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# Balance-of-Powers Arguments, the Structural Constitution, and the Problem of Executive "Underenforcement"

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ARTICLE

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BALANCE-OF-POWERS ARGUMENTS,  
THE STRUCTURAL CONSTITUTION,  
AND THE PROBLEM OF EXECUTIVE  
“UNDERENFORCEMENT”

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ERIC A. POSNER†

*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. Possible theories of the balance of powers are examined and all are rejected as unworkable and normatively implausible. Judges and scholars should abandon the balance-of-powers metaphor and instead address directly whether bureaucratic innovation is likely to improve policy outcomes. Additionally, implications for the underenforcement controversy are discussed.*

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## INTRODUCTION

The central metaphor in judicial opinions that addresses a clash between the Executive and Congress is the *balance of power*: the idea that neither branch should be powerful enough to dominate the other. In American constitutional law, the metaphor originates from Madison’s theory that governments should be divided into three branches—executive, legislative, and judicial—which must always remain in balance.<sup>1</sup> 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.<sup>2</sup>

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 glance seems geometrically precise, is elusive under close inspection. Power is famously difficult to define. It is even harder to quantify or assign “weight” to. Does balance of power mean that Congress and the President possess the same amount of power? Or merely that both branches play a role in determining policy outcomes (or some policy outcomes)? Or

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<sup>1</sup> 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.” THE FEDERALIST NO. 47, at 232 (James Madison) (David Wootton ed., 2003).

<sup>2</sup> 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) (“[T]he separation of powers has been urged . . . to establish a balance of governmental powers [during the seventeenth and eighteenth centuries].”).

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. Scholars agree that the Executive is immensely more powerful today than it was at the Founding and has concentrated power at the expense of the judiciary and Congress.<sup>3</sup> Does that mean that the 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 vast powers to the executive branch so that officials appointed by the President would be responsible for enacting and enforcing regulations.<sup>4</sup> 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 and the judiciary, providing the Executive with additional means to gather information, persuade the public, and enforce the law.<sup>5</sup> Should the courts withdraw power from the Executive in order to compensate for these advantages? Congress has grown in size from ninety-one members in 1789,<sup>6</sup> to 535 today. Did Congress become more powerful as a consequence of its greater size, or weaker because of the difficulties of cooperation among a large group of people? The party system was not anticipated

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<sup>3</sup> See ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 6-7, 50, 377, 418-19 (1973) (describing how the imperial presidency, created by wars abroad, has intensified its domestic power, while “[t]he great institutions—Congress, the courts, the executive establishment, the press, the universities, public opinion—ha[ve] to reclaim their own dignity and meet their own responsibilities”). See generally EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787-1984* (5th ed. 1984) (positing that there is a long-term trend that consolidates power in executive individuals and executive administrations).

<sup>4</sup> See Edward A. Purcell, Jr., *The Courts, Federalism, and the Federal Constitution, 1920-2000*, in 3 *THE CAMBRIDGE HISTORY OF LAW IN AMERICA: THE TWENTIETH CENTURY AND AFTER* (1920—) 127, 140-41 (Michael Grossberg & Christopher Tomlins eds., 2008) (providing an overview of structural and functional shifts the New Deal brought to the federal government, particularly the executive branch, vis-à-vis state and local governments).

<sup>5</sup> See John Maxwell Hamilton & Kevin Kosar, *How the American Government is Trying to Control What You Think*, WASH. POST (Sept. 24, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/09/24/the-new-propaganda-how-the-american-government-is-trying-to-control-what-you-think/> [<https://perma.cc/23QC-Y5XA>] (describing how government agencies and the incumbent President have used technology to shape public opinion); cf. Robert C. Power, *Technology and the Fourth Amendment: A Proposed Formulation for Visual Searches*, 80 J. CRIM. L. & CRIMINOLOGY 1, 1-2 (1989) (describing how technology has enhanced law enforcement capabilities).

<sup>6</sup> See *Party Division in the Senate, 1789-Present*, U.S. SENATE, <http://www.senate.gov/history/partydiv.htm> [<https://perma.cc/GAA6-TDP5>] (indicating that there were twenty-six Senate seats in 1789); *Congress Profiles*, U.S. HOUSE OF REPRESENTATIVES: HIST., ART & ARCHIVES, <http://history.house.gov/Congressional-Overview/Profiles/1st/> [<https://perma.cc/SJ5X-EPBF>] (noting that there were sixty-five House seats in 1789).

by the Founders. Is the balance of power upset when government is unified under one party, or would the balance be unaffected or improved?

For a possible analogy, consider the role that “balance of power” plays in the theory of international relations.<sup>7</sup> 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 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 might fall behind in an arms race, 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.<sup>8</sup> In both analogies, “balance” means peace, either external or internal, which 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 Court’s assertion that its 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 the infringement was not significant in light of other means of controlling the independent counsel at the President’s disposal.<sup>9</sup> 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

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<sup>7</sup> I borrow this analogy from Bentham. JEREMY BENTHAM, BENTHAM’S HANDBOOK OF POLITICAL FALLACIES 166 (Harold A. Larrabee ed., 1952). The Founders’ development of the separation of powers framework was, in fact, influenced by balance-of-power theory in the international relations context. See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1446-48 (1987) (describing how the balance of powers in the Articles of Confederation approximated a multilateral treaty among separate sovereign entities).

<sup>8</sup> M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 107-08 (2d ed. 1998).

<sup>9</sup> 487 U.S. 654, 691-93, 695-96 (1988).

protection.<sup>10</sup> The Court's reasoning is that a dual for-cause rule infringes more on the President's power than a single for-cause rule.<sup>11</sup> But can anyone reasonably believe that pension accountants charged with the task of regulating private firms represent a greater threat to presidential power than an independent counsel who can bring criminal charges against the President and his advisors? President Clinton's impeachment, instigated by an independent counsel,<sup>12</sup> should lay such a thought to rest.

In this Article, I supply a framework for analyzing claims about the balance of power between Congress and the Executive.

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.<sup>13</sup> 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.<sup>14</sup> *Horizontal* power refers to the relative vertical power of the different agents of government, conventionally divided into executive, legislative, and judicial branches. The Executive has maximum horizontal power if it possesses all the vertical power such that the legislature and judiciary are unable to coerce citizens independently.

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, but it 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 the focus of my analysis is on horizontal power and the notion of balance. I argue that the balance-of-power metaphor is not used consistently in judicial opinions and academic articles, although I do not claim that the concept of balance of powers is incoherent.<sup>15</sup> My main goal is conceptual: to

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<sup>10</sup> 561 U.S. 477, 486-87, 514 (2010).

<sup>11</sup> *Id.* at 492, 494-95.

<sup>12</sup> Robert W. Gordon, *Imprudence and Partisanship: Starr's OIG and the Clinton-Lewinsky Affair*, 68 *FORDHAM L. REV.* 639, 640-41 (1999).

<sup>13</sup> One might define power more broadly to include the power to change people's preferences. See, e.g., RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN* 29-49 (The Free Press 1990) (1960) (describing political power in terms of the power to persuade). I do not think this broader definition would change my argument, while it would introduce some conceptual complications.

<sup>14</sup> 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, 752 (1999).

<sup>15</sup> For arguments that the idea of balance of powers is incoherent because each branch is not a monolithic whole, see generally M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 *U. PA. L. REV.* 603 (2001).

provide an account of the balance of powers and its role in constitutional adjudication. To do this, I borrow some simple concepts from game theory, which clarify what exactly “power” means. These concepts also make clear the inconsistent ways that “balance of power” is used by the Supreme Court, and I ultimately suggest that the metaphor is not useful. A more promising approach is for the judicial department to address directly the social costs and benefits of proposed changes to government structure that end up in court.

## 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.<sup>16</sup> The Act lodged the Board in the Securities and Exchange Commission (SEC), and gave SEC commissioners the power to appoint and remove the Board members subject to a for-cause standard.<sup>17</sup> The SEC commissioners themselves enjoy independence: the President can also remove them only for cause.<sup>18</sup> Thus, the Board is protected by a double layer of insulation from presidential interference: Board members cannot be removed by the President, but rather only by SEC commissioners for cause, and SEC commissioners can only be removed by the President for cause.<sup>19</sup>

In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, the Supreme Court held that this arrangement violated the separation of powers.<sup>20</sup> 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 by impermissibly interfering with the executive power to enforce laws.<sup>21</sup>

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<sup>16</sup> Sarbanes-Oxley Act of 2002 § 101, 15 U.S.C. § 7211 (2012).

<sup>17</sup> More precisely, the Court assumed that the Act did this. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 485-87 (2010).

<sup>18</sup> There is no statute providing for the removal of SEC commissioners. HENRY B. HOGUE ET AL., CONG. RESEARCH SERV., R43391, INDEPENDENCE OF FEDERAL FINANCIAL REGULATORS 18-19 (2014). But the Supreme Court decided *Free Enterprise Fund* “with [the] understanding” that SEC commissioners can be removed only for cause. 561 U.S. at 487. See also *SEC v. Blinder, Robinson & Co.*, 855 F.2d 677, 682 (10th Cir. 1988) (“[T]he President has the power to remove [an SEC] commissioner for inefficiency, neglect of duty, or malfeasance in office.”).

<sup>19</sup> *Free Enter. Fund*, 561 U.S. at 486-87.

<sup>20</sup> *Id.* at 498. For some useful background, see generally 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).

