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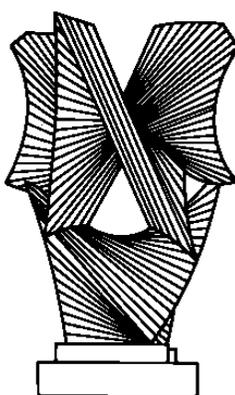
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Balance-of-Powers Arguments and the Structural Constitution

Eric A. Posner¹

Abstract. Balance-of-powers arguments are ubiquitous in judicial opinions and academic articles that address separation-of-powers disputes over the president's removal authority, power to disregard statutes, authority to conduct foreign wars, and much else. However, the concept of the balance of powers has never received a satisfactory theoretical treatment. This Essay examines possible theories of the balance of powers and rejects them all as unworkable and normatively questionable. Judges and scholars should abandon the balance-of-powers metaphor and instead address directly whether bureaucratic innovation is likely to improve policy outcomes.

Introduction

Many scholars believe that the executive branch has become too powerful. The executive branch is vastly more powerful today than it was at the founding, and in recent years presidents have made strong claims as to their constitutional powers, including the power to disregard acts of Congress.² Yet the courts do not regard the presidency as too powerful. Courts frequently worry about legislative encroachment on the presidency, and in disputes between Congress and the executive see their role as ensuring that neither institution obtains power at the expense of the other. For the courts, then, the picture is one in which each branch is constantly seeking to obtain advantages over the other, not one in which the presidency has overwhelmed Congress.

The central metaphor in cases that feature a clash between the executive and Congress is the balance of power—the idea that neither branch should be

¹ Kirkland & Ellis Professor, University of Chicago Law School. Thanks to Curt Bradley, Aziz Huq, Jonathan Masur, Richard McAdams, Ariel Porat, Sai Prakash, David Strauss, Cass Sunstein, and Adrian Vermeule, to participants at workshops at Northwestern Law School and the University of Chicago Law School, and to participants at a conference on separation of powers held at NYU Law School, for their helpful comments, and to Randy Zack for valuable research assistance.

² See generally Charlie Savage, *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy* (Back Bay 2008).

powerful enough to dominate the other. In American constitutional law, the metaphor originates, of course, with Madison, and his theory that governments should be divided into three branches—executive, legislative, and judicial—which must always remain in balance.³ Although Madison meant all three types of power must not be held by one branch, and did not suggest the modern idea that incremental shifts in the balance of power could be unconstitutional, Madison’s idea is frequently interpreted today to mean that a particular balance must always be maintained, and that it is the courts’ duty to maintain it.⁴

But what do courts do when they maintain the balance of power between the executive and Congress? What does this metaphor mean? The idea, which at first sight seems geometrically precise, is elusive under close inspection. Power is famously difficult to define. It is even harder to quantify, or to assign “weights” to. Does balance of power mean that Congress and the president possess the same amount of power? What would that mean? Or merely that both branches play a role in determining policy outcomes (or some policy outcomes)? Or just that one branch can prevent the other from engaging in abuses (or certain abuses)? Or just that efforts by one branch to implement policy will be systematically questioned, criticized, or opposed by the other?

A historical perspective shows just how difficult it is to answer these questions. Historians agree that the executive is immensely more powerful today than it was at the founding, while Congress and the judiciary have changed very little. Does that mean that distribution of power among the branches is “unbalanced,” and that courts must try to correct it by withdrawing power from the executive? At various points, notably starting with the New Deal, Congress delegated enormous powers to the executive branch, so that officials appointed by the president would be responsible for enacting and enforcing regulations. Did these delegations weaken Congress by transferring powers to the executive or strengthen Congress by enhancing its ability to achieve its goals? Technological change appears to have enhanced the power of the executive relative to that of Congress, providing it with additional means to gather information, persuade the public, and enforce the law, while providing few additional benefits to Congress and the judiciary. Should the courts withdraw power from the executive in order to compensate for these advantages? Congress has grown in size from 90 members in 1789, to 535 today. Did Congress become more powerful as a consequence of its greater size, or weaker because of the difficulties of

³ The compulsory quotation is: “The accumulation of all powers legislative, executive, and judiciary in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.” James Madison, *The Federalist No. 47*, in *The Essential Federalist and Anti-Federalist Papers* (David Wootton ed., Hackett 2003).

⁴ And, to be sure, the balance-of-powers idea was commonly associated with separation of powers at the time of the founding. See W.B. Gwyn, *The Meaning of the Separation of Powers* 127-28 (1965).

cooperation among a larger group of people? The party system was not anticipated by the founders. Is the balance of power upset when government is unified under one party or unaffected or improved?

For a possible analogy, consider the role that “balance of power” plays in the theory of international relations.⁵ Two states can be said to be at balance when neither is strong enough to conquer the other and hence both refrain from going to war. The potential benefits from victory are outweighed by the risk of loss and the costs and losses that must be incurred even if victory is secured. A third country that seeks to ensure that neither country overwhelms the other can lend military assistance to whichever country falls behind in an arms race if one does, in this way maintaining the “balance of powers.” Here, the balance of powers metaphor is helpful. Another analogy comes from an old constitutional tradition originating in the ancient world, which reflected anxiety about conflicts between the masses of ordinary people and the elites. A “balanced” constitution was one that ensured that neither group was able to take advantage of the other, and conflict between the two of them was minimized.⁶ In both analogies, “balance” means peace, either external or internal, and peace can be observed. By contrast, the executive and Congress do not try to conquer each other; they do not have territory that can be held or taken. Nor do they have resources that can be seized. Instead, they compete to influence public policy outcomes. To determine whether their power is in balance, one needs a theory as to how they influence those public policy outcomes, and what it means for their influence to be equivalent. No such theory has ever been proposed.

In light of the difficulty of defining and measuring power, let alone determining whether the power of different branches “balances,” one might be skeptical of the courts’ assertion that their task is to maintain that balance of power. In *Morrison v. Olson*, for example, the Supreme Court acknowledged that the statutory for-cause restriction on the Attorney General’s power to fire an independent counsel infringed on executive power, but nonetheless upheld the statute because, in light of other means of controlling the independent counsel at the president’s disposal, the infringement was not significant.⁷ By contrast, in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, the Supreme Court struck down a statute that restricted the president’s ability to fire members of an administrative body by giving both those members and their bosses, the SEC Commissioners, for-cause protection.⁸ Although it is possible that the executive was weakened more by the dual for-cause protection than by

⁵ I borrow this analogy from Bentham. See Jeremy Bentham, *The Handbook of Political Fallacies* 166 (Harold A. Larrabee ed. 1952).

⁶ M.J.C. Vile, *Constitutionalism and the Separation of Powers* 107-08 (2d ed. 1998).

⁷ 487 U.S. 654, 659–660 (1988).

⁸ *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3164 (2010) (“FEF”).

the single for-cause protection, the Court did not explain why it believed the balance of powers was maintained in the second case but not the first.

In this paper, I supply a framework for analyzing claims about the balance of power between Congress and the executive. I will briefly address the judiciary as well but in common with the literature I will treat the judiciary as a neutral adjudicator that is charged with maintaining the balance of power between Congress and the executive, although this position is unsatisfactory given that the judiciary, on Madisonian assumptions, can itself encroach on the other branches, and indeed should be motivated to do so, and thus cannot be considered neutral.

Power is the ability to force people to act differently from how they would otherwise act, usually by credibly threatening to harm their interests if they do not act as desired.⁹ In the context of the U.S. government, one can distinguish two dimensions of power. *Vertical* power refers to the power of the government to coerce citizens.¹⁰ *Horizontal* power refers to the relative vertical power of the different agents of government, which is conventionally divided into executive, legislative, and judicial. The executive has maximum horizontal power if it possesses all the vertical power so that the legislature and judiciary lack the ability to coerce citizens independently and only the executive can.

The balance of power idea refers to horizontal power, but, as I will argue, it cannot be understood without reference to vertical power. A skewed balance of power may be harmless if vertical power is limited; a skewed balance of power will be dangerous if vertical power is great. One point I will make is that the debates in the literature on the balance of power are so removed from practical questions of governance that scholars and courts have lost sight of the social consequences of their positions on the balance of power.

But my focus is horizontal power, and the notion of balance. I argue that the balance of power metaphor is not used consistently or even coherently in judicial opinions and academic articles, although I do not claim that the concept of balance of powers is incoherent.¹¹ But my main goal is conceptual: to provide a coherent account of the balance of powers, and how it could play a role in constitutional adjudication. To do this, I rely on a very simple spatial model,

⁹ One might define power more broadly to include the power to change people's own preferences, see, e.g. Richard E. Neustadt, *Presidential Power and the Modern Presidents: The Politics of Leadership from Roosevelt to Reagan* (Free Press rev. ed. 1991); I do not think this broader definition would change my argument, while it would introduce some conceptual complications.

¹⁰ I do not use the term in the same way as Victoria Nourse, who uses it to refer to the relative influence of different popular constituencies on the government. See Victoria Nourse, *The Vertical Separation of Powers*, 49 *Duke L. J.* 749 (1999) (conceiving of shifting "vertical power" as "as a shift in the relative power of popular constituencies").

¹¹ As argued by Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 *U. Pa. L. Rev* 603 (2001).

familiar from the political science literature. The spatial model can be used to define rigorously what a balance of power could mean in the context of the separation of powers. I argue that the model reveals clearly what is wrong with the balance of powers metaphor, and conclude that even the best interpretation of the balance of powers has nothing to recommend it.

I. The “Balance of Powers” in the Courts and in the Academic Literature

A. The Courts

The Sarbanes-Oxley Act created a new agency called the Public Company Accounting Oversight Board, which was given the authority to regulate accounting firms. The Act lodged the Board in the Securities and Exchange Commission (SEC), and gave the SEC commissioners the power to appoint and remove the Board members subject to a for-cause standard.¹² The SEC commissioners themselves enjoy independence; the president can also remove them only for cause. Thus, the Board is protected by a double layer of insulation from presidential interference: Board members cannot be removed by the president but only by SEC commissioners for cause, and SEC commissioners can be removed by the president only for cause.

In *Free Enterprise Fund vs. Public Company Accounting Oversight Board*, the Supreme Court held that this arrangement violated the separation of powers.¹³ The Court said that although the presidential removal power can be subject to certain constraints, including for-cause requirements, the dual for-cause limitation went too far, impermissibly interfering with the executive power to enforce laws.

But how did the dual for-cause limitation go too far? One might take the position, held by a number of commentators, that *any* provision that limits the executive’s power to remove is an impermissible restriction on executive power. But the Supreme Court has never held that view. In *Humphrey’s Executor v. United States*, the Court upheld a statute that provided that the president could not remove a member of the Federal Trade Commission except with cause.¹⁴ In *Morrison v. Olson*, the Court upheld a statute that provided that the Attorney General could not remove independent counsels except with cause, observing blandly that although the statute no doubt “reduces the amount of control or supervision that the Attorney General and, through him, the President exercises over the investigation and prosecution of a certain class of alleged criminal

¹² More precisely, the Court assumed that the Act did this.

¹³ FEF, 130 S. Ct. 3138. For some useful background, see Richard H. Pildes, *Separation of Powers, Independent Agencies, and Financial Regulation: The Case of the Sarbanes-Oxley Act*, 5 N.Y.U. J.L. & Bus. 485 (2009).

¹⁴ 295 U.S. 602, 631–632 (1935).

activity,” the reduction was incremental, because the Attorney General and thus the president retained various ways of exerting control over the independent counsel.¹⁵ The Court in FEF distinguished these cases on the grounds that the Board was subject to a dual, rather than single, for-cause limitation, but it did not explain why, if the incremental restriction on executive power in Humphrey’s Executor and Morrison was constitutionally acceptable, the additional increment created by the dual for-cause limitation went too far. Just how far is too far?

The Court did not answer this question. Instead, it fell back on a line of thinking that, if taken literally, would require that Morrison and Humphrey’s Executor be overturned:

In fact, the multilevel protection that the dissent endorses “provides a blueprint for extensive expansion of the legislative power. . . .” In a system of checks and balances, “[p]ower abhors a vacuum,” and one branch’s handicap is another’s strength. “Even when a branch does not arrogate power to itself,” therefore, it must not “impair another in the performance of its constitutional duties.” Congress has plenary control over the salary, duties, and even existence of executive offices. Only Presidential oversight can counter its influence. That is why the Constitution vests certain powers in the President that “the Legislature has no right to diminish or modify.”¹⁶

Echoing Justice Scalia’s complaint in his dissenting opinion in Morrison that “this statute does deprive the President of substantial control over the prosecutory functions performed by the independent counsel, and it does substantially affect the balance of powers,”¹⁷ the Court held that the dual for-cause restriction encroaches on executive power. But the Court did not explain why ebbs and flows in the relative power of the two branches have been tolerated in the past.

