

William & Mary Law Review

Volume 30 (1988-1989)
Issue 2 *The American Constitutional Tradition
of Shared and Separated Powers*

Article 12

February 1989

The Separation of Powers and the Rule of Law: The Virtues of "Seeing The Trees"

Peter M. Shane

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Constitutional Law Commons](#)

Repository Citation

Peter M. Shane, *The Separation of Powers and the Rule of Law: The Virtues of "Seeing The Trees"*, 30 Wm. & Mary L. Rev. 375 (1989), <https://scholarship.law.wm.edu/wmlr/vol30/iss2/12>

Copyright c 1989 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmlr>

THE SEPARATION OF POWERS AND THE RULE OF LAW: THE VIRTUES OF "SEEING THE TREES"

PETER M. SHANE*

President Verkuil's essay for this symposium¹ is a contribution to what might be called the "seeing the forest" tendency in recent separation of powers thought. Writings of this kind reflect that federal courts over the last fifteen years have been deciding basic issues of constitutional structure and operation at an unprecedented rate. Moreover, other such issues lurk in the not too distant judicial horizon.² The common perception of the "seeing the forest" school is that Supreme Court precedents in this area are unpersuasive, or inconsistently reasoned, or incompletely explained. Consequently, a need is asserted for some theoretical creativity to give the courts—and us—a sense of what separation of powers cases are "really about." Seeing the forest in which past disputes were merely the trees is an effort to lend focus and manageability to future debate and adjudication.

Seeing the forest is an important enterprise. Insightful efforts to find patterns in disparate strands of litigation help both citizens and public officials to rethink the course of the law, the assumptions law embodies, and the connections between law and other aspects of our culture.

It is less clear, however, whether seeing the forest is always the most productive stance from which to advise courts on the resolution of particular disputes. Judges typically approach cases with a more particularistic bias that focuses on the facts of *this* case, the meaning of *this* constitutional clause, and the interests of *these* parties, rather than any global vision of the Constitution. "Seeing the trees" is thus equally critical to litigation as we typically con-

* Professor of Law, University of Iowa.

1. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301 (1989).

2. As this comment went to press, the Supreme Court had just decided *Mistretta v. United States*, 57 U.S.L.W. 4102 (U.S. Jan. 18, 1989) (upholding constitutional status of United States Sentencing Commission against separation of powers challenge).

ceive of it, and, for reasons I will discuss, equally critical to what I believe is the most attractive conception of the rule of law in a government of separated powers.

I. THE VIRTUES OF "SEEING THE TREES"

From the point of view of a judge or a litigator, there is something odd about critiquing as a single category of cases—that is, "separation of powers" cases—all of the following: *Morrison v. Olson*,³ *Buckley v. Valeo*,⁴ *INS v. Chadha*,⁵ *Bowsher v. Synar*,⁶ *Commodity Futures Trading Commission v. Schor*,⁷ and *Nixon v. Administrator of General Services*,⁸ to take but a few recent landmarks. Each deals with a problem in the distribution of governmental powers that in some obvious respects is different from the problems addressed in the other cases.

It is as if we conceptualized all of the last decade's first, fourth, fifth, eighth, and fourteenth amendment cases as "human dignity" cases. In doing so, we would likely find profound inconsistencies in rhetoric, method, and perhaps, result in cases, for example, on abortion and searches and seizures. What we would make of it is unclear. We might not derive any generalization more ambitious than the observation that different Justices express themselves differently, or that the necessities of coalition-building produce different sorts of opinions in different cases. If we were attempting to theorize about constitutional interpretation, we might conclude that different tendencies in different sub-areas of human rights decision making relate to different levels of explicitness with which

3. 108 S. Ct. 2597 (1988) (upholding independent counsel provisions of Ethics in Government Act).

4. 424 U.S. 1 (1976) (invalidating grant of administrative power to Federal Election Commission because of unconstitutional appointments process).

5. 462 U.S. 919 (1983) (invalidating legislative vetoes under bicameralism and presentment clauses of article I).