<sup>21</sup> *Free Enter. Fund*, 561 U.S. at 492, 498.

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 limiting the Executive's power to remove is an impermissible restriction on executive power.<sup>22</sup> But the Supreme Court has never held that view.<sup>23</sup> 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 without cause.<sup>24</sup> In *Morrison v. Olson*, the Court upheld a statute that provided that the Attorney General could not remove independent counsel except with cause.<sup>25</sup> The *Morrison* Court blandly observed 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 activity," the reduction was incremental because the Attorney General and thus the President retained various ways of exerting control over the independent counsel.<sup>26</sup> The Court in *Free Enterprise Fund* distinguished these cases on the grounds that the Board was subject to a dual, rather than single, for-cause limitation.<sup>27</sup> But it did not explain why, if the incremental restrictions on executive power in *Humphrey's Executor* and *Morrison* were constitutional, the additional increment created by the dual for-cause limitation went too far. Just how far is too far?

The *Free Enterprise Fund* 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

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<sup>22</sup> See Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 597 (1994) ("The President's power over nominations and his exclusively held executive power strongly suggest that he must be able to remove federal officers who he feels are not executing federal law in a manner consistent with his administrative agenda."); see also Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 103 (1994) (arguing that the Founders envisioned the President to have the ability to discharge, at will, an official who "makes discretionary decisions about the content of public policy").

<sup>23</sup> Although *Myers v. United States*, 272 U.S. 52 (1926), could be interpreted as reflecting such a view, this interpretation was ruled out in subsequent Supreme Court jurisprudence.

<sup>24</sup> 295 U.S. 602, 631-32 (1935).

<sup>25</sup> 487 U.S. 654, 692 (1988).

<sup>26</sup> *Id.* at 695-96.

<sup>27</sup> *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 492-94 (2010).



influence. That is why the Constitution vests certain powers in the President that “the Legislature has no right to diminish or modify.”<sup>28</sup>

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,”<sup>29</sup> the Court held that the dual for-cause restriction encroaches on executive power.<sup>30</sup> But the Court did not explain why ebbs and flows in the relative power of the two branches have been tolerated in the past.

Justice Breyer’s dissent in *Free Enterprise Fund* 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 will *still* be “powerless to intervene” by removing the Board members if the Commission reasonably decides not to do so.<sup>31</sup>

In this and related passages, Justice Breyer argued that the dual for-cause restriction did not reduce presidential power “significantly”;<sup>32</sup> 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*.<sup>33</sup> 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 admits. 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.<sup>34</sup> 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

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<sup>28</sup> *Id.* at 500 (footnote omitted) (citations omitted).

<sup>29</sup> 487 U.S. at 714-15 (Scalia, J., dissenting).

<sup>30</sup> *Free Enter. Fund*, 561 U.S. at 492, 498.

<sup>31</sup> *Id.* at 525 (Breyer, J., dissenting).

<sup>32</sup> *Id.* at 536.

<sup>33</sup> *Id.* at 522.

<sup>34</sup> *Id.* at 499-500 (majority opinion).

President's hand since the President could no longer fire officials that Congress dislikes.

*Morrison* and *Free Enterprise Fund* also fail to address another question: 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 *Free Enterprise Fund*, and only the briefest mention 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,” can effectively be resisted.<sup>35</sup>

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.<sup>36</sup> As a result, we do not know whether the constitutional equilibrium would have prevailed if the independent counsel statute had been struck down by *Morrison*. 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.

The silence of the opinions on the location of the constitutionally-permissible balance of power is notable. 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 *Free Enterprise Fund*, the majority argued that the dual for-cause requirement was unprecedented,<sup>37</sup> while the dissent insisted that it did not differ meaningfully from restrictions in the statute book.<sup>38</sup> In *Morrison*, the majority pointed out that the President retains other means for controlling the independent counsel,<sup>39</sup> while the dissent argued that those other means were not sufficient.<sup>40</sup> 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 presumably would have believed that the balance of power at the Founding should be the constitutional baseline. Others might take a different position, but few people would likely 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.

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<sup>35</sup> *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting) (citation omitted).

<sup>36</sup> 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.

<sup>37</sup> 561 U.S. at 494-96.

<sup>38</sup> *Id.* at 548 (Breyer, J., dissenting)

<sup>39</sup> 487 U.S. at 692-93.

<sup>40</sup> *Id.* at 706-07 (Scalia, J., dissenting).

Balance-of-power reasoning in one form or another exists in numerous other cases involving the separation of powers.<sup>41</sup> It also can be found in other areas of constitutional law, such as in cases involving federalism.<sup>42</sup> The opinions in these cases are no more illuminating than those in *Free Enterprise Fund* and *Morrison*.

### B. *The Academic Literature*

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's argument that courts should not adjudicate separation of powers disputes.

In its usual form, [Holmes's 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.<sup>43</sup>

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<sup>41</sup> See, e.g., *Clinton v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring) (“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.”); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995) (deciding 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”); *Mistretta v. United States*, 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”); *Bowsher v. Synar*, 478 U.S. 714, 776 (1986) (White, J., dissenting) (“[T]he 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., concurring) (“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.”) (footnote omitted).

<sup>42</sup> In these cases, the Court claims that a balance of power must exist between the national government and the states. See, e.g., *United States v. Comstock*, 560 U.S. 126, 179 (2010) (Thomas, J., dissenting) (“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.’”) (alteration in original) (citation omitted). But this is a topic for another article.

<sup>43</sup> Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 495 (1987) (footnotes omitted).

To avoid such imbalances, Sunstein favors enabling courts to strike down statutes that undermine the values protected by the separation of powers.<sup>44</sup>

This type of thinking is often associated with the “functionalist” position on separation of powers, which embraces judicial enforcement of separation of powers to maintain a balance of power among the branches.<sup>45</sup> But the “formalist” position, in which each branch must exercise its characteristic power absent explicit deviations in the Constitution,<sup>46</sup> is arguably based on balance of powers 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.<sup>47</sup> The formalist can 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.<sup>48</sup>

Moreover, in order to avoid the charge of irrelevance, some formalists have relied on an idea roughly similar to the concept of balancing.<sup>49</sup> This is the idea that the Constitution prohibits “the encroachment or aggrandizement of one branch at the expense of the other,”<sup>50</sup> 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.<sup>51</sup> 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

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<sup>44</sup> *Id.* at 509-10.

<sup>45</sup> Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 232.

<sup>46</sup> *Id.* at 230.

<sup>47</sup> *Id.* at 233.

<sup>48</sup> 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.

<sup>49</sup> See John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1959-60 (2011) (discussing how “formalists subscribe to the idea that the Constitution adopts a freestanding separation of powers doctrine” that derives from the general constitutional structure).

<sup>50</sup> *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (per curiam).

<sup>51</sup> See generally Manning, *supra* note 49.

statute took too much power from the Executive and gave too much power to Congress. For instance, 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.<sup>52</sup>

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's 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,

[P]ermitting 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, limitations on the removal power inevitably tip the balance in Congress's favor.<sup>53</sup>

Calabresi and Yoo argue that in *Clinton v. City of New York*, in which the Court invalidated the line-item veto,<sup>54</sup> 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 . . . 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.<sup>55</sup>

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

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<sup>52</sup> Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 176 (1994).

<sup>53</sup> Steven G. Calabresi & Christopher S. Yoo, *Remove Morrison v. Olson*, 62 VAND. L. REV. EN BANC 103, 117 (2009) (footnote omitted); 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.").

<sup>54</sup> 524 U.S. 417, 448 (1998).

<sup>55</sup> Calabresi & Yoo, *supra* note 53, at 117.

officials or controlling the bureaucracy even if his decisions are restricted by the “for cause” rule.

The two sides of the debate simply differ in their assessment as to whether the independent counsel weakens the President, or whether any weakening of the President is justified by public policy considerations, including those underlying the theory of the separation of powers. Because neither side offers empirical evidence or even alludes 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,<sup>56</sup> delegation of power to the executive branch,<sup>57</sup> the establishment of special tribunals,<sup>58</sup> the line-item veto,<sup>59</sup> executive dominance of foreign relations,<sup>60</sup> sentencing guidelines,<sup>61</sup> judicial deference to agency interpretations,<sup>62</sup> and the impact of the party system on the structure of government.<sup>63</sup> A number of recent articles and books claim that the Bush

<sup>56</sup> See *infra* subsection IV.B.2.

<sup>57</sup> Greene, *supra* note 52, at 154.

<sup>58</sup> See generally Brian M. Hoffstadt, *Normalizing the Federal Clemency Power*, 79 TEX. L. REV. 561 (2001) (suggesting proposals to reform the Executive’s clemency power and potential balance of power challenges to two of the proposals—i.e., direct congressional regulation of the President’s clemency power and increased judicial scrutiny of the President’s clemency decisions on public policy grounds).

<sup>59</sup> See generally Antony R. Petrilla, Note, *The Role of the Line-Item Veto in the Federal Balance of Power*, 31 HARV. J. ON LEGIS. 469 (1994) (exploring the need for an executive line-item veto, proposals for a constitutional line-item veto amendment, and the dangers of a broad line-item veto power for the balance of power among the federal branches of government).

