The Revolution that Wasn't

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I. INTRODUCTION

A principal legacy of the Rehnquist Court is its revitalization of doctrines associated with federalism. That jurisprudence has many critics and many defenders. They disagree about how to describe what has happened, the importance of what has happened, and the wisdom of what has happened. But they all agree that something has happened. There has been genuine innovation in this area of constitutional law.

Not so with separation of powers doctrine. Commentators do not perceive important shifts in the doctrine. Nor should they—the reasoning and results in the Rehnquist Court cases are of a piece with what came before. Lack of "revolution" (using the term loosely) was not for lack of opportunity. The Supreme Court had many opportunities to revise its doctrines. And, from the perspective that the Court has invoked in explaining many of its federalism cases, there is much—very much, in fact—that is not right about the structure of the federal government and the constitutional rules that permit that structure.

This paper asks why there has been no "revolution" in separation of powers jurisprudence during the Rehnquist Court. Many would expect doctrinal developments in federalism and separation of powers to track one another. Investigating why they have not done so reveals, in fact, that the internal and external factors that influence the developments in the two areas are quite different.
II. READING THE REHNQUIST COURT

A. A Federalism Revolution

The Rehnquist Court has worked important changes in the doctrines relating to federalism. For the first time since the post-New Deal period, the Court has invalidated some acts of Congress as beyond the scope of the commerce power, making clear in the process that there are some judicially enforceable outer limits on the scope of that power.\(^1\) It has also invalidated some acts of Congress on Tenth\(^2\) and Eleventh Amendment\(^3\) grounds. And it has held invalid some exercises of Congress’s power under Section 5 of the Fourteenth Amendment.\(^4\) While their long-range effects are not entirely clear, taken together the Court’s rulings plainly restrict the scope of federal power.

B. Separation of Powers

The Rehnquist Court had a steady stream of separation of powers cases,\(^5\) and it becomes a flood if one includes Article III standing cases.\(^6\) Several of the cases were high-profile and politically salient. The Court validated the Independent Counsel Act\(^7\) and the creation of the U.S. Sentencing Commission;\(^8\) it invalidated the line-item veto\(^9\) and rebuffed President Clinton’s executive-power based claim that he was entitled to a stay in

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a civil suit arising out of actions he took before he was President. There were low-profile cases as well, some of them consequential. The Court invalidated a statute extending the statute of limitations for securities fraud cases; it rejected a challenge to a statute on Origination Clause grounds; it sustained delegations of authority from Congress to the executive and the judiciary; and it evaluated several Appointments Clause cases.

In contrast to the Rehnquist Court’s federalism decisions, these cases had no notable impact on separation of powers law. This claim is difficult to prove. For instance, perhaps some years hence the line-item veto case will be the centerpiece of an invigorated separation of powers jurisprudence. Oddly enough, that invigorated doctrine could go in two different directions. If the dissenters’ views of what was at stake in the case—namely, that the case was about the permissible scope of delegations to the executive—the invalidation of the veto could conceivably later be read to restrict the sort of authority Congress can delegate to the executive. Or the case might be read as a pro-legislative power opinion in the sense that the functional complaint about the veto was that it diminished legislative power relative to the President. The President’s power was enhanced, so went the argument, because the line-item veto undermined Congress’s ability to get what it wanted by bundling proposals together and forcing the President to an all-or-nothing choice on a Congressionally-designed package. On that reading, the invalidation of the line-item veto could portend other Congress-friendly decisions.

These speculative predictions notwithstanding, most commentators do not perceive dramatic changes in separation-of-powers jurisprudence. As for the black-letter doctrine itself, only one case (Morrison v. Olson, dis-

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10 Jones, 520 U.S. 681.
11 Plaut, 514 U.S. 211; see also Miller, 530 U.S. 327.
16 Clinton v. City of New York, 524 U.S. 417, 465 (1998) (“It is [the nondelegation] doctrine, and not the Presentment Clause, that was discussed in the Field opinion, and it is this doctrine, and not the Presentment Clause, that is the issue presented by the statute before us here.”) (Scalia, dissenting).
17 The majority in the line-item veto case may have gestured toward this argument when it noted, “[o]ur first President understood the text of the Presentment Clause as requiring that he either ‘approve all the parts of a Bill, or reject it in toto.”’ Id. at 440. Whether the Court is invoking this argument, it is a conventional one against a legislative veto. See M. Elizabeth Magill, Beyond Powers and Branches in Separation of Powers Law, 150 U. PA. L. REV. 603, 627 & n.69 (2001).
cussed shortly) self-consciously adjusted the existing doctrine in the way that is evident in some federalism cases. There are not signals of a quiet revolution. The court decided several delegation cases, applying the “intelligible principle” test and upholding all of the delegations. It evaluated several appointments arrangements, largely applying the pre-existing framework. Mistretta, the Line-Item Veto Case, and Clinton v. Jones all applied already established frameworks. The court can subtly change the framework by applying it in a new way, but the outcomes in those three cases are unremarkable. In Mistretta, the Court clearly perceived the question as difficult. But, in light of the legitimacy of independent agencies (both the work they do under the understanding of the non-delegation doctrine and that their “independence” is constitutional), that result is far from shocking. The Court invalidated the narrowly drawn line-item veto but, in

19 Olson, 487 U.S. 654, which did revise the doctrine, is discussed in the text, infra text accompanying notes 26-44. The other cases evaluating appointments arrangements include: Mistretta, 488 U.S. 361, Metropolitan Washington Airports, 501 U.S. 252, Freytag, 501 U.S. 868, Weiss, 510 U.S. 163, and Edmond, 520 U.S. 651.
20 488 U.S. at 374 (“In light of our approval of these broad delegations, we harbor no doubt that Congress’ delegation of authority to the Sentencing Commission is sufficiently specific and detailed to meet constitutional requirements.”); id. at 380 (outlining standard separation of powers test for evaluation of an institutional arrangement); id. at 390 (“In light of this precedent and practice, we can discern no separation-of-powers impediment to the placement of the Sentencing Commission within the Judicial Branch.”); id. at 397 (“We find Congress’ requirement of judicial service somewhat troublesome, but we do not believe that the Act impermissibly interferes with the functioning of the Judiciary.”); id. at 404 (“In light of the foregoing history and precedent, we conclude that the principle of separation of powers does not absolutely prohibit Article III judges from serving on commissions such as that created by the Act.”); id. at 409 (“We have never considered it incompatible with the functioning of the Judicial Branch that the President has the power to elevate federal judges from one level to another or to tempt judges away from the bench with Executive Branch positions.”); id. at 411 (“We see no risk that the President’s limited removal power will compromise the impartiality of Article III judges serving on the Commission and, consequently, no risk that the Act’s removal provision will prevent the Judicial Branch from performing its constitutionally assigned function of fairly adjudicating cases and controversies.”); id. at 412 (“We conclude that in creating the Sentencing Commission—an unusual hybrid in structure and authority—Congress neither delegated excessive legislative power nor upset the constitutionally mandated balance of powers among the coordinate Branches. The Constitution’s structural protections do not prohibit Congress from delegating to an expert body located within the Judicial Branch the intricate task of formulating sentencing guidelines consistent with such significant statutory direction as is present here.”).
21 City of New York, 524 U.S. at 438-40 (holding that the line-item veto violates bicameralism and presentment requirements of Articles I and II).
22 520 U.S. 681, 692 (1997) (“Petitioner’s principal submission—that in ‘all but the most exceptional cases,’ the Constitution affords the President temporary immunity from civil damages litigation arising out of events that occurred before he took office—cannot be sustained on the basis of precedent.” (citation omitted)); id. at 705 (“In sum, ‘[i]t is settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States.’ If the Judiciary may severely burden the Executive Branch by reviewing the legality of the President’s official conduct, and if it may direct appropriate process to the President himself, it must follow that the federal courts have power to determine the legality of his unofficial conduct.” (citation omitted)).
doing so, the Court applied the standard tools of analysis. Justice Stevens’ opinion for the Court, in fact, reads much like Chief Justice Burger’s opinion in *Chadha*. According to these two majorities, the legislative and the line-item veto ran afoul of the bicameralism and presentment requirements of the Constitution. Whether either “veto” violated the relevant Constitutional rules was open to question, but the similar decision-making method in the two cases is the point here. Finally, *Clinton v. Jones*, for all its political salience, was a routine application of principles developed in earlier cases.