6. 478 U.S. 714 (1986) (invalidating vesting of certain budgetary functions in Comptroller General because of officer's plenary removability by Congress).

7. 478 U.S. 833 (1986) (permitting administrative agency to adjudicate counterclaims raised under state law).

8. 433 U.S. 425 (1977) (upholding, against separation of powers challenges, regulability of President Nixon's presidential records under Presidential Recordings and Materials Preservation Act, 88 Stat. 1695 (1974) (current version at 44 U.S.C., § 2107 (1982 & Supp. III 1985))).

the Constitution appears to address particular problems,⁹ to different levels of clarity in the direction of precedent cases, or to different judicial assessments of the weightiness of competing interests in the disputes litigated. Whatever our speculation, however, I predict we would not spring too quickly to the assumption that the Supreme Court was merely foolish because of inconsistencies in the implementation of the "human dignity" principle.

The reason for my prediction is simple. Apparent inconsistencies in the implementation of the "human dignity" principle would seem a natural by-product of the conventional understanding that the Constitution does not embody any unitary principle of human dignity. When the Court asks whether a warrant is necessary for a police search of our garbage, it does not think of itself as asking the same question as when the Court considers whether corporal punishment in public schools must be preceded by a hearing. The Court is asking whether a garbage search is covered by the fourth amendment. This conventional wisdom may, of course, be unfortunate; maybe the Constitution should be understood to embrace some unified conception of human dignity. My point is, however, that the Constitution usually is not so read. More important for present purposes, the Constitution does not embody any more clearly than a "human dignity principle," any unitary principle called the "separation of powers."

"Separation of powers" is, as Verkuil notes, just one maxim, and perhaps an unfortunate one, by which we seek to capture something essential about the detailed distribution of powers that the Constitution commands.¹⁰ "Checks and balances" is another, arguably more useful maxim.¹¹ The Constitution, however, speaks at a level of particularity about governmental powers that is far less abstract than either of these maxims, and each detail may signal

9. Because, for example, article III is silent on how federal courts shall operate, as opposed to the categories of subjects on which they shall operate, one would expect constitutional disputes over the allocation of particular functions to the courts to be adjudicated necessarily on some sort of functionalist ground. See *CFTC v. Schor*, 478 U.S. 833 (1986) (permitting administrative agency to adjudicate counterclaims raised under state law).

10. Verkuil, *supra* note 1, at 301.

11. For a creative "seeing the forest" rethinking from a checks and balances perspective, focusing on the constitutional status of independent agencies, see Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

concerns more nuanced and more helpful than the answers we get to the question, "What is the separation of powers really about?"

That seeing the trees, not only the forest, has virtues for the straightforward resolution of cases involving government organization is amply demonstrated by the dispute over the independent counsel statute.¹² Despite the length and passion of Justice Scalia's dissent,¹³ it is difficult to grasp from a "seeing the trees" perspective why the law's constitutionality was not patent to all concerned.

Typically two objections were made to the law, one to the judicial appointment of prosecutors and one to the limited removability of the independent counsel. One might have thought that the bare wording of the necessary and proper clause,¹⁴ and the express authority of Congress to vest the appointment of inferior officers in the courts¹⁵ would have answered both objections. Two other clauses come into play, however: the vesting of executive power in the President,¹⁶ and the presidential obligation to "take Care that the Laws be faithfully executed."¹⁷ How should we approach the war of clauses?

Presumably, the "seeing the forest" school would start from some premise as to the purposes of the separation of powers and ask whether the Ethics in Government Act¹⁸ undermined those foundational purposes. This was, indeed, Justice Scalia's approach. He rejected the Court's argument as resting too heavily on "such relatively technical details as the Appointments Clause and the removal power," and argued that the relevant constitutional provisions derive "comprehensible content" from "the principle of separation of powers."¹⁹ That principle, as Scalia viewed it, dictates that the President may not be deprived of "exclusive control over . . . quintessentially executive activity."²⁰

12. See *Morrison v. Olson*, 108 S. Ct. 2597 (1988).

13. *Id.* at 2622-41 (Scalia, J., dissenting).