<sup>60</sup> See generally Michael P. Van Alstine, *Executive Aggrandizement in Foreign Affairs Lawmaking*, 54 UCLA L. REV. 309 (2006) (describing how Presidents have used the Constitution’s relative silence regarding the distribution of foreign affairs powers to create and unilaterally enforce foreign affairs obligations of the United States under international law, as well as assert domestic lawmaking authority to advance executive branch preferences in foreign affairs).

<sup>61</sup> See generally Mark Tushnet, *The Sentencing Commission and Constitutional Theory: Bowls and Plateaus in Separation of Powers Theory*, 66 S. CAL. L. REV. 581 (1992). Tushnet is skeptical about whether judges or anyone else can actually conduct balance-of-powers analysis, but gamely tries to do so himself. *Id.* at 585 (“Judges simply are not in a good position to determine whether an innovation is likely to have adverse long-term effects on the balance of powers, because they are not likely to know enough about how those effects might occur.”).

<sup>62</sup> See generally Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989) (positing that the Court repeatedly—e.g., in determining who holds the interpretive authority for organic statutes (i.e., *Chevron*), who may appoint agency heads and who may approve them, whether agency actions may be disapproved by formal legislative action short of the full lawmaking process, and whether the reasons for agency enforcement strategy may be subjected to judicial scrutiny—has decided in favor of the President and the agency, and against the possibility of an external check by Congress or the judiciary).

<sup>63</sup> See generally Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312 (2006). 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. *Id.* at 2347-49, 2354-59.

Administration expanded executive power at the expense of Congress.<sup>64</sup> Many other examples of scholarship linking balance of powers to substantive areas of the law can be found.<sup>65</sup> All of these arguments are variations on the theme that the Executive (or in some cases Congress) has overreached, thereby upsetting the balance of power, resulting in the need for the other branches to assert themselves more aggressively to rebalance the distribution of power. But in none of these cases are authors able to show that the balance of power was “upset.” They only demonstrate 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,<sup>66</sup> which favored the Executive—might be counterbalanced by a disadvantage in another area—for instance, approval of restrictions on removal,<sup>67</sup> which favored Congress.<sup>68</sup> 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.

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<sup>64</sup> See, e.g., BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 90-93, 95-99 (2010) (attacking the rise of signing statements and increased reliance on the Office of Legal Counsel during the Bush presidency); PETER M. SHANE, *MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY* 112-42 (2009) (outlining unprecedented expansions of executive power during the George W. Bush Administration). For the contrary view, see JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11* 38 (2012), conceding that while the Bush policies implemented in 2001 and 2002 expanded executive power in the national security arena, Congress and the judiciary “pushed back . . . like never before in our nation's history.”

<sup>65</sup> See, e.g., JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 46 (1938) (arguing that the bureaucracy may preserve the balance of powers); Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 *STAN. L. REV.* 989, 993 (2006) (“[T]he existing approach of separation of powers in criminal matters cannot be squared with constitutional theory or sound institutional design.”); Patrick M. Garry, *The Unannounced Revolution: How the Court Has Indirectly Effected a Shift in the Separation of Powers*, 57 *ALA. L. REV.* 689, 707-15 (2006) (positing that Congress has delegated excessive power to the judiciary by transferring authority to agencies which the judiciary supervises); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 *YALE L.J.* 2314, 2322-27 (2006) (proposing an “internal” separation of powers within the executive branch achieved through overlapping agency directives); Victoria F. Nourse & John P. Figura, *Toward a Representational Theory of the Executive*, 91 *B.U. L. REV.* 273, 287-88 (2011) (reviewing STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008)) (arguing that the unitary executive theory provides the Executive with a means for increasing its power).

<sup>66</sup> See *INS v. Chadha*, 462 U.S. 919, 958-59 (1983) (rejecting the use of a legislative veto on constitutional, balance-of-power grounds).

<sup>67</sup> See *Morrison v. Olson*, 487 U.S. 654, 693 (1988) (approving congressional limitations on the removal power of the Attorney General, which limits presidential control over independent counsel).

<sup>68</sup> But see *infra* notes 147-155 and accompanying text.

Only a few scholars have questioned the logic of the balance of powers.<sup>69</sup> A number of Articles have addressed the accuracy of its premises.<sup>70</sup> Sai Prakash criticized the balance-of-powers idea in part on the basis of its indeterminacy.<sup>71</sup> And Elizabeth Magill subsequently advanced several cogent criticisms in an article devoted to dismembering the concept.<sup>72</sup> Magill argued that balance-of-powers arguments are fatally flawed because it is impossible to determine the extent to which any statute or action affects the balance of power.<sup>73</sup> We lack a normative benchmark for evaluating claims about the balance of power and the branches are composed of individuals who represent diverse constituencies, so that a balance among different groups of the public can exist even if one branch dominates governance.<sup>74</sup>

Although I share Magill's skepticism, I believe that her criticisms go too far and that the kitchen-sink scope of her argument may have limited its

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<sup>69</sup> See, e.g., Magill, *supra* note 15, at 656 (“The basic failing [of the questions we ask to appropriately distribute government authority] is a mismatch between the nature of the distribution of government authority and [separation of powers,] the doctrine that purports to evaluate that distribution.”); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 581-82 (1984) (“Once one descends below the level of the branch heads named in the Constitution—Congress, President, and the Supreme Court—separation of powers ceases to have descriptive power.”). To be sure, many scholars have raised questions about whether the system of separation of powers produces good outcomes relative to other possible systems. See, e.g., Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 640 (2000) (“I reject Westminster as well as Washington as my guide and proffer the model of constrained parliamentarianism as the most promising framework for future development of the separation of powers.”); Adrian Vermeule, *The Invisible Hand in Legal and Political Theory*, 96 VA. L. REV. 1417, 1442 (2010) (“[U]niversal institutional ambition may be the best of the attainable regimes [under a separation of powers framework], even if universal self-restraint would be best of all.”). But my focus here is specifically on the logical and normative coherence of the balance of powers.

<sup>70</sup> See Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 951, 959 (2005) (arguing that separation of powers assumes that the branches will seek to maximize power, but observing that there is no reason to believe that the temporary occupants of the branches will internalize goals of institutional aggrandizement); Levinson & Pildes, *supra* note 63, at 2356 (noting that, for “[a]t least the heirs of Jacksonian realism,” separation of powers depends on “the actual political dynamics between the legislative and executive branches” and “these dynamics, in turn, depend centrally on political parties”).

<sup>71</sup> See Saikrishna B. Prakash, *Deviant Executive Lawmaking*, 67 GEO. WASH. L. REV. 1, 46-47 (1998) (suggesting that balance-of-powers arguments do not help resolve the constitutionality of the line-item veto); see also Neal Devins & Saikrishna B. Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 572 (2012) (“[C]laims about interbranch imbalances and executive lawlessness are question-begging and shed more heat than light.”). In Prakash's view, balance-of-powers doctrine has no basis in the constitutional text. *Id.* at 573.

<sup>72</sup> See generally Magill, *supra* note 15. The criticism was made even earlier by Jeremy Bentham. See BENTHAM, *supra* note 7, at 163-67. Various other observers and commentators in the eighteenth and nineteenth centuries have also criticized the idea. See VILE, *supra* note 8, at 127-28 (noting eighteenth and nineteenth century critics of the balance-of-powers approach).

<sup>73</sup> Magill, *supra* note 15, at 604-05.

<sup>74</sup> *Id.* at 608-626, 633, 645-49.



influence.<sup>75</sup> It is possible to provide a conceptually coherent account of the balance of power, or to 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 Article—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. ANALYZING THE BALANCE OF POWER

### A. Concepts

The complex relationship between rules and outcomes can be illustrated with a simple game theory example. In the divide-the-dollar game, two players, Alice and Bob, must agree on how to divide a single dollar. If they agree, they share the proceeds. If they do not agree, the dollar is destroyed.

Consider two versions of the game. In the first version (called the dictator game), Alice has the unilateral power to offer a particular division; Bob can only accept or reject. If Alice and Bob are both rational, Alice will keep 99 cents for herself and offer 1 cent to Bob—which we designate (99,1) for (Alice, Bob)—and Bob will accept. Bob will accept because he prefers 1 cent to nothing. Anticipating this response, Alice offers 1 cent rather than 98 cents, 50 cents, or any other amount, because that offer gives her the highest payoff.<sup>76</sup>

In the second version (let us call it the take-turns game), Alice makes the first offer, but Bob now has the choice to respond by making a counteroffer, whereupon Alice can either accept or make another counteroffer, ad infinitum. With each subsequent offer, the value that can be divided falls by 1 cent, reflecting the cost of delay (receiving a payoff today is better than receiving a payoff in the future). For example, if Alice offers (99,1), and Bob makes a counteroffer, Bob could respond with (1,98), (2,97), (50,49), or any other combination that adds up to 99 cents. In this game, the most plausible equilibrium is one in which Alice offers (50,50) in the first round because she fears that Bob will reject an offer that gives him less than half, and Bob accepts.<sup>77</sup>

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<sup>75</sup> Magill's article has not dammed the flow of balance-of-power arguments in the scholarly literature or the courts. See *supra* notes 55-65 and accompanying text.

<sup>76</sup> See Gary E. Bolton et al., *Dictator Game Giving: Rules of Fairness Versus Acts of Kindness*, 27 INT'L J. GAME THEORY 269, 270 (1998) ("The standard economic analysis of the dictator game pivots on the assumption that individuals prefer having more money to having less . . .").