*Morrison* is the only case that could not be described as ho-hum. That case explicitly adjusted the rules about permissible removal arrangements that were set forth in *Myers v. United States* and *Humphrey’s Executor v. United States*. *Myers* held that Congress could not require that a postmaster’s removal by the President be contingent on the advice and consent of the Senate. Although a dispute about a postmaster’s removal might seem obscure, the holding was consequential because it meant the judicially imposed demise of the Tenure in Office Act. The Tenure in Office Act, of course, was an 1867 statute dictating that an officer appointed with Senate consent held office until the Senate approved the officer’s successor. President Johnson was impeached in 1868, but not convicted, for discharging the Secretary of War in violation of the statute. It was not until *Myers* in 1926 that the Court decided the constitutionality of such an act. The *Myers* Court’s vindication of Presidential removal authority, however, was short lived. The holding was importantly limited just nine years later, in 1935’s *Humphrey’s Executor*. There, the Court held that Congress could, by providing commissioners of the Federal Trade Commission a form of tenure, limit the President’s ability to fire such a Commissioner based on policy differences. The Court in *Humphrey’s Executor* distinguished

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23 *City of New York*, 524 U.S. at 438 (“In both legal and practical effect, the President has amended two Acts of Congress by repealing a portion of each... There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes.”); INS v. Chadha, 462 U.S. 919, 956-57 (1983) (“Since it is clear that the action by the House under § 244(c)(2) was not within any of the express constitutional exceptions authorizing one House to act alone, and equally clear that it was an exercise of legislative power, that action was subject to the standards prescribed in Art. I.”).

24 *City of New York*, 524 U.S. at 464–65 (line-item veto fully satisfies bicameralism and presentment requirements) (Scalia, J., dissenting); E. Donald Elliott, INS v. Chadha: *The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125, 134 (“The legislative veto ‘alters legal rights,’ however, only because the Court chooses to characterize its effect that way.”).

25 See *supra* note 22.

26 272 U.S. 52 (1926).


28 *Myers*, 272 U.S. at 176.

29 Tenure in Office Act, ch. 154, 14 Stat. 430 (1867).


31 295 U.S. 602.
Myers as involving a “purely executive” officer. Until Morrison, then, the constitutional line between Myers and Humphrey’s was the difference between “purely executive” officers (that the President had the power to remove without any interference from Congress) and quasi-legislative and quasi-judicial officers (where Congress could limit the President’s removal authority by providing tenure protection). 32

After Morrison, Congress’s ability to limit the President’s power of removal no longer turns on whether the officer is exercising “purely executive” authority. 33 After Morrison, the question is whether the tenure protection interferes with the President’s ability to perform his executive functions, including his duty to “take care that the laws be faithfully executed.” 34 This is an important change in the doctrine, and the result in the case—the idea that there can be an “independent” prosecutor in the executive branch—makes one sit up and take notice.

But Morrison does not a revolution in separation-of-powers doctrine make. The doctrinal adjustment was already implicit in the arrangements sanctioned by Humphrey’s Executor. Independent agencies like the Federal Trade Commission, in addition to their “quasi” legislative and judicial functions, also perform some “purely executive” functions. To the extent that for-cause limitations could be imposed on officials that performed any executive functions, even if they did not perform solely executive functions, the Myers line was not fully respected. Morrison admitted what had been true in practice.

Morrison also respected another part of the pre-existing Myers/Humphrey’s Executor framework. In addition to distinguishing between purely executive and non-purely executive officers, that framework distinguished between direct (Myers tenure-in-office act type arrangements where the Senate had to consent to the removal) and indirect (Humphrey’s Executor for-cause tenure protection) congressional involvement with removal. The independent counsel’s tenure was protected by the indirect method and in that sense it is not surprising that the Court viewed it as permissible. Finally, to focus directly on the comparison between two areas of law that is the question of this paper, to the extent that Morrison does represent important evolution in the doctrine, it is away from, not toward, the evolution evident in the federalism cases. The federalism cases are often defended as movement in the direction of a historically sanctioned allocation of authority between the federal and state governments. But Morrison moves away from, rather than toward, such historical arrangements.

Perhaps this relative stasis in separation of powers law can be easily explained. One might argue that federalism doctrines, until the Court adjusted them, were inconsistent with a proper understanding of the constitu-

32 487 U.S. at 688–89.
33 Id. at 689.
34 Id. at 689–90 (quoting U.S. CONST. art. II, § 3) (alterations in original).
tion (however one defines “proper”) while separation of powers jurisprudence closely tracked such understandings. But this is not satisfying. The federalism cases are often defended as bringing the law into line with historically-sanctioned understandings of the appropriate constitutional balance between the state and federal governments. A similar case for reform of the law can be made in the separation of powers area. Consider administrative and independent agencies, perhaps the most obvious arrangements that are in tension with both textual and historical constitutional commitments. Delegations of authority to these entities outstrip any that early Congresses, much less Framers of the Constitution, could possibly have imagined. Those agencies not only issue general rules resolving questions that one might think should be addressed by statutes (trade-offs between health benefit and cost, for instance), but they are permitted to adjudicate individual controversies. The actions these agencies perform are constitutionally permissible under the nondelegation doctrine and the doctrines that permit Article I courts. Officers that direct independent agencies can also be insulated from the President in various ways. These present-day institutional arrangements are, at a minimum, in tension with the text and the historical understanding of the provisions of the constitution that touch on separation of powers. There are other examples as well. Congress’s now routine approval of omnibus bills diminishes the power of the President’s veto. The scope and breadth of Presidential lawmaking, through Executive Orders primarily, has grown dramatically over time. There is thus no

35 Judith A. Best, Budgetary Breakdown and the Vitiation of the Veto, in THE FETTERED PRESIDENCY: LEGAL CONSTRAINTS ON THE EXECUTIVE BRANCH 119, 121–23 (L. Gordon Crovitz & Jeremy A. Rabkin eds., 1989) (observing that “the last minute omnibus appropriations bill is virtually veto proof” because the President, not Congress, will take the blame for a government shutdown); Steven G. Calabresi, Some Normative Arguments for the Unitary Executive, 48 ARK. L. REV. 23, 79 (1995) (arguing that the President’s power to exercise his “national, anti-factional voice” in the appropriations process is reduced when unrelated riders are added to an omnibus appropriations bill because of the political consequences of a government shutdown resulting from a veto of the bill over the riders); Michael J. Gerhardt, The Bottom Line on the Line-Item Veto Act of 1996, 6 CORNELL J.L. & PUB. POL’Y 233, 235 (1997) (discussing the diminishment of the President’s veto power due to omnibus legislation as one of the reasons for support of line-item veto power in general and the Line-Item Veto Act of 1996); Glen Robinson, Public Choice Speculations on the Item Veto, 74 VA. L. REV. 403, 407–09 (1988) (explaining that bills that bundle public and private goods together, including omnibus bills, are rarely vetoed because the President is unwilling to incur the political costs resulting from failing to approve the public goods provisions or has judged that the benefits of the bill overall outweigh the costs of the offending private goods provisions); J. Gregory Sidak & Thomas A. Smith, Four Faces of the Item Veto: A Reply to Tribe and Kurland, 84 NW. U. L. REV. 437, 467–74 (1990) (asserting that omnibus bills and other bundled bills diminish the President’s veto power). But see Neal E. Devins, In Search of the Lost Chord: Reflections on the 1996 Item Veto Act, 47 CASE W. RES. L. REV. 1605, 1619–23 (1997) (arguing that omnibus bills do not weaken the President’s veto power because, “[a]n energetic President, through the threatened use of his veto power, may take advantage of high stakes omnibus legislation to enhance his bargaining position”).

36 KENNETH R. MAYER, WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWER 79–87 (2001) (concluding that executive orders have become more substantive in nature over time, that the number of significant executive orders issued each year has increased since the 1950s, and
shortage of examples of institutional arrangements and practices that are hard to square with the text and the historical understanding of the constitution. The Court’s failure to revise separation of powers law, in other words, cannot be explained as a product of correspondence between a proper understanding of the constitution (as that is understood in the federalism cases) and the Court’s separation of powers jurisprudence.\(^3\)

In fact, in reviewing the Rehnquist Court’s separation of powers cases, one is struck by just how tame they are. In a period where the Court seems willing to upset some old assumptions about the allocation of authority between the federal and state governments, the Court shrinks from any interpretation that would work a serious change in either the doctrine or in the structure of the federal government. The only two outliers are Justice Thomas and Justice Scalia. Justice Thomas, writing for himself, has asked whether the test that has long served as the touchstone of the non-delegation doctrine— which asks whether Congress has provided an “intelligible principle” to guide the exercise of discretion—serves to prevent “cessions of legislative power.”\(^38\) “I believe,” he wrote, “that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than ‘legislative.’”\(^39\) Justice Thomas’s doubts are a notable development, but it is equally notable that he is alone. Justice Scalia has also played the lone wolf. He dissented by himself in the cases validating the Independent Counsel Act\(^4\) and the U.S. Sentencing Commission.\(^4\) He has also expressed qualified support for notions of a unitary executive, arguments that have attracted few adherents.\(^4\)

that “the percentage of executive orders that deal with foreign affairs, executive branch administration, and domestic policy has grown significantly since the 1930s”); Calabresi, supra note 35, at 30 (noting the “anti-Presidentialist” argument that the President has “too much power over lawmaking,” in part because of a “much more aggressive presidential use of executive orders and signing statements”); Tara L. Branum, President or King? The Use and Abuse of Executive Orders in Modern-Day America, 28 J. LEGIS. 1 (2002) (observing that the scope of executive orders has expanded historically, especially in times of crisis).