14. U.S. CONST. art. I, § 8, cl. 18.

15. *Id.* art. II, § 2, para. 2.

16. *Id.* art. II, § 1, para. 1.

17. *Id.* art. II, § 3.

18. 92 Stat. 1867 (1978). The current version is codified at 28 U.S.C.A. §§ 591-599 (West Supp. 1988).

19. 108 S. Ct. at 2625 (Scalia, J., dissenting).

20. *Id.* at 2627.

In contrast, the "seeing the trees" school, at least as I would represent it, would ask a "technical question": whether the vesting clause of article II or the faithful execution clause signals a constitutional mandate of plenary presidential control over criminal prosecution that overcomes the plain import of the necessary and proper, and appointments clauses.²¹

The "seeing the trees" approach is entirely comprehensible on the independent counsel issue. Criminal prosecutors were well known in 1787.²² If we ask, in "seeing the trees" fashion, whether we can learn something in particular about the status of independent counsel under the vesting and faithful execution clauses, we may find we have a more confident basis for assessing the constitutionality of the office than if we ask a more general question related to the purposes of the separation of powers.

Indeed, we discover the following. That the founding generation conceptualized criminal prosecution as an inherently executive function necessarily encompassed by the vesting clause of article II is extremely unlikely. In England, criminal prosecution was not reserved to the crown.²³ In the colonies and in some states with constitutions worded identically in all relevant respects to the federal Constitution, there were judicially appointed prosecutors as well as executive appointed prosecutors functioning with apparent policy

21. As it happens, both approaches to a particular issue might yield the same answer. Indeed, it would be puzzling if they did not. When the Constitution was drafted to include the language of article II, the founding generation was presumably privy to its own purposes and did not adopt particular language to undermine them. Scalia's deduction from *his* global theory of the separation of powers of a conclusion at odds with the conclusion yielded by a more "technical" inquiry into the pieces of the Constitution is itself some evidence that *his* global theory is misinterpreting whatever global theory of the separation of powers might be imputed most reasonably to the Constitution.

Of course, if the question posed in a particular case were a question entirely alien to the founding generation, an attempt to apply the Constitution to the question in a wholly particularistic fashion could become perverse. For such a question, one would need to impute to the text some broader normative understanding to make the text comprehensibly applicable to an unanticipated problem. The control of criminal prosecution, however, was not an issue unfamiliar to the founding generation.

22. J. JACOBY, *THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY* 11-19 (1980) (discussing the development of criminal prosecution during the American colonial period).

23. *Id.* at 7-11 (discussing the English common law tradition of private prosecution).

independence.²⁴ I am unaware of evidence that the faithful execution clause was intended at all as a power-conferring clause. Its origination in the English Bill of Rights²⁵ and the lack of debate surrounding its adoption in this country suggest strongly that it was understood chiefly as an uncontroversial prohibition on the executive suspension of statutes, not an aggrandizement of the President's role in policy making. If I am right about that, then creating independent counsel to prevent a *de facto* suspension of statutes through executive branch corruption strongly vindicates the clause, rather than violating it.²⁶

Under this approach, I simply perceive no persuasive basis for arguing that the Ethics in Government Act abridges any power that the Constitution lodges in the President. This conclusion arises under what is at one level a formalistic approach that does not consciously attend to any broad normative theory of power distribution.²⁷ If a court adopts this approach, that court will be open

24. *Id.* at 19-28 (discussing the status of post-revolutionary U.S. prosecutors). For a more detailed review of the evidence, see Shane, *Independent Policy Making and the President's Faithful Execution of the Laws*, 57 GEO. WASH. L. REV. (forthcoming 1989).

25. Bill of Rights, 1 W. & M., 2d sess., ch. 2, § 2 (1689): "That the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal."

26. The requirement of the faithful execution clause is not that the President faithfully execute the laws, but that he take care that they be faithfully executed. Because the Attorney General may remove independent counsel for "good cause," 28 U.S.C.A. § 596(a)(1) (West Supp. 1988), the President presumably may rely on his own caretaking obligation to direct his subordinate, that is, the Attorney General, to discharge any independent counsel who fails to execute the laws faithfully. In the normal course of things, however—in light of the conflict of interest posed for the President in the investigation and prosecution of those officials susceptible to investigation by an independent counsel—a public perception is rational that the law will be more, not less, faithfully executed because of counsel's independence.

