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The Concept of Independence in Public Law

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INTRODUCTION

The separation of powers decisions of the 1980s have been reviled,[1] refuted,[2] rationalized,[3] and refurbished,[4] all in one steady flow of scholarly debate and bewilderment. Commentators have probed the unpredictable doctrine and the still more elusive politics of seven decisions[5] in which the Supreme Court significantly extended the territory of administrative law, moving from the familiar regions of agency discretion and statutory interpretation to the wilderness of government structure. The Court's apparent task in those cases was to examine the scope of Con-

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[1] E. Donald Elliott, *Why Our Separation of Powers Jurisprudence Is So Abysmal*, 57 GEO. WASH. L. REV. 506, 509 (1989) (arguing the Court's separation of powers analysis suffers from a kind of "literalism" that impedes it "from becoming a positive, creative force in our constitutional law").

[2] Dean Alfange, Jr., *The Supreme Court and the Separation of Powers: A Welcome Return to Normalcy?*, 58 GEO. WASH. L. REV. 668, 672 (1990) (criticizing formalist decisions of the 1980s as inconsistent with "historical understandings of the meaning of the [separation of powers] doctrine").

[3] In Public Citizen v. Department of Justice, 491 U.S. 440 (1989), Justice Kennedy, joined by Chief Justice Rehnquist and Justice O'Connor, attempted to harmonize the functionalist approach of the Court's 1988 decision in Morrison v. Olson, 487 U.S. 654 (1988), with the formalism of other separation of powers cases of the 1980s. The three justices cast *Morrison* as a removal authority case, thus involving a "power . . . not explicitly assigned by the text of the Constitution to be within the sole province of the President, but rather . . . encompassed within the general grant to the President of the 'executive Power.' " 491 U.S. at 484. This characterization begged the larger question of *Morrison*—whether the explicit vesting of "executive power" in the President permits allocation of prosecutorial authority away from direct Presidential control.

[4] Lee S. Liberman, Morrison v. Olson: *A Formalist Perspective on Why the Court Was Wrong*, 38 AM. U. L. REV. 313 (1989) (articulating a formalist position considerably more developed than the Court offered in its formalist opinions of the 1980s, and noting that careful formalism and careful functionalism may not be all that different).

[5] Public Citizen v. Department of Justice, 491 U.S. 440 (1989) (Kennedy, J., concurring) (finding Federal Advisory Committee Act violates Article II); Mistretta v. United States, 488 U.S. 361 (1989) (holding United States Sentencing Commission does not violate Article II or separation of powers principles); Morrison v. Olson, 487 U.S. 654 (1988) (holding independent counsel provisions of Ethics in Government Act do not violate Articles II or III or separation of powers principles); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986) (holding assignment of jurisdiction to federal agency to entertain state law counterclaims does not violate Article III); Bowsher v. Synar, 478 U.S. 714 (1986) (holding assignment of executive functions to Comptroller General in Gramm-Rudman legislation violates separation of powers); INS v. Chadha, 462 U.S. 919 (1983) (holding legislative veto violates procedures of Article I); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (holding Bankruptcy Act of 1978 unconstitutionally confers Article III judicial power on bankruptcy judges).

gress' authority both to create new kinds of offices addressing complex problems and to vest controversial powers in existing institutions. While the ensuing scholarly discussion, largely confined to the implications of the cases for the modern regulatory state,[6] was rich and varied, much of it expressed a basic perplexity about the nature of the cases' core concern. The purpose of this Article is to argue for the significance of a thread connecting separation of powers cases since 1935: the concept of independence, not simply of certain agencies and public officials of the "fourth branch," but also of the executive, judicial, and legislative branches of government.

The Article posits that the uncertain scope of independent judgment and action in our political and legal traditions is the underlying conundrum of the separation of powers cases. In the American system of shared and separated powers, actions by either the executive or the legislative branch may prompt claims that the doctrine of separation of powers has been violated. Yet the judiciary, left to resolve the dispute, lacks useful legal definitions of the permissible scope of autonomous action by the political branches. As a leading scholar of the separation of powers has written, the courts are without "definitions and rules appropriate for judicial application."[7] Both formalist and functionalist methodologies appear indeterminate.[8] In this context, the equally unclear nature of the judiciary's own autonomy is inevitably a complicating factor. Yet somehow the cases are decided. This Article asks how.