<sup>77</sup> This is related to the Rubinstein bargaining model. See generally Ariel Rubinstein, *Perfect Equilibrium in a Bargaining Model*, 50 ECONOMETRICA 97 (1982). The actual analysis is a great

So given a basic setup—two players, a set of rules, and payoffs—we can isolate the effect of a change in the rules. In the dictator version of the game, the rule is that Bob must either accept or reject Alice’s offer. In the take-turns version, the rule is that Bob may make a counteroffer, and then Alice may respond. The change in the rule results in a change in the outcome: (99,1) versus (50,50). The concept of “bargaining power” is often used in this context to distinguish the relative positions of the two persons under the different rules. In the first example, Alice has all the bargaining power. In the second example, neither Alice nor Bob has bargaining power.

Bargaining power, under this conception, refers to the ability of one party to extract a greater-than-equal portion of the surplus that she generates through cooperation with the other. As the discussion has illustrated, bargaining power can change as a result of a change in the rules. One can usefully start with a benchmark distribution of bargaining power, and then use it to evaluate changes in the rules. For example, suppose that we believe that Alice and Bob should have no bargaining power: they should always split the surplus. To ensure that this happens, we use the take-turns rule. Now if someone proposes a switch to the dictator rule, a possible response is that such a change would upset the balance of power between Alice and Bob, allowing Alice to obtain nearly the entire surplus when she ought to receive only half.

This paradigm is not the only way to think about the balance of power,<sup>78</sup> but it is a useful starting point. It captures the idea that the balance of power is important because it leads to outcomes we care about, and that the balance of power is itself determined by the underlying rules that control parties’ behavior. Moreover, the assumption that balance of power means equal bargaining power (that is, no bargaining power for each party) captures the connotation of fairness and equilibrium.

### B. *Form Versus Substance*

In the example above with Alice and Bob, a change in the rules predictably produces a change in outcomes, but that need not be the case. A change in the rules might not lead to a change in outcomes; and a change in outcomes can result without a change in the rules. Examples of both cases follow.

*A change in the rules does not necessarily change outcomes.* Consider the take-turns version of the game again, where Alice offers (50,50) and Bob accepts. Suppose that an external agent changes the rules of the game by

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deal more complicated, and two qualifications should be noted. First, the division of the payoffs depends on the ratio of the players’ discount factors. *Id.* at 108. In the text, I assume they are equal. Second, I assume equal division is the equilibrium, but in the Rubinstein model, there may be multiple. *See id.* at 107.

<sup>78</sup> For other ways that balance of powers is discussed, see *infra* Section II.C.

giving Bob the option to inflict a negative payoff of 100 on Alice after she makes her offer, if he pays a fee of 10. From a formal perspective, the rule change favors Bob. He now has the option to do something that he could not do before. However, the rule does not change the outcome of the game. Bob prefers an outcome of (50,50) to an outcome where he decreases his payoff to inflict disproportionate loss on Alice.<sup>79</sup> Accordingly, he accepts Alice's offer rather than exercise the option to inflict the sanction.

*Outcomes may change without a change in the rules.* Again, consider the take-turns version of the game. Suppose that Alice becomes famous and beloved among the public, while Bob becomes extremely unpopular. Suppose further that the public will punish Bob with a sanction of -100 if he rejects an offer from Alice. Now, Alice will offer (99,1) and Bob will accept it in the first round in order to avoid the sanction of -100. In game theory terms, we have simply changed the payoffs; the change in payoffs leads to a change in behavior even though the rules themselves did not change.

The lesson is that a change in the rules (a change in form) is neither a necessary nor sufficient condition for a change in outcomes (a change in substance).

Let us consider this example in the context of the Executive (instead of Alice) and Congress (instead of Bob). The President and Congress receive positive payoffs if they agree on a policy but they bargain over how the payoffs are divided, and payoffs decline with delay. Thus, the divide-the-dollar model accurately describes the context of their interactions. Suppose further that the Constitution establishes the rules of the take-turns game, and the Founders implemented those rules because they sought to divide political payoffs equally between the President and Congress.

One way to think about this is to imagine that Congress and the President interact at specified moments on a timeline. Every time they interact, they can produce a new law or not. If they produce a new law, they generate a surplus for themselves. If the constitutional rules produce the same balance of power as the take-turns game does, then, whatever the surplus in any given action, Congress and the President each receive half of it. So their payoffs are: (50,50) in period 1, (50,50) in period 2, and so on.

Now suppose that one day the rules change. A simple example is that the Supreme Court announces that Congress can create an independent counsel with the power to investigate the President. Suppose that before this announcement, it was understood that Congress lacked the power to do this.

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<sup>79</sup> The actual analysis is a bit more complex. One must start at the end of the game and work backward. And for an infinite game, one can define an arbitrary subset of the game and demonstrate that neither party possesses a profitable deviation from some given strategy in that subset to show that the strategy is optimal. In this example, whenever Bob has the option, he will not use it because his payoff from using it is lower than his payoff from making a different move.

The new rule permitting an independent counsel is akin, albeit at a more modest level, to the change of the rule from take-turns to dictatorship (in favor of Congress, not the President). Now once the Supreme Court permits the congressional appointment of independent counsel, it may become possible for Congress to threaten the President with harassing investigations unless the Executive gives Congress a greater share of the surplus. From a formal standpoint, there is a change in the rules.

But whether the new rule actually gives Congress greater bargaining power depends on the political context in which it operates. Suppose it turns out that while the counsel can harass the President (generating a payoff of 100 for the Executive), use of the counsel also injures Congress by distracting the President from implementing laws that Congress cares about or riling up the public against Congress (generating a payoff of -10 for Congress). Thus, while the Supreme Court has given Congress a new power by changing the rules in Congress's favor, it does not change payoffs. The President is injured in a formal sense but not in a substantive sense.

As noted above, bargaining power and outcomes are determined by the political context as well as the rules. And so as we saw before, bargaining power and hence outcomes can change even though there is no formal change in the rules. Suppose the President becomes extremely popular after a war, and now the public gets angry whenever Congress fails to cooperate with the President's program. Even though the rules have not changed, Congress may receive a payoff of -100 if it refuses to enact a law proposed by the President, so now the President can propose laws that greatly favor his own agenda (99,1) and Congress will cooperate. The rules have not changed—outcomes have.

Thus, it should be clear that the effect of the independent counsel rule could vary over time. Perhaps in period 1, the President is popular; Congress cannot use the independent counsel power because of the risk of a public backlash. But in period 2, the President loses popularity, and now Congress can use the independent counsel to coerce a larger share of the surplus from the current interaction. By now, it should be clear that the relationship between form (the rules) and substance (the outcomes) is complicated. Changing the rules does not necessarily change outcomes, and outcomes can change despite an absence in the change of rules.

Now let us consider a third example. Suppose the independent counsel rule makes it easier for the President and Congress to pass laws by enhancing public trust. We could represent this effect by stipulating that the law would increase the joint payoff from 100 to 200 in any particular period. In principle, the parties could divide the payoff (100,100). But suppose that it costs nothing for Congress to use the counsel and—fearing the counsel—the President gives Congress a greater share of the surplus,

say (80,120), whenever they bargain over and reach agreement on various policies. Note that in this example, (1) the rule changes, (2) the President and Congress both enjoy higher payoffs than before, but (3) Congress gains more than the President does.

From a substantive standpoint, one might object to the independent counsel rule because the payoffs become unequal, or approve of it because the overall outcome is superior. One's views might also depend on exactly what distribution is produced. For example, one might object to (80,120) because the inequality is too extreme, but approve of (99,101) because the inequality is less extreme and a surplus is being generated. One's sense of an appropriate division could also depend on a historical benchmark. If one believes that the Founding era or another relevant benchmark established a division of (40,60), then distributions consistent with that division, even though unequal, may be appropriate. There are other possible ways to evaluate this rule, and we turn to them now.

### C. *Balance of Power in the Case Law*

Balance-of-power arguments in the Supreme Court typically arise in two instances: first, when Congress passes a law that appears to either take power from the Executive or to give additional power to it; and second, when the Executive engages in some action that is not clearly authorized by a statute. In all of these cases, it is possible to make a formalist argument that the statute or action violates the constitutional rules. Formalist arguments do not rely on the balance of power, which is a substantive idea. If the Court decides to resolve the dispute on formalist grounds, it holds that the rules were broken or not broken, and that is the end of it.

For example, in his dissent in *Morrison v. Olson*, Justice Scalia argued that the independent counsel statute is unconstitutional because it deprives the President of full control over an official who is authorized to conduct a criminal investigation, an act of executive power.<sup>80</sup> For Scalia, the rules provide that the President must control officials who engage in criminal investigations. By depriving the President of the power to remove the independent counsel, the independent counsel statute breaks the rules. No discussion of the change in the balance of the power between the President and Congress, if there is any, is warranted.

Complexities arise when the Court decides to resolve the dispute on substantive grounds. It becomes necessary to appeal beyond the rules, and it frequently happens that the Court appeals to the balance of powers.

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<sup>80</sup> 487 U.S. 654, 705-06 (1988) (Scalia, J., dissenting).