The dissent by Justice Breyer also made no progress with this question:

But even if we put all these other matters to the side, we should still conclude that the “for cause” restriction before us will not restrict presidential power significantly. For one thing, the restriction directly limits, not the President’s power, but the power of an already independent agency. . . . But so long as the President is legitimately foreclosed from removing the Commissioners except for cause (as the majority assumes), nullifying the Commission’s power to remove Board members only for cause will not resolve the problem the Court has identified: The President

¹⁵ Morrison, 487 U.S. at 695–696.

¹⁶ Free Enter. Fund, 130 S. Ct. at 3156 (citations and a footnote omitted).

¹⁷ Morrison, 487 U.S. at 714–715.

will still be “powerless to intervene” by removing the Board members if the Commission reasonably decides not to do so.¹⁸

In this passage and related passages, Justice Breyer argued that the dual for-cause restriction did not reduce presidential power “significantly;” indeed, it may even have increased presidential power by giving the president a way to commit not to interfere with policy choices *ex ante* where he might change his mind *ex post*.¹⁹ Neither the majority nor the dissent explained how they determined that the reduction in presidential power was “significant” or not.

The difficulties go deeper than either the majority or dissent admit. One possibility, as recognized by the majority, is that the law enhances the influence of Congress at the expense of the president because insulated executive officials worry more about budget cuts than about being fired. Another possibility is that the Board’s insulation protects it from the president *and* Congress, which loses the ability to demand that the president sack an official who displeases it. If so, the dual for-cause restriction does not affect the balance of powers. Indeed, the insulation could strengthen the president’s hand since he can no longer fire officials that Congress dislikes while he retains the freedom to appoint whoever he wants.

Both opinions are also curiously silent about another question, which is what is the baseline for determining when a reduction in presidential power goes too far? This issue received no attention from the majority or dissent in FEF, and only the briefest of mentions in Justice Scalia’s dissent in Morrison:

That is what this suit is about. Power. The allocation of power among Congress, the President, and the courts in such fashion as to preserve the equilibrium the Constitution sought to establish—so that “a gradual concentration of the several powers in the same department,” Federalist No. 51, p. 321 (J. Madison), can effectively be resisted.²⁰

While Scalia appeared to identify the benchmark balance of power as that which prevailed at the time of the founding, he did not explain what that balance of power was, that is, who had how much power relative to whom.²¹ As a result, we do not know whether the constitutional equilibrium would have prevailed if the independent counsel statute had been struck down. If the executive had become too powerful relative to the founding-era baseline, then the statute would have helped reinstate the proper equilibrium rather than upset it.

¹⁸ Free Enter. Fund, 130 S. Ct. at 3170–3171.

¹⁹ See, e.g., *id.* at 3169, 3175.

²⁰ Morrison, 487 U.S. at 699.

²¹ Scalia’s opinion also rests on purely formalist grounds, and it is not clear how much weight he gives to the balance of power idea.

The silence in the opinions on the location of the constitutionally permissible balance of power is striking. The opinions evade this issue by implicitly taking the status quo at the time that the statute was enacted as the baseline for comparison. In *FEF*, the majority argued that the dual for-cause requirement was unprecedented, while the dissent insisted that it did not differ meaningfully from restrictions in the statute book.²² In *Morrison*, the majority pointed out that the president retains other means for controlling the independent counsel, while the dissent argued that those other means were not sufficient.²³ The implied baseline in both cases was the status quo balance of power. But why should the status quo matter? An originalist like Justice Scalia would presumably believe that the balance of power at the founding should be the constitutional baseline. Others might take a different position, but few people would argue that the constitutional balance of powers is whatever the balance of power exists at any given time. Certainly, no court has explicitly made this claim.

Balance-of-power reasoning in one form or another exists in numerous other cases involving the separation of powers.²⁴ It also can be found in other areas of constitutional law, for example, cases involving federalism.²⁵ The opinions in these cases are no more illuminating than the opinions in *FEF* and *Morrison*.

B. The Academic Literature

²² See *Free Enter. Fund*, 130 S. Ct. at 3153–3154, 3171.

²³ *Morrison*, 487 U.S. at 692–693.

²⁴ See, e.g., *Mistretta v. U.S.*, 488 U.S. 361, 412 (1989) (holding that congressional delegation of the Sentencing Commission to the judicial branch does not “upset the constitutionally mandated balance of powers among the coordinate Branches”); *Plaut v. Spendthrift Farm Inc.*, 514 U.S. 211 (1995) (holding that it is an encroachment on the judiciary’s power for Congress to “declare by retroactive legislation that the law applicable” is “other than what the courts said it was”); *Clinton v. City of New York*, 524 U.S. 417, 449–52 (1988) (Kennedy, J. conc.) (“In this respect the [separation of powers] operates on a horizontal axis to secure a proper balance of legislative, executive, and judicial authority. By increasing the power of the President beyond what the Framers envisioned, the statute compromises the political liberty of our citizens, liberty which the separation of powers seeks to secure.”); *Bowsher v. Synar*, 478 U.S. 714, 776 (White, J., diss.) (“the role of this Court should be limited to determining whether the Act so alters the balance of authority among the branches of government as to pose a genuine threat to the basic division between the lawmaking power and the power to execute the law”); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson, J., conc.) (“I cannot be brought to believe that this country will suffer if the Court refuses further to aggrandize the presidential office, already so potent and so relatively immune from judicial review, at the expense of Congress.”).

²⁵ In these cases, the Court claims that a balance of power must exist between the national government and the states. See, e.g., *U.S. v. Comstock*, 130 S. Ct. 1949, 1982 (2010) (“The purpose of this design is to preserve the ‘balance of power between the States and the Federal Government ... [that] protect[s] our fundamental liberties.’”). But this is a topic for another time.

With some important exceptions, the academic literature has accepted the balance-of-powers framework. Cass Sunstein provides a characteristic statement of this view in the course of criticizing Justice Holmes' argument that courts should not adjudicate separation of powers disputes:

In its usual form, it [Holmes' position] amounts to a wholesale abandonment of the separation of powers, and its belief in a self-calibrating institutional equilibrium, based on the supposedly equal power of the opposing forces, is without historical or theoretical support. There is good reason to suppose that without adequate controls one branch will sometimes exercise too much power over the others. One of the purposes of the Constitution was to prevent that outcome and to check imbalances when they occur. Acquiescence by one branch to a redistribution of national powers may not prevent—indeed it may increase—the danger that the new arrangement will jeopardize some of the purposes that underlie the constitutional structure.²⁶

To avoid such imbalances, Sunstein favors enabling courts to strike down statutes that undermine the values protected by the separation of powers.

This type of thinking is often associated with the “functionalist” position on separation of powers, which holds that judicial enforcement of separation of powers is designed to maintain a balance of power among the branches.²⁷ But on one view, the “formalist” position, according to which each branch must exercise its characteristic power absent explicit deviations in the Constitution, is ultimately based on the balance of powers idea as well. The only difference is that the formalist believes that the founders determined the correct balance for all time by establishing simple rules that allocate powers, while the functionalist wants to revisit the balance of powers whenever a dispute among the branches occurs.²⁸ The formalist can plausibly argue that her position allows courts to avoid the futile task of determining the optimal balance of power every time a challenge occurs, but the price to be paid for this advantage is that we end up trapped in the eighteenth-century balance of power that is of little relevance for today, and in any event no longer prevails.²⁹

Moreover, in order to avoid the charge of irrelevance, some formalists have relied on an idea roughly similar to the concept of balancing. This is the idea that the Constitution prohibits “the encroachment or aggrandizement of one

²⁶ Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L. Rev. 421, 495 (1987).

²⁷ See Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 Sup. Ct. Rev. 225, 232.

²⁸ *Id.* at 233.

²⁹ A formalist could also deny that the rules contained in the Constitution have anything to do with balance at all, or that it is irrelevant from the formalist perspective why the founders designed the rules in the way they did—whether to achieve “balance” or something else.

branch at the expense of the other,”³⁰ where “encroachment” means one branch taking on the essential function of another branch in the absence of textual authorization. For example, statutory restrictions on the removal power amount to unconstitutional encroachment because they involve an effort by Congress to restrict executive power, where the power to remove is assumed to be a feature of executive power. This approach reintroduces indeterminacy into the formalist argument, and may be inconsistent with the premises of formalism, as John Manning has argued.³¹ But I will not further address this issue and instead will focus on the balance of powers.

In the academic debate on the independent counsel statute, scholars echo the majority and dissent in *Morrison*, arguing back and forth as to whether the statute took too much power from the executive and gave too much power to Congress. Abner Greene argues:

There is, though, a justification for the *Morrison* result that is perfectly consonant with the original balance of powers theme, with the framers’ concern with corruption and self-dealing within any branch of government. The Ethics in Government Act can be seen as intruding into executive power precisely when executive power fails to operate—when the executive has, in effect, exempted itself from the execution of the laws.³²

On this view, the framers envisioned an original balance of powers in which the executive’s power to dominate other branches of government was in part balanced by Congress’ power to enact laws that constrain it. President Nixon’s presidency became too powerful when he refused to enforce the laws that executive officials had broken. The independent counsel statute restored this balance by creating a mechanism that ensures enforcement when the president’s interests are at stake.

By contrast, Steven Calabresi and Christopher Yoo argue:

permitting Congress to place limits on the President’s removal power threatens to upset the Madisonian conception of the separation of powers, which envisions all three branches constantly engaged in a state of dynamic tension. By reducing the President’s role in this balance,

³⁰ *Buckley v. Valeo*, 424 U.S. 1, 122 (1976).

³¹ John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 *Harv. L. Rev.* 1939 (2011) (arguing that the Constitution does not incorporate a general separation-of-powers principle on formalist grounds).

³² Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 *U. Chi. L. Rev.* 123, 126 (1994) (footnote omitted).

limitations on the removal power inevitably tip the balance in Congress's favor.³³

Calabresi and Yoo argue that in *Clinton v. New York*, in which the Court invalidated the line-item veto, the Court's holding reflected the view that "Even though Congress had voluntarily surrendered its own power and had acted out of the laudable desire to eliminate pork-barrel politics and reduce government spending, the change still would have taken the legislative branch out of this process of dynamic tension that the Framers regarded as the best safeguard for liberty."³⁴ But this is not true. The legislative branch would have remained in the "process," as it must enact legislation before the president can veto line items. Similarly, in *Morrison* the executive remains in the "process" of removing officials or controlling the bureaucracy even if his decisions are restricted by the "for cause" rule.

It is clear that the two sides of the debate simply differ in their assessment as to whether the independent counsel weakens the president or not, or possibly whether any weakening of the president is justified by public policy considerations, including those underlying the theory of the separation of powers. Because they do not offer empirical evidence, or even allude to the type of empirical evidence that could resolve their disagreement, the debate is fruitless.

Scholars make similar balance-of-power arguments about the other types of clashes between Congress and the executive, including the disputes over the legislative veto,³⁵ delegation of power to the executive branch,³⁶ the establishment of special tribunals,³⁷ the line-item veto,³⁸ executive dominance of foreign relations,³⁹ sentencing guidelines,⁴⁰ judicial deference to agency interpretations,⁴¹

³³ Steven G. Calabresi & Christopher S. Yoo, *Remove Morrison v. Olson*, 62 *Vand. L. Rev. En Banc* 103, 117 (2009). See also Steven G. Calabresi, *The Vesting Clauses As Power Grants*, 88 *Nw. U. L. Rev.* 1377, 1400 (1994) ("Yet, the apparently lesser power [of making an office independent] is not actually a lesser one since its exercise involves changing the constitutional balance of power whereas congressional creation of new offices does not.")

³⁴ *Id.*

³⁵ See Part V.B.2, below.

³⁶ See Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 *U. Chi. L. Rev.* 123, 154 (1994).

³⁷ See, e.g., Brian M. Hoffstadt, *Normalizing the Federal Clemency Power*, 79 *Tex. L. Rev.* 561 (2001).

³⁸ See, e.g., Anthony R. Petrilla, Note, *The Role of the Line-Item Veto in the Federal Balance of Power*, 31 *Harv. J. on Legis.* 469 (1994) (describing a type of line-item veto that would not upset the balance of powers).

³⁹ See Michael P. Van Alstine, *Executive Aggrandizement in Foreign Affairs Lawmaking*, 54 *UCLA L. Rev.* 309 (2006).