Noting the absence of convincingly explained or applied legal doctrine to provide an understanding of the decisions, the Article looks to several seminal political and literary texts of the American experience that embody traditions of thinking about independence.[9] These texts yield a num-

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[6] *See, e.g.*, Symposium, Bowsher v. Synar, 72 CORNELL L. REV. 421 (1987); Symposium, Morrison v. Olson: *Addressing the Constitutionality of the Independent Counsel Statute*, 38 AM. U. L. REV. 255 (1989); Symposium, *Separation of Powers and the Executive Branch: The Reagan Era in Retrospect*, 57 GEO. WASH. L. REV. 401 (1989); Symposium, *The American Constitutional Tradition of Shared and Separated Powers*, 30 WM. & MARY L. REV. 209 (1989); *Administering the Administrative State*, 57 U. CHI. L. REV. 331 (1990).

[7] William B. Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474, 503-04 (1989) ("The functionalists appear to be substituting one indeterminate doctrine for another. . . . [T]here is no commonly accepted scale for ranking values.").

[8] *Id.*

[9] THE DECLARATION OF INDEPENDENCE (U.S. 1776) [hereinafter THE DECLARATION]; THE FEDERALIST No. 40 (James Madison); ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Phil-

ber of meanings of independence that have currency in the American imagination. The multiple meanings involve different dynamics of political judgment and action. This Article suggests that the variety of meanings may account for the range of approaches and concerns in separation of powers cases. By associating a different dynamic of independence with each of the branches of government, the Article posits that each branch can be viewed as exercising independent judgment, and thus defining its scope of autonomy, in a unique way with unique dangers. Specifically, each branch's independence can be seen as a function not of its separateness from the other branches, but of its particular balance of separateness from, and linkage to, politics. Separation of powers problems arise when a branch's particular judgment amounts to an exercise of independence from politics that appears to exceed a relevant tradition.

The Article has four parts. Each part begins by presenting a different understanding of independence drawn from nonlegal American texts. That understanding then becomes the basis for characterizing a set of separation of powers cases. Part I concerns the political aggressiveness that independence promotes in the Presidency, prompting legal challenges to acts of executive authority. Part II addresses the anxiety that independence can breed in the Supreme Court, leading to a mechanical form of decision-making that in turn has prompted a range of critical commentary. Part III addresses the isolation to which legislative independence falls prey, provoking charges of congressional abdication. Part IV studies the political idealism that fourth-branch independence attempts to incorporate in limited form.

Thus, I will discuss first what can be called the tradition of *generative independence*, established powerfully in the Declaration of Independence and invoked somewhat less persuasively in James Madison's essay, Federalist No. 40. I will suggest that the meaning of independence for the executive branch is, to a great extent, associated with this generative tradition. For the executive branch, independence has meant independence from the politics of the past. High-stakes legal battles have arisen from acts of Presidents who, in efforts to be generative of a new order, have aggressively "declared independence" from political tradition in terms and cir-

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lips Bradley ed., 1945); HENRY ADAMS, THE EDUCATION OF HENRY ADAMS (Henry C. Lodge ed., 1918); WILLIAM FAULKNER, GO DOWN, MOSES (Vintage Books 1973) (1940).

cumstances that the judiciary could not endorse. I will suggest that a deep wariness of this tradition may account for cases rejecting presidential claims to expansive power, whether by President Roosevelt in his 1935 effort to take over the independent commissions,[10] President Truman in the steel seizure episode,[11] or President Reagan in his swift first-term effort to introduce and to legitimate a program of deregulation.[12]

Second, I will discuss *preservationist independence*, a concept derived from Tocqueville's classic analysis of the young republic, *Democracy in America*.[13] Of particular relevance are Tocqueville's accounts of the "occult science" of the American legal profession as one of the "mitigations of the tyranny of the majority," and his description of the Supreme Court's role of safeguarding the Union against the fickleness of legislative majorities. Against this background the idea of preservationist independence takes shape: the seeming aloofness of American law from current politics in order to preserve from factious innovation a vision of fundamental constitutional order. The Article will associate this meaning of independence with the judicial branch in its review of separation of powers cases involving certain acts of Congress. The Article will next discuss the anxiety that such a concept—the precept of independence from the politics of the present—may produce in judges. The anxiety of judicial independence finds expression in judicial formalism,[14] which assumes a particularly mechanical voice in cases where the legislative action under review smacks of a *lack* of independence from political capture on the part of Congress. Judicial formalism in this light is an ill-fated effort to express judicial distance from present politics in response to what appears to be its opposite—political expedience or fickleness—in the legislative branch.

Third, the Article will consider *reformist independence*, the eighteenth-century notion of political resistance. In *The Education of Henry Adams*,[15] the historian-autobiographer Henry Adams recalls the commitment of his famous forebears to a position of critical independence from the status quo of corrupt power and authority. But as the twentieth century

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[10] Humphrey's Ex'r v. United States, 295 U.S. 602 (1935).