27. I have urged elsewhere that such an approach suffices to resolve *INS v. Chadha*, 462 U.S. 919 (1983), on the ground that two-house legislative vetoes clearly run afoul of the text of the presentment clauses, U.S. CONST. art I, § 7, and it is implausible that one-House vetoes are more attractive on relevant normative grounds than are two-House vetoes. Shane, *Conventionalism in Constitutional Interpretation and the Place of Administrative Agencies*, 36 AM. U.L. REV. 573, 585-86 (1987). In discussion at this symposium, Professor Sherry challenged this argument vigorously by elaborating on an idea offered by Justice White in his *Chadha* dissent. White (and Sherry) argue that two-House vetoes are problematic because they defeat bicameralism. Under a two-House veto, an executive branch proposal (authorized by whatever statute authorizes the legislative veto process) would become law even if one House disapproved. The process would differ from the ordinary legislative process, under which legislation requires the concurrence of the President and both Houses of Con-

to criticism for inconsistent method when it resorts, as it must, to less formalistic approaches to questions to which the Constitution does not speak as directly. The harm of such inconsistency is not, however, self-evident. A court steeled to such criticism may take pleasure in what Verkuil somewhat dismissively suggests is the "cathartic"²⁸ pleasure of occasionally declaring that the Constitution means what it says.

Such a court might also take heart in recognizing that the distinctions sometimes drawn between "constitutional formalism" and "functionalism," or between "formalism" and "normativism"

gress. A one-House veto (under this argument) more faithfully recreates the legislative process because, if one House disapproves the President's proposal and thus keeps it from becoming law, its vote is precisely equivalent to the decision of one House not to enact a presidential proposal introduced as an ordinary bill. *Chadha*, 462 U.S. at 997 (White, J., dissenting).

This argument—treating executive branch initiatives subject to one-House vetoes as constitutionally acceptable because the process is an equivalent form of "reverse" legislation—is elegant, but textually untenable. The Constitution clearly indicates that its drafters contemplated the possibility that legislation might originate with a presidential proposal; the President is expressly permitted to recommend to Congress "Consideration such Measures as he shall judge necessary and expedient." U.S. CONST. art. II, § 3. Nonetheless, the document still reads: "Every Bill which shall have passed the House of Representatives and the Senate," and "Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment)" "shall, before it become[s] a Law, be presented to the President of the United States" for his approval or disapproval. *Id.* art. I, § 7. The "reverse legislation" argument urges, in essence, that it is constitutionally permissible for Congress to ignore article I, § 7 with regard to any measure that originated under article II, § 3. If that conclusion is sound, it is odd that the Constitution does not say so. The ordering of the legislative process received the founding generation's concentrated attention. In my judgment, no compelling normative case has been made for ignoring the obvious import of the Constitution regarding the order of the legislative process.

To put the point yet another way, Verkuil suggests that legislative vetoes of agency rules pose sufficiently "well documented" "conflict of interest possibilities" to permit their invalidation on that rationale. Verkuil, *supra* note 1, at 313-14. I do not agree that the law review articles he cites provide a more confident basis for adjudicating the constitutionality of legislative vetoes than does the text of article I.