Before discussing the cases, I identify some possible ways of thinking about whether a rule or action violates the balance of powers:

- Minimalist: The rule of action is consistent with the balance of powers as long as there remains a way for another branch to check the active branch.
- Equal: The rule or action is consistent with equal balance of powers, or converts a previously unequal balance to an equal balance.
- Historical: The rule or action is consistent with, or results in, the balance of powers that existed at the time of the Founding (or other historical benchmark).
- Pareto: The rule or action improves outcomes for both the President and Congress, though it may give one or the other an advantage.
- Prioritarian: The rule or action results in payoffs that are (1) equal for the two branches, or (2) such that deviations from inequality may be justified if the increase in payoffs for the worse-off party is great enough.
- Status-quo-consistent: The rule or action does not change the status quo balance of powers.

All six approaches to the balance-of-power analysis can be found in Supreme Court cases.<sup>81</sup> The minimalist approach is one interpretation of Madison's argument that no single branch should accumulate all powers.<sup>82</sup> Many of the cases reflect this belief. In *Morrison*, for example, the court upheld the independent counsel statute because the President appoints the Attorney General, and thus can use that power of appointment to influence who is ultimately chosen as independent counsel,<sup>83</sup> at least in theory. The mere existence of a possible check satisfies the balance of power.<sup>84</sup>

However, *Morrison* and cases like it can be interpreted to require something more. The *Morrison* majority approved the independent counsel statute because the executive branch retains "sufficient control over the independent counsel."<sup>85</sup> The majority believes that the for-cause provision is not important enough to unbalance the relationship between the Executive and Congress, even if it formally impinges on the rules as Scalia saw them. It is, however, not clear which version of the substantive definition the majority uses. The most likely possibility is that the majority

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<sup>81</sup> See *infra* notes 83-96 and accompanying text.

<sup>82</sup> See *supra* note 1 and accompanying text.

<sup>83</sup> 487 U.S. at 671-72.

<sup>84</sup> The minimalist conception plays a large role in the academic commentary. Defenders of executive power in various contexts—including Jack Goldsmith, John Yoo, Adam Cox, and Cristina Rodríguez—identify checks on the President's power without trying to show that the checks are sufficient from the standpoint of a relevant substantive baseline. See *infra* notes 166-70 and accompanying text.

<sup>85</sup> 487 U.S. at 696.

saw the public advantages of the independent counsel and thought that they outweighed any marginal harm to executive power.<sup>86</sup> This is consistent with the Prioritarian view. Or the majority may have thought that the constraints the statute put on the Executive were practically nil, in which case it believed that the statute did not harm the balance, as per the Equality or the Status-quo-consistent view.

Justice Breyer's dissent in *Free Enterprise Fund* also reflects a substantive view. First, he points out that Presidents never test the for-cause clauses in various statutes by trying to fire people.<sup>87</sup> Perhaps the President never really needs to do so because his subordinates want to please him even if they do not fear being fired. If that is the case, the rules do not reduce the President's power, and the statute should be upheld on Equality or Status-quo-consistent grounds. Second, Justice Breyer posits that the dual for-cause rule may actually strengthen the President by keeping in place an official that the Commission would like to fire but the President wants to keep.<sup>88</sup> This is consistent with the Pareto view. Finally, Breyer makes the Prioritarian argument of the *Morrison* majority: "Where a 'for cause' provision is so unlikely to restrict Presidential power and so likely to further a legitimate institutional need," it should be upheld.<sup>89</sup> Here, the public benefits outweigh the incremental loss of power to the Executive.

The Historical view appears in many opinions as well, though typically as a rhetorical flourish. For example, in *Clinton v. City of New York*, Justice Kennedy, in concurrence, argues that the line-item veto is unconstitutional because it increased "the power of the President beyond what the Framers envisioned."<sup>90</sup> Justice Kennedy does not actually show that the President's power has increased beyond what the Framers envisioned. He does not discuss what the Framers envisioned at all, or cite any evidence. Indeed, the reasoning of the opinion is formalist rather than historical. He objects to the line-item veto because it gives the President what he thinks of as legislative power.<sup>91</sup>

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<sup>86</sup> This seems to be what Scalia meant when he criticized the majority for using a "balancing test." *Id.* at 711 (Scalia, J., dissenting).

<sup>87</sup> *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 524-25 (2010) (Breyer, J., dissenting).

<sup>88</sup> *Id.* at 525-26 (Breyer, J., dissenting).

<sup>89</sup> *Id.* at 532 (Breyer, J., dissenting).

<sup>90</sup> 524 U.S. 417, 452 (1998) (Kennedy, J., concurring).

<sup>91</sup> *See id.* at 451 ("The law establishes a new mechanism which gives the President the sole ability . . . to extract further concessions from Congress. The law is the functional equivalent of a line item veto . . .").

The Historical view plays a more interesting role in Justice Jackson's concurrence in *Youngstown Sheet & Tube*.

As to whether there is imperative necessity for such powers, it is relevant to note the gap that exists between the President's paper powers and his real powers. The Constitution does not disclose the measure of the actual controls wielded by the modern presidential office. That instrument must be understood as an Eighteenth-Century sketch of a government hoped for, not as a blueprint of the Government that is. Vast accretions of federal power, eroded from that reserved by the States, have magnified the scope of presidential activity. Subtle shifts take place in the centers of real power that do not show on the face of the Constitution.

Executive power has the advantage of concentration in a single head in whose choice the whole Nation has a part, making him the focus of public hopes and expectations. In drama, magnitude and finality his decisions so far overshadow any others that almost alone he fills the public eye and ear. No other personality in public life can begin to compete with him in access to the public mind through modern methods of communications. By his prestige as head of state and his influence upon public opinion he exerts a leverage upon those who are supposed to check and balance his power which often cancels their effectiveness.

Moreover, rise of the party system has made a significant extraconstitutional supplement to real executive power. No appraisal of his necessities is realistic which overlooks that he heads a political system as well as a legal system. Party loyalties and interests, sometimes more binding than law, extend his effective control into branches of government other than his own and he often may win, as a political leader, what he cannot command under the Constitution . . . 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.<sup>92</sup>

In the first sentence, Justice Jackson rejects the formalist approach. The eighteenth-century President had few law enforcement officers at his disposal. His entire legal staff consisted of a part-time Attorney General.<sup>93</sup> He did not command a standing army of consequential size or influence.<sup>94</sup>

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<sup>92</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 653-54 (1952) (Jackson, J., concurring) (footnote omitted).

<sup>93</sup> *About DOJ*, U.S. DEP'T OF JUST., <https://www.justice.gov/about> [<https://perma.cc/U8XL-ECC7>].

<sup>94</sup> See RUSSELL FRANK WEIGLEY, *THE AMERICAN WAY OF WAR: A HISTORY OF UNITED STATES MILITARY STRATEGY AND POLICY* 41 (1973) ("Suspicion of standing armies remained strong in all regions of the country . . . . The financial resources of the new government remained



He did not lead a well-organized political party.<sup>95</sup> He could not communicate instantly to the entire country. All this had changed by 1952, the year that the case was decided. Two points can be distinguished. A formalist approach that, for example, endorsed the President's authority over a vast army based on his commander-in-chief power allows him to dominate the other institutions of government in a way that he could not in the eighteenth century. Moreover, formalism is helpless to undo the accretions to presidential power that arguably do violate the rules—for example, the President's authority to make policy through regulation—because the Court lacks the political power and will.<sup>96</sup>

The executive branch is much more powerful than it was at the Founding. Jackson does not say or imply that courts should try to recreate the eighteenth-century balance of power. Unlike Kennedy, Jackson realizes that this would be meaningless—because the original balance of powers cannot be identified—or impossible—because a return to the original balance of powers would not be tolerated politically. In the end, Jackson does not endorse the Historical view. Instead, he uses the eighteenth-century baseline to argue that the Court should not tolerate further growth of executive power except when authorized by Congress. When would Congress hand over additional authority to the Executive? Presumably, either when the authority does not result in any weakening of Congress, perhaps because it is merely formal or even ceremonial, or when Congress itself benefits because it expects the Executive to use the additional power in a way that furthers Congress's interests. The first is Status-quo-consistent; the second is Pareto or Prioritarian.

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too limited, the prestige and popular standing of the government too precarious to permit ambitious military programs.”).

<sup>95</sup> See L. SANDY MAISEL & MARK D. BREWER, PARTIES AND ELECTIONS IN AMERICA: THE ELECTORAL PROCESS 26 (6th ed. 2012) (“[P]arties were weak and fragile in the early years of the nineteenth century. Partisan loyalties were not well established; political leaders themselves shifted frequently.”).

<sup>96</sup> A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537-38 (1935), for example, announced that “Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable,” but this pronouncement was an illustratively abortive effort to impose limits on that ability. See Douglas H. Ginsburg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 U. PA. J. CONST. L. 251, 257-59 (2010) (discussing political backlash to *Schechter Poultry* and the Court's subsequent retreat from the nondelegation doctrine).

#### IV. IMPLICATIONS: REVISITING CLAIMS ABOUT PRESIDENTIAL POWER

##### A. Recent “Imperial Presidency” Claims

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.<sup>97</sup> Bush defined a private criminal organization as a belligerent, ordered military forces to kill members of that organization without judicial process or 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 of these acts violated statutes.<sup>98</sup> Bush also drew on a broad interpretation of his commander-in-chief powers to justify disregarding statutes that he did not agree with.<sup>99</sup>

Many commentators gave special attention to torture.<sup>100</sup> Congress passed the Anti-Torture Statute in 1994, which in plain terms bars persons acting under color of law from engaging in torture.<sup>101</sup> The Bush Administration nonetheless authorized “enhanced interrogation techniques,” including waterboarding, which by any definition amounts to torture.<sup>102</sup> These techniques were used against at least three detainees, and possibly more.<sup>103</sup> Thus, it appears that the Executive flagrantly disregarded the will of Congress. The balance of powers broke down.