\(^37\) I should note here that my focus is primarily in the domestic arena. I am not taking on and evaluating separation of powers questions that arise in the foreign affairs context. There is a large body of literature examining those contexts. See, e.g., John K. Setear, The President’s Rational Choice of a Treaty’s Preratification Pathway: Article II, Congressional-Executive Agreement, or Executive Agreement?, 31 J. LEGAL STUD. SS-39 (2002).


\(^39\) Id.


\(^4\) The most obvious case here is Justice Scalia’s solo dissent in Morrison. But there are others. See, e.g., Young v. United States ex rel. Vuitton et Fils, S.A., 481 U.S. 787, 815 (1987) (Scalia, J., concurring) (explaining that prosecution is an executive function and that is the reason that a federal court cannot appoint private citizen to investigate and prosecute criminal contempt); Printz v. United States, 521 U.S. 898, 922–23 (1997) (stating that the Brady Act is constitutionally problematic, inter alia, because the President cannot control state officers who administer the law); id. at 959–60 (calling Justice
Lack of innovation in separation of powers law was also not for lack of opportunity. The Court had cases that it could have used as opportunities to revise the law along any of the possible dimensions—the relationship between the legislature and the executive, between the legislature and the courts, and between the executive and the courts. There were a number of non-delegation doctrine cases that presented opportunities to re-think that doctrine and several cases evaluating appointment and removal arrangements for officers that could have permitted the Court to re-think its stance there as well.

III. WHY NO REVOLUTION?

One might have thought that developments in separation of powers doctrine would mimic developments in federalism law. If the evolution evident in federalism doctrines is a result of evolving methods of interpretation—the rise of more historically minded constitutional interpretation, for instance—wouldn’t that also suggest changes in separation of powers law? Some have explained federalism developments as part of the Court’s new-found confidence, even arrogance, in its exercise of judicial review, a confidence that makes it more willing to invalidate the acts of the legislature without angst about the counter-majoritarian nature of its decisions. But, if jurisprudential trends are changing or if the Court is newly bold, such developments should affect other areas of law. In particular, they should have implications for separation of powers doctrine. Federalism and separation of powers provisions of the constitution are both “structural,” that is, they channel authority to government decisionmakers rather

Scalia’s Article II argument “colorful hyperbole”) (Stevens, J., dissenting); see also Vt. Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 778 & n.8 (2000) (holding that qui tam relators can have Art III standing, but reserving the question of whether qui tam relators violate the Apointments Clause or the take care clause of Article II).


44 Olson, 487 U.S. 654, is the most important case. There, the Court went beyond the existing precedent rather than revised it. In FEC v. NRA Political Victory Fund, 513 U.S. 88 (1994), the Court held that the FEC did not have the authority to litigate on its own behalf in the Supreme Court. It was a statutory, not constitutional, holding. Id. at 99. The challenges to the FEC presented in the lower court were based on unitary executive theories. See FEC v. NRA Political Victory Fund, 6 F.3d 821, 823–34 (D.C. Cir. 1993) (addressing challenges to the statute’s requirement of bi-partisan appointment, to the FEC’s independence of the President in its law enforcement activities, and to the appointment by Congress of ex officio members of the Commission).


47 Larry D. Kramer, Forward, We the Court, 115 Harv. L. Rev. 4, 14 (2001) (“The Rehnquist Court no longer views itself as first among equals, but has instead staked its claim to being the only institution empowered to speak with authority when it comes to the meaning of the Constitution.”).
than place substantive limits on the actions of any and all government decisionmaking. Just as some have argued that the balance between federal and state power should be resolved by politics,\(^{48}\) so too have some argued that the division of authority among the three branches of the national government should be left to politics.\(^ {49}\) At least as a starting point, then, federalism and separation of powers doctrines can both be considered apples. Why don't they ripen and fall off the tree together?

This Part stakes out answers to that question. It identifies both internal and external influences on separation of powers doctrine, suggesting that, while there may be important analogies between the two areas of law, it is the dis-analogies that help explain the distinctive patterns in the Rehnquist Court.

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The first two arguments suggest that the Court is unlikely to forsake judicial enforcement of many of the separation of powers provisions of the Constitution. These arguments identify judicial incentives to protect the exercise of judicial power that are in play in some separation of powers controversies and factors that make certain separation of powers questions eminently justiciable. These factors help explain why the Court is likely to be continuously in the separation of powers business, and by that I mean relying on doctrines that will sometimes result in the invalidation of the actions of other governmental actors. As a result, the Court is unlikely to announce, as in Garcia v. San Antonio Metropolitan Transit Authority,\(^ {50}\) the explicit nonjusticiability of certain separation of powers questions or, as in the combined effect of Wickard v. Filburn\(^ {51}\) and United States v. Darby,\(^ {52}\) to implicitly state that anything goes. Given the factors identified below, in other words, parts of separation of powers law will be more static across time than federalism doctrines.

A. Judicial Incentives and the Protection of the Independent Judiciary

The most straightforward reason we are unlikely to see a full retreat from the enforcement of separation of powers provisions of the Constitution is the unique interest that the Court has in this field. To put the point simply: When the Court perceives a threat to the exercise of federal judicial power, it will act to protect the exercise of that authority. Fulfillment of

\(^{48}\) Herbert Wechsler was the most famous exponent of this argument in the modern era. See Herbert Wechsler, The Political Safeguards of Federalism, in Principles, Politics, and Fundamental Law: Selected Essays 49 (1961). Larry Kramer updated the argument. See Larry Kramer, Putting the Politics Back into the Political Safeguards of Federalism, 100 Colum. L. Rev. 215 (2000).


\(^{50}\) 469 U.S. 528 (1985).

\(^{51}\) 317 U.S. 111 (1942).

\(^{52}\) 312 U.S. 100 (1941).
that function alone would count as a separation of powers jurisprudence. More speculatively, I suggest that the Court’s instinct to protect its own interests may make it more willing to seriously entertain other separation of powers claims.

If the Court perceives the exercise of judicial power to be threatened or the judiciary compromised, the Court will act to protect itself. There are many cases historically that provide evidence for that proposition, and there are a striking number of cases in the Rehnquist Court that provide evidence for it as well. The most straightforward is *Plaut v. Spendthrift Farm, Inc.*, where the Court held that Congress’s extension of the statute-of-limitations for a class of securities fraud claims constituted an invasion of the judicial power because it required the re-opening of final judgments. Sometimes threats to the judiciary do not come from statutes. In *Young v. United States ex rel. Vuitton et Fils, S.A.*, the Court held that a federal court can appoint, subject to some limitations, a private prosecutor in order to prosecute a criminal contempt. Such authority, the Court reasoned, prevented court dependency on the cooperation of the executive for the investigation and prosecution of criminal contempts.

Protection of the interests of the judiciary also pops up in all sorts of not-so-on-point situations. The Court’s reading of Section 5 of the Fourteenth Amendment in *City of Boerne v. Flores* bristles with indignation over Congress’s perceived attempt to challenge what the Court views to be its superiority in the interpretation of the Constitution. As a matter of

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54. *Id.* The statute at issue in *Plaut* was enacted in response to *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), in which the Supreme Court established a statute of limitations for certain securities fraud suits; the suits had to be filed within one year after the discovery of the facts constituting the basis for the claim and within three years after the violation. *Id.* at 364. As a result of *Lampf*, some suits that had been timely filed under the pre-*Lampf* regime had to be dismissed on the authority of *Lampf*. Congress reversed the *Lampf* holding for cases that had been filed prior to *Lampf* and were, under pre-*Lampf* rules, timely. *Plaut*, 514 U.S. at 213–15. Under the statute, such suits could be reinstated upon the filing of a motion. 15 U.S.C. § 78aa-1 (2000).

Our national experience teaches that the Constitution is preserved best when each part of the Government respects both the Constitution and the proper actions and determinations of other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. *Marbury v. Madison*, 5 U.S. 137 (1 Cranch) 136, 177 (1803). When the political branches of Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in the later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed.