[11] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[12] Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

[13] TOCQUEVILLE, *supra* note 9.

[14] *See, e.g.*, INS v. Chadha, 462 U.S. 919 (1983); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

[15] ADAMS, *supra* note 9.

begins, Adams sees the concept of resistance as a quaint idea from a lost age; indeed, political and intellectual independence appear all but impossible in a world of hidden or incompletely understood forces controlling individuals, states, and human history itself. With large-scale and perplexing economic, scientific, and social developments, the political mind is at a loss to particularize, much less propose or take part; it can assert its independent judgment only by theorizing broadly about the reasons for its own lack of freedom. Reformist independence thus becomes something quite different in the world of Henry Adams: independence in the ironic sense of isolation. I will associate this latter strain with the legislative branch as it figures in another set of separation of powers cases. When Congress, like Adams, appears engulfed by complexity, it is able to act only from an isolated stance by naming a problem and delegating authority to resolve it to another body.[16] In cases challenging such transfers of power, the Supreme Court invariably acquiesces in the legislative act. Whether the Court too readily accepts the model of legislative independence as isolation, and is thus too tolerant of the attenuation of the legislative role, becomes a central concern.

Finally, the Article will examine the heartfelt, yet often ineffectual, strain of *independence as alienation* from political faith in a morally impoverished society. This tradition is one of dissent, the political mind's rejection of and separation from society. Here the individual opts out of a milieu whose corruption and other limitations are understood only too well. Both the force and dangers of this aspect of American independence are captured with wrenching power in William Faulkner's novel *Go Down, Moses*,[17] in which a young Southerner disavows his tainted heritage, removes himself from a corrupt moral order, and lives instead in a realm of ideals. I will suggest that a concerned response to the tradition of alienation underlies the controversial independent counsel statute[18] and its nearly unanimous validation by the Supreme Court as the 1980s concluded.[19] For better or worse, the Court recognized in that statute a societal effort to bring political alienation "in house" in order to avoid losing the passionate energies of the alienated, accusatory vision.

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[16] *See, e.g.*, Mistretta v. United States, 488 U.S. 361 (1989); Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607 (1980).

[17] FAULKNER, *supra* note 9.

[18] Ethics in Government Act of 1978, 28 U.S.C. § 49, 591 *et seq.* (1988 & Supp. II 1990).

[19] Morrison v. Olson, 487 U.S. 654 (1988).

In the context of diverse American meanings of independence, the doctrine of separation of powers takes on a new light. The branches are seen working to generate, preserve, reform, or accuse—with all the excesses that can accompany such missions. The cases represent society's continuing debate about the scope of these roles and ultimately about the nature of government by executive activism, judicial abstraction, legislative passivity, and idealistic oversight. How far each branch is allowed to take or be taken by a particular concept of independence becomes the story of public law.

I. Generative Independence: The Declaration of Independence, Federalist No. 40, and Presidential Initiatives

The generative tradition of independence derives from The Declaration of Independence (The Declaration),[20] drafted principally by Thomas Jefferson and adopted by the Constitutional Convention in 1776, and James Madison's essay of twelve years later, number forty in the series of essays that became The Federalist.[21] This tradition involves the use of a particular vocabulary and argument as an act of bold political creation or self-creation. This act of language sets in motion new political energy—be it an idea, a program, an institution, or a government. At the same time, the act strives for political palatability by indicating limits on the scope of its generative power or goals. In particular, the generative tradition of independence seeks legitimacy through articulated commitments to responsibility and community.

The purpose of both The Declaration and Federalist No. 40 is to explain and to defend a break from political and legal authority. Each is a complex effort. Making a case for legitimate ultra vires action, even in times of revolution or other political turbulence, requires a vision not frequently called upon, and hence neither easily put into words nor easily understood.

Despite The Declaration's utterly familiar subject—the colonies' rationale for separating from Great Britain—it has been called "the least comprehended of all the great documents produced as a result of our political

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[20] The Declaration, *supra* note 9.