⁴⁰ Mark Tushnet, *The Sentencing Commission and Constitutional Theory: Bowls and Plateaus in Separation of Powers Theory*, 66 *S. Cal. L. Rev.* 581, 583 (1992). Tushnet is skeptical about whether judges or anyone else can actually conduct balance-of-powers analysis but gamely tries to do so himself.

and the impact of the party system on the structure of government.⁴² A number of recent articles and books claim that the Bush administration expanded executive power at the expense of Congress.⁴³ Many other examples can be invoked.⁴⁴ All of these arguments are variations on the theme that the executive (or in some cases Congress) has overreached, upsetting the balance of power, and the other branches should assert themselves more aggressively, so as to rebalance the distribution of power. But in none of these cases are authors able to show that the balance of power was “upset;” only that one branch gained at the expense of another branch (and even these claims are disputed), not that the gain was excessive. Moreover, there is rarely attention to how an advantage in one area (for example, the invalidation of the legislative veto, which favored the executive) might be counterbalanced by a disadvantage in another area (for example, approval of restrictions on removal, which favored Congress),⁴⁵ or for that matter how changes in purely formal powers are affected by general political considerations like the temporary popularity of the president after a successful war or unpopularity after a random gaffe or scandal.

Only a few scholars have questioned the logic of the balance of powers.⁴⁶ A number of papers have addressed the empirical accuracy of its premises.⁴⁷ Sai

⁴¹ Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 *Colum. L. Rev.* 452 (1989) (criticizing the *Chevron* doctrine for upsetting the balance of powers).

⁴² Levinson & Pildes, *supra* note __, at 2348, 2354-59. Levinson and Pildes do not explicitly endorse the balance-of-powers approach, but they assume it is correct for the purpose of making a number of normative proposals.

⁴³ See, e.g., Bruce Ackerman, *The Decline and Fall of the American Republic* (Harvard 2010); Peter Shane, *Madison’s Nightmare: How Executive Power Threatens American Democracy* (Chicago 2009). For the contrary view, see Jack Goldsmith, *Power and Constraint: The Accountable Presidency After 9/11* (Norton 2012).

⁴⁴ See, e.g., Rachel Barkow, *Separation of Powers and the Criminal Law*, 58 *Stan. L. Rev.* 989 (2006); Patrick M. Garry, *The Unannounced Revolution: How the Court Has Indirectly Effected a Shift in the Separation of Powers*, 57 *Ala. L. Rev.* 689 (2006) (arguing that Congress has delegated excessive power to the judiciary by transferring authority to agencies which the judiciary supervises); Victoria F. Nourse & John P. Figura, *Toward a Representational Theory of the Executive: Review of The Unitary Executive: Presidential Power from Washington to Bush*, 91 *B.U.L. Rev.* 273 (2011) (arguing that the unitary executive theory provides the executive with a means for increasing its power); Neal Katyal, *Internal Separation of Powers: Checking Today’s most Dangerous Branch from Within*, 115 *Yale L. J.* 2314 (2006) (trying to recreate separation of powers within the executive branch).

⁴⁵ But for an exception, see William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 *Geo. L.J.* 523 (1992), discussed below.

⁴⁶ To be sure, many scholars have raised questions about whether the system of separation of powers produces good outcomes relative to other possible systems such as parliamentarism. See, e.g., Bruce Ackerman, *The New Separation of Powers*, 113 *Harv. L. Rev.* 633 (2000); Adrian Vermeule, *The Invisible Hand in Legal and Political Theory*, 96 *Va. L. Rev.* 1417 (2010). But my focus here is specifically on the logical and normative coherence of the balance of powers.

⁴⁷ Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 *Harv. L. Rev.* 915 (2005) argues that separation of powers assumes that the branches will seek to maximize power

Prakash criticized the balance-of-powers idea in part on the basis of its indeterminacy.⁴⁸ And Elizabeth Magill subsequently advanced several cogent criticisms of the balance of powers in an article devoted to dismembering the concept.⁴⁹ Magill argued that balance of powers arguments are fatally flawed because (1) it is impossible to determine the extent to which any statute or action affects the balance of power; (2) we lack a normative benchmark for evaluating claims about the balance of power; and (3) the branches are composed of individuals who represent diverse constituencies, so that a balance among different groups of the public can exist even if a branch dominates governance.⁵⁰

Although I share Magill’s skepticism, I believe that her criticisms go too far, and the kitchen-sink scope of her argument may have limited its influence.⁵¹ It is possible to provide a conceptually coherent account of the balance of power, and even to claim that one can, in a conceptually coherent way, compare the balance of power created by a statute with some benchmark, constitutionally proper balance of power. However, once one achieves this conceptual clarity—and that is the goal of this paper—it becomes clear that the skepticism underlying Magill’s argument is correct: the balance of power is both normatively suspect and almost impossible to apply in a systematic matter for the purpose of approving or rejecting legal innovations in administrative structure.

II. Evaluating Claims about Horizontal Power

A. The Baseline Problem

To criticize the existing distribution of power, one must show that it deviates from a constitutional baseline. But what is that baseline, and how does one compare the existing distribution to that baseline?

but observes that there is no reason to believe that the temporary occupants of the branches will internalize goals of institutional aggrandizement. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 *Harv. L. Rev.* 2311, 2356 (2006), argue that separation of powers can serve its balancing function only when the government is divided on a partisan basis.

⁴⁸ See Saikrishna Bangalore Prakash, *Deviant Executive Lawmaking*, 67 *Geo. Wash. L. Rev.* 1, 46-47 (1998) (arguing that balance-of-powers arguments do not help resolve constitutionality of line-item veto); see also Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 *Colum. L. Rev.* 507, 572-73 (2012) (arguing that balance-of-powers arguments does not help resolve the constitutionality of the executive’s duty to defend statutes). Prakash’s main objection to the balance of powers doctrine is that, in his view, it has no basis in the constitutional text.

⁴⁹ See Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 *U. Pa. L. Rev.* 603 (2001). The criticism was made even earlier by Jeremy Bentham. See Bentham, *supra* note __, at 163-67, and by various lesser observers and commentators in the eighteenth and nineteenth centuries. See Vile, *supra* note __, at 127-28.

⁵⁰ See Magill, *supra* note __, at 608–626, 633, 645–649.

⁵¹ Although her article has been cited a fair number of times, it has not dammed the flow of balance-of-power arguments in the scholarly literature or the courts.

To answer this question, let us use detention as our running example. A terrorist attack occurs, and the president claims the power to detain suspected terrorists without trial. Congress and the courts object. After a number of adverse judicial decisions, Congress enacts a law that gives suspected terrorists limited procedural protections, which the president signs. Courts approve this compromise legislation.

The ideal points of the three agents can be depicted along a line, as is standard with political science models.⁵²

SQ J C P

SQ represents the status quo, which we will assume is a rule that suspected criminals (including suspected terrorists) are entitled to full due process rights. J represents the ideal point of the Court; C represents the ideal point of Congress; and P represents the ideal point of the president. As one moves right along the line, the level of procedural protections for suspected terrorists declines. So we assume initially that the Court is willing to relax these protections, but not as much as Congress, which in turn is not willing to relax the protections as much as the president is. These ideal points are hypothetical only; it is conceivable that the preferences of the agents follow a different order, now or at any other time.

A policy outcome can also be depicted as a point, X, on the line. In the example, X represents the level of procedural protection that is ultimately granted to suspected terrorists. X could end up anywhere on the line—at SQ, for example, if the branches are unable to change the law; or at, say, halfway between C and P, if the new law is a compromise between Congress’ and the president’s ideal points; or at P, if the president alone determines policy.⁵³

Thus, it is easy to use a quantitative representation of the extent to which a political agent’s preferences are embodied in the policy outcome. It is simply the difference between the value of X and the value of the agent’s ideal point, which we will designate D_i , where $i = \{\text{Court, Congress, and president}\}$. A lower score is better for the agent in question, as it means that the difference between the policy outcome and its ideal point is smaller. If, for convenience, we treat $SQ=0$, $J=1$,

⁵² For examples of their use to discuss separation of powers issues, see Terry M. Moe and William G. Howell, *Unilateral Action and Presidential Power: A Theory*, 29 *Presidential Stud. Q.* 850, 856–858 (1999); Jeffrey A. Segal, Chad Westerland, & Stefanie A. Lindquist, *Congress, the Supreme Court, and Judicial Review: Testing a Constitutional Separation of Powers Model*, 55 *Am. J. Pol. Sci.* 89, 93–95 (2011).

⁵³ Where X lands could depend on purely formal considerations (for example, the president’s veto, Congress’s power to enact bills, and so forth) or political considerations (for example, Congress may not oppose a popular president because of the political costs). I bracket these issues here.

$C=2$, and $P=3$, and the policy outcome X turns out to be 2.5, halfway between C and P , then we get the following results. For the Court, the payoff is 1.5; for Congress and the president, the payoff is 0.5. (In symbols, $D_j=1.5$; $D_c=0.5$; $D_p=0.5$.) Their lower scores show that Congress and the president have greater influence on the policy outcome than the judiciary does.

If we know or can estimate the ideal points of each agent and the policy outcome, we can measure the extent of the power or influence of each agent over any particular policy dimension. The next step would be to aggregate over policy outcomes. One view might be that if the president is powerful in one dimension (say, foreign relations) but Congress is powerful in another dimension (say, tax rate), then the balance of power is satisfied even though each branch may look too powerful from the narrower focus. Another view is that we do not want such power imbalances in any policy dimension, in which case we would argue that Congress should have more power over foreign policy, and the president should have more power over tax rates. But let us put these (possibly insuperable) difficulties aside. The question now is, What does it mean to say that the president or any other branch is powerful or too powerful? I can think of three possibilities.

First, we might stipulate that an agent is powerful if it always gets its way, or conversely that the agent is not powerful if it does not always get its way. In other words, the president is powerful if in all (or some significant number of) cases, $D_p=0$; or, conversely, the president is not powerful if $D_p>0$. A minimalist version of Madison might reflect this approach: at a minimum, all three branches must participate in determining policy outcomes, and so the policy outcomes must reflect a compromise of the ideal points of all three branches.

The obvious problem with this approach is that we might consider the president far too powerful even if he does not always get his way. But it is at least clear that merely pointing out that in some instances the president did not achieve his ideal point is not sufficient to prove that the president does not possess excessive power.⁵⁴

Indeed, any formulaic or axiomatic approach to establishing a baseline test of constitutional horizontal power will be hard to defend. Consider the possibility that an optimal “checks and balances” approach would require that, on average, $D_j = D_c = D_p$. This would mean that any given policy outcome X would on average reflect the equal influence of each branch. This is functionally equivalent to a system in which the three agents governed a country in a troika where decisions were all made by unanimity (or possibly majority depending on the structure of the agents’ preferences). But there is no particular reason to believe that such a distribution of power would be the right one.

⁵⁴ See Part V.A., below.

Second, we might use a historical baseline. One such baseline is the distribution of power that existed during the founding.⁵⁵ One could also use a modern baseline, perhaps one that by consensus responds to modern conditions or needs: say, the distribution of power as it existed during Theodore Roosevelt's administration (arguably, the birth of the modern presidency), or FDR's (the birth of the modern administrative state), or, say, Reagan's (the rebirth of the presidency after the temporary loss of confidence in the office caused by the Watergate scandal). The founding-era baseline might have certain legitimacy, reflecting a clear constitutional commitment; a modern-era baseline would be more realistic, although intensely controversial. In any event, using the historical baseline approach, we could stipulate that an agent's power is legitimate if its D_i today is roughly equivalent to its D_i at the relevant historical baseline.

This approach faces numerous hurdles as well. One would need to explain why one historical period should be used as the baseline rather than another, and there is no consensus on what historical period should be used. Doing comparisons over different historical periods—especially if the baseline period occurred long in the past such as the founding—would be almost impossible. What was the distribution of power across the branches during the founding era? How would one measure it? There is also a kind of second-best problem. Suppose, as has sometimes been claimed, that Congress is weaker than at the founding but that both the president and the courts are stronger. This new equilibrium may be better from the standpoint of the public interest than one in which the original equilibrium prevailed. And it is not clear that courts could weaken the president without making themselves stronger, thus upsetting the balance in a new way with a strong judiciary and Congress but weak executive. Finally, if one historical period is chosen as the baseline, it will freeze a distribution of power in place that may not be appropriate for future periods (putting aside constitutional amendment, which is extremely difficult). The distribution of power today or at some time in the past is unlikely to be optimal for any given point in the future.

Third, we might set our baseline with reference to a conception of the public interest or social welfare. For example, we might argue that the distribution of power at any time should be whatever distribution of power advances the public interest or maximizes social welfare or some other criterion of social well-being. Thus, it is always available to the president to argue that his latest seizure of power is legitimate because it advances the public interest. For example, Bush could argue that he needed to obtain the power to detain terrorism suspects because under the previous distribution of power the president was unable to protect the United States adequately from foreign attack. His opponents would

⁵⁵ For an example of such an approach in the academic literature, see William Eskridge Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 *Geo. L. J.* 523 (1992).

need to argue that the accretion of presidential power would create a risk of abuse greater than any benefits.

The major attraction of this approach is that it provides a normative basis for arguing about the distribution of power. By contrast, the first and second approaches provide an arbitrary or insufficiently defended normative baseline. And many public debates do have the character of being simultaneously about optimal policy and the optimal institutional structure for achieving the best policy. Thus, conservatives today argue for a strong president in national security areas but a somewhat weaker president (or government) for domestic affairs, probably on the basis of policy goals rather than strong normative commitments about institutional structure. Conservatives and liberals alike constantly renegotiate institutional structures in light of changing conceptions of the public interest.