*Id.*
statutory interpretation, the Court held that the Federal Election Commission cannot seek certiorari in the Supreme Court without the Solicitor General's advance permission.\textsuperscript{58} The Court held the same with respect to the private prosecutor that it authorized District Courts to appoint in \textit{Young}; in that case, the holding went against the views of the Solicitor General himself.\textsuperscript{59} These rulings are easily explicable; they serve the interest of the Court by making sure it hears a single, familiar, and credible voice. Finally, one last example comes from the Court's invalidation of statutory restrictions on the types of claims that Legal Services Corporation-funded lawyers can bring. There, the Court reasoned that the restrictions were invalid in part because they might limit the arguments that lawyers could make to a court.\textsuperscript{60} If one is looking for judicial attention to the interests of the courts, one finds it in all sorts of places.

To understand some Rehnquist Court cases from this "court protection" perspective is a little more complicated. The Court's Article III standing cases, \textit{Lujan v. National Wildlife Federation},\textsuperscript{61} for instance—can be understood to be about the protection of the judiciary's interests. In \textit{Lujan}, the Court is declining to hear a category of cases, which might be considered contrary to its interest in maximizing its power. But that is a naïve interpretation.\textsuperscript{62} One must notice that the Court is deciding not to hear cases that Congress, through broad citizen suit provisions, would like federal courts to hear. One explanation for the standing cases is that the Court will not hear cases that undermine what the Court views to be its appropriate role. \textit{That} is about protecting the judiciary even if, narrowly understood, it is about not hearing a particular case.

Sustaining the U.S. Sentencing Commission is likewise hard to understand from a "protection of the judiciary" perspective. The claims against that Commission were that Congress delegated legislative power inappropriately (a claim the Court easily dismissed) and, more particularly, that Congress could not assign this particular task to an entity in the judicial branch because it was not the exercise of a judicial power and the assignment threatened the independence of the judiciary. How could sustaining such an arrangement protect both general judicial interests and the specific exercise of the judicial power?

One can plausibly understand \textit{Mistretta} as protecting judicial interests by focusing on the internal hierarchy of the courts. A more objective sen-

\textsuperscript{58} FEC v. NRA Political Victory Fund, 513 U.S. 88 (1994).
\textsuperscript{60} Legal Serv. Co. v. Velazquez, 531 U.S. 533, 545–46 (2001).
\textsuperscript{61} 497 U.S. 871 (1990).
tencing system is something that district court judges might resist, but not necessarily something that appellate courts would resist. Objectivity in sentencing makes review of sentencing decisions easier. If one thinks of appellate courts as managers, the Sentencing Commission is a manager's dream. All the better that it is housed in the judiciary and run in part by judges. As for the Supreme Court's evaluation of the structure and location of the Commission, the Court was concerned about the potential for the Commission to threaten the independence or the integrity of the judicial branch. It was simply not persuaded that the Commission presented such a threat.

Whether an outside observer can understand the standing cases, Mistretta or Morrison, as consistent with the protection of judicial power or of the judiciary as an institution is distinct from whether the judiciary perceives itself to be protecting itself. It is not easy to construct a positive theory of what counts as a threat to the judiciary and what does not. To take some of the puzzling cases of the Rehnquist Court, the Court viewed the statute at issue in Plaut v. Spendthrift Farm, Inc.\(^6\) to invade the judicial power while the statute at issue in Miller v. French\(^6\) did not. Nor did the Court view the courts' role in the appointment of the Independent Counsel, or the structure and location of the Sentencing Commission, to be a threat. These conclusions are puzzling to many. But it matters little whether we would endorse the Court's implicit vision of what qualifies as an invasion of the judicial power or a threat to the independence of the judiciary. That question is distinct from the more basic point here: When the Court perceives such a threat, it will rebuff it.

It matters for separation of powers law that the Court will reliably protect what it perceives to be its interests. In the first place, as long as the Court is willing to police the boundary between judicial power and legislative or executive power and ask whether some assignment threatens the independence or integrity of the judicial branch of government, then, voilà, that is a separation of powers jurisprudence. If the Court will always reliably protect itself, in other words, there will never be a Garcia in certain parts of separation of powers law.

Such court protection may have broader implications as well. When the Court is policing the boundaries of judicial power and protecting the integrity of the judicial branch, it is also more likely to be in the separation of powers business generally speaking. That is, it will be more willing to consider, and even protect, what it considers to be the interests of the other institutions of the federal government. This claim seems plausible, though it cannot be proven. If the Court is protecting its own authority (Plaut is an example) and carefully inspecting arrangements to make sure its integrity and independence are not undermined (Morrison, Mistretta), then it would be a little odd for the Court to explicitly state or implicitly suggest that the

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64 530 U.S. 327 (2000).
boundaries of the powers of other branches and the integrity of those branches are beyond judicial ken. If this is right, the Court will hear the claim that the line-item veto diminishes the authority of Congress; it will hear and take seriously the claim that the Independent Counsel threatens to undermine the executive by weakening the President's control over the exercise of executive power.

By comparison, there is no equivalent judicial interest in federalism doctrines. At one time, perhaps there was. If the authority of the federal courts were linked to the authority of the federal government more generally, then federal courts interested in protecting their own stature and authority would have an interest in expansive interpretations of federal legislative or executive power. But that connection seems to have been attenuated today. The Court's conclusion in United States v. Lopez, for instance, that the Gun-Free School Zones Act exceeds Congress's commerce power does mean that there will not be federal question cases arising under that statute in federal courts. But this enforcement of the commerce power does not seem to imply any limitation on the important prerogatives of federal courts, such as the scope of judicial review, or the deference the Court owes to state and federal actors.

B. The Eminent Justiciability of Certain Separation of Powers Questions

1. Appointment and Removal Arrangements.—Separation of powers doctrine has long been populated with a large share of cases that evaluate how officials exercising governmental power are appointed or removed. The Court has evaluated statutes that prevent the President from firing an officer based on policy difference (Humphrey's Executor, Morrison), that condition the President's removal on the Senate's consent (Myers), that involve Congress or the judiciary in the appointment or removal of the officer (Morrison, Mistretta, Buckley v. Valeo, Bowsher v. Synar), and that appoint a judge or a Member of Congress to exercise governmental authority (Mistretta, Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.). Over the years, there have been many

65 See Michael J. Klarman, What's So Great About Constitutionalism?, 93 NW. U. L. REV. 145, 149–50 (1998) (noting that federal courts may have "an abstract bias in favor of expanding the power of the government with which they are affiliated" as well as "a concrete incentive to expand national government power and thereby augment their own jurisdiction vis-à-vis state courts" because an expansion of federal legislative power might result in the expansion of federal judicial power); G. Edward White, Recovering Coterminous Power Theory, 14 NOVA L. REV. 155, 168–69 (1989) (discussing the argument made by the anti-Federalist commentator “Brutus” that the federal judiciary will expand the power of the national government and its own jurisdiction by broadly interpreting the powers set forth in Articles I and III).
such arrangements and the Supreme Court has been willing to evaluate their constitutionality.

Is this obsession with appointment and removal evidence of lawyers’ capacity for paying attention to the trees and not the forest? As a result of the toothless nondelegation doctrine, the Court does not police what many government officials are authorized to do, but is for some reason intensely interested in the mechanics of their appointment and removal. As I argue below, this criticism is off the mark; these cases should instead be understood as evaluating part of the forest. But the point for present purposes is that the existence of such arrangements and the Court’s willingness to develop a body of doctrine that evaluates them helps explain why important parts of separation of powers doctrine have not gone through periods, as federalism doctrines have, of explicit or implicit nonjusticiability.

A striking number of the Supreme Court’s separation of powers cases have always been about the appointment or removal of various officers. It surprises many to find out that Humphrey’s Executor, a pillar of the law making independent agencies constitutional, turns on whether the appointment arrangements—and, specifically, the restrictions on the President’s authority to remove such officers—for such officers are constitutional. Under Humphrey’s Executor, Congress can insulate officers who perform quasi-judicial and quasi-legislative functions from the President by providing them a form of tenure. While less clear, Congress can also apparently limit the President’s appointment power by specifying bipartisanship (half from each party) on multi-member commissions or requiring the President to choose from a limited list of appointees (Mistretta). But more direct Congressional control over the officer, through actual appointment (Buckley), removal (Bowsher), or consent to the removal by the President (Myers), it is clear, does not comport with the Constitution.

