the law. See, e.g., *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 613 (1838) ("To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible."). Beyond that core principle, however, does the Take Care Clause merely authorize the President to remove subordinates who commit clear errors of law or does it permit him or her to remove subordinates who refuse to yield to presidential directives on reasonably contestable legal questions? In previous writing, I have suggested that the latter position is more consistent with the text of the clause. See Manning, *supra* note 481, at 1288 n.17. It is a standard assumption of modern public law that there may be a "best" or "most natural" answer to a legal question but that "reasonable" people may disagree about what that answer is. *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 702 (1991); see also, e.g., *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 115 (1988); *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). In that light, it would seem to follow that the President might properly conclude that a subordinate is not being faithful to the law even if the subordinate's position is a reasonable one.

⁴⁸⁴ The Court has frequently invoked the Take Care Clause in determining the scope of presidential removal authority. See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3154 (2010); *Morrison v. Olson*, 487 U.S. 654, 689–90 (1988); *Myers v. United States*, 272 U.S. 52, 117 (1926). Some of these opinions, however, have simultaneously included elements of freestanding separation of powers analysis. See *Free Enter. Fund*, 130 S. Ct. at 3148, 3157; *Morrison*, 487 U.S. at 685.

structural inferences of the sort described above differ, in material respects, from the free-form version that underlies separation of powers and federalism doctrine.⁴⁸⁵ In the latter contexts, the interpreter uses the structure and relationship among multiple clauses to extract a common background value — separation of powers or federalism — that is not derived from or bounded by any particular clause.⁴⁸⁶ This form of reasoning inevitably has a generality-shifting quality to it.⁴⁸⁷ Reading an indeterminate Vesting Clause in light of more specific grants of power, in contrast, merely helps an interpreter pinpoint a sensible meaning within a range set by the text itself.⁴⁸⁸

Even if one thinks that ground-level structural inferences reflect an acceptable form of textual interpretation, it is not clear how much this practice changes the basic reality that the Vesting Clauses reflect a fair bit of indeterminacy concerning the three powers they incorporate. If one uses a more specific clause or clauses — such as the Bicameralism and Presentment Clauses, the Impeachment Clauses, the Opinion Clause, or the Take Care Clause — to determine what a Vesting Clause means, it is not clear what work the Vesting Clause is doing in that equation. This sort of structural inference may simply be another instance of the traditional textual maxim that the specific governs the general.⁴⁸⁹

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The foregoing discussion is not meant to provide a comprehensive account of the techniques for interpreting the Constitution's structural provisions. Rather, it is meant to suggest that in light of the generality of the Vesting Clauses, any claim predicated on the reallocation of, or encroachment upon, a power conferred by one of those clauses re-

⁴⁸⁵ See John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 440–43 (2010) (distinguishing clause-bound from free-form structural inference).

⁴⁸⁶ See Manning, *Federalism*, *supra* note 33, at 2058–61 (describing the generality shifting qualities of the Court's federalism cases); see also Part I, pp. 1950–71 (discussing freestanding separation of powers).

⁴⁸⁷ Accordingly, the vice in the free-form version of structural inference is not that it reads multiple clauses in relation to one another, but rather that it enforces “values” that are unmoored from the levels of generality at which lawmakers framed the provisions from which the values are derived. From a legitimacy standpoint, this problem is no different from teasing a value from a single clause without respecting the contours or limitations of the clause itself. Thus, if one extracted a noninterference-with-private-property value from the Takings Clause, U.S. CONST. amend. V, and then applied it even where no “taking” had technically occurred, the net result would be to disregard the particular *means* by which constitutionmakers chose to protect property. The same difficulty obtains when interpreters attempt to enforce a freestanding separation of powers value, rather than focusing on the particular ways in which the document's many structural provisions allocate and condition the exercise of federal power. See Manning, *supra* note 485, at 442–43.

⁴⁸⁸ See Manning, *supra* note 485, at 442.

⁴⁸⁹ See *supra* pp. 2012–13.

quires, at a minimum, careful excavation of all sorts of context. To be sure, each of the major potential sources of meaning raises cautions of one sort or another. Our constitutionmakers deviated substantially from common law antecedents in their design and understanding of the U.S. Constitution; early practical constructions of the Constitution may be vulnerable to systematic bias or strategic behavior; and the practice of structural inference raises the question of how much independent work the Vesting Clause itself is doing in the equation. No interpretive method, however, is complication free. And these techniques have the decided virtue of eschewing freestanding separation of powers doctrine in favor of techniques that try, instead, to ascertain whether the general wording of the Vesting Clauses conceals an identifiable background understanding that speaks to the precise structural question at issue. By focusing on the specific connotations that reasonable constitutionmakers would have attributed to the particular texts they were adopting, the foregoing methods quite directly serve the goals of what I have called ordinary interpretation.

CONCLUSION

The separation of powers has been a foundational doctrine of American constitutional law from the beginning of the Republic. The difficulty, however, is that the Constitution does not adopt a freestanding separation of powers in the abstract. Separation of powers doctrine derives from the simple proposition that if one looks at all of the structural provisions of the Constitution, they evince an unmistakable purpose to divide and check power. Functionalists stress the checking function. Their version of separation of powers holds that Congress has broad power to create institutions of government as long as it maintains an overall system of checks — a creative tension among the branches. Formalists, in contrast, stress a norm of strict separation. For them, efforts by one branch to influence or regulate the functions of another may violate that norm, even if they cannot support their conclusion by reference to the specific historical understanding of any given clause.

By abstracting from particular clauses to freestanding separation of powers doctrines, both approaches disregard precise constitutional provisions and the realities of the constitutionmaking process. U.S. constitutionmakers may have had a clear purpose to adopt a separation of powers. But like any set of lawmakers, they disagreed sharply about what their shared background aims entailed and how best to implement them. Like any set of lawmakers, they had to balance conflicting purposes — among others, the purpose to separate and to provide mutual checks on power through occasional blending. Given those realities, one cannot find in the Constitution evidence of *any* generalizable vision of the separation of powers — neither that of the

functionalists nor that of the formalists. If that is so, then interpreters should determine the allocation of power by asking how it is effectuated by particular clauses. When the Constitution conditions the exercise of power on compliance with a specified procedure, interpreters should enforce that specific framework strictly. But when the Constitution is indeterminate — as the Vesting Clauses often (but not always) are — interpreters have no basis to displace judgments made by Congress pursuant to the express power delegated to it to compose the government under the Necessary and Proper Clause.