The problem here is that the social welfare function is not observable; what is good for the country is the subject of constant debate.⁵⁶ Moreover, the relationship between institutions and social welfare (or any other normative standard) is extremely ambiguous, and itself subject to intense debate. For example, conservatives argue that a strong presidency is needed to protect the country from terrorist attacks; liberals disagree. The ultimate source of disagreement may simply be that conservatives think that the terrorist threat is greater than liberals do, or that the harm from a terrorist threat is greater, or that the risk to civil liberties from a strong presidency is less or less important. Constitutional norms, as embodied in institutional structures, are supposed to make governance easier by delegating the power to electoral winners to implement normative goals. If every public policy debate becomes a debate about institutional structure, policy-making becomes cumbersome, maybe impossible.

In sum, because it is difficult both to identify the constitutional baseline for horizontal power and to rigorously characterize it, all claims that presidential power has violated or stayed consistent with that baseline will be difficult to evaluate.

B. The Measurement Problem

To measure an agent's power, one needs three pieces of information: the location of the status quo, the location of X, and the location of the agent's ideal

⁵⁶ Compare similar sorts of arguments about corporate governance. At least in principle we can test theories of corporate governance by doing event studies that relate a particular change in the distribution of power between corporate officers, directors, and shareholders, and stock price. Here we have a relatively uncontroversial normative baseline in stock price, and we can do empirical tests because thousands of corporations exist. Along these two dimensions, the evaluation of separation of powers is lacking.

points. Of these three pieces of information, the second two create difficulties that require additional comment.

How does one determine the location of the policy outcome? Consider the suggestion that after 9/11, the status quo policy of granting due process to suspected terrorists was abandoned in favor of a rule that gave them more limited due process—approximately the right to access to the D.C. federal courts for the purpose of presenting exculpatory evidence and to some extent challenging inculpatory evidence as to whether one satisfies the definition of enemy combatant.⁵⁷ The policy outcome is different from the status quo outcome because the government has announced a different legal rule.

Another approach is to look at actual outcomes: the extent to which a particular suspect is given opportunities and resources to defend herself. Of course, any single suspect might receive special treatment or especially bad treatment because of unique circumstances, politics, the breakdown of institutional safeguards, and the like. Thus, we should look at aggregate outcomes. We might, for example, compare how members of Al Qaeda are treated in comparison to various control groups—including suspected terrorists unaffiliated with Al Qaeda, and suspected members of Al Qaeda before 9/11, that is, before the policy had been implemented. If there is no difference, then the policy outcome has not changed. If there is, it has.

Both of these approach pose difficulties. As for the first, although it is clear that the government can detain members of Al Qaeda on weaker evidence than it can use to convict someone of a crime, the extent of the difference depends on how courts interpret the rule. The courts could give the government the benefit of the doubt, or the detainee the benefit of the doubt. It is thus hard to quantify the magnitude of the change based only on a policy statement. And yet looking at aggregate outcomes does not solve the problem. It is not clear how one translates the various facts—such-and-such detainees who allegedly engaged in such-and-such acts—into a point on a line.

Determining the location of the agents' ideal points is also difficult. It is tempting to argue that, for example, President Bush's ideal point was a policy that permitted him to detain anyone suspected of terrorism without any legal constraint. But the truth is more complicated. Initially, we should distinguish Bush's personal ideal point, which expresses his ideological preferences, and a constructed ideal point, which reflects the various political pressures that constrain his freedom of action. If all that the president cares about is reelection, then he will never act to maximize his personal ideal point, and for all intents and purposes his ideal point reflects those of various constituencies. Note further that

⁵⁷ See Case Management Order, *In re Guantanamo Bay Detainee Litig.*, Misc. No. 08-0442 (TFH), at 1 (D.D.C. Nov. 6, 2008).

these constituencies may shift. The ideal point is nothing so simple as the median Republican voter, for example; it might reflect the pivotal voter in a particular swing state like Pennsylvania or Ohio, or important donors to the president or the Republican party, or Republican politicians to whom the president owes political debts.⁵⁸

Adding to the ambiguity, the president will not necessarily (or even ever) reveal his ideal point (or even be sure about what it is). Typically, politicians, like business people and indeed people in all walks of life, exaggerate their bargaining position so as to extract concessions from counterparties. Bush might have sought much more power than he wanted or thought he needed, or thought that his own constituents would support—because he understood that Congress would push back (and possibly his constituents would understand this), or because he sought to mollify extremists in his party while aiming to achieve the goals of his more moderate supporters.

In addition, a president may make concessions in one policy area in order to obtain his goals in another area. For example, President Obama may have given up trying to close Guantanamo Bay because he preferred to obtain congressional support for his health care law and stimulus package.⁵⁹ To compare his power and that of Congress, one must know how close this joint policy outcome is to the president's two ideal points, and the same for Congress. But because the branches may be trading policy outcomes in many different dimensions at the same time—budget, tax level, foreign policy, etc.—it will often be difficult or perhaps impossible to determine which agent has the most influence on aggregate policy outcomes.

In sum, to determine the relative power of Congress and the president, one must identify their ideal points, the location of the status quo, and the location of a policy outcome, and yet determining the location of all of these points seems nearly impossible. One might reasonably assert that the current policy is stronger or weaker than the status quo policy, and possibly that it more closely approximates the ideal point of one branch than the other, but any kind of precise measurement or determination will be unavoidably elusive.

C. Selection Problems

The analysis so far has assumed away a number of complications related to the selection of officeholders. As an illustration, consider the claim that the president has gained power relative to Congress but has lost power to the judiciary, so on net presidential power has not increased. But the president selects

⁵⁸ For more discussion, see Section C.

⁵⁹ See Daniel Klaidman, *Kill Or Capture: The War on Terror and the Soul of the Obama Presidency* 110 (2012) (describing Rahm Emanuel's framing of this choice to the president).

members of the judiciary, albeit subject to two constraints—he must wait for judges to retire, and his selection is subject to Senate confirmation, which may be a greater or lesser constraint on his freedom of choice. At one extreme, if the president can select a substantial portion of the judiciary, or even just a single Supreme Court justice if that justice is a pivotal voter, and further he is able to select judges who are loyal to him, then the advance of judicial power at the expense of Congress (if such is the case) has actually strengthened the president’s hand, not weakened it.

This logic can be extended in various directions. A popular president may be able to influence the composition of Congress by distributing campaign funds to favored candidates, endorsing them, and helping them campaign. It is possible that Congress could end up doing the president’s bidding, even without any overt demand on his part, so what commentators might see as autonomous congressional policy choices are in fact the choices of the president. Conversely, it is possible that important members of Congress, party leaders, and other officials play a large role in determining who will be elected president, in which case the president’s actions, however autonomous they may seem, actually reflect the interests of Congress. *Bush v. Gore*⁶⁰ shows that the judiciary also can play a role in the selection of the president.

Or consider Levinson and Pildes’ argument that Madisonian separation of powers serves its checking function only when government is divided.⁶¹ Suppose that Democrats control the presidency and both houses of Congress. It is possible that the Democratic president, as party leader, dictates policy to Congress, or Congress dictates policy to the presidency, or some group of Democratic notables dictate policy to both. In any event, the two branches will not check each other in the Madisonian sense. In the Levinson/Pildes view, the horizontal distribution of powers is hostage to the fortunes of the two parties.

These factors play havoc with the spatial analysis above. The reason is that an agent’s ideal point is at least partly endogenous: it reflects larger political forces, including the (possibly endogenous) ideal points of other agents. These concerns are reflected in generally older worries that the president may be the figurehead of Congress or Congress may be the plaything of the president. Thus, if the president and Congress agree on a policy outcome X, it may not be because the two agents have different ideal points and compromise. It may be because one agent ensures that an agent with the identical ideal point is selected for another branch.

Claims about the rise or decline of presidential power must take into account this problem. If the president does some act X that is normally

⁶⁰ 531 U.S. 98 (2000).

⁶¹ Levinson & Pildes, *supra* note __, at 2316–2331.

accomplished by Congress, the reason may simply be that Congress has selected a president that serves its interests, and so does not need to do the act itself. The president is not powerful; he is a figurehead. But if Congress appears to act on its own, it is possible that it is acting in the interest of the president because he has selected pivotal voters in Congress. The president is not weak; he is the puppet master behind the scenes who does not even have to issue threats or directions in order to get his way.

The upshot is that even if one can in various cases conclude that a policy outcome better approximates the ideal point of one branch or the other, one cannot necessarily conclude much about whether the balance of powers has operated in a desirable fashion. Suppose, for example, that the policy outcome falls exactly between the ideal point of the president and Congress, and suppose, further, that we believe that such an exact division of influence is entailed by the balance of power rightly understood. Yet if the president has managed to shift the ideal point of Congress in his direction by manipulating or influencing Congress's membership, then the ideal point is in fact closer to the president than some hypothetical "real" congressional ideal point that would have existed in the absence of his interference. This suggests that the balance of power should depend on hypothetical rather than real ideal points, but there does not seem any way to derive those hypothetical ideal points from either political theory or empirical observation. In the effort to maintain balance among the branches, one loses sight of political context in which they operate.

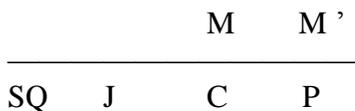
III. Vertical Power: The Technology of Power

It has been said that although Hobbes believed in absolute power for the sovereign, the Hobbesian monarch could not pose a significant threat to civil liberties because the seventeenth century government lacked the means to control most people. Whether or not this claim is true, it suggests an important complication that confronts anyone who tries to compare the current distribution of powers with some earlier baseline case.

Computers and video technology did not exist in the eighteenth century; they do today. Both then and now, the executive formally has the power to observe people in public spaces so as to ensure that they do not commit crimes or cause disorder. However, computers and video technology make it easier for the executive to observe people in public spaces. And although these technologies have also made it easier for people to resist observation and control (for example, they can send encrypted email messages to each other), it seems on balance that governments can exert greater control over populations today than they could in the past.

Vertical power matters to the horizontal-powers debate because in that debate participants argue in large part over whether excessive horizontal power on the part of the president enables him to engage in abuse. If it turns out that vertical power is low, however, then the president cannot engage in abuse even if he monopolizes horizontal power. Conversely, if vertical power is much greater than in the past, then it matters more than in the past how horizontal powers are allocated.

To illustrate these points, let us return to our spatial model:



The model now shows two possible outcomes, M and M', which I will call policy maximums for reasons I will shortly explain. Vertical power refers to the range of policy outcomes available to the agents. Suppose that at some initial time, technology permits a policy outcome anywhere in the range from the status quo to M. Then technology changes, and the range increases to M'. Vertical power has increased because now it is possible for the political agents to choose an outcome farther from the status quo than they did before. In this example, the change in technology increases the vertical power of the presidency only if the president can choose policy outcomes. If he must compromise with Congress, then even after the technological change, the political outcome will be located at M, the point at which Congress and the president can agree, no different from the point at which they could agree prior to the technological change.⁶²

Increases in vertical power do not necessarily benefit the president at the expense of Congress. In many cases, increases in vertical power will benefit whichever agent has the more extreme preferences, assuming that that agent has enough horizontal power to implement those preferences. However, one can imagine ways in which technological changes uniquely benefit one branch. For example, it is possible that communication technology gives horizontal as well as vertical power to the president because the president is in a better position than Congress or the courts to use that technology to enhance his influence over the public.

Many critics of the imperial presidency make just this point: because vertical power has increased, the increase in the president's horizontal power creates a greater risk of abuse than ever before, even in eras (such as the Civil

⁶² I am assuming that Congress moves first and makes a take-it-or-leave-it offer of M to the president, who then accepts the offer because M is superior to the status quo. Different assumptions would produce different outcomes, but the lesson is the same.

War) when the president had significant horizontal power.⁶³ “Abuse” is not always clearly defined—commentators often seem to have in mind violations of civil liberties. From the standpoint of our model, we will define “abuse” to mean political outcomes that differ excessively from the normatively desirable outcome, such as the preference of the median voter or, more vaguely, the “public interest.” How should such a claim be evaluated?

The main problem with this claim is the sheer difficulty of comparing the level of presidential (or government) power in the past and the level today. Suppose, for example, we decided to reduce the power of the president to what it was in the eighteenth century. Would that mean depriving the executive branch of computer technology? Of advanced weapons? Of telephones? Of ballpoint pens? Of course, as noted, the people whom the government seeks to control have also benefited from technological advances, which enable them to resist government control, so it would certainly go too far to limit the government to eighteenth century technology. But then what level of technology would be appropriate? Or, if we permit the government to use more efficient modern technology but put limits on how it is to be used, what should these limits be? These questions are impossible to answer; they may even be meaningless.