This pattern of appointment and removal cases continued in the Rehnquist Court. The crucial first holding in Morrison is that the independent counsel is an “inferior” officer for purposes of the Appointments Clause, meaning that his appointment does not require the advice and consent of the Senate. Several other Rehnquist Court cases, including Frey-

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72 Buckley, 424 U.S. at 143 (holding that appointment by Senate and House to FEC not constitutional nor is requirement that both houses approve all appointments); Bowsher, 478 U.S. at 736 (finding it unconstitutional for Congress to retain power to remove Comptroller General, who performs executive function under Gramm-Rudman-Hollings Act); Myers v. United States, 272 U.S. 52 (1926) (holding that requiring the Senate to approve removal of postmaster first class is unconstitutional).
tag v. Commissioner of Internal Revenue,\textsuperscript{74} Weiss v. United States,\textsuperscript{75} and Edmond v. United States,\textsuperscript{76} raised questions about the line between a principal and inferior officer. Mistretta involved a creative appointment arrangement of another sort. The statute called for the appointment of three federal judges as Commissioners of the Sentencing Commission.\textsuperscript{77} Likewise too with Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc., where Congress created a Board of Review that included Congressmen and had veto power over the operations of Reagan National and Dulles Airports.\textsuperscript{78}

Leave aside for now why the rules about appointment and removal are what they are. What is most significant is that the Court has been willing (at least in the twentieth century) to evaluate appointment and removal arrangements, identifying constitutionally proper and improper ones. Compare this steady judicial activity with Garcia and Wickard/Darby's announcements that the Court will not be in the business of identifying and enforcing limitations in those areas. What explains the steady judicial activity?

The character of the Appointments Clause as a legal rule must help explain the Court's involvement.\textsuperscript{79} In contrast to many sources of law in federalism doctrine (and some in separation of powers doctrine), the Appointments Clause sets forth a rule that invites judicial enforcement.

\textsuperscript{74} 501 U.S. 868 (1991) (holding that a special trial judge appointed by the chief judge of the Tax Court is an "inferior officer" and that the Tax Court is a "Court of Law" for purposes of the Appointments Clause).
\textsuperscript{75} 510 U.S. 163 (1994).
\textsuperscript{76} 520 U.S. 651 (1997) (stating that judge of Coast Guard Court of Criminal Appeals is an inferior officer for Appointments Clause purposes).
\textsuperscript{77} Mistretta v. United States, 488 U.S. 361, 397-408 (1989).
\textsuperscript{79} A generalized version of this claim would be that the character of constitutional doctrine is explained by the character of the constitutional text that is being interpreted. More particularly, the argument would be that the more specific the constitutional rule, the less likely there is to be judicial creativity and, with that, evolving constitutional doctrines. While most would take the example in the text—President be thirty-five years of age—as a noncontroversial example that generally supports the broader claim, the broad claim cannot be correct. There are some obvious counter-examples that disprove it. The Eleventh Amendment, which sets forth a classic rule but has been interpreted as if it sets forth a standard about protection of state sovereignty, is one counter example. Many constitutional theorists have written on this question. For a characteristically thoughtful discussion of the claim about the relationship between constitutional text and constitutional interpretation by judges, see Frederick Schauer, Constitutional Invocations, 65 FORDHAM L. REV. 1295 (1997).

The claim I am making is much narrower. My claim is that the existence of a rule like the Appointments Clause helps explain the effective justiciability of the appointments questions. It is not that the appointments rule is likely to be enforced in some particular way—say, consistently with its "literal" terms. If its literal terms are violated, I suspect it would be literally enforced. (Buckley v. Valeo, 424 U.S. 1 (1976), is a good example.) But the bottom line claim here is not about the result that will be reached in appointments cases; it is that the likely judicial response to the Appointments Clause will be to enforce it in some way.
The clause sets forth multiple classifications: principal officers who must be appointed with the advice and consent of the Senate; inferior officers who may be appointed by the President alone, by a court of law, or by a head of department (depending on the dictates of Congress); and perhaps there is an implicit distinction between officers (either principal or inferior) and employees. In terms of clarity, the clause is not akin to the requirement that the President be thirty-five years old and a resident of the United States for fourteen years. Nor is it as clear as its cousin, the Incompatibility Clause. Even so, the Appointments Clause is a different kind of legal rule than the Tenth Amendment or Section 5 of the Fourteenth Amendment. It seems designed for courts to answer questions about it. The provision is ambiguous enough to generate cases—the difference between a superior officer and an inferior officer, the difference between an officer and an employee, what counts as a head of department or court of law—but not so open-ended as to permit any interpretation at all.

As any survey of the Court's nonjusticiability cases makes clear, it takes more than the existence of a constitutional rule of some specificity to explain justiciability. There are provisions of the Constitution that supply rules arguably similar in character to the Appointments Clause but are nonetheless nonjusticiable. For instance, a plurality of the Supreme Court held nonjusticiable a challenge to President Carter's notice that he would rescind a treaty that had been approved by two-thirds of the Senate. Some of the arguments over the President's action were strikingly similar to the dispute over the Tenure in Office Act. The challengers claimed that the Senate's advice and consent to the treaty implied the power to advise and

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80 U.S. CONST. art. II, § 1, cl. 5.
81 Id. art. I, § 6, cl. 2.
82 The literature on this topic is so large that even the standard survey footnote cannot do it justice. For a recent discussion and evaluation of the political question doctrine, see Rachel E. Barkow, More Supreme than Court: The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy, 102 COLUM. L. REV. 237 (2002).
83 For example, the Court held nonjusticiable Judge Walter Nixon's challenge to the procedures used by the Senate in his impeachment trial. The Senate relied on a committee, which Judge Nixon argued violated the requirement of Article I, section 3 that the "Senate shall have the sole Power to try all Impeachments." See Nixon v. United States, 506 U.S. 224 (1993). There are also the several lower court cases that have held nonjusticiable challenges to military actions taken without a congressional declaration of war. See, e.g., Holtzman v. Schlesinger, 484 F.2d 1307 (3d Cir.), cert. denied, 416 U.S. 936 (1973).
84 Goldwater v. Carter, 444 U.S. 996 (1979). The Court did not have merits briefing and argument. Instead, it granted certiorari, vacated the judgment below, and remanded with instructions to dismiss the complaint. Then-Justice Rehnquist wrote for a plurality to explain that the question was a political one and therefore nonjusticiable. Id. at 1002.
85 And some of them were not. The fact that the treaty contained an explicit provision for termination by either party on one year's notice was crucial to the lower court's disposition in the case on the merits. See Goldwater v. Carter, 617 F.2d 697, 699 (D.C. Cir.), judgment vacated, 444 U.S. 996 (1979).
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consent when the President rescinded the treaty. But the Court determined that the dispute was a political question and therefore nonjusticiable. I know of no general theory of nonjusticiability and developing one is far beyond the scope of this paper. What can be said is that the warning signs of nonjusticiability—evaluation of the President's actions in the foreign affairs area or scrutinizing Congress's internal processes—are absent in disputes over the appointment and removal of officials. The more complete explanation for the continued adjudication of appointment and removal cases, then, is the existence of a certain kind of legal rule (like the Appointments Clause) and the absence the usual warning signs of a credible nonjusticiability argument.

One needs more than a rule that judges will enforce, however, to generate cases. One needs appointments arrangements that push at the boundaries of the rule. Congress has more than satisfied this requirement historically and continues to do so. To be sure, the legality of Congress's arrangements does not always turn solely on the Appointments Clause. Congress has also rested such arrangements on the necessary and proper power. And resistance to such arrangements has been rooted in claims about infringement of executive power or more general concerns about separation of powers. That said, many challenged arrangements over the years, and in the Rehnquist Court as well, have required evaluation of the Appointments Clause.

The Tenure in Office Act—which, in effect, required the Senate's consent before an officer could be removed from office—is the granddaddy of these "creative" arrangements. It was approved, in part, on a theory rooted in the Appointments Clause. That argument was that the method of removal followed the method of appointment and thus if the Senate provided advice and consent for appointment it was also permitted to condition removal on its advice and consent. Many other arrangements straightforwardly test the internal workings of the Appointments Clause or its applicability. The Independent Counsel Act is only constitutional if the counsel is an inferior officer for purposes of the Appointments Clause. In Freytag, a special trial judge appointed by the Chief Judge of the tax court must be an inferior officer and the Chief Judge must be either a Court of Law or a head of department for the arrangement to comport with the Appointments Clause.87 In Buckley, Congress had attempted to appoint gov-

86 The argument is outlined in the D.C. Circuit's opinion. See Goldwater, 617 F.2d at 703 ("[The argument] is that, since the President clearly cannot enter into a treaty without the consent of the Senate, the inference is inescapable that he must in all circumstances seek the same senatorial consent to terminate that treaty."). Interestingly, the court goes on to note that this argument would mean that the Senate must approve the removal of an officer that was appointed with advice and consent of the Senate, a position, the court points out, that was rejected in Humphrey's Executor. Id.