[21] References will be to The Federalist (Garry Wills ed., 1982).

development."[22] Perhaps its language, structure, and imagery intimate a meaning beyond the eloquent recital of natural law principles and the listing of specific grievances. Madison's letter is less well known, but is similarly elusive. Through a series of arguments whose unifying structure has never been thoroughly traced, it defends the Constitutional Convention's arguably unauthorized act of proposing both a constitution, rather than an amended set of Articles, and a ratification process inconsistent with the Articles.[23] While The Declaration announces to an aroused people that the time for separation from a distant mother country has come, Madison's letter has the perhaps more complicated task of defending a severance from the authority of the people itself—a break from binding instructions issued by Congress and the states. Madison not only cites The Declaration, but, like Jefferson, pursues a vision of unauthorized political action as legitimate because it is generative of a new kind of order. As suggested below, The Declaration and Federalist No. 40 are part of one strand of an American discourse of independence, a way of thinking and talking about acts of renouncing or exceeding authority in order to bring about fundamental change.

A. *The Declaration of Independence*

Scholars have examined The Declaration from a number of perspectives. Some have probed the impact of Locke's political philosophy.[24] Another view stresses The Declaration's link to the moral-sense theory of the Scottish Enlightenment.[25] Gordon Wood places The Declaration—indeed, the American Revolution—in the context of debates in England over the meaning and fate of the British constitution.[26] Wood traces American rev-

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[22] HERBERT FRIEDENWALD, THE DECLARATION OF INDEPENDENCE 152 (1904).

[23] In Madison's justification for the Convention's unauthorized actions, Professor Ackerman hears "the voice of the successful revolutionary." Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1021 (1984).

[24] *See, e.g.*, CARL BECKER, THE DECLARATION OF INDEPENDENCE 57-79 (Vintage Books 1958); FRIEDENWALD, *supra* note 22, at 184-207.

[25] GARRY WILLS, INVENTING AMERICA (1978).

[26] GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 14-15 (1969). Wood points out that in the American mind

> natural law and English history were allied. Whatever the universality with which [the Americans] clothed their rights, those rights remained the common law rights embedded in the English past. . . . [and] already embodied in the historic English constitution—a constitution which was esteemed by the enlightened of the world precisely because of its "agreea-

olutionary rhetoric and attitudes to "those expressions of radical intellectuals writing to the left of the official Whig line" in England[27]—writers and thinkers who did not question the form of mixed government, but who felt Britain was "suffering moral decay of the sort that beset the republics of antiquity before their fall."[28] Whig radicalism was part of a country outlook marked by a concept of independence at its core. That concept addressed the structure of governance under the British constitution as well as the intellectual liberty of the individual. The concept entailed

> an independent view of politics, a widely shared conception about the way English public life should be organized—where the parts of the constitution were independent of one another, where the Commons were independent of the Crown, where members of Parliament were independent of any connection or party, in short, the kind of society where no man was beholden to another.[29]

To the Whig radicals, the sort of independence embodied in separated powers and unbeholden citizens was threatened by the Crown's efforts to influence the House of Commons through executive appointments and other modes of "bribing its way into tyranny."[30] The Crown was seen as rendering the House of Commons "dependent" and thus violating the essence of the British constitution. From this debate and vocabulary in England, Americans derived a belief in, and a way to describe, an intent on the part of the Crown to spread corruption to the New World.[31]

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bleness to the laws of nature."

Id. at 10 (citation omitted); *see also* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 33-54 (1967).

[27] WOOD, *supra* note 26, at 15.

[28] Edward H. Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371, 373 (1976).

[29] WOOD, *supra* note 26, at 15.

[30] *Id.* at 33. Hume's essay, *On the Independency of Parliament*, makes the case for why the influence of the Crown was in fact "necessary to the preservation of our mixed government." DAVID HUME, *On the Independency of Parliament, in* ESSAYS: MORAL, POLITICAL AND LITERARY 121 (Thomas H. Green & Thomas H. Grose eds., 1898). The Crown serves as a checking function to a House of Commons so powerful "that it absolutely commands all the other parts of the government." *Id.* at 120. In his book on The Federalist, Garry Wills links Hume's defense of Crown influence with Madison's view of the operation of the British constitution. GARRY WILLS, EXPLAINING AMERICA 43 (1981).

[31] Following Wood, Levi recounts:

The King and his officers were thought to have abused their power. Parliament offered the

Against this background, the Continental Congress adopted The Declaration. My purpose here is to examine how that document, in its own language and structure, conceives of the idea of independence.[32]

The Declaration has five parts.[33] The first consists of the familiar opening sentence:

> When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the Powers of the earth the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.[34]

This beginning makes no secret of the document's animating subject—dissolution of the tie to Great Britain—but at the same time it achieves a rich complexity. On the one hand, it locates the colonies in a particular world as their political birth takes place—a world of already-independent powers, of God, law, and entitlements.[35] It states outright that in such a world the colonies have a moral right to self-rule. On the

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> colonies no protection. In the Declaration of Independence and its bill of particulars against George III, the colonists repeated the theory of 1688 [that revolution was a legitimate response to the King's violation of a compact between the rulers and the ruled]. The compact had again been broken.