The post 9/11 debates illustrate these problems. Critics objected to the government’s various efforts to monitor communications by suspected terrorists, including telephone and email communications.⁶⁴ These efforts to monitor were more intrusive than in the recent past, when the government did not monitor these types of communications at all or without a warrant. Thus, there seemed to be an identifiable increase in the executive’s power over ordinary people, enabling the executive to engage in abusive types of monitoring that had been outside its capabilities. Yet the counterargument was that these technologies gave suspected terrorists new and more powerful and secure ways to communicate with each other, thus making them less susceptible to government control than they had been in the past. Other technological advances, including the miniaturization of weapons systems also gave terrorists greater power to cause harm. Ordinary people also had more secure and efficient ways to communicate than they had before. It is simply not clear whether the government’s exploitation of technology after 9/11 increased its power at the expense of the public, or reversed a trend in the direction of excessive government weakness.

Unless we can determine the change in vertical power, we cannot evaluate claims that the increase in the president’s horizontal power (supposing that has occurred) has created new risks of abuse of executive power. Yet it is

⁶³ See generally Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime* (Norton 2004) (discussing the President’s enhanced ability to suppress speech during several different wars).

⁶⁴ See, e.g., David Cole, *Reviving the Nixon Doctrine: NSA Spying, the Commander-In-Chief, and Executive Power in the War on Terror*, 13 Wash. & Lee J. Rts. & Soc. Just. 17 (2006).

questionable that we can say, with any degree of rigor, the extent to which vertical power has changed and created new opportunities for abuse.

IV. Implications: Revisiting Claims About Presidential Power

A. Are Recent “Imperial Presidency” Claims Meaningless?

1. The History of Executive Power

Most debates about presidential power in the legal literature focus on the horizontal aspect of it and ignore the vertical aspect of it. Scholars obsess over whether the president has taken too much power from Congress or vice versa, but rarely discuss whether the government as such has gained too much power over the people. Yet Madisonian opposition to concentration of horizontal power in one branch reflected the fear of “tyranny,” the abuse of people’s rights, which could take place only if the government possessed sufficient vertical power.⁶⁵ If the government lacks sufficient vertical power, concentration of horizontal power in one branch cannot result in tyranny.

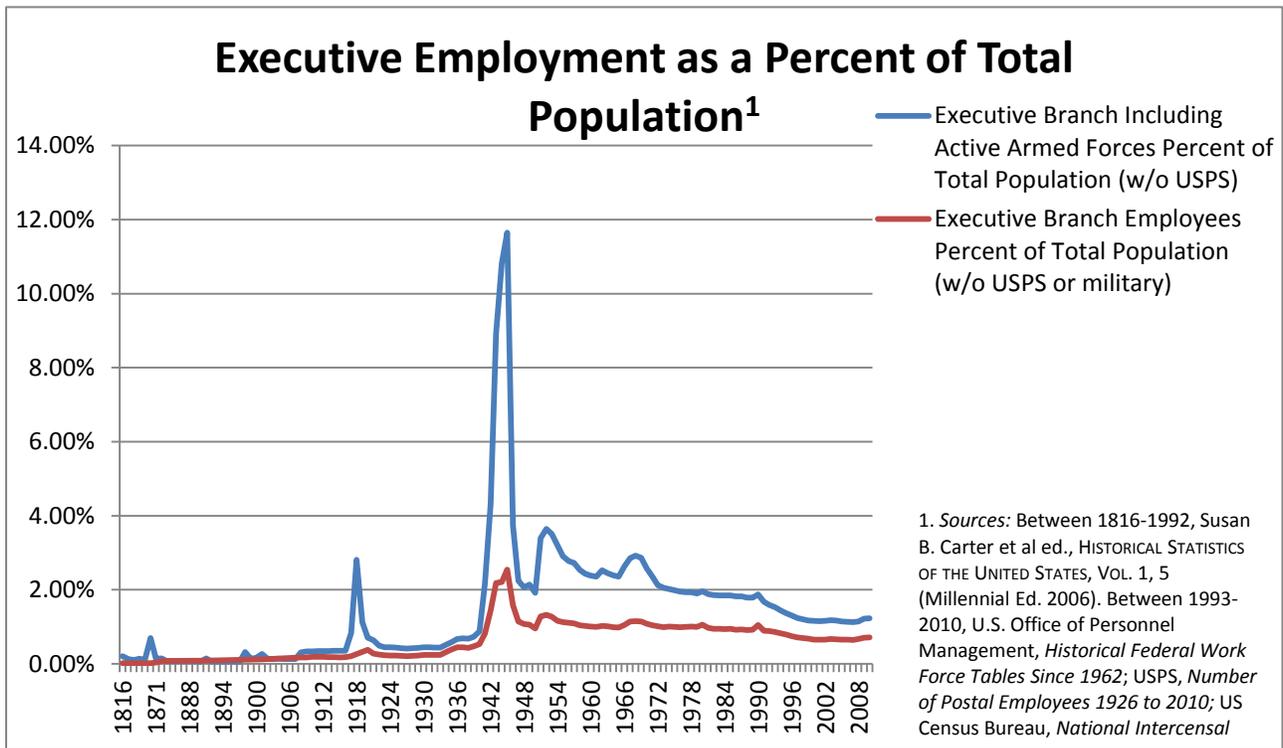
Fears about government tyranny can be found outside the legal literature. Arthur Schlesinger Jr.’s argument that the advance of vertical power, along with its concentration in the executive branch, has produced an “imperial presidency” is the most famous example, although Schlesinger did not think that tyranny had actually arrived but was just over the horizon.⁶⁶ During the Bush administration, a number of journalists and legal scholars picked up on this theme.⁶⁷

But is it true that presidential power—both horizontal and vertical—has increased since the founding? There is no way to observe and hence measure power directly; the best we can do is use some proxies. As a rough proxy of vertical executive power, consider the percentage of the population who are employed by the executive. Figure 1 shows that this percentage increased permanently during the FDR administration, but it has flattened out and even declined slightly over the last fifty years.

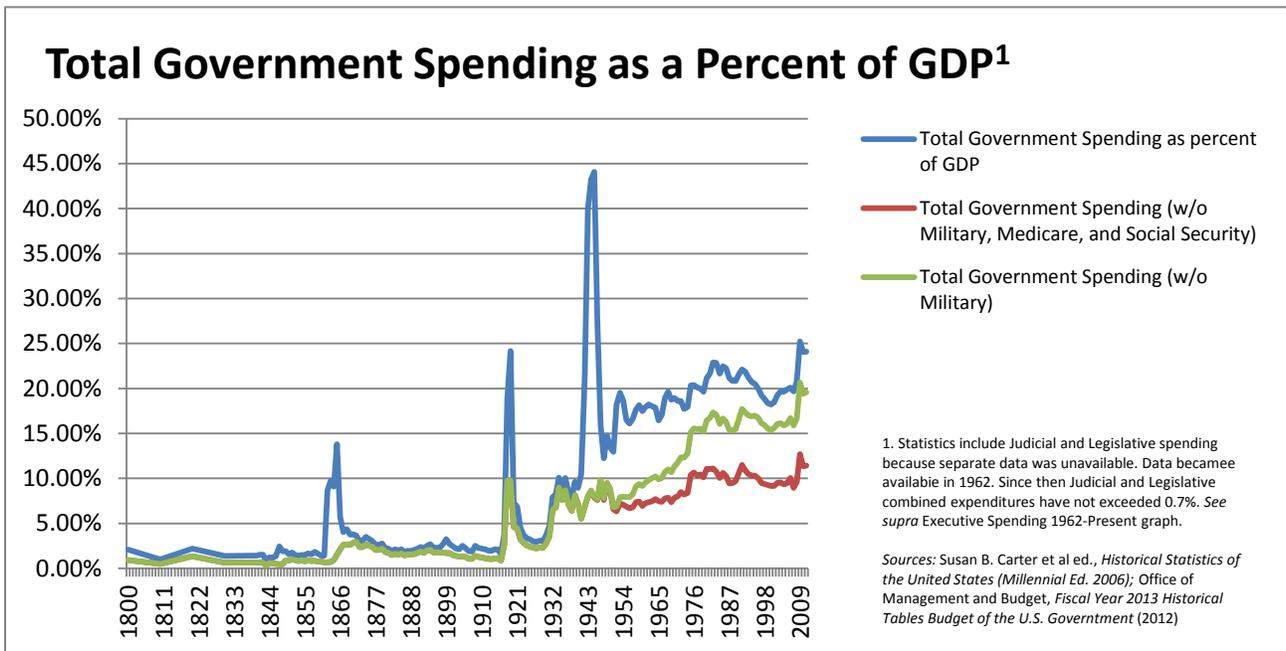
⁶⁵ See Madison, *supra* note ____.

⁶⁶ Arthur M. Schlesinger, *The Imperial Presidency* (Mariner Reprint ed., 2004).

⁶⁷ Charlie Savage, *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy* (Back Bay 2008); Shane, *supra* note ____; Ackerman, *supra* note ____.



One might make the further point that since the executive spends virtually the entire budget, the ratio of budget to GDP may be another rough proxy for executive or at least governmental power. Figure 2 provides the data.

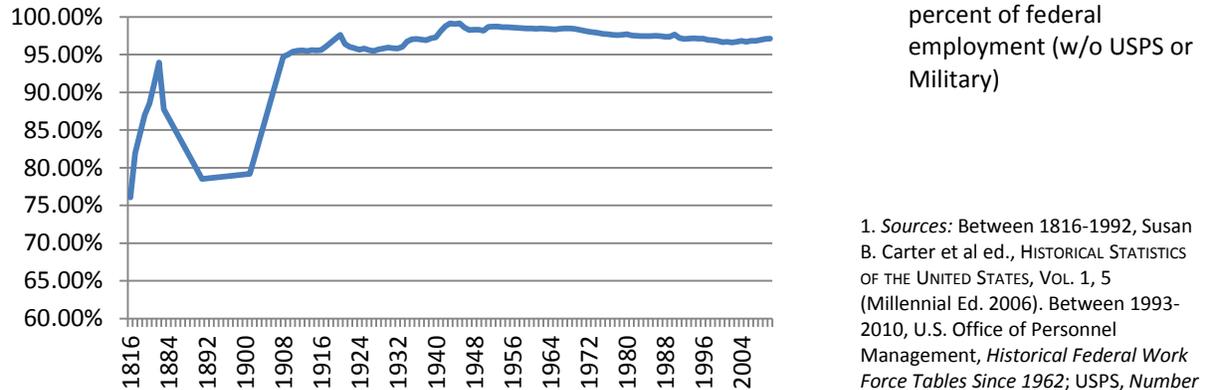


Two observations can be made about these graphs. First, vertical presidential power—measured in terms of employment and budget—has, if the proxies are accurate, increased since the founding. Second, however, the advance of vertical power since the New Deal is not as clear. In terms of employment by the executive branch, presidential power has declined from its highest point during the New Deal. In terms of budget, there has been little movement since the 1970s once one excludes the spike attributable to the financial crisis and recession in 2008 and 2009. The graphs provide little support for the view that every incremental advance in executive power enables the executive to accumulate still more.⁶⁸ A more accurate account is that a radical advance in executive power took place during the New Deal, and perhaps a smaller increase during the Great Society era of the 1960s, but otherwise has leveled off.

Figure 3 depicts the percentage of government workers who are employed in the executive branch (as opposed to Congress and the judiciary). This is a rough proxy for horizontal power.

⁶⁸ A theme in the literature; see, e.g., Ackerman, *supra* note ___, who was, however, referring to the increases in executive power during wars and emergencies.