87 Freytag v. Commissioner, 501 U.S. 868 (1991); see also Weiss v. United States, 510 U.S. 163 (1994) (classifying military officers serving as military judges as inferior officers who are properly appointed based on their commission from the President); Edmond v. United States, 520 U.S. 651 (1997)
ernment officials in ways that were inconsistent with the Appointments Clause on many grounds; the Court determined that, given the functions the Federal Election Commissioners exercised, they were officers of the United States and therefore had to be appointed consistently with the clause.

Why does Congress establish these arrangements? Because rules that structure the appointment and removal of an officer help shape the incentives of that officer. There is probably not a one-to-one relationship here; government officials have many other pressures and demands on them that might on any given occasion swamp the incentive created through appointment and removal rules. But creative appointment and removal arrangements must have some effect otherwise Congress would not keep adopting them. Congress's interest is to arrange it so that the official will care about Congress's views (for example, the Tenure in Office Act, Bowsher, or Buckley) or has insulation from the President (for example, the independent counsel, independent agencies generally, or the U.S. Sentencing Commission). Congress, in other words, adopts these arrangements for reasons that do implicate separation of powers concerns. These are efforts to assert Congressional influence over the officer or to insulate the officer from an institutional competitor, the President.

In its narrowest form, the argument here is that the Court has been ready to evaluate arrangements that explicitly test the reach of the Appointments Clause and that such cases matter because they implicate separation of powers concerns. I have also offered an explanation for why that is so, one rooted in the character of the legal rule embodied in the Appointments Clause. But, even if my explanation for the pattern of cases is not persuasive, it is the existence of the pattern that is important.

(determining that judge of Coast Guard Court of Criminal Appeals is an inferior officer and thus appointment by Secretary of Transportation is permissible).

88 424 U.S. at 113; see also id. at 118-41. There were six voting members. Two were appointed by the President pro tempore of the Senate; two were appointed by the Speaker of the House; and two were appointed by the President. All six of the voting members had to be confirmed by both houses of Congress.

89 Id. Some cases about the structure of an office do not involve the Appointments Clause. The Court could evaluate the structure and appointment of the Sentencing Commission without much consideration of the Appointments Clause. And, while the clause speaks to the appointment of an officer, it does not explicitly speak to the officer's removal. Although tenure-in-office restrictions on removal were, as noted in the text, rooted in a negative implication of the Appointments Clause, other cases were not defended on that theory. Where Congress kept removal power, as in Bowsher v. Synar, the Court's evaluation did have to involve the Appointments Clause. 478 U.S. 714, 765-766 (1986) (White, J., dissenting). And the several cases involving what I have termed "indirect" restrictions on removal—illustrated by Humphrey's Executor v. United States, 295 U.S. 602, 629 (1935) and Morrison v. Olson, 487 U.S. 654, 692-93 (1988)—were justified under the necessary and proper power. One could conceivably understand them as a "lesser included power" to a tenure-in-office power which was itself rooted in part on the Senate's role in advice and consent. But they have not generally been defended on that ground.
As with the earlier argument about the protection of judicial prerogatives, if the Court did nothing but evaluate claims under the Appointments Clause, that would constitute a separation of powers doctrine. Put the two together—protection of the judicial power and the integrity of the judiciary, and evaluation of appointment or removal arrangements that involve the Appointments Clause—and there is a large body of separation of powers law.

But the argument has a broader form as well. Given the Appointments Clause cases that the Court will evaluate, the Court will also be inclined to evaluate a broader set of appointment and removal arrangements, including those that do not directly involve the clause. Assume that courts will generally consider claims brought to them that directly involve the Appointments Clause. First, such claims will often be bound up with other claims. The defense of the Senate consent to removal in *Myers* was rooted in part in the Appointments Clause and in part in the necessary and proper power. The claims against the Act were that removal is an executive power and that Senate consent to removal interferes with the exercise of executive power. If the Court rejects one claim (advice and consent to removal is not implied by advice and consent to appointment) it may at the same time be embracing another (advice and consent to removal interferes with the exercise of executive power).

More than that, the holding in one Appointments Clause case takes on a life of its own, doing work in other cases where the Appointments Clause is not involved. *Myers* and *Humphrey's Executor* illustrate the point. In *Myers* the Appointments Clause was at issue, but the Court rejected the argument in favor of the executive power argument. Within a decade, the Court in *Humphrey's Executor* evaluated Congress’s limitation on the President’s power to remove at-will an officer of the Federal Trade Commission. *Humphrey’s* did not involve the Appointments Clause. Congress’s limitation was defended as an exercise of necessary and proper power. The statute was attacked on the ground that it interfered with the executive power, an argument that was based heavily on *Myers*'s holding that the removal restriction at issue there interfered with executive power. In that context, it seems almost inconceivable that the Court would hold the dispute nonjusticiable. One can make a similar point about *Morrison*. Evaluation of the independent counsel required the Court to interpret the Appointments Clause, but there were other questions in the case—the validity of an interbranch appointment, the President’s removal ability—that did not involve the Clause but that would have been awkward for the Court to avoid.

If the existence of a specific rule such as the Appointments Clause (as well as the absence of the usual signals for nonjusticiability) helps explain the regular appearance of cases that adjudicate appointment and removal arrangements, then the provisions of the constitution that touch on federalism (for the most part) provide a contrast. The Tenth Amendment and Section 5
of the Fourteenth Amendment provide the sharpest contrast. The meaning of those provisions is created only after judges take it upon themselves to interpret them by whatever method. The Commerce Clause is closer to a rule, but it is still a far cry from the Appointments Clause. Indeed, of the provisions associated with federalism, the Commerce Clause seems closest on the generality/specificity dimension to the allocation of legislative power to the Congress. The fact that the nondelegation principle is essentially nonjusticiable and that the interpretation of the commerce power meant, for at least some decades, that Congress could reach nearly any activity, is supportive of, not resistant to, the claims made here. Both the nondelegation doctrine and the commerce power rest on constitutional provisions that are open-ended enough (when compared to other legal rules of interest here) to vest a great deal of discretion in the interpreter, which leaves space for varying interpretations, including effective nonjusticiability. In contrast to the Vesting Clauses or the commerce power, a rule like the Appointments Clause is much less likely to generate a Garcia or a Wickard/Darby—a rule of explicit or implicit nonjusticiability.

2. The Existence of Comparatively Many Rules.—This point about the rule-like nature of the Appointments Clause can be made more globally. When compared to the provisions of the constitution that touch on federalism doctrine, the separation of powers provisions of the constitution are comprised of a large number of rules. Separation of powers commentators tend to focus on the Vesting Clauses, which are, at their outer edges anyway, allocations of authority that can be difficult to distinguish from one another and hence difficult for judges to enforce in a straightforward way. Even so, the Vesting Clauses tell us more about what the rules are than the Tenth Amendment or Section 5 of the Fourteenth Amendment.

But looking beyond the Vesting Clauses, the first three articles of the constitution are literally riddled with "appointments clause-like" rules about how the institutions of the national government will be designed and staffed. Because governmental actors do not often take actions that violate the literal terms of the Constitution, these provisions do not generate a lot of cases. But their mere existence means, I think, that the Court is unlikely to announce that the allocation of authority between the institutions of the national government will be left to politics.

Of the rule-like provisions of the Constitution, the ones that have generated some cases are the rules about bicameralism and presentment. Both the legislative veto and the line-item veto were invalidated in opinions animated by the conviction that the political branches had attempted to make an end run around the constitutionally-mandated procedures by which legislation is to be made. To the Court, the legislative veto permitted the enactment of legislation by a subset of Congress without bicameralism and

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90 Magill, supra note 17, at 608–26.
presentment.\textsuperscript{91} To the majority in the line-item veto case, there was a similar problem.\textsuperscript{92} If Congress could not constitutionally give the President an actual line-item veto—defined as the ability to single out certain provisions of a legislative package and refuse to affix his signature to those individual provisions, while making the rest law—then Congress could not in effect do that same thing by providing for a time lapse and calling the veto cancellation. Neither judicial opinion is entirely satisfactory. It is contestable to say that the rejection of Chadha’s deportation was itself a legislative act; and it is contestable to say that the President’s cancellation authority was the equivalent of a repeal. But that misses an important feature of the two decisions: The existence, and arguable applicability, of the specific requirements that could be mechanically enforced was important to the disposition of those cases.

To emphasize once again, the point here is quite narrow: Given the presence of a fair number of constitutional rules about how institutions of the national government are to work, rules that are specific enough that their application can be relatively straightforward, it is unlikely that we would see a Court opinion that explicitly or in effect treated questions about the allocation of authority among the branches of government as questions to be decided by politics.