<sup>97</sup> See, e.g., Dahlia Lithwick, Opinion, *The Imperial Presidency*, WASH. POST (Jan. 14, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/01/12/AR2007011201952.html> [https://perma.cc/X8TT-KGJX] (arguing that Bush Administration antiterrorism action was driven not by policy need but by intentional efforts to expand executive power); *supra* note 64 and accompanying text.

<sup>98</sup> For an overwrought but comprehensive account of these actions, see CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY (2008).

<sup>99</sup> *Id.*

<sup>100</sup> See, e.g., JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION (2009); Editorial, *Prosecute Torturers and Their Bosses*, N.Y. TIMES (Dec. 21, 2014), <http://www.nytimes.com/2014/12/22/opinion/prosecute-torturers-and-their-bosses.html> [https://perma.cc/L2DZ-3MLZ]; Lithwick, *supra* note 97.

<sup>101</sup> Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, 18 U.S.C. § 2340 (2016).

<sup>102</sup> See Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1571-72 (2007) (discussing “interrogation methods that could not possibly be described as humane,” such as waterboarding, “in which the prisoner is smothered with water to make him feel he is drowning”; detention in a “cold cell,” “in which the prisoner is stripped naked, repeatedly doused with cold water and held in a cell kept nearly fifty degrees”; forced nudity; and the use of attack dogs to induce panic).

<sup>103</sup> Charlie Savage & Scott Shane, *Libyan Alleges Waterboarding by C.I.A., Report Says*, N.Y. TIMES (Sept. 6, 2012), <http://www.nytimes.com/2012/09/06/world/middleeast/libyan-alleges-waterboarding-by-cia-human-rights-watch-report-says.html> [https://perma.cc/PES3-7QRY].

By contrast, Jack Goldsmith argues that the Bush Administration authorized these techniques only after extensive legal analysis, and time and again faced constraints from outside the executive branch.<sup>104</sup> The CIA ensured that various executive branch institutions endorsed, or at least gave silent acquiescence to, coercive interrogation.<sup>105</sup> 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,<sup>106</sup> and the Obama Administration has repudiated it as well.<sup>107</sup> Although Goldsmith's account of "pushback" against presidential power relies to a large extent on public pressure, he gives some credit to Congress and suggests that the system of separation of powers was vindicated.<sup>108</sup>

How can one rigorously evaluate this debate? The arguments of many of the critics of the Bush Administration were formalist. Those critics argued that Bush upset the balance of power because he disregarded statutes that, under the constitutional rules, he was required to obey. Goldsmith's response is a classically substantive claim that, while the rules were evaded, the balance of power in substance was not overturned. Forces other than Congress made up for Congress's failure or inability to constrain the President.

Goldsmith does not show, however, that the normatively correct balance of power was maintained.<sup>109</sup> He does not, for example, make a historical argument that Bush acted consistently with the Founding-era balance of

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<sup>104</sup> GOLDSMITH, *supra* note 64, at 86-112.

<sup>105</sup> *Id.* at 96-98.

<sup>106</sup> See Mark Mazzetti, *Letters Give C.I.A. Tactics a Legal Rationale*, N.Y. TIMES (Apr. 27, 2008), <http://www.nytimes.com/2008/04/27/washington/27intel.html> [<https://perma.cc/J8XT-W7JH>] (citing waterboarding as a particularly severe interrogation tactic used primarily in the first two years after the 9/11 attacks); see also David Morgan, *Bush Puts CIA Prisons Under Geneva Conventions*, REUTERS (July 20, 2007), <http://www.reuters.com/article/2007/07/20/us-security-interrogations-idUSN2029519720070720> [<https://perma.cc/J8QM-H9A6>] (reporting the Bush Administration's July 2007 order that CIA interrogators comply with the Geneva Conventions against torture).

<sup>107</sup> See Clyde Haberman, *As Another Anniversary Passes, Still Waiting for Justice*, N.Y. TIMES: CITY ROOM (Sept. 11, 2012, 9:13 AM), <http://cityroom.blogs.nytimes.com/2012/09/11/as-another-anniversary-passes-still-waiting-for-justice/?scp=3&sq=obama%20waterboarding&st=cse> [<https://perma.cc/ELU4-CJPN>] ("[W]aterboarding . . . is a technique that the Obama [A]dministration agrees amounts to torture."); see also Savage & Shane, *supra* note 103 (reporting on the Obama Administration's "truth commission" to establish a definitive account of interrogation and detention in the post-9/11 era, as well as the Administration's repudiation of Bush-era interrogation techniques).

<sup>108</sup> GOLDSMITH, *supra* note 64, at 119-21.

<sup>109</sup> See generally Baher Azmy, *An Insufficiently Accountable Presidency: Some Reflections on Jack Goldsmith's Power and Constraint*, 45 CASE W. RES. J. INT'L L. 23 (2012).

power, as many critics say he should. Nor does he show that the external forces—the media, public interest groups, and so forth—were powerful enough to create a balance of power that, even if not historically correct, is normatively desirable. An optimistic view is that these forces ensured that the President’s actions advanced the public interest in a way that Congress approved. Congress did not fight back but nonetheless benefited, and hence the Prioritarian or Pareto definitions were satisfied.

Thus, the debate between Goldsmith and his critics cannot be joined until the underlying normative benchmark is clarified. If critics believe that only the historical balance of power is normatively justified, while Goldsmith takes a Pareto or Prioritarian view, then the real argument is about what is the right normative baseline, not about whether the ACLU or *New York Times* constrained the Bush Administration. However, an alternative view, which I pursue in the Conclusion, is that this is not the right way to argue about presidential power. How exactly the President and Congress divide the political payoffs from their interactions is less important than whether those interactions benefit the public.<sup>110</sup>

As if to prove the elasticity of the concept of power, conservatives who defended Bush’s use of power have come to the conclusion that Obama is the “imperial president.”<sup>111</sup> They point to his decision not to enforce the immigration laws against certain young people who lack immigration papers,<sup>112</sup> to use waivers to undermine the No Child Left Behind law,<sup>113</sup> and to launch a military intervention in Libya without congressional authorization.<sup>114</sup> Obama has also maintained most of the features of Bush’s approach to counterterrorism, expanding the drone program under which the

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<sup>110</sup> Cf. Magill, *supra* note 15, at 629 (criticizing the notion, which many scholars implicitly rely upon, that “[d]iscussions of the need to prevent aggrandizement or to preserve balance among the departments assume that balance among the three branches is an end in itself”).

<sup>111</sup> See, e.g., Charles Krauthammer, Opinion, *The Imperial Presidency Revisited*, WASH. POST (July 5, 2012), [https://www.washingtonpost.com/opinions/charles-krauthammer-the-imperial-presidency-revisited/2012/07/05/gJQAR66PQW\\_story.html](https://www.washingtonpost.com/opinions/charles-krauthammer-the-imperial-presidency-revisited/2012/07/05/gJQAR66PQW_story.html) [https://perma.cc/Q3KU-QCD4] (“During the Bush 43 years, we were repeatedly treated to garment-rending about the imperial presidency . . . . Yet the current [Obama] [A]dministration’s imperiousness has earned little comparable attention.”); Kimberley Strassel, Opinion, *Obama’s Imperial Presidency*, WALL ST. J. (July 5, 2012), <http://online.wsj.com/article/SB10001424052702304141204577506881495497626.html> [https://perma.cc/6FQX-P3CJ] (“Mr. Obama has granted himself unprecedented power.”).

<sup>112</sup> Charles Krauthammer, Opinion, *The Immigration No-Brainer*, WASH. POST (July 10, 2014), [https://www.washingtonpost.com/opinions/charles-krauthammer-the-immigration-no-brainer/2014/07/10/a7e8723c-085a-11e4-bbf1-cc51275e7f8f\\_story.html](https://www.washingtonpost.com/opinions/charles-krauthammer-the-immigration-no-brainer/2014/07/10/a7e8723c-085a-11e4-bbf1-cc51275e7f8f_story.html) [https://perma.cc/5TWV-F5EJ].

<sup>113</sup> See Caitlin Emma, *Are New No Child Waivers Illegal?*, POLITICO (Aug. 23, 2013), <http://www.politico.com/story/2013/08/arne-duncan-no-child-left-behind-waivers-095818> [https://perma.cc/A7XR-SRQ6] (quoting conservative scholars critical of President Obama’s decision to grant certain states and school districts waivers to No Child Left Behind).

<sup>114</sup> Editorial, *Obama’s Illegal War*, WASH. TIMES (Mar. 18, 2011), <http://www.washingtontimes.com/news/2011/mar/18/obamas-illegal-war/> [https://perma.cc/K5EA-GRRC].

executive branch determines who will be killed overseas, including American citizens.<sup>115</sup> Obama has not cited his constitutional powers as enthusiastically as Bush did,<sup>116</sup> but Obama's lawyers have also not repudiated the Article II theory and could draw on it if they believed it necessary.<sup>117</sup> The ambiguity of the constitutional baseline also makes it difficult to compare the horizontal power of Bush and Obama.