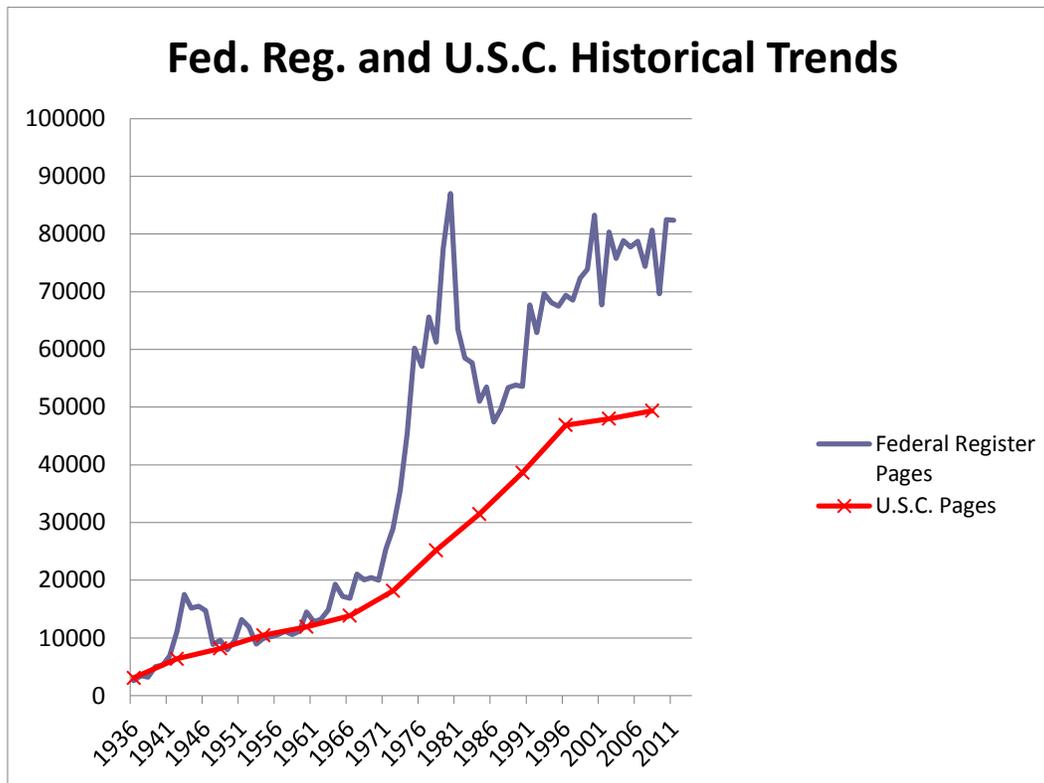
Executive Employment as a Percent of Federal Employment¹



The data suggest that the executive gained power at the expense of the other branches, not during the New Deal but (putting aside the temporary spike during the Civil War) at the time of Teddy Roosevelt.

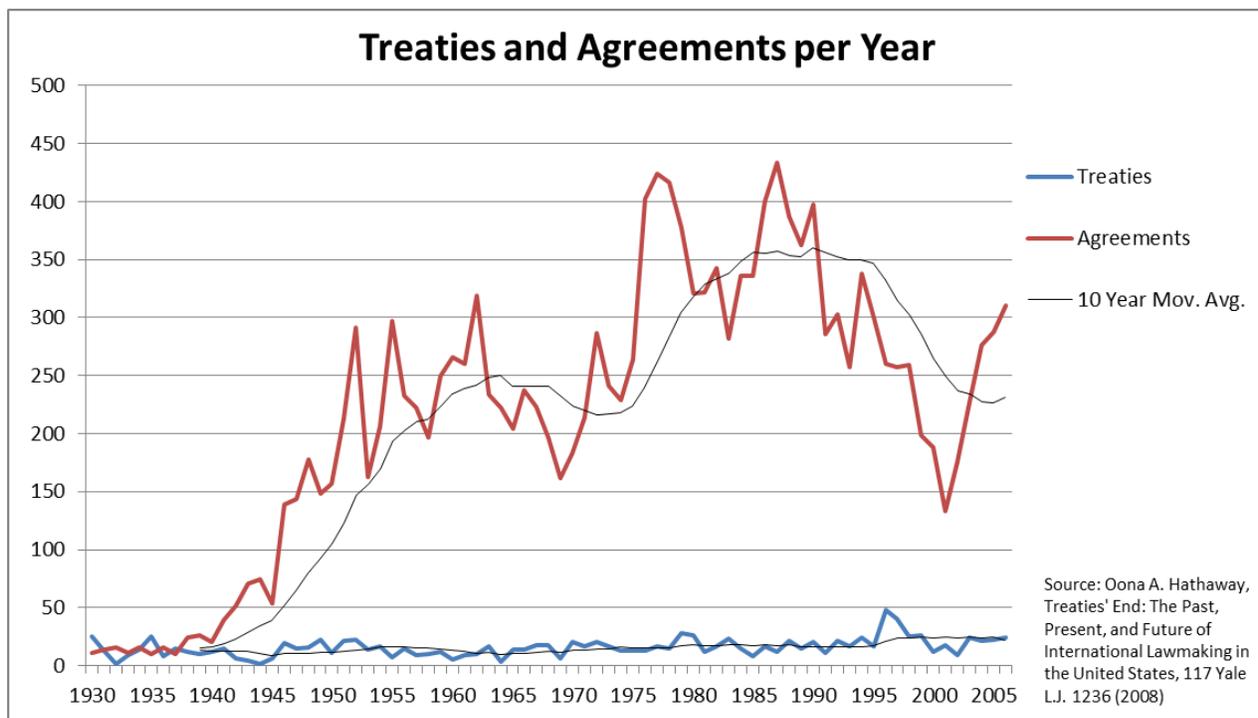
We can obtain another perspective on the relative power of the presidency and Congress by comparing the amount of “law” that is produced by each. The founders expected Congress to make the law, and the president to enforce. But in the modern administrative state, the executive branch makes law through regulation on the basis of its delegated powers. Figure 4 compares the lawmaking activity of Congress and the executive since 1936 by depicting total pages per year in the U.S. Code and total pages per year in the Federal Register.⁶⁹ Like our other measures, these measures are extremely crude, but they are nonetheless helpful for seeing how the president’s influence has increased. The first Federal Register volume appeared in 1936; before then, the executive engaged in regulation but much less than before the New Deal. The president’s regulatory power then increased at roughly the same rate as Congress’s, until the 1960s, when the president’s regulatory power began increasing at a significantly faster rate. In absolute terms, the graph also confirms the widely held view that the national government has gained tremendous (vertical) power since early in the twentieth century.

⁶⁹ Federal Register pages were taken from <https://www.federalregister.gov/uploads/2012/03/FR-Pages-published.pdf>. U.S.C. page numbers were taken directly from the U.S.C. volumes. We estimated page numbers by multiplying the average of a few sample volumes by total number of volumes. A new U.S.C. volume appears every six years, as shown by an “x” on the graph.



Finally, in Figure 5 we compare the growth of congressional-executive agreements relative to treaties. Presidents make treaties with the approval of two thirds of the Senate, whereas congressional-executive agreements require a majority in each house. Although congressional participation is required in both cases, a president who has access to both methods for entering treaties is more powerful than a president who must persuade two thirds of the Senate to join him, and thus the rise of the congressional-executive agreement is yet another piece of evidence about the increase in presidential power.⁷⁰ It is evident that, based on this proxy, presidential power increased from the 1930s through the 1970s, but then tailed off.

⁷⁰ “Sole” executive agreements, where the executive enters into international agreements without the approval of either house of Congress, provide another proxy for executive power. However, I have not found reliable data on these agreements.



These five figures rest on empirical data that are at best rough proxies for the power, and can give us no more than rough impressions about trends. Still, they are better than no evidence at all. They are consistent with each other, and with the conventional view that the executive has gained both vertical and horizontal power over the course of American history, and in particular during the first half of the twentieth century, but provide no support for alarmist claims that executive power has reached new heights in the last decade.⁷¹

2. Recent Claims about the Imperial Presidency

During the Bush administration, many critics of the presidency argued that Bush had “aggrandized” executive power, defying Congress in ways that his predecessors had not.⁷² Bush defined a private criminal organization as a belligerent, ordered military forces to kill members of that organization without judicial process and detain them without charges, refused to comply with the laws of war with respect to lawful combatants in Afghanistan, and authorized torture and wiretapping. Many if not all of these acts violated statutes. Bush also drew on

⁷¹ Embodied in a large group of recent books critical of the Bush administration’s constitutional arguments. E.g., Ackerman, *supra* note __; Shane, *supra* note __; Savage, *supra* note __.

⁷² See, e.g. Dahlia Lithwick, *The Imperial Presidency*, *Washington Post*, Jan. 14, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/01/12/AR2007011201952.html> (last accessed 09/27/2012);

a broad interpretation of his commander-in-chief powers to justify disregarding statutes that he did not agree with.

Many commentators gave special attention to torture. Congress passed the Anti-Torture Statute in 1994, which in plain terms prohibits anyone from engaging in torture.⁷³ The Bush administration nonetheless authorized “enhanced interrogation techniques,” including waterboarding, which by any definition amounts to torture. These techniques were used against at least three detainees, and possibly more.⁷⁴ Thus, it appears that the executive flagrantly disregarded the will of Congress. The balance of powers broke down.

By contrast, Jack Goldsmith points out that the Bush administration authorized these techniques only after extensive legal analysis, and time and again faced constraints from outside the executive branch.⁷⁵ The CIA ensured that various executive branch institutions endorsed, or at least gave silent acquiescence to, coercive interrogation. CIA officials made a presentation to members of the House and Senate intelligence committees. After the program was put into effect and information about it leaked out, various members of the public—journalists, lawyers, politicians—raised a hue and cry. The Bush administration was forced to ask inspectors general to evaluate the program—and in doing so, used a mechanism put into place by Congress in the Inspectors General Act. Congress also passed a new law that banned torture. The Bush administration stopped using waterboarding in 2007,⁷⁶ and the Obama administration has repudiated it as well.⁷⁷ Although Goldsmith’s account of “pushback” against presidential power relies to a large extent on ordinary politics, he gives some credit to Congress, and suggests that the system of separation of powers prevailed.⁷⁸

⁷³ 18 USC §§ 2340 (1994), 2340a (2001).

⁷⁴ Charlie Savage & Scott Shane, *Libyan Alleges Waterboarding by C.I.A., Report Says*, N.Y. Times, Sept. 6th, 2012, available at <http://www.nytimes.com/2012/09/06/world/middleeast/libyan-alleges-waterboarding-by-cia-human-rights-watch-report-says.html?pagewanted=all> (last accessed 9/25/12).

⁷⁵ Goldsmith, *supra* note __ at 86-112.

⁷⁶ See Mark Mazzetti, *Letters Give C.I.A. Tactics a Legal Rationale*, N.Y. Times, April 27, 2008, available at <http://www.nytimes.com/2008/04/27/washington/27intel.html> (last accessed 09/25/12); David Morgan, *Bush Puts CIA Prisons Under Geneva Conventions*, Reuters, July 20th, 2007, available at <http://www.reuters.com/article/2007/07/20/us-security-interrogations-idUSN2029519720070720> (last accessed 09/25/12).

⁷⁷ See New York Times, *Waterboarding*, Sept. 6, 2012, available at <http://topics.nytimes.com/top/reference/timestopics/subjects/t/torture/waterboarding/index.html?scp=2&sq=obama%20waterboarding&st=cse> (last accessed 09/25/2012); Clyde Haberman, *As Another Anniversary Passes, Still Waiting for Justice*, New York Times, Sept. 11th, 2012, available at <http://cityroom.blogs.nytimes.com/2012/09/11/as-another-anniversary-passes-still-waiting-for-justice/?scp=3&sq=obama%20waterboarding&st=cse> (last accessed 09/25/12).

⁷⁸ Goldsmith, *supra* note __ at 119-21.

How can one rigorously evaluate this debate? Goldsmith puts a great deal of weight on process, emphasizing the ways in which executive branch officials took account of the law even while attempting to circumvent it. But the critics are not concerned with process but with outcomes.

To address the issue rigorously, one would need to identify the ideal point of Congress, the ideal point of the executive, and the location of the policy outcome—sporadic torture. We immediately run into numerous problems. Do we use the ideal point of Congress at the time that it passed the Anti-Torture Statute or the ideal point of Congress at the time of the conflict over torture? Is the ideal point of Congress that of the median voter (in the House, the Senate?), the leadership, or some voting bloc? Do we use the public preferences of Congress or the hidden preferences represented by the committee members who did not object to the interrogation techniques? Did Congress's ideal point change over time in response to developments in public opinion?

The questions are scarcely less difficult to answer when we turn to the executive. Is the ideal point some personal or ideological preference of Bush himself, or his judgment as to the optimal political position to take in response to pressure from voters, or a point that reflects a compromise among the views of different people and institutions in the executive branch? Even if it were that of Bush himself, how can we identify his ideal point? Should we use a public statement or wait for archival records to appear, or acknowledge that we have no idea—he may have wanted to torture as many suspects as possible, or he may have wanted to reserve the use of torture for just the worst cases?

We cannot answer these questions with any confidence, but they at least enable us to see how much uncertainty there is as to the issue of whether the executive encroached on the power of Congress. It is possible that the acts of torture were preferred by Congress, at least in the early years; it is even possible that they went beyond what Bush wanted. We simply do not know.

Then there is the question whether the outcome, which at least on Goldsmith's account reflected the power of both branches, reflected a constitutionally valid balance of power. Here again we face considerable uncertainty. The question is not so much whether George Washington could have authorized torture (which he never did) in violation of a statute (which did not exist at that time). It is whether Washington's influence on relevant policy outcomes was similar to that of George W. Bush. The question seems impossible to answer. And as noted before, there is not even agreement as to whether the founding-era balance of power should be the constitutional baseline, and if not, which era's balance of power should be.