Levi, *supra* note 28, at 373.

[32] Other textual analyses of The Declaration can be found in JAMES B. WHITE, WHEN WORDS LOSE THEIR MEANING 231-40 (1984), and Stuart M. Tave, *The Creative Teacher—Who Needs Him?*, 53 ILL. ENG. BULL. 6 (1966). Like mine, they follow the progress of The Declaration's rhetoric. Professor White's subject is "(t)he community the reader is asked by this text to join." WHITE, *supra*, at 238. He concludes that it is a community of heroic patriots and that The Declaration is "meant to work a change of feeling in the reader" from complacency to resolve. *Id.* at 239. My focus is The Declaration as a document feeling its way to its own conclusions and identity, not as simply a rhetorical effort to provoke an emotion in others. Therefore, I also disagree with Stuart Tave who makes the claim that part of The Declaration's tone is of "someone who has perfectly under control himself and his material, who has thought out the whole thought before he begins to speak and knows from the first word where he is going to end." Tave, *supra*, at 9.

[33] *Cf.* MORTIMER J. ADLER & WILLIAM GORMAN, THE AMERICAN TESTAMENT 21 (1975) (positing a four-part structure; not noting a thematic distinction between the list of grievances concerning the King and the penultimate paragraph about "our British brethren").

[34] THE DECLARATION para. 1.

[35] ADLER & GORMAN, *supra* note 33, at 22 ("Jefferson and the signers were . . . firmly aware of the play in history of irrational, arbitrary forces. Their affirmation that human history should be taken as something in the moral order was made despite, not in ignorance of, the general turgid course of that history.").

other hand, the principal clause of the sentence states that when "one people" are to become independent, they are required to state the causes of dissolution, as if independence cannot be theirs simply by right but must be earned—that is, won by a statement, perfected by an argument. A considerable tension, then, marks the first part of the text. Independence belongs to the colonies by right, yet independence is a condition that must be assumed or acquired through an act of persuasive speech.

But why is such an act—a statement of causes—necessary? Jefferson attributes the requirement to a "decent respect to the opinions of mankind."[36] Scholars interpret this as Jefferson's expression of the colonies' duty to explain a moral act to a moral world,[37] or as Jefferson's effort to provide an example of "virtue inciting [others] to virtue."[38] These readings are helpful: the first at the level of paraphrase, the second as interpretation through the prism of possible sources. But more in keeping with the remainder of the text, indeed more explanatory of why the rest of the document exists at all, is a reading which notes that the colonies themselves are part of the mankind to which the required statement is to be made. With this in mind, the requirement of reasons reflects a sense that the colonies must define themselves *to themselves* as a prerequisite to independence.

Why would this be so? Again, the sentence itself provides support. The world in which Jefferson locates the colonies not only entitles the people to independence, but is one of complexity and fallibility. It is a world of human events that may impel the severance of long-held political bands; it is a world of other powers that may have engaged in similar struggles. It is therefore a world in which a self-defining statement or image may well be necessary to spark the moral courage needed to assume the status of independence. But, more deeply, the act of declaring independence in its very nature may require a second act—that the people not simply "throw off" an older order but articulate a vision of the new at the same time. Finally, a statement of self-definition may be a way of facing the awesome step of independence, particularly if the statement consists of self-imposed

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[36] THE DECLARATION para. 1.

[37] ADLER & GORMAN, *supra* note 33, at 22.

[38] WILLS, *supra* note 25, at 318. Wills explains that in moral sense theory, "part of virtue, an essential part, was to appear virtuous to others, giving them a motive to pass on the pleasure of doing good." *Id.* at 317.

limitations on the independence claimed. The opening sentence, then, places "one people" in human history, and suggests that they may not "assume . . . separate and equal station" unless they define themselves and the nature of their independence. The rest of The Declaration becomes an effort to articulate the meaning of independence.

The second part[39] undertakes the task by presenting a theory of the state based on a theory of man. Men are created equal and have unalienable rights; governments exist for men, not men for governments; the people maintain a right to abolish the government when it turns destructive of basic rights.[40] Here The Declaration "proclaims the very independence of the human intellect";[41] its assumption is "man's very nature as a critical being"[42] and man's ability to judge the acts of government on the basis of "moral insight."[43] But in celebrating the independent intellect, Jefferson makes a factual statement, based on "all experience," that is more like a hope, and may well be a warning. He states that men will not act upon their moral insight "while evils are sufferable";[44] they will endure in "patient sufferance"[45] until a tyrannical design on the part of government becomes plain. This may be Jefferson's expression of trust that the critical political consciousness he is recognizing poses little danger of passion or blindness. More likely, it is a warning to the colonies that independence,

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[39] I take the second part to consist of the second paragraph, beginning, "We hold these truths to be self-evident" and concluding, "To prove this, let Facts be submitted to a candid world." THE DECLARATION para. 2.