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The two explanations offered so far are in the service of the rather modest claim that, in some areas of separation of powers law, the Supreme Court will consistently adjudicate controversies—protecting the exercise of judicial power and evaluating alleged violations of certain types of constitutional rules. In these areas, the Court is unlikely to ever retreat in the way that it has with respect to important aspects of federalism doctrine. Though modest, this claim may be important in explaining the disjunction between the Rehnquist Court’s movement in federalism doctrine and the lack of movement in parts of separation of powers doctrine.

But the explanations offered so far do not explain the content of that doctrine. Yes, the Court will be involved in adjudicating Appointments Clause cases, but why has it settled on particular rules? The next set of arguments focus on that question.

To do so, one must first draw conclusions about the substantive content of separation of powers doctrine. I will focus my attention on the Court’s acceptance as a constitutional matter of the administrative state. This substantive conclusion is reflected in many different doctrinal areas. In important respects, the Court has resisted claims that the Constitution establishes a unitary executive. While Congress is not permitted direct involvement in the appointment or removal of executive officials, it is apparently permitted to limit the President’s appointment powers in general ways and is defi-

nity permitted to insulate certain officers from removal at will by the President. Of more significance is that Congress can delegate significant policymaking authority to expert bodies, mostly in the executive but also in the judiciary, and the Court will not police those delegations to determine whether they are so loosey-goosey as to constitute a give-away of legislative authority. Despite many arguments in favor of revitalization of the nondelegation doctrine, and many opportunities, the Court will not—emphatically will not—revitalize that doctrine. This Part asks why the substantive content of these parts of separation of powers law have not changed in a period where the Court is willing to revisit some old commitments.

C. External Influences on Federalism and Separation of Powers Doctrine

Many have written on the external changes—economic, political, demographic, sociological, intellectual—that have made the late twentieth century a period where devolution to the states as a matter of policy and of law is possible. Keith Whittington has provided one of the most comprehensive accounts. He first traces the forces that pushed toward a centralized, federal state in the earlier part of the twentieth century—the rise of an expertise model of governing, of the positive state committed to economic regulation and redistribution, and of commitment to regulating public morality. These centralizing forces reached their height in the 1960s, but were then overtaken by factors that both raised doubt about the efficacy and wisdom of centralized action and rehabilitated the states. In tracing that changing environment on federalism questions, Whittington first argues that many factors combined to make liberalism recede as the dominant vision, and with liberalism went the governing ideology that "underwrote the modern state." So too did economic forces—the rise of globalism, the structure of post-industrial economic entities—combine to diminish the efficacy of any government’s control over the economy. As the federal government’s stature as a moral force diminished and the states “gradually recov-


95 Id. at 510.

96 Id. at 511–16.
tered public confidence," the federal government no longer acted as keeper of the public morality. Whittington does not argue that the factors he identifies made a devolutionary trend in policy or law inevitable. But they do make it possible in a way that he argues would not have been possible, say, in the 1940s, 1950s, or even the 1960s.

Most would agree that separation of powers doctrines can be influenced by trends such as the ones Whittington recounts as facilitating centralization and then making decentralization possible. It is now a fairly conventional claim that views, including judicial views, of Presidential power tend to expand during wartime. Events of the type Whittington and others identify must have played a role in creating the view that administrative agencies operating under broad delegations from the Congress were constitutionally acceptable. Many of the forces Whittington identifies as pushing in the direction of a centralized state suggested that the state should wield power through a particular form, that is, the expert bureaucracy. If such forces could play a role in constitutionally blessing the administrative agency—a position operationalized in law through a toothless nondelegation doctrine—could not external events create conditions that would make that governmental structure less appealing and hence less constitutionally acceptable?

Yes, of course they could, at least theoretically. But to understand why that has not occurred, it is important first to clarify what such a factor would have to suggest in order to influence the constitutional rules. Trends capable of influencing views on delegation would have to do more than cast

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97 Id. at 516. Christopher Schroeder supplements the account by pointing to the ways in which distrust of the federal government has grown dramatically in recent years. Christopher H. Schroeder, Causes of the Recent Turn in Constitutional Interpretation, 51 DUKE L.J. 307, 334–51 (2001).


doubt on regulation in general. That is because the alternative to administrative agency regulation under vague mandates is surely not no regulation. If a court invalidated a regulatory scheme on nondelegation doctrine grounds, the likely result would be that Congress would re-adopt the legislation and provide for private enforcement or it would cure the lack of intelligible principle, re-enact the legislation, and re-delegate to the same administrative agency. So factors that might have the capacity to influence non-delegation rules would have to cast doubt, not on regulation generally, but on actions taken by administrative agencies.

The constitutional doctrine facilitating delegations to such entities has stubbornly refused to move. Does this mean that the courts are enchanted by administrative agencies? To the contrary. If the New Deal period started with enormous enthusiasm about the capacity for expert administration, that attitude was quickly replaced by skepticism about the possibility of the talented and public-spirited regulator. The agency official rather quickly came to be viewed as incompetent or, worse, in the business of delivering rents to the parties he was supposed to regulate. Judicial doctrines, mostly in the field of administrative law, evolved rather dramatically to take account of this new vision.

Why didn’t such skepticism lead to a revision in the nondelegation doctrine? Let me offer three admittedly speculative suggestions. First, the rise in disenchantment with administration came at the wrong time given the overall jurisprudential commitments of the Supreme Court. The con-

101 Eric Claeys has thoughtfully argued that the Supreme Court’s case law can be explained by commitment to a progressive theory of apolitical administration. When apolitical administration is advanced, the Court upholds the arrangement; when apolitical administration is undermined, the Court invalidates the arrangement. See Eric R. Claeys, Progressive Political Theory and Separation of Powers on the Burger and Rehnquist Courts (forthcoming 2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=480691 (last visited Sept. 16, 2004). As I suggest in the text, I think the argument misses the serious skepticism of agency decisionmaking that is now reflected in administrative law doctrines.

102 Merrill, supra note 99, at 1059–68, 1075–1112 (discussing the shift in the dominant understanding of administrative agencies from public trust to capture theory and the resulting consequences for legal doctrines concerning agencies); Reuel E. Schiller, Rulemaking’s Promise: Administrative Law and Legal Culture in the 1960s and 1970s, 53 ADMIN. L. REV. 1139, 1142, 1149–55 (2001) (explaining federal court decisions of the 1960s and ’70s that heightened review of agency actions and required agencies to engage in rulemaking, in part, as a response to criticism that agencies had become “arbitrary, inefficient, and inevitability captured by the interests they were supposed to regulate”) [hereinafter Schiller, Rulemaking’s Promise]; Reuel E. Schiller, Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 53 VAND. L. REV. 1389, 1417–42 (2000) (describing the decline of “interest group pluralism” and subsequent efforts by courts to make the administrative process more participatory through the doctrines of judicial review, administrative process, and standing) [hereinafter Schiller, Enlarging the Administrative Polity]; Richard B. Stewart, The Reformation of American Administrative Law, 88 HARV. L. REV. 1669, 1670, 1712–60 (1975) (identifying the change in attitude towards the traditional administrative state and describing the resulting development of legal doctrines by federal judges to insure fair representation of parties affected by the actions of administrative agencies).
cern that agencies might be captured manifested itself in judicial doctrine by the mid to late 1960s. But that was a period where the post New Deal settlement—about the scope of federal power, about deference to social and economic legislation—was not open for re-negotiation. A revitalized non-delegation doctrine, remember, would mean sweeping invalidation of significant parts of the apparatus of the federal government. For example, the EPA, the FCC, the FDA, the FTC, the OSHA, and the SEC all administer some vague mandates; it is conceivable that adherence to nondelegation doctrine would necessitate invalidation of portions of each of those agencies’ missions. But at the point when skepticism of agency behavior seeped into the courts, such sweeping judicial invalidation of parts of the federal government was not in the realm of the possible. More than this, as just noted, it was not (and still is not) clear what would be achieved by revitalizing the nondelegation doctrine and invalidating major parts of the administrative state. Judicial invalidation of parts of these agencies’ missions may not have seemed much better. That alternative was not, as discussed earlier, the end of regulation of those fields. In the face of an invalidation, Congress would probably re-enact statutes and have them privately enforced or re-delegate to the administrative agency with more specific instructions.

Finally, the nondelegation doctrine was not the only space in which courts could express their concerns about agency power. There were many outlets for judicial skepticism because courts had sub-constitutional tools available to tame that incompetent or captured agency. These were tools that courts used with vigor. Through the everyday mechanisms of administrative law, courts transformed what agencies were required to do in order to survive judicial review of their actions.\(^\text{103}\) Agency actions had to be transparent, participatory, and reasonably justified for the court.\(^\text{104}\) Once tamed, the administrative agency does not seem a candidate for reform even when it does become possible to reconsider old commitments.