### 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;<sup>118</sup> whether Congress can control the President's management of military operations<sup>119</sup> or foreign relations more generally;<sup>120</sup> whether the President enjoys emergency powers that allow him to disregard statutes during crises;<sup>121</sup> whether the President can keep secrets from Congress;<sup>122</sup> and whether the President and other

<sup>115</sup> Scott Shane, *Drone Strikes Reveal Uncomfortable Truth: U.S. Is Often Unsure About Who Will Die*, N.Y. TIMES (Apr. 23, 2015), <http://www.nytimes.com/2015/04/24/world/asia/drone-strikes-reveal-uncomfortable-truth-us-is-often-unsure-about-who-will-die.html> [<https://perma.cc/R39R-FNQS>].

<sup>116</sup> See Gordon Silverstein, *The Law: Bush, Cheney, and the Separation of Powers: A Lasting Legal Legacy?*, 39 PRESIDENTIAL STUD. Q., Dec. 2009, at 878, 883, 893 (contrasting Bush's expansive approach to executive power with Obama's more traditional approach).

<sup>117</sup> See Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1106 (2013) (giving the Obama Administration's argument for military operations in Libya without express Congressional authorization as an example of an appeal to historical practice to expand presidential power).

<sup>118</sup> See, e.g., David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113, 123-135 (1993) (arguing that the executive branch must follow judicial interpretation but may "shad[e] the doctrine slightly to permit more executive power"); cf. Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199, 201-202 (1994) (asserting that when a law infringes on the Executive's constitutional powers, the President can "decline to abide by it").

<sup>119</sup> 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, 947-50 (2008) (contending that Congress has historically been and should continue to be "an active participant in setting the terms of battle").

<sup>120</sup> See, e.g., H. Jefferson Powell, *The President's Authority Over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 540-55 (1999) (explaining the nature of the powers granted to the President and to Congress over foreign affairs).

<sup>121</sup> See, e.g., Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1047-1056 (2004) (maintaining that "[t]he Executive should be given the power to act unilaterally only for the briefest period—long enough for the legislature to convene and consider the matter, but no longer. If the legislature is already in session, one week seems the longest tolerable period; if not, two weeks at most"); 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).

<sup>122</sup> See, e.g., Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489, 533-34 (2007) (asserting that in circumstances where executive secrets are outside Congress's legislative and oversight powers, the executive should not be forced to divulge them).

executive officials enjoy immunities from prosecution for actions they undertake in the course of their duties.<sup>123</sup> 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.<sup>124</sup> 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*.<sup>125</sup>

As we saw earlier,<sup>126</sup> the debate about the removal power has largely proceeded along the lines dictated by the balance-of-power metaphor. Critics of for-cause requirements, like Justice Scalia in his *Morrison* dissent,<sup>127</sup> argue that for-cause requirements tilt the balance of power in Congress's favor; defenders, like Justice Breyer in his *Free Enterprise Fund* dissent,<sup>128</sup> argue that for-cause requirements do not upset the balance of 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 suggests that the for-cause requirement will shift the surplus in Congress's favor; it is not clear that this would be 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.<sup>129</sup> Indeed, President Carter backed and signed the Ethics in Government Act,<sup>130</sup> 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

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<sup>123</sup> See, e.g., Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 COLUM. L. REV. 1612, 1612-16 (1997) (delineating how "nonstatutory review" can be used by the courts to exercise control over executive action).

<sup>124</sup> See *supra* note 22 and accompanying text.

<sup>125</sup> See *supra* note 21 and accompanying text.

<sup>126</sup> See *supra* subsection I.A.

<sup>127</sup> See *supra* note 29 and accompanying text.

<sup>128</sup> See *supra* notes 87-89 and accompanying text.

<sup>129</sup> A similar point is made by Justice Breyer in *Free Enterprise Fund* regarding the potential for the executive branch to empower impartial adjudication and technical regulation by constraining the President's ability to terminate executive branch officials. *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 522 (2010) (Breyer, J., dissenting).

<sup>130</sup> Pub. L. No. 95-521, 92 Stat. 1824-67 (1978) (codified as amended in scattered sections of 2, 5 & 28 U.S.C.).

repaired after Watergate. On this view, the 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's—the question is how much it reduced his power. 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.<sup>131</sup> Some agencies that are nominally independent are in fact sensitive to the President's agenda, and other agencies that are nominally nonindependent are in fact able to deviate from the President's agenda.<sup>132</sup> For example, the Bush Administration suffered a political setback when it fired lawyers in the nonindependent Justice Department, suggesting that political norms confer independence, of a sort, on that agency.<sup>133</sup> By contrast, according to Vermeule, the National Labor Relations Board (NLRB) enjoys statutory independence but in fact is highly politicized.<sup>134</sup> 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 in 1999).<sup>135</sup> But 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.

The baseline problem poses an even greater issue. 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 was notably silent on this issue, referring only to our “former constitutional system,”<sup>136</sup> which may refer to the system that existed just prior to the decision, the system at the Founding, or the system at some other time period. The problem for Scalia was 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

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<sup>131</sup> Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1166 (2013).

<sup>132</sup> *Id.* at 1165-66.

<sup>133</sup> *Id.* at 1167.

<sup>134</sup> *Id.* at 1179-80.

<sup>135</sup> Carol Elder Bruce, Opinion, *An Independent Counsel Law Needs to Be Restored*, N.Y. TIMES: ROOM FOR DEBATE (June 13, 2012), <http://www.nytimes.com/roomfordebate/2012/06/13/did-any-good-come-of-watergate/an-independent-counsel-law-needs-to-be-restored> [<https://perma.cc/UQV6-XBFE>].

<sup>136</sup> *Morrison v. Olson*, 487 U.S. 654, 714-15 (1988) (Scalia, J., dissenting).

the baseline is instead the balance of power on the day before the statute was enacted (as entailed by the Status-quo-consistent definition), the question is why that date should be the baseline.

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.<sup>137</sup> Or one might defend for-cause requirements on the grounds that Presidents pressure 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.<sup>138</sup>

My point is 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, academics, commentators, or the public—and obscures 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.<sup>139</sup>

## 2. The Legislative Veto

In *INS v. Chadha*, 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.<sup>140</sup> The majority's formalist opinion held that the statute violated presentment (because the purported veto was in effect legislation not signed by the President) and bicameralism (because, under this arrangement, only one house would need to approve a resolution purporting to invalidate the executive branch's decision), and left it at that.<sup>141</sup> Justice Powell's concurrence, however, argued

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<sup>137</sup> Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 101-03 (1994).

<sup>138</sup> But arguments from democratic theory should probably be avoided. See Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 6 (2013) (“[J]udicial enforcement of presidential removal authority will not reliably promote presidential control or democratic accountability.”).

<sup>139</sup> Cf. Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 413-14 (2012) (discussing the role of tradition in separation-of-powers disputes).

<sup>140</sup> 462 U.S. 919, 923, 959 (1983).

<sup>141</sup> *Id.* at 946-51.



that the legislative veto should be struck down because it represents an excessive accumulation of power in Congress, albeit judicial rather than executive power.<sup>142</sup> 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.<sup>143</sup> For example, "In the energy field, the legislative veto served to balance broad delegations in legislation emerging from the energy crisis of the 1970's."<sup>144</sup> 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.<sup>145</sup> 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. Justice White's argument echoes Justice Jackson's argument that the historical shift in the balance of power in the President's favor justifies judicial opposition to actions that further strengthen the President (as in *Youngstown*) or judicial support of actions that strengthen Congress (as in *Chadha*).

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."<sup>146</sup> 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.<sup>147</sup>

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<sup>142</sup> *Id.* at 966-67 (Powell, J., concurring).

<sup>143</sup> *Id.* at 970-74 (White, J., dissenting).

<sup>144</sup> *Id.* at 971.

<sup>145</sup> *Id.* at 970-71.

<sup>146</sup> William N. Eskridge, Jr. & John Ferejohn, *Constitutional Horticulture: Deliberation—Respecting Judicial Review*, 87 TEX. L. REV. 1273, 1296-97 (2009).

<sup>147</sup> 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"); William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 540-43 (1992) (arguing that the legislative veto was needed to ensure balance of powers from the perspective of the original understanding of the Constitution); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1825-26 (1996) (same); 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, 419-20 (2000) (discussing the debate over whether *Chadha* upset or restored the balance of powers).

In an earlier Article on the legislative veto, Professors Eskridge and Ferejohn employed a spatial model to defend Justice White's position.<sup>148</sup> Eskridge and Ferejohn argue that under the original understanding, Congress had 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 (when 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's. Agencies do so because the power to initiate legislation, which greatly influences the ultimate outcome, has shifted from Congress to the agency where regulatory power has been delegated, and congressional efforts to revise regulations it dislikes requires a supermajority because of the President's veto threat. 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.<sup>149</sup> 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's ideal point. Thus, consistent with the understanding of the Founders, the policy outcome is more closely aligned with Congress's 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 "offsets" to a certain extent the additional power transferred to the Executive with the rise of the administrative state, but they ignore all the other ways in which constitutional and political developments have affected the "balance" between the branches. For instance, the Executive has also obtained power relative to Congress as a result of developments in communications technology. According to Eskridge and Ferejohn's logic, that imbalance would justify further constraints—say, a one-house veto, which Eskridge and Ferejohn suggest is constitutionally defensible only under

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<sup>148</sup> See generally Eskridge & Ferejohn, *supra* note 147.