As if to prove the elasticity of the concept of power, today conservatives who defended Bush's use of power have come to the conclusion that Obama is the "imperial president."⁷⁹ They point to his decision not to enforce the immigration laws against certain young people who lack immigration papers, to use waivers to undermine the No Child Left Behind law, and to launch a military intervention in Libya without congressional authorization. Obama has also maintained most of the features of Bush's approach to counterterrorism, expanding the drone program under which the executive branch determines who will be killed overseas, including American citizens. Obama has not cited his constitutional powers as enthusiastically as Bush did, but Obama's lawyers have also not repudiated the Article II theory, and could draw on it if they believed it necessary.

But the ambiguity of the constitutional baseline also makes it difficult to compare the horizontal power of Bush and Obama. I see no way to evaluate claims that a recent president has violated the Constitution by seizing or exercising disproportionate power—though it is easy to imagine extreme cases (shutting down Congress, for example) where such a judgment would be plausible.

B. Doctrinal Controversies

A large number of doctrinal controversies involve scholars and judges arguing that a particular rule gives the president (or Congress) too much or too little power relative to the other. The debates involve such questions as whether the executive can refuse to enforce the law;⁸⁰ whether Congress can control the president's management of military operations⁸¹ or foreign relations more generally;⁸² whether the president enjoys emergency powers that allow him to disregard statutes during crises;⁸³ whether the president can keep secrets from

⁷⁹ See, e.g., Charles Krauthammer, *The Imperial Presidency Revisited*, Chicago Tribune, July 9, 2012, available at <http://www.chicagotribune.com/ct-oped-0709-krauthammer-20120709-15,0,5806015.column> (last accessed 09/16/2012); Kimberley Strassel, *Strassel: Obama's Imperial Presidency*, Wall St. J., July 5, 2012, available at <http://online.wsj.com/article/SB10001424052702304141204577506881495497626.html> (last accessed 09/16/2012).

⁸⁰ See, e.g., David S. Strauss, *Presidential Interpretation of the Constitution*, 15 *Cardozo L. Rev.* 113, 123–137 (1993) (arguing that the executive branch must follow judicial interpretation but may "shad[e] the doctrine slightly to permit more executive power"); cf. Office of Legal Counsel, *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 *U.S. Op. Off. Legal Counsel* 199, 201–202 (O.L.C.) (1994) (arguing that when a law infringes on the executive's constitutional powers the President can "decline to abide by it").

⁸¹ See, e.g., David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb – A Constitutional History*, 121 *Harv. L. Rev.* 941, 1101–11 (2008) (arguing that historically Congress has been "an active participant in setting the terms of battle" and should continue to be).

⁸² H. Jefferson Powell, *The President's Authority Over Foreign Affairs: An Executive Branch Perspective*, 67 *Geo. Wash. L. Rev.* 527, 540–555 (1999).

⁸³ Bruce Ackerman, *The Emergency Constitution*, 113 *Yale L. J.* 1029, 1047–1056 (2004) (discussing the need to ensure the increase of executive power caused by an emergency does not

Congress;⁸⁴ and whether the president and other executive officials enjoy immunities from prosecution for actions they undertake in the course of their duties.⁸⁵ I will discuss two of these controversies: the removal power and the legislative veto.

1. The Removal Power

Presidents and their academic allies contend that the power to remove executive branch officials is inherent in executive power. If the president cannot remove officials who act contrary to the president's wishes, then the president cannot control that person, and thus cannot control the executive branch. Yet Congress has, from time to time, placed various limits on the president's power to remove executive branch officials—notably, the for-cause restriction that was approved in *Morrison* and the double for-cause restriction that was struck down in *Free Enterprise Fund*.

As we saw earlier, the debate about the removal power has largely proceeded along the lines dictated by the metaphor of the balance of power. Critics of for-cause requirements, like Justice Scalia in his *Morrison* dissent, argue that for-cause requirements tilt the balance of power in Congress's favor, while defenders, like Justice Breyer in his *Free Enterprise Fund* dissent, argue that for-cause requirements do not upset the balance power.

It should now be clear that these claims about the effect of for-cause requirements on the balance of power are nearly impossible to evaluate. Scalia's argument entails that the for-cause requirement will cause some significant portion of political outcomes to move away from the president's ideal point and toward Congress' ideal point. It is not clear that this is so—conceivably, the independent counsel could increase the president's power by creating a greater risk of sanction for wayward executive agents who violate the law where the president does not want them to.⁸⁶ Indeed, President Carter backed and signed the Ethics in Government Act,⁸⁷ which created the independent counsel statute; he may well have believed that presidential power would increase if the public's confidence in the presidency could be repaired after Watergate. On this view, the

persist past the emergency); cf. Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 *Stan. L. Rev.* 605, 614–620 (2003) (arguing that expanded executive power during emergencies does not have a tendency to persist after the emergency has ended).

⁸⁴ Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 *Iowa L. Rev.* 489, 532– 534 (2007) (arguing that in circumstances where executive secrets are outside Congress' legislative and oversight powers, the Executive should not be forced to divulge them).

⁸⁵ See, e.g., Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 *Colum. L. Rev.* 1612 (1997)

⁸⁶ A similar point is made by Breyer in dissent in *Free Enterprise Fund* regarding the value of self-commitment for the executive. See *Free Enter. Fund*, 130 S. Ct at 3169.

⁸⁷ Pub. L. No. 95-521, 92 Stat. 1824 (1978).

statute increases the president's vertical power (his ability to ensure that agents implement his policies), which may make up for any (possibly trivial) loss in horizontal power.

Even if the independent counsel statute reduced the president's power—either absolutely or only relative to Congress—the question is how much it reduced his power, and it is difficult, probably impossible, to answer this question. As Adrian Vermeule has recently pointed out, the extent to which an agency is “independent,” in the sense of being able to make decisions that do not follow the political interests of the executive, depends a great deal on political context and public opinion.⁸⁸ Some agencies that are nominally independent are in fact sensitive to the president's agenda, and other agencies that are nominally non-independent are in fact able to deviate from the president's agenda. For example, the Bush administration suffered a political setback when it fired lawyers in the non-independent Justice Department, suggesting that political norms confer independence, of at least a sort, on that agency.⁸⁹ By contrast, the National Labor Relations Board enjoys statutory independence but in fact is highly politicized, according to Vermeule.⁹⁰ Thus, if Congress passes a law that restricts the president's power over the Justice Department, it may weaken the president excessively (and that may well be the final verdict on the independent counsel statute, which was allowed to expire); while if Congress passes a law that restricts the president's power over the NLRB, it may improve the balance of power. A court charged with maintaining the balance of power would need to be attuned to this political context.

An even greater problem is the baseline problem. If the independent counsel statute reduced the president's horizontal power, was this reduction a violation of the constitutional baseline or did it restore the balance of powers to the appropriate constitutional baseline? Scalia is notably silent on this issue, referring only to our “former constitutional system,”⁹¹ which may refer to the system that existed just prior to the decision or the system at the founding, or the system at some other time period. The problem for Scalia is that if the founding provides the baseline, then surely the independent counsel statute is constitutional, as nearly everyone agrees that the president is significantly more powerful relative to Congress today, or in 1988, when the case was decided, than he was at the time of the founding. If the baseline is instead the balance of power on the day before the statute was enacted, the question is why that date should be the baseline. As we saw above, the baseline problem seems to be insoluble.

⁸⁸ See Adrian Vermeule, *Conventions of Agency Independence*, Colum. L. Rev. (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2103338.

⁸⁹ *Id.* at 2.

⁹⁰ *Id.* at 12.

⁹¹ *Morrison*, 487 U.S. at 714.

It is, of course, possible to argue for or against for-cause requirements on policy grounds. One might criticize them on the grounds that bureaucrats who cannot be disciplined by the president will produce worse policy outcomes than bureaucrats who can be, presumably because the president is responsive to democratic pressures.⁹² Or one might defend for-cause requirements on the grounds that presidents cause agencies to produce outcomes that benefit favored constituents rather than the public interest; only independence would enable agencies to resist this pressure; and agency officials themselves care about the public interest. Both of these arguments are theoretically coherent and amenable to empirical testing, and it might turn out that some agencies should be independent and others should not be.⁹³

My point is thus not that arguments about administrative structure are impossible to resolve. It is that such arguments should not take place through the metaphor of the balance of power, which provides no guidance to courts or to thinking in general, and obscure the issues at stake. It is hard to believe that the balance of power idea actually explains the outcomes in the removal cases. If the cases display any logic at all, they suggest a generalized suspicion of bureaucratic innovation on the part of the Supreme Court, leading to a presumption against such innovation unless the innovation is incremental and seems likely to improve regulatory outcomes.⁹⁴

2. The Legislative Veto

In *INS v. Chadha*,⁹⁵ the Supreme Court struck down a statute that authorized one house of Congress to veto a decision by the executive branch to permit a removable alien to stay in the United States. The majority opinion held that the statute violated presentment (because the veto is in effect legislation that is not signed by the president) and bicameralism (because only one house need approve a resolution invalidating the executive branch's decision), and left it at that. Justice Powell's concurrence, however, argued that the legislative veto should be struck down because it represents an excessive accumulation of power in Congress (albeit judicial rather than executive power).⁹⁶ Justice White's dissent put even more emphasis on the balance of powers, but argued that the legislative veto ensured that excessive authority was not put in the hands of the executive. For example, "in the energy field, the legislative veto served to balance broad

⁹² See, e.g., Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 *Colum. L. Rev.* 1, 100–103 (1994).

⁹³ But arguments from democratic theory should probably be avoided; see Aziz Z. Huq, *The Removal Power as a Political Question* (unpub. m.s. 2012).

⁹⁴ Cf. Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 *Harv. L. Rev.* (forthcoming 2012) (discussing role of tradition in separation-of-powers disputes).

⁹⁵ 462 U.S. 917 (1983).

⁹⁶ *Id.* at 966–67.

delegations in legislation emerging from the energy crisis of the 1970s.”⁹⁷ Justice White argued that the legislative veto was the mechanism that Congress used to ensure that a balance of power remained between it and the executive despite the massive delegations of authority to executive branch agencies that took place over the course of the twentieth century. Invalidating the legislative veto, then, meant that Congress would have no means of checking executive power, short of refusing to delegate power in the first place.

Many academics took up this view. In the words of Professors Eskridge and Ferejohn, “Chadha invalidated legislative veto provisions in hundreds of federal statutes and was potentially far-reaching judicial activism, unsettling the careful balance between the federal Legislative and Executive Branches.”⁹⁸ Not all academics agree with Eskridge and Ferejohn, or Justice White, that the legislative veto is needed to maintain the balance of power, but the debate has in large part focused on the question of how the legislative veto affects the balance of power, with some arguing that the legislative veto excessively favors Congress and others arguing that it does not.⁹⁹

In an earlier paper on the legislative veto, Professors Eskridge and Ferejohn employed the spatial model I described in Part III.A to defend Justice White’s position.¹⁰⁰ Eskridge and Ferejohn argue that under the original understanding, Congress has greater influence on legislation than the executive because of its role in approving legislation. The president’s veto power can be used to block some legislation and influence other legislation on the margin (which Congress writes to avoid the veto), but presidential influence is nonetheless rather modest because Congress initiates legislation and can override the veto. Thus, legislative outcomes will be closer to Congress’s ideal point than to the President’s ideal point. Under the modern system of agency regulation, however, the president has significantly greater influence on outcomes. Agencies can issue rules, and the president appoints and typically can remove agency heads. Although Congress can legislate in order to reverse rules that it does not like, an agency that seeks to advance the president’s agenda will nonetheless be able to enact rules that are closer to the president’s ideal point than to Congress’—the

⁹⁷ *Id.* at 971–72.

⁹⁸ William N. Eskridge, Jr. & John Ferejohn, *Constitutional Horticulture: Deliberation Respecting Judicial Review*, 87 *Tex. L. Rev.* 1273, 1296–97 (2009).

⁹⁹ See, e.g., Anthony M. Bottenfield, *Congressional Creativity: The Post-Chadha Struggle for Agency Control in the Era of Presidential Signing Statements*, 112 *Penn St. L. Rev.* 1125, 1148 (2008) (asking whether “the post-Chadha framework leave[s] Congress with necessary tools to maintain the balance of power with the executive in the policymaking arena?”); Eskridge & Ferejohn, *The Article I, Section 7 Game*, *supra* note __ at 540–43 (arguing that legislative veto needed to ensure balance of powers); Martin S. Flaherty, *The Most Dangerous Branch*, 105 *Yale L.J.* 1725 (1996) (similar); Leslie M. Kelleher, *Separation of Powers and Delegations of Authority to Cancel Statutes in the Line Item Veto Act and the Rules Enabling Act*, 68 *Geo. Wash. L. Rev.* 395, 420 (2000) (discussing debate over whether Chadha upset or restored the balance of powers).

¹⁰⁰ See generally, Eskridge & Ferejohn, *The Article I, Section 7 Game*, *supra* note __.

basic reason being that the power to initiate legislation, which greatly influences the ultimate outcome, has shifted from Congress to the agency where regulatory power has been delegated. Thus, we have an imbalance of power, one that necessitates a corrective mechanism.

