

# THE STRUCTURAL CONSTITUTION AND THE COUNTERMAJORITARIAN DIFFICULTY

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The last quarter century has seen an astonishing revival of judicial, and especially Supreme Court, enforcement of the structural constitution.<sup>1</sup> This revival began in separation of powers cases and has spread most recently to federalism cases. From 1937 to the mid-1970s, the Supreme Court rarely enforced structural constitutional guarantees when faced with problematic congressional or presidential actions. Beginning in the mid-1970s, however, a sea change occurred such that in recent years the most talked about cases on the High Court's docket have all been separation of powers or federalism cases.<sup>2</sup>

The purpose of this Symposium Issue is to explore the striking revival in judicial enforcement of the structural constitution in more depth. I want to begin that process in this *Foreword* by offering a brief positive account of how and why the structural constitutional revival began in the separation of powers area precisely a quarter century ago during the Nixon presidency, and how it gained force over the past six years during the Clinton presidency. Analyzing the origins of the separation of powers revival is helpful to understanding its value and to appreciating its likely staying power. I believe the origins of the structural constitutional revival suggest that judicial enforcement of the structural constitution is likely to be with us for some time to come.

As I suggested above, between 1937 and 1974, the Supreme Court behaved in a largely Choperian fashion<sup>3</sup> and rarely

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1. Steven G. Calabresi, *Textualism and the Counter-majoritarian Difficulty*, 65 GEO. WASH. L. REV. 1373, 1375-82 (1998) [hereinafter *Textualism*].

2. *Id.* at 1375-82.

3. JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* (1980) (arguing

intervened in disputes on the scope of executive power—with the notable exception of the *Youngstown* Steel Seizure Case.<sup>4</sup> The Nixon presidency, however, changed all that and led to a revival in the High Court's separation of powers caselaw. A landmark decision was handed down in the *Nixon* tapes case<sup>5</sup> where the Court astoundingly took jurisdiction over a wholly internal executive branch dispute and thus rejected the theory of the unitary executive. The *Nixon* tapes case defeat was followed two years later by a landmark victory for the Executive Branch in *Buckley v. Valeo*,<sup>6</sup> which reinvigorated the president's Appointments Clause powers by striking down provisions of the then new campaign finance laws. During this same period both Congress and the courts joined forces to reject one of Nixon's most important executive power claims by essentially disallowing presidential impoundment.

Astonishingly, all of these very same issues have reappeared in some form or another during the Clinton era. Most dramatically, the Court last summer in *Clinton v. City of New York*<sup>7</sup> struck down a line item veto statute passed by Congress as violating the Article I, Section 7 requirements of bicameralism and presentment. This decision is astonishing because, among other things, it repudiates an act favored by both Congress and the Executive Branch on the relative scope of their own powers. Justice Jackson's *Youngstown* concurrence suggested that such Acts would be entitled to much deference and would almost always prevail.<sup>8</sup> Moreover, the decision is also astonishing because it appears to rest on non-delegation doctrine premises even though Justice Stevens's majority opinion goes out of its way to try to make it appear that such is not the case. *Clinton v. City of New York* was thus a major setback for executive branch claims to lawmaking power akin to the congressional/judicial rejection of the Nixon Administration's ideas on impoundment and even to *Youngstown* itself.

Similarly, *Clinton v. Jones*<sup>9</sup> was a setback to presidential

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that judicial review should not be exercised in structural constitutional cases except to the extent needed to permit judicial protection of individual rights).

4. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

5. See *United States v. Nixon*, 418 U.S. 683 (1974).

6. 424 U.S. 1 (1976).

7. 118 S. Ct. 2091 (1998).

8. See *Youngstown*, 343 U.S. at 637 [Jackson, J., concurring].

9. 117 S. Ct. 1636 (1997) (holding that the President of the United States, in all but the

immunity akin in retrospect to the *Nixon* tapes case. Both Supreme Court decisions brought the respective presidencies to the brink of disaster or, in Nixon's case, beyond. Finally, just as the 1976 decision in *Buckley v. Valeo* reinvigorated the president's appointments powers, so too the Court's 1997 decision in *Edmond v. United States*<sup>10</sup> essentially displaced the faulty Appointments Clause analysis of *Morrison v. Olson*.<sup>11</sup>

Thus, it is clear that during the last 25 years—from the Nixon era to the Clinton era—the Supreme Court has come to play a very active non-Choperian role in separation of powers issues, in contrast to the more passive role it played between 1937 and 1974. I want now to consider some possible explanations for the Court's newly aggressive role.