28. Verkuil, *supra* note 1, at 314. Verkuil's argument that, in some respects, the due process clause can "do the job" of the separation of powers principle, so far as constitutional interpretation is concerned, is somewhat ironic. *Id.* at 306-07, 311. The reason I would quickly agree that the due process clause is a more manageable source of constitutional understanding than "the separation of powers principle" is that the due process clause is "in" the Constitution in a critical textual way that the separation of powers principle is not. *Id.* at 307-08. Verkuil is to some extent inviting courts only to declare what the due process cause implies.

are themselves overdrawn. An important part of our legal culture is the felt necessity to legitimate our contemporary vision of good government by linking that vision to the aspirations of the founding generation in some rhetorically compelling form. Most Americans count stability and order as important attributes of good government. Conventional constitutional textualism—occasionally declaring that the Constitution means what it says—promotes these values. Recourse to constitutional textualism is thus both functional and normatively sound, so long as textualism is confined to cases in which it is logically workable and does not lead to a result we are confident is morally unacceptable or absurd in practice.²⁹

II. THE INCOMPLETENESS OF THE FORMAL RULE OF LAW VISION

Having advertised the virtues of not exclusively seeing the forest, or at least not looking for the forest prematurely, I would like next to highlight a problem Verkuil himself associates with the particular focus he suggests for separation of powers doctrine. Verkuil urges a “rule of law” conception of the separation of powers, in which the separation of powers is part of a constitutional design to reduce “conflicts of interest” within and among the branches of government.³⁰ What Verkuil means by “conflict of interest” is sometimes a conflict of wills between branches,³¹ and sometimes the potential for the aggrandizement of power within one branch without any sufficient check in another branch on the arbitrariness of its exercise.³² For example, Congress’ usurpation of law execution powers would run an impermissible risk of bias and caprice in law enforcement.³³ Congress’ overbroad delegation of power would run the risk that lawmaking and law enforcing powers would be united dangerously in the executive branch.³⁴

29. See generally Shane, *supra* note 27, at 582-85, 588-91, 593-99 (analyzing the approach of conventionalist textualism).

30. Verkuil, *supra* note 1, at 304-05.

31. *Id.* at 307.

32. *Id.* at 307, 309. Verkuil also mentions conflicts of interest emanating from “an individual’s personal stake in the outcome of a proceeding,” but these call less obviously for the invocation of procedural due process in any unconventional sense. *Id.* at 307.

33. *Id.* at 309.

34. *Id.* at 317.

A key problem in the judicial adoption of this perspective is that it invites courts to undertake a role in policing the branches that could aggrandize the judicial branch without a sufficient check on the exercise of judicial power. Verkuil himself questions the wisdom of a reinvigorated delegation doctrine because "[d]eciding what delegations are excessive . . . can put judges in an untenable position," of threatening to undermine the legislature, and making law without electoral accountability.³⁵

One might nonetheless embrace the Verkuil approach if one believed it could lead more confidently to correct results in the adjudication of interbranch conflicts. That, I believe, would not be the case. Consider, for example, the problem of congressional standing.³⁶ The Constitution does not address this question with any explicitness, and some functionalist answer is necessary. To draw the problem most sharply, imagine that Congress adopts specific procedures for suing the President to vindicate Congress' interest in a particular vote or in the integrity of a particular congressional power. Under this procedure, Congress sues to invalidate a pocket veto. How should a court behave if it is interested in avoiding the conflict of interest problem that Verkuil sees as being at the heart of the separation of powers?

One could argue that *declining* standing is proper because recognizing standing would unduly aggrandize the power of the courts, promote conflict between the courts and the political branches, or permit Congress to oversee the President through means other than using its article I powers. Following this analysis, courts adhering to the Verkuil "conflict of interest" approach would turn away congressional plaintiffs.

Alternatively, one might argue that *recognizing* standing is proper because it represents deference to legislative judgment. Judicial dispute resolution can promote harmony between the political branches, and Congress will be discouraged from resorting to the aggressive use of article I powers over appropriations or impeachment, which are difficult to check and destabilizing if used in

35. *Id.* at 320; see also *id.* at 301-02, 307, 320.

36. For an extensive judicial debate over the existence of congressional standing to sue the executive branch, see *Barnes v. Kline*, 759 F.2d 21 (D.C. Cir. 1985), *vacated sub nom.* *Burke v. Barnes*, 107 S. Ct. 734 (1987).

a retaliatory way. According to this analysis, courts would help relieve what Verkuil calls conflicts of interest by authorizing congressional plaintiffs.