[40] Professor Becker notes that Locke's natural law philosophy—"that morality, religion, and politics ought to conform to God's will as revealed in the essential nature of man," Becker, *supra* note 24, at 57, "seemed to the colonists sheer common sense, needing no argument at all. . . . [T]hey were already convinced because they had long been living under governments which did, in a rough and ready way, conform to the kind of government for which Locke furnished a reasoned foundation." *Id.* at 72-73; *see also* BENJAMIN F. WRIGHT, JR., AMERICAN INTERPRETATIONS OF NATURAL LAW: A STUDY IN THE HISTORY OF POLITICAL THOUGHT 62-99 (1962) (development of natural law theory, 1760-1776). Wills stresses that in listing life, liberty, and the pursuit of happiness as unalienable rights, Jefferson changed the "Lockean triad" of life, liberty, and property. WILLS, *supra* note 25, at 229. Wills links Jefferson to moral sense theory, contrasting Jefferson's views on man's social nature to Locke's focus on autonomy. *Id.* at 236-37. Some think that Wills overstates the Scottish influence on Jefferson. *See, e.g.*, Ronald Hamowy, *Jefferson and the Scottish Enlightenment: A Critique of Garry Wills'* Inventing America: Jefferson's Declaration of Independence, 36 WM. & MARY Q. 503 (1979) (book review).

[41] PAUL EIDELBERG, ON THE SILENCE OF THE DECLARATION OF INDEPENDENCE 11 (1976).

[42] *Id.* at 6.

[43] *Id.* at 13.

[44] THE DECLARATION para. 2.

[45] *Id.*

properly understood, includes the practice of prudence. Part two thus sets out a theory of government by consent, familiar even then to the colonies. This theory incorporates a solemn respect for the independence of man's reason and powers of moral judgment, and it qualifies that independence by hearkening to prudence, thereby limiting even as it liberates.

The third part moves from theory to grim detail.[46] It catalogues the colonists' grievances, most of which concern the King's obliteration of local lawmaking in the colonies. Here Jefferson presents the specific case for dissolution. As in the previous part, he also contributes to a definition of independence. By focusing on the King's action of "taking away our Charters, abolishing our most valuable Laws," dissolving representative houses, forbidding elections, and controlling judges,[47] Jefferson indicates that the new order will be based on exactly the opposite treatment of law. Independence will consist of limits, structure, and process. As stated in part two, the new order will "provide new Guards for . . . future security."[48]

If this were all—if the concept of independence only entailed formal dissolution of the tie to Britain, the first steps toward self-identity through claims of independent intellect tied to prudence, and a dedication to the restraints of law—then The Declaration could have ended at the conclusion of part three. But it continues, as if still in search of itself, as if its full meaning were not yet articulated. The concept of independence requires a further component.

Where Jefferson goes next is crucial.[49] Turning from the crisp, lawyer-like indictment of the King by list, where the subject is the disappearance of law in the colonies, the six troubled sentences of the fourth part evoke the disappearance of friendship. The ostensible point is to explain that the colonists previously pleaded their injuries to their "British brethren" only to go ignored. But the point is hardly necessary to a declaration of inde-

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[46] The third part in my reading consists of the grievances against the King and Parliament, beginning, "He has refused his Assent to Laws" and concluding with, "A Prince, whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free People." *Id.* paras. 3-30.

[47] *Id.*

[48] *Id.* para. 2.

[49] The fourth part in this reading is the paragraph beginning, "Nor have We been wanting in attention to our British brethren," and concluding with "in Peace Friends." *Id.* para. 31.

pendence from British rule, and even if considered important, it could have been stated in a sentence or two. Instead, Jefferson writes on in a tone no longer controlled and legalistic, but heartfelt and searching. The subject of this paragraph is clearly essential to his search for a way to conclude The Declaration, and in so doing, to complete a definition of independence.