**D. The Normative/Political Valence of Federalism and Separation of Powers**

Aside from those who describe the changing conditions that make movement toward devolution possible, many commentators stake out more normative positions on the Court’s federalism decisions. They argue that the Court’s federalism revival is explained by some factor and then they ei-


ther decry or celebrate that development. Several commentators, for instance, have characterized the Rehnquist Court federalism revival as politically conservative.\textsuperscript{105} Political conservatives are fans of federalism, so goes the argument, because state governments are less likely to enact certain types of regulation and wealth redistribution regimes. Given interjurisdictional competition, for example, redistribution of wealth is systematically less likely to occur at the state level. Others explain that the court has rightly become more persuaded of the traditional virtues of a federalist system—experimentation and inter-state competition yielding superior approaches (races to the top), diversity (carrying the possibility of satisfying more preferences), or the intrinsic value of decentralized government decisionmaking.\textsuperscript{106}

These arguments paint too broadly. It is hard to take much away from the checkerboard of the Court’s federalism “revolution.” Piece together the Court’s decisions on the Commerce Clause, Section 5 of the Fourteenth Amendment, the anti-commandeering rule rooted in the Tenth Amendment, and state immunity from damage actions rooted in the Eleventh Amendment. These movements in the direction of the states are a strange mish-mash that hardly add up to a full-scale shift of government authority to the states.\textsuperscript{107} Compared to the results one might hope to achieve, or fear would result, from a comprehensive devolution of federal authority to state governments, the Court’s decisions seem a thin reed indeed. Nonetheless, I shall take as a given that—at the margins, as the economists like to say—federalism decisions can be understood, as well as defended or critiqued, along such dimensions as consistency with a politically conservative prefer-

\textsuperscript{105} See, e.g., Herman Schwartz, The States’ Rights Assault on Federal Authority, in \textit{THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT} 155–67 (Herman Schwarz ed., 2002) (asserting that the Rehnquist Court’s federalism jurisprudence is a “states’ rights resurgence” and should be understood as a masked “assault on those shortchanged by birth and by fortune”).

\textsuperscript{106} Steven G. Calabresi, \textit{Federalism and the Rehnquist Court: A Normative Defense}, 574 \textit{ANNALS AM. ACAD. POL. & SOC. SCI.} 24, 27–28 (2001) (recounting the traditional arguments in favor of federalism (satisfaction of preferences, healthy competition between jurisdictions, increased policy experimentation, and greater accountability)). In Calabresi’s view, federalism “merely perfects the Madisonian constitutional system, which pits differently assembled majorities in different constituencies against each other in the hope that the true popular will thus emerge and prevail.” \textit{Id.} at 35; see also John O. McGinnis, Reviving Tocqueville’s America: The Rehnquist Court’s Jurisprudence of Social Discovery, 90 \textit{CAL. L. REV.} 485, 489, 511 (2002) (arguing that the Rehnquist Court is engaged in a revival of federalism that can be described as part of its jurisprudence of “decentralization and private ordering of social norms”).

\textsuperscript{107} Richard H. Fallon, Jr., The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions, 69 U. CHI. L. REV. 429, 468 (2002) (describing the Rehnquist Court’s federalism cases as a “mixed picture”). “If the Supreme Court is implementing a federalism revolution, it is thus distinctively a lawyers’ revolution. Though the rhetoric is sometimes audacious, few landmarks have toppled. Much of the significance, if not the devil himself, inhabits the details.” \textit{Id.} at 494; see also John C. Jeffries, Jr., In Praise of the Eleventh Amendment and Section 1983, 84 VA. L. REV. 47, 47–54 (1998) (explaining the impotence of the Eleventh Amendment as “a structural constraint on the powers of the federal government”).
ence for state instead of federal action, or for the traditional values of federalism—experimentation, diversity, and localized decisionmaking.

What is striking about all these perspectives on federalism is that, despite their differences, they are committed to the notion that limitations on federal power, and comparative enhancement of state power, have predictable consequences. They then bemoan or celebrate those consequences. But the shared assumption is that it really matters whether states decide something or the federal government decides something. The specific views underlying the assumption are that states will be more politically conservative; they will experiment by pursuing diverse responses to social problems, which can tell us something about the best response or at least permit people to match with the state regime that most suits their preferences; or states satisfy a deep need for decisionmaking that is close to the people.

The shared assumption seems quite plausible. Shifting authority away from federal actors and to state actors is to send authority to a systematically different set of decisionmakers. State political systems are genuinely different political systems than the national political system. Consider first the formal differences one notices in a survey of state governmental structures. Many governors have line-item veto authority, many state judiciaries are elected, many states have traditions of referenda. And the less formal differences are no less real. There are systematic ideological and cultural differences that map on to states and regions of the country. Levels of state regulation and state redistribution vary even in the current regime, where there is strong pressure toward national uniformity.

Those who write about separation of powers believe that it really matters whether, for instance, Congress or the executive branch decides some question. And on many important levels, it does. The executive and the legislature are structured and staffed differently. Not only are these institutions structured differently, they have different jobs to do, different ways of doing those jobs, and different internal norms. And from a democratic theory perspective, the choice between Congress and an administrative agency is the choice between decisionmakers with electoral connections and those without direct electoral legitimacy.

But those who think about separation of powers can exaggerate these differences and the comparison to federalism well makes the point. To take up the primary delegation question, if one compares the choice between

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108 Louis Fisher & Neal Devins, How Successfully Can the States’ Item Veto Be Transferred to the President?, 75 GEO. L.J. 159, 166-67 (1986) (describing the different types of veto power that states have authorized their governors to exercise).


Congress and the executive on the one hand to the choice between the federal government and state governments on the other, the consequences of the intra-federal choice seem puny because the differences by comparison look lilliputian. Compare two hypothetical cases: In one, the Supreme Court holds that the Occupational Safety and Health Act is an unconstitutional delegation of legislative power because it lacks an intelligible principle by which the agency can implement the Act. Congress will have to rewrite the Act with more specific standards if the regime is to stand. In the other case, the Court holds that there is no enumerated power that permits the federal government to have a federal regime of occupational safety and health. No Congressional re-drafting will solve the problem; occupational safety and health regimes, if they are to exist at all, will exist at the state level only. Is there any doubt that the latter would be revolutionary while the former would not? The federal political system is first and foremost a federal system. When compared to the federal/state choice, the incentives of decisionmakers in the federal system—and especially the two democratic institutions—are more similar than different; the constituencies that care about what government does are active in, have access to, and influence in the whole range of federal institutions.

This matters because it means it is difficult to predict the outcome of a shift of authority from one institution to the other. If the President had a line-item veto, would the world look a lot different? If Congress specified regulatory trade-offs instead of administrative agencies specifying regulatory trade-offs, would the world look a lot different? The answers to these questions are far from clear. Those choices would channel decisionmaking to different decisionmakers (to the President from Congress; to the Congress from the agency) with different ways of doing business. But no matter where the decision is lodged, the decisionmaker without the authority will continue to exist, will express its views, and will remain a repeat player in a federal system where there are thousands of occasions for inter-branch negotiation and compromise. More than that, the constituencies that care about the choice that is being made will energetically press their views to the decisionmaker, no matter where he sits. It is for these reasons that the allocation of authority between Congress and the executive, for instance, does not have the sort of systematic valence as does the choice between the federal government and state governments. And, without such predictable consequences to either celebrate or worry about, it will be much harder for external forces to influence in major ways doctrines like the nondelegation doctrine.

111 The argument here is more comprehensively developed elsewhere. See Magill, supra note 17, at 632–49.
IV. LESSONS OF THE COMPARISON

This comparison between federalism and separation of powers has some broader lessons. One lesson is that we should be cautious of some of the global explanations that have been offered for the Rehnquist Court's decisions. A turn toward historically informed constitutional interpretation cannot explain what has happened in separation of powers law. Nor can an explanation that emphasizes the Court's confidence about its exercise of judicial review explain the Court's resistance to revising some parts of separation of powers doctrine.

The most important lesson, though, is that federalism and separation of powers are not siblings. They might not even be cousins. True, they are both about channeling decisionmaking authority to particular institutions and they are not about placing substantive limits on government decision-making generally. But they are fundamentally different as a matter of positive law and political economy. For those reasons, the internal and external factors that generate the doctrine should be expected to produce different patterns. In other words, the main lesson here is that the federalism and separation of powers are apples and oranges. They will not ripen and fall off the tree together and we should not expect them to.