In Verkuil's terms, then, the separation of powers principle argues in both directions with considerable force. This uncertainty can yield either of two consequences. One is that the Court will recognize standing because the challenge to standing is itself non-justiciable, a position the courts would be unlikely to take on a question so critical to the exercise of judicial power. Alternatively, the Court will assess the constitutionality of congressional standing, but according to some normative premise behind the distribution of government powers other than the impact of recognizing standing on the conflict of interest problem. That is, the court will use another factor that it regards as being within judicial cognizance and judicial competence to enforce, but which argues more decisively for a particular resolution of the standing puzzle. A court might turn its attention to arguments that the Constitution "prefers" political resolutions to political disputes, or effective constraints on the President to insure compliance with the Constitution, or the primacy of the courts in constitutional interpretation. None of these arguments is likely to produce an uncontroversial resolution of the congressional standing question. My point is, however, that the Court will be forced, if it is to address the standing problem at all, to an inquiry into all the purposes that might be inferred from the Constitution's distribution of government powers. This inquiry is likely to be more eclectic than the Verkuil approach.

III. THE RULE OF LAW AS CULTURE

President Verkuil advances a conception of the "rule of law" that embodies two particular values, the values of impartiality and of fair hearing. I prefer to treat these values, critical as they are, as part of a larger, more enveloping conception of the rule of law. I have argued elsewhere that the rule of law should be understood as a dedication to achieving mutual accountability in society through an institutionalized commitment to a certain kind of normative interpretation—a way of separating right from wrong—that we call

legal interpretation.³⁷ Two things are distinctive about legal interpretation. First, it occurs and is implemented through processes widely acknowledged as legitimate and deserving of people's allegiance. Second, it forces those with power in society, including institutions, to give disciplined recognition to the interests of other persons, groups, or institutions in the processes of making decisions as to how the power of the state will be wielded.

A government of separated powers, properly checked and balanced, is especially well suited to this kind of ideology because, if any branch proposes to act in a manner too dismissive of interests other than its own, different branches have opportunities to give voice to other interests and to provoke attention to alternative sets of concerns.³⁸ Particularistic attention to all the small pieces of the Constitution may bolster this ideology by helping to sustain a persistent, often tense dialogue among the Congress, the President, and the Court about constitutional meaning. To put it least glamorously, if any branch relies too heavily on constitutional clause A to justify the expansion of its power, another branch may find political sustenance for resisting the attack with sufficient attention to constitutional clause B. By picking up signals or meaning from each piece of the mosaic, law may grow in a more nuanced, more subtle way than if clashes are always cast as disputes over "what the separation of powers really means."

Although implemented by attention to what Justice Scalia scorns as mere "technical" issues,³⁹ this vision is at base profoundly antiformal. It forswears ultimate constitutional tidiness. Perhaps what is important or essential about the constitutional distribution of powers cannot be distilled to any single normative precept, or even to a set of consistent precepts that can be ranked in order of operational importance. The late Grant Gilmore pointed out that Dean Langdell's aspiration for a scientific distillation of law was doomed by a single technological development—the advent of the West Reporting System, and the torrent

37. Shane, *Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress*, 71 MINN. L. REV. 461, 485-92 (1987).

38. *Id.* at 490-501.

39. *Morrison v. Olson*, 108 S. Ct. 2597, 2625 (1988) (Scalia, J., dissenting).

it produced of untidy, inconsistent judicial opinions.⁴⁰ I have likewise thought it no accident that the classic attempt to generate an elegant formal approach to equal protection—Tussman and tenBroek's *The Equal Protection of the Laws*⁴¹—was written before *Brown v. Board of Education*⁴² unleashed a flood of litigation exposing the infinite facets of our quest for equality and dooming the ambition for neat elegance. In the same way, I believe we are now confronting a range of questions concerning the distribution of governmental powers that is too great to admit of any hope that an elegant, unified conception of the separation of powers can rescue us from certain and salutary controversy

40. G. GILMORE, *THE AGES OF AMERICAN LAW* 47 (1977); G. GILMORE, *THE DEATH OF CONTRACT* 55 (1974).

41. Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

42. 347 U.S. 483 (1954).