Eskridge and Ferejohn argue that in fact Congress has understood as much, and implemented a corrective mechanism in the form of the legislative veto—indeed, Congress put the legislative veto in hundreds of statutes. Because the legislative veto enables Congress to invalidate an agency rule without obtaining the president’s consent, it can rein in the agencies, and force them to implement rules closer to Congress’ ideal point. Thus, consistent with the understanding of the founders, the policy outcome is more closely aligned with Congress’ ideal point than with the president’s, even if the institutional structure differs.

The whole argument is puzzling. Eskridge and Ferejohn show that the legislative veto to some extent “offsets” additional power transferred to the executive in the administrative state, but they ignore all the other ways in which constitutional and political developments have affected the “balance” between the branches. The executive also obtained power relative to Congress as a result of the advance of communications technology. According to Eskridge and Ferejohn’s logic, that imbalance would justify further constraints—say, a one-house veto, which, however, Eskridge and Ferejohn firmly reject. The executive also has more employees at its disposal, and a greater budget. Surely those developments affect the balance of power as well. Or one could argue that the courts have in the last decade usurped the executive’s power by exerting control over combat operations,¹⁰¹ justifying any effort by the executive to seize some judicial powers. For all the sophistication of their method, the Eskridge and Ferejohn argument has an air of unreality—as though the branches were engaging in gymnastic maneuvers in a vacuum rather than responding to public opinion, parties, and the media.

And then there is the baseline problem. Eskridge and Ferejohn acknowledge that there is no reason to use the founding-era balance of powers as the baseline for determining the constitutionality of the legislative veto.¹⁰² We may instead think that the president should today have a greater influence on policy outcomes than at the founding. One could give a number of reasons. Today, the president is elected; at the founding he was not. Today, Congress is larger and more diverse than it was at the founding, possibly interfering with internal deliberation and coordination and producing worse policy outcomes. Today, the national government has much greater responsibilities, requiring quick

¹⁰¹ *Boumediene v. Bush*, 553 U.S. 723 (2008) (recognizing habeas jurisdiction over Guantánamo Bay detainees); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (striking down military commissions).

¹⁰² Eskridge & Ferejohn, *The Article I, Section 7 Game*, supra note _ at 556-57.

and even continuous reactions to changing events—something Congress is institutionally incapable of providing. The president has a national constituency; during the Founding, and up until the Civil War, people were more inclined to think of the nation as a collectivity of states rather than as a single national population, justifying greater influence for Congress. But then if we accept these reasons for rejecting the founding-era baseline as we must, we do not know what baseline should be used.

Another problem with Eskridge and Ferejohn's argument is that it assumes without any evidence that the legislative veto actually gives Congress any power.¹⁰³ Fear of executive branch retaliation may cause Congress not to threaten to use legislative vetoes, or to threaten to use them only sparingly. Or Congress may have additional methods for influencing policy outcomes. It can write more detailed statutes; it can threaten to withhold funds; it can harass agency officials or conversely shield them from the influence of the executive with for-cause protections. Or, alternatively, perhaps the ability to enact legislative vetoes causes Congress to delegate excessively; a prohibition on legislative vetoes (like the nondelegation doctrine itself, which Eskridge and Ferejohn support) may make Congress more reluctant to confer power on the executive. Indeed, Eskridge and Ferejohn suggests that Congress can respond to the invalidation of the legislative veto by delegating less, in which case the legislative veto will not upset the balance of power.

It is quite difficult to say what the effect of the invalidation of the legislative veto might have on the balance of powers; and even if one can describe the effect with any degree of confidence, it is even harder to say whether the resulting balance of powers is constitutional or not. It would be best to do without the balance of powers metaphor altogether, and look for an alternative means for evaluating reforms of institutional structure.

C. An Alternative

If the balance of powers is not a useful organizing principle for thinking about government, what is the alternative? Let us for the moment bracket the role of courts (which I will return to in Section D), and ask how scholars and policymakers should think about government structure. The now-standard approach is to rely on principal-agent models, which are ubiquitous in the

¹⁰³ At least one scholar finds no evidence for this assumption, in the area of education law. See Jessica Korn, *Improving the Policymaking Process by Protecting the Separation of Powers: Chadha and the Legislative Vetoes in Education Statutes*, 26 *Polity* 677 (1994); for a similar view based on an examination of the evidence, see Harold H. Bruff & Ernest Gellhorn, *Congressional Control of Administrative Regulations: A Study of Legislative Vetoes*, 90 *Harv. L. Rev.* 1369, 1370-71 (1977).

political science and economics literatures on government structure,¹⁰⁴ and have made some inroads in legal scholarship. The principal-agent model provides a simple framework for asking questions about the optimal structure of government.

The literature is vast and cannot be summarized here, but a few comments are appropriate. In a principal-agent model, as applied to government structure, we conceive of the public as the principal and the government as the agent. The role of the government is to take actions that benefit the public according to some normative criterion such as welfare maximization or satisfaction of the preference of the median voter. Electoral institutions are justified because they provide a means for the public to select leaders whose ideal points are similar to those of the public, and to punish leaders (by refusing to reelect them) who select policy outcomes that differ from those that benefit the public. Constitutional rights are justified because in some circumstances leaders would otherwise use their power to weaken electoral institutions or exploit those who are out of power. Independent bodies are needed because leaders lack incentives to enforce laws that undermine their power. Thus, many of the major features of American political institutions can be fit easily into the principle-agent framework.

The principal-agent model also provides guidance for answering more fine-grained questions such as whether the president's power to remove a subordinate should be subject to a for-cause standard. If the president's ideal point is aligned with the public's, then the for-cause standard will produce worse outcomes than a discretionary standard, as it enables the agent to satisfy her own preferences rather than those of the public. If the president's ideal point is not aligned with the public's, then the for-cause standard may improve political outcomes, although we would still need to address how close the agent's ideal point is aligned with the public's (including whether Congress would have more influence over the agent and would also use that influence to drive the agent closer to or farther from the public's ideal point).

This type of evaluation is clearly difficult because the answer depends on empirical data that will rarely be available and so people will need to rely on crude empirical conjectures. But it avoids any reliance on unhelpful notions of the balance of power. Indeed, I suspect that agency models will tend to undermine the Madisonian idea because it is hard to justify, from a principal-agent perspective, a goal of maintaining a balance of power among multiple agents—as opposed to assigning them functions to which their expertise suits them. A recent paper by Jide Nzelibe and Matthew Stephenson, for example, presents a model of separation of powers that in fact undermines it by suggesting that the president should have the option to obtain congressional acquiescence to his projects but

¹⁰⁴ See, e.g., Dennis Mueller, *Public Choice III* (2008); *The Oxford Handbook of Political Economy* (Barry R. Weingast and Donald A. Wittman eds., 2008).

not be compelled to do so.¹⁰⁵ Other papers have attempted to model separation of powers in such a way as to show that it may advance the public interest, but even in these papers the notion of balance plays no role.¹⁰⁶

D. The Role of Courts

One of the peculiarities of the balance of powers doctrine is that it started off in Madison's mind as a description of the equilibrium in which the three branches would hold themselves,¹⁰⁷ but today it has become a rule that the court uses to adjudicate disputes between Congress and the president and on occasion to resist incursions into its own domain.¹⁰⁸ But Madison treated the judiciary as no less eager to expand its power than the two other branches. On Madisonian premises, we should be suspicious of the Supreme Court's insistence that it is a neutral adjudicator as between the political branches. The Court may be more akin to the offshore balancer in realist international relations theory, which intervenes on the side of the weaker of two rival countries in order to ensure that they remain eternally locked in conflict and no threat to the balancer itself. The Court maintains balance not to ensure the optimal form of government, still less to maintain the constitutional plan, but just to ensure that neither branch becomes so powerful as to pose a threat to its prerogatives.

In any event, under current doctrine courts take an active role in resolving disputes about separation of powers, frequently relying as we have discussed on the metaphor of the balance of power, and at other times on more formalistic ideas about the allocation of powers.¹⁰⁹ Some scholars believe that courts should use the political question doctrine to avoid resolving separation of powers questions on grounds of institutional competence.¹¹⁰ As long as courts continue to employ the balance of powers analysis, this argument is a sound one. Because there is no reliable way to use the balance of powers metaphor to resolve separation of powers questions in a socially desirable way, courts can produce no social benefit by involving themselves in these disputes.

Suppose, however, that courts used conventional agency models to resolve separation of powers disputes. One might be more optimistic about the

¹⁰⁵ See Jide O. Nzalibe & Matthew C. Stephenson, Complementary Constraints: Separation of Powers, Rational Voting, and Constitutional Design, 123 Harv. L. Rev. 617 (2010).

¹⁰⁶ See, e.g., Torsten Persson, Gérard Roland & Guido Tabellini, Separation of Powers and Political Accountability, 112 Q. J. Econ. 1163, 1166 (1997), and, for criticisms, Eric A. Posner & Adrian Vermeule, The Executive Unbound 118-19 (2010).

¹⁰⁷ Federalist Nos. 47, 51, in *The Essential Federalist*, supra note ____.

¹⁰⁸ See Scalia's comment on Federalist 51, text accompanying supra note ____.

¹⁰⁹ Merrill, supra note ____.

¹¹⁰ See, e.g., Jesse H. Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* (Chicago 1980). This position can be traced back at least to Justice Holmes. See Sunstein, supra note ___, at 494-95.

consequences of adjudication because at least courts would be using a reliable method, one that lends itself to empirical analysis. However, it is far from clear that courts should involve themselves in what are essentially policy questions about the optimal role of government structure. They do not have any expertise in these matters, which are not legal questions at all.

One might respond with worries that if courts are not involved, constitutional values embodied in the separation of powers—which, recall, were intended to prevent “tyranny”—would be overridden by the political branches. But these worries are exaggerated. The literature on separation of powers is distinguished by the lack of connection between theory and practice. Congress is supposed to be self-aggrandizing, yet it has continuously delegated power to the executive for more than a half century. The judiciary, too, has largely deferred to the executive in administrative matters and foreign policy. For all the talk about an “imperial presidency,” there has been no serious political effort to withdraw powers from the executive since the early 1970s. The legal literature seems incapable of understanding that competition between the parties, not the branches of government, provides the main constraint on government today.¹¹¹ A more realistic account of the development of U.S. government structure is simply that Congress, the judiciary, and the executive have by and large worked together through the party system to transform an eighteenth-century government structure into a modern government structure, probably responding jointly to popular pressure for a government that is capable of implementing popular policies.

Thus, it is tempting to conclude that courts should invoke the political question doctrine whenever appointments issues or possibly any separation-of-powers issues arise.¹¹² Another approach, equally good in my view, would be for courts simply to enforce whatever statute Congress enacts on the grounds that the judiciary should not strike down a statute unless it has reason to believe that it is harmful in some way. Given that Congress has shown no reluctance to grant authority to the executive over the last sixty years, this judicial approach would not likely have any negative implications for presidential power.

Conclusion

The balance of powers metaphor has had a good run but it is time to put it to rest. It provides no practical guidance to courts when they adjudicate disputes between branches; nor does it reflect any reasonable constitutional goal. We might agree with Madison that all government powers should not be located in a single individual or group of magistrates, but once we rule out this extreme

¹¹¹ As noted by Pildes & Levinson, *supra* note __; this point has long been a commonplace in the political science literature.

¹¹² See Huq, *supra* note __; Choper, *supra* note __.

outcome, the concept of “balance” is too vague and slippery to serve as a workable rule.

It also distracts from the central question of optimal government structure. The reason we should care about, say, constraints on the removal power is not that those constraints upset some balance between Congress and the president. The reason is that those constraints may improve or worsen the performance of the bureaucracy. To determine whether they do, one must consider the particular body in question and ask why the constraints might be useful or harmful. Is this body likely to be captured by industry? Is it likely to be used for partisan purposes? In answering these questions, one should look at the history of the body (if there is any) and other elements of its structure. For example, an agency that is staffed by highly trained professionals with a narrowly defined mission might be less susceptible to industry capture; and an agency that can be manipulated so as to improve the president’s reelection prospects might be more susceptible to partisan abuse. As a result, most countries give independence to the central bank, as has the United States—and there is no need to worry about whether doing so upsets the balance of power between the branches. For other agencies, tradeoffs point in different directions, resulting in various optimal levels of independence. Again, balance plays no role in the analysis. Finally, in cases where the executive claims the power to violate laws, or not to defend those laws in courts, or to modify appropriations or impound funds—the question again is whether outcomes are likely to be better if the executive can act without congressional consent or not. One might believe that in some cases the answer is yes (for example, congressional micromanaging of military operations) and in other cases no (for example, impoundment or line-item vetoes) without also being required to take a position as to whether these views are consistent with some overriding balance. Policy experts already know this; it is time that judges and law professors learn it too.

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