Jefferson's language settles around two key words in the discussion of the "British brethren." The first is the term "deaf": despite repeated entreaties by the colonies, the British people have remained "deaf to the voice of justice and of consanguinity."[50] The British are not openly hostile or verbally antagonistic to the colonists. Worse, they are deaf—indifferent, perhaps uncomprehending, surely unengaged. The second key word ends the final sentence of the paragraph: "We must, therefore, acquiesce in the necessity which denounces our Separation, and hold them, as we hold the rest of mankind, Enemies in War, in Peace Friends."[51] The deafness of former friends—the indifference of brothers—is the image that Jefferson pursued in this penultimate part of The Declaration. It is the negative image that allowed him to grasp the positive component needed to complete the concept of independence. It is the image that propelled him to the still remarkable power of the concluding paragraph, the fifth part of the document,[52] where he reversed the image—from indifferent brothers to fellow representatives who "mutually pledge to each other our Lives, our Fortunes and our sacred Honor."[53] The concluding image is thus a pledge of profound dependence.[54] Political independence thus requires the sort of personal commitment marked by the words life, fortune, and honor, implying a third stratum of constraint—in addition to prudence and law—for the new order.

In its entirety, The Declaration can be seen, then, as a progress of im-

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[50] *Id.*

[51] *Id.*

[52] *Id.* para. 32.

[53] *Id.*

[54] Wills' chapter on paragraph 31 (the paragraph on "our British brethren") is excellent. WILLS, *supra* note 25, at 307-19. His focus is Jefferson's disappointment that Congress edited the original draft of this paragraph, omitting language that stressed Jefferson's views on the importance of affection in the social contract. *Id.* at 314-15. He sees "Jefferson's declaration of independence [as] a renunciation of unfeeling brethren," *id.* at 319, whereas I see that renunciation as providing Jefferson with a rhetorical image that allowed him to produce the powerful final image of the pledge and therefore to articulate the full meaning of independence.

age and thought. In the contextualizing first sentence, Jefferson intimates that independence is not simply political freedom but a condition that must be ascertained through an act of language. That defining act announces a theory of independent reason and moral insight that leads to a repudiation of the King. But the independent mind is cautioned to be prudent, and the king-free new order will be premised in law. Finally, the new order is consecrated with a pledge of support, whereby the signers, and by extension all the people, become mutual trustees. Independence, then, is understood as a composite of the freedom of judgment, tempered by prudence; the freedom of self-rule, ordered by law; and the commitment of personal responsibility and accountability. The colonies, having defined themselves in terms of an ideal, in terms of law, and in terms of friendship, can lay claim to independence; they may now "assume . . . the separate and equal station to which the Laws of Nature and of Nature's God entitle them."[55]

B. The Federalist No. 40

In Federalist No. 39, James Madison cites an objection made by opponents of the proposed Constitution: "And it is asked by what authority this bold and radical innovation was undertaken?"[56] He devotes Federalist No. 40 to answering this objection, posing the question as "whether the convention were authorized to frame and propose this mixed Constitution," and conceding, "The powers of the convention ought, in strictness, to be determined."[57]

The powers of the Convention, according to antifederalists, were limited by the language of both the Annapolis recommendation of September 1786 and the congressional authorization of February 1787. The Annapolis language proposed a Convention that would "devise *such further provisions* as shall appear [to the delegates] necessary to render the Constitution of the [federal] government *adequate to the exigencies of the Union.*"[58] Congress called for a Convention:

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[55] THE DECLARATION para. 1.

[56] THE FEDERALIST No. 39, at 192 (James Madison) (Garry Wills ed., 1982).

[57] THE FEDERALIST No. 40, at 195 (James Madison) (Garry Wills ed., 1982) [hereinafter THE FEDERALIST No. 40].

[58] *Id.* at 195-96 (quoting the language of "the act from Annapolis") (emphasis in original); *see also* Richard S. Kay, *The Illegality of the Constitution*, 4 CONST. COMMENTARY 57, 63 (1987).

> for the sole and express purpose *of revising the articles of confederation*, and reporting to Congress and the several Legislatures, such *alterations and provisions therein*, as shall, when agreed to in Congress, and confirmed by the States, render the [federal] Constitution *adequate to the exigencies of government and the preservation of the Union.*[59]

The Philadelphia Convention arguably went beyond "revising" the Articles; Professor Kay says that it "proposed an entirely new government."[60] Moreover, the Convention did not present the proposed Constitution to Congress for approval, or to the legislatures of the states, but called for ratification by "specially elected conventions" in the states.[61] Besides ignoring the Congressional authorization on approval, the Convention also flew in the face of the existing Articles of Confederation, which required that any change in the Articles "be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State."[62]

Antifederalists who opposed the Constitution's transformation of a confederacy of states into a "consolidation" thus built part of their attack on the Convention's apparent lack of authority to propose such a plan and the lack of legal basis for the proposed ratification procedure.[63] The Convention's product was "bold and radical" not only for its extraordinary content but for the independent character of its creation.