One distinctive feature of the last quarter century in American politics is that it has been to an unusual degree a time of split party control of the Congress and of the presidency. Both Presidents Nixon and Clinton, and also President Bush, faced Congresses entirely controlled by the opposition political party. In this environment, it is not surprising that separation of powers disputes would arise frequently and that some such disputes would be litigated. A first explanation, then, for the startling rebirth in the Supreme Court's separation of powers case law must obviously be found in the underlying splits in the distribution of power.

A second explanatory factor might be found by considering the Supreme Court's own incentive structure. By 1974, the Supreme Court had come under intense criticism for its activist rulings in the Warren and early Burger eras, culminating with its controversial decision in *Roe v. Wade*.<sup>12</sup> Decisions such as *Roe* placed the Court in the middle of intense social controversies over moral and cultural issues. In contrast, the momentous separation of powers decisions of the last 25 years have excited

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most exceptional circumstances, may be subjected to civil suits arising from events which occurred before he took office).

10. 117 S. Ct. 1573 (1997) (holding that the power of appointment of Coast Guard Court of Criminal Appeals judges is given by statute to the Secretary of Transportation and finding that a judge of the Court of Criminal Appeals is an "inferior officer" for purposes of the Appointments Clause and, therefore, the grant of authority to the Secretary of Transportation to appoint such judges does not violate the Appointments Clause).

11. 487 U.S. 654 (1988) (upholding the constitutionality of the independent counsel provision of the Ethics in Government Act of 1978).

12. 410 U.S. 113 (1973).

little controversy and have produced minimal criticism of the Court. Separation of powers cases—and more recently federalism cases—have thus provided the Court with an opportunity to exercise its power of judicial review in dramatic, visible contexts while essentially avoiding political controversy.

A benefit to the Court from deciding separation of powers controversies is that in doing so it can always be sure that either Congress or the President will be happy with the results. This means the Court can count on there being a politically powerful actor that will vigorously defend whatever decision the Court has reached. The built-in existence of a powerful defending interest group ought to make separation of powers decisions appealing to a court that finds many other areas of its docket to be highly controversial.

This point, in turn, helps to expose some additional reasons as to why the Supreme Court might be policing separation of powers boundaries. For almost forty years now, constitutional scholars have struggled periodically with the problem of the countermajoritarian difficulty.<sup>13</sup> The difficulty is argued to exist whenever a majority of the Court prevents a majority of the people here and now from having their way. In separation of powers disputes, strikingly, there is no countermajoritarian difficulty because the Court is choosing between the majority of the people that elects the Congress and the majority that elects the President. In separation of powers disputes, the Court plays the role of jurisdictional policeman, deciding in essence which of two differently constituted national majorities has jurisdiction over a particular question. No current majority is permanently disempowered. The Court's role in separation of powers disputes is thus not anti-democratic but is democracy enhancing. The Court polices the democratic processes<sup>14</sup> to decide which national majority—the presidential one or the congressional one—gets to decide which questions.

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13. The phrase originated in, and was made famous by, ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-23 (1986). See also Calabresi, *Textualism*, *supra* note 1 (discussing textualism and the countermajoritarian difficulty).

14. This concept is, of course, drawn from JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1990). See also Calabresi, *Textualism*, *supra* note 1, at 1390-93 (discussing the applicability of Ely's theory to structural constitutional review).

This choice is clearly of great consequence. The national majority that elects the President and the national majority that elects Congress are very different. The presidential national majority is assembled only once every four years in an election that everyone mobilizes for and that turns predominantly on national issues.<sup>15</sup> The congressional national majority, however, as Willmoore Kendall pointed out long ago, is assembled over a six year cycle in 435 electoral districts and in the 50 states.<sup>16</sup> Congressional elections are local, as former House Speaker Thomas P. ("Tip") O'Neill once pointed out, and they are greatly affected by the important men and women of each local community.