<sup>149</sup> *Id.* at 563-64.

certain assumptions.<sup>150</sup> 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 Executive detention,<sup>151</sup> 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.<sup>152</sup> 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, 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 and even continuous reactions to changing events—something Congress is institutionally incapable of providing. The President now has a more unified national constituency, but during the Founding and up until the Civil War, people were more inclined to think of the nation as a collective of states rather than as a single national population, justifying greater influence for Congress. But if we accept these reasons for rejecting the Founding-era baseline, 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.<sup>153</sup> 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. Alternatively, perhaps the ability to

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<sup>150</sup> *Id.* at 540-43.

<sup>151</sup> See *Boumediene v. Bush*, 553 U.S. 723, 771 (2008) (recognizing habeas jurisdiction over Guantanamo Bay detainees); *Hamdan v. Rumsfeld*, 548 U.S. 557, 566 (2006) (providing that, despite provisions of the Detainee Treatment Act of 2005, the Supreme Court could review the executive detention and military commission trials of Guantanamo Bay detainees).

<sup>152</sup> Eskridge & Ferejohn, *supra* note 147, at 556-57.

<sup>153</sup> See generally Eskridge & Ferejohn, *supra* note 147. At least one scholar finds no evidence for this assumption in the area of education law. See generally Jessica Korn, *Improving the Policymaking Process by Protecting the Separation of Powers: Chadha & the Legislative Vetoes in Education Statutes*, 26 POLITY 677 (1994). For a similar view based on an examination of the evidence, see generally Harold H. Bruff & Ernest Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369 (1977).

enact legislative vetoes causes Congress to delegate excessively; a prohibition on legislative vetoes (like the nondelegation doctrine itself, which Eskridge and Ferejohn support<sup>154</sup>) may make Congress more reluctant to confer power on the Executive. Indeed, Eskridge and Ferejohn suggest that Congress can respond to the invalidation of the legislative veto by delegating less, in which case the legislative veto would not upset the balance of power.<sup>155</sup>

It is quite difficult to say what the effect of the invalidation of the legislative veto might have on the balance of powers. 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. *The Underenforcement Controversy*

In recent years, President Obama has come under criticism for failing to enforce certain federal laws. The most sustained criticism has been directed at two immigration orders—one directing immigration authorities to defer removal of children who were brought into the country illegally (DACA), and another directing authorities to defer removal of unauthorized migrants who are parents of citizens or lawful permanent residents (DAPA).<sup>156</sup> Obama has also been accused of “underenforcing” the Affordable Care Act,<sup>157</sup> federal drug laws,<sup>158</sup> and No Child Left Behind.<sup>159</sup>

Some critics simply argue that the President has an obligation to enforce the law, and policies like DACA and DAPA violate that obligation.<sup>160</sup> However, Congress has not appropriated enough funds to enable the President to deport more than a small fraction of illegal immigrants,<sup>161</sup> and the President cannot be expected to do the impossible. A more sophisticated

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<sup>154</sup> Eskridge & Ferejohn, *supra* note 147, at 558.

<sup>155</sup> *Id.* at 545-46.

<sup>156</sup> Matt Ford, *A Ruling Against the Obama Administration on Immigration*, THE ATLANTIC (Nov. 10, 2015), <http://www.theatlantic.com/politics/archive/2015/11/fifth-circuit-obama-immigration/415077/> [<https://perma.cc/TR5D-XC5W>].

<sup>157</sup> See Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 749-54 (2014) (discussing how President Obama has delayed for substantial periods the enforcement of key provisions of the Affordable Care Act).

<sup>158</sup> Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 783 (2013).

<sup>159</sup> Emma, *supra* note 113.

<sup>160</sup> See generally Delahunty & Yoo, *supra* note 158.

<sup>161</sup> See Tom Cohen, *Obama Seeks Emergency Immigration Funds, More Authority*, CNN (July 8, 2014), <http://www.cnn.com/2014/07/08/politics/immigration/> [<https://perma.cc/J6VY-537V>] (noting that President Obama sought an emergency funding request from Congress for \$3.7 billion, but the Senate's immigration reform bill would have appropriated \$30 billion in proposed border security funding).

strain of criticism recognizes that by tradition and (supposedly) the text of the Constitution, the President enjoys independent authority as the Executive. Prosecutorial discretion, for example, is an entrenched feature of American legal practice, and has been for centuries.<sup>162</sup> The challenge is to reconcile the tradition of independence and the obligation to enforce the law. Zachary Price tries to resolve this tension by declaring that the President cannot issue “categorical” pronouncements about enforcement but is allowed to make case-by-case decisions, or delegate case-by-case discretion to subordinates.<sup>163</sup> This argument makes little sense. Categorical pronouncements have frequently been used to direct executive branch subordinates,<sup>164</sup> and they provide greater transparency, predictability, and guidance than case-by-case delegation does.<sup>165</sup>

What limits are there on presidential power, then? Could the President refuse to enforce the tax code against people he finds sympathetic, or he genuinely believes deserve tax relief, or against his political supporters? Adam Cox and Cristina M. Rodríguez, in a lengthy defense of DACA and DAPA, argue that there are certain “limiting principles.”<sup>166</sup> Ironically, they find those limiting principles in congressional action. For example, Congress could put limits on the President’s discretion, use its appropriations power to push back on presidential action, or limit the President’s power to supervise subordinates.<sup>167</sup> They also argue that, as a practical matter, public opinion and the bureaucracy constrain the President.<sup>168</sup> If subordinates are reluctant to carry out the President’s order, this is itself a kind of check on presidential power. These arguments are similar to Goldsmith’s.<sup>169</sup> They also echo the arguments of defenders of unilateral executive warmaking power. John Yoo, for example, argues that his broad interpretation of the Vesting and Commander-in-Chief Clauses does not upset the balance of power because Congress can check the President by denying him appropriations.<sup>170</sup>

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<sup>162</sup> See generally Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243 (2010).

<sup>163</sup> Price, *supra* note 157, at 675. For similar arguments, see generally Delahunty & Yoo, *supra* note 158.

<sup>164</sup> See generally Daniel T. Deacon, Note, *Deregulation Through Nonenforcement*, 83 N.Y.U. L. REV. 795 (2010) (providing an overview of the Bush Administration’s pervasive use of blanket nonenforcement policies to pursue policy objectives).

<sup>165</sup> See generally Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104 (2015) (defending DACA and DAPA as more transparent, predictable, and centralized than individualized discretion). Their argument has a clever jiu-jitsu element to it. Though President Obama’s critics point out that he violated the “rule of law” by failing to enforce immigration law, Cox and Rodríguez argue that he actually advanced the “rule of law” by enforcing the law in a more “transparent” and “predictable” manner. *Id.* at 174.

<sup>166</sup> *Id.* at 210-14.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 143 n.114, 170 n.187.

<sup>169</sup> See *supra* notes 104-108 and accompanying text.

<sup>170</sup> John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 295 (1996).

These arguments could be interpreted as asserting the Minimalist conception of the balance of power. As long as Congress retains some means to check the Executive, the new assertion of executive power does not upset the balance. It is doubtful, however, that these authors would accept this interpretation. The Minimalist view implies that an adequate response to a complaint about presidential overreaching is to point out that there remain “checks” on the President’s power, as if the President could go too far only by abolishing Congress, the courts, and civil society. The authors seem to employ a more robust sense of the balance of powers—perhaps the Equality, or Prioritarian, or Originalist sense—but they do not articulate it and do not try to show that the constitutional schemes they envision are consistent with it.<sup>171</sup>

The balance of power argument, the talk of checks and balances, is a sideshow. These scholars are most persuasive when they abandon these concepts and simply make an argument that the particular problem at hand requires an institutional structure that gives the President a primary, but not unlimited, role. Cox and Rodríguez’s best argument is that DACA and DAPA are justified by the simple fact that Congress has not given the President resources to remove all illegal immigrants; there is a broad consensus that the limited resources should be used for criminals; and the enforcement system will be fairer, more transparent, and more efficient if the criteria for removal are published rather than concealed.<sup>172</sup> Notice that this argument does not appeal to checks and balances.

Goldsmith’s best argument is that counterterrorism requires secrecy and speed, and so it cannot be debated openly in Congress; that the executive branch has (in his view) implemented adequate review procedures to minimize error; and that the media, leaks from the executive branch, and the vestigial roles of Congress and the courts further minimize errors while not posing an excessive threat to secret operations.<sup>173</sup> Agree with him or not, one need not invoke the balance of power.

Whether we are arguing about “underenforcement” of statutes or defiance of Congress and the courts, we can debate how the President should act—and what powers he should be allowed to have—without falling back on the balance of powers. The concept has long been ceremonial rather than useful; a nod to the Founders in times of turmoil. It can now be abandoned.

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<sup>171</sup> Yoo, however, has tried to defend his view by citing history. *Id.*

<sup>172</sup> See *supra* notes 165-68 and accompanying text.

<sup>173</sup> See *supra* notes 104-08.

## 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. It rests on empirical premises about interbranch struggle that have little support in American history, while ignoring other empirical factors (notably, the party system) that are vastly more important. It does not reflect any reasonable constitutional goals. We can 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 outcome, the concept of “balance” is too vague and slippery to serve as a workable guiding principle.

It also distracts from the central question of optimal government structure. The reason we should care about 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 among 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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