As a result, Congresses of any party are always concerned with constituency service issues, hostile to foreign aid, and favorably disposed to spending national funds in their local states or districts. In contrast, Presidents are always favorably disposed toward foreign aid, they tend to favor free trade agreements, and they tend to focus more than Congress does on major national issues. Presidents may be willing to take an action that benefits a national majority but that is vehemently opposed in some states or regions or by some interest groups. This is both the benefit and the curse of plebiscitary rule.<sup>17</sup> Congresses on the other hand tend to be cautious and consensus oriented—loath to upset the status quo. They represent regions and interest groups extraordinarily well—sometimes too well.

Thus, when the Supreme Court vindicates the claims of one or the other of our two national majorities, real policy consequences often result. The invalidation of the line item veto, of impoundment, and of the presidential steel seizure in *Youngstown* greatly reinforces local and state influences over spending and seizures of property.<sup>18</sup> In contrast, executive branch victories in the creative use of executive orders, signing statements, and of legal interpretations entitled to *Chevron*

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15. Calabresi, *Textualism*, *supra* note 1, at 1383. See also Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 58-70 (1995) [hereinafter *Normative Arguments*] (discussing president's role as a representative of national majorities).

16. Willmoore Kendall, *The Two Majorities*, 4 MIDWEST J. OF POL. SCI. 317 (1960).

17. Calabresi, *Normative Arguments*, *supra* note 15, at 75-77, 96-98 (arguing against plebiscitary rule).

18. *Id.*

deference<sup>19</sup> greatly reinforce the power and voice of the national majority that elects the President. When one weighs *Youngstown*, *Clinton v. City of New York*, and the relative handful of other Supreme Court decisions that purport to bar plebiscitary presidential lawmaking against the vast number of important executive orders and related interpretations of overly broad statutes issued by the Executive Branch every year, it is hard not to conclude that our constitutional regime in practice allows a great deal of plebiscitary presidential lawmaking to go on even as the Supreme Court pretends it is not allowed. *Clinton v. City of New York* could turn out to be a portent of greater judicial willingness to clamp down in the future on especially novel or sweeping forms of presidential lawmaking. Similarly, recent moves in Congress to cut back on delegations of authority to regulatory agencies in costly rule-makings could turn out to be a healthy policy result of current skepticism over executive power. But, there will always be some presidential lawmaking left in our constitutional system just as we will probably always have the periodic Supreme Court pronouncement that presidential lawmaking is not allowed because it violates Article I, Section 7.

Supreme Court separation of powers opinions settle very important cases but they are less effective in policing the boundary lines between our two contending national majorities. The Supreme Court can help point us in the right direction from time to time, however, by reminding us of the dangers of plebiscitary governance even as much useful presidential lawmaking gets quietly overlooked.

The structural constitutional revival most likely began in the separation of powers area because of the post-1968 trend toward split party control of the presidency and Congress, because of the incentive structure presented to the Supreme Court during this time period, and because of the underlying realities of a Madisonian electoral regime that causes two equally legitimate democratic majorities to coexist and contend with one another at the national level. The structural constitutional revival that began in separation of powers cases

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19. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (holding that executive agencies should be extended judicial deference when interpreting statutes of ambiguous intent or competing policy interests).

inevitably spread to federalism cases<sup>20</sup> because those cases call on the Court to play the same kind of umpiring role between different contending majorities as it was by then already playing in the separation of powers area. As I have argued elsewhere, judicial enforcement of both the separation of powers<sup>21</sup> and of constitutional federalism guarantees<sup>22</sup> serves important public purposes as public choice theory and the economic theory of federalism suggest. Moreover, such an approach resonates deeply with the text and electoral structure of our constitutional regime.

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20. Calabresi, *Textualism*, *supra* note 1.

21. Calabresi, *Normative Arguments*, *supra* note 15.

22. Steven G. Calabresi, "A Government of Limited and Enumerated Powers": *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752 (1995).