Broadly, the structure of Federalist No. 40 follows that of The Declaration. The first part of each document states that the governing authority no longer governs (be it the Crown for Jefferson, or limiting words in the orders for Madison). Each argument is then spurred to a series of justifications that amount to political self-definition and lay the groundwork for change. In so doing, each combines statements of revolutionary freedom with expressions of self-imposed limitation and prospects of a new order. And each concludes with an image of friendship.

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[59] THE FEDERALIST No. 40, *supra* note 57, at 196 (quoting the language of "the act from Annapolis") (emphasis in original).

[60] Kay, *supra* note 58, at 64.

[61] *Id.*

[62] *Id.* at 67 (quoting THE ARTICLES OF CONFEDERATION art. XIII (U.S. 1781)).

[63] *Id.* at 65.

Of course, the two documents differ as well. The rhetoric of political birth is necessarily different from the argument of political baptism. The first seeks to stop history long enough to imagine an independent people; the second tries to get history going again through an independently designed political system. The speech of the first is the vocabulary of moral entitlement, limited by themes of prudence, law, and friendship. The speech of the second is the vocabulary of political governance—judicial, executive, and legislative.

Madison couches his first step—conceding and defending the Convention's break from its orders[64]—in terms of "rules of construction, dictated by plain reason, as well as founded on legal axioms."[65] "Plain reason" fuels this part; legal reasoning is engaged later. Like Jefferson, then, Madison begins with faith in the independent intellect to question authority and to make dynamic choices. His conclusion in this part is that the Convention's instructions, from both Congress and Annapolis, are internally inconsistent, and that in such circumstances, "the less important should give way to the more important part."[66] Instead of explicitly announcing independence from the instructions, however, Madison says of the antifederalists: "[L]et them declare" whether an adequate government was to be provided, or the Articles of Confederation preserved. Again, "[l]et them declare" whether maintenance of the Articles was the object of reform or "whether the establishment of a government, adequate to the national happiness" was the priority.[67] Confident that they could not so declare, Madison indirectly makes a declaration of his own.

But as with Jefferson, the discourse of independence requires more: justification follows, containing seeds of self-definition. My reading of the lengthy remainder of Madison's essay is that it defines the Convention's independent action first in judicial, then executive, and finally in legislative terms, as if each sort of political judgment were an aspect of that action. The rather astonishing effect is two-fold. First, Madison is able to domesticate the Convention's illegality; it thereby achieves a certain legitimacy. Second, by illustrating the sort of reasoning that will underlie the

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[64] I take the first part, thematically, to consist of ¶¶ 1 to 9, THE FEDERALIST No. 40, *supra* note 57, at 195-97.

[65] *Id.* at 197.

[66] *Id.*

[67] *Id.*

work of each of the proposed Constitution's three branches, Madison intimates that a stalwart independence will still find expression in each of the three branches.

Illegality is domesticated by viewing the Convention's action first from a judicial perspective.[68] Madison suggests that the Convention might *not* have contravened its orders, but reasonably adjudged its authority and stayed within its given bounds. Using "legal axioms" of construction to parse orders as well as the Articles, Madison in effect offers a reenactment of how the Convention may have adjudicated its authority. Madison demonstrates how the adjudicative process is conscious of the difficulty of line-drawing, how it investigates the speaker's intent in interpreting language, how it looks to and relies on precedent. The Convention's adjudication thus is presented as limited in scope and bounded by the tools of construction.

Next, Madison reverts to assuming that the Convention's action was *not* authorized, and he examines that action as an *executive* response to necessity.[69] He catalogues the elements of the emergency facing the states as the Convention gathered: a national crisis, a people full of "the keenest anxiety,"[70] the desire among enemies that the United States dissolve into chaos. Viewed from this perspective, members of the Convention could not "neglect to *execute* the degree of power vested in them";[71] they were duty-bound to assume "operative" powers.[72] The Convention's action, then, is less egregious because extreme circumstances demand energetic, expeditious response, even if unauthorized.

Last,[73] Madison shifts his vocabulary from words like "operative" and "executive" to "assembly," "this body," and the "advice" offered by the body as "friends."[74] He now views the Convention as exercising the legislative function of preparing measures for the common good. Just as the judicial function was limited by its tools of construction, and the executive function was limited to moments of emergency, the legislative function is

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[68] This perspective is achieved in ¶¶ 10 to 13, *id.* at 197-99.
[69] *Id.* at 199-200 (¶¶ 15 to 16).
[70] *Id.* at 200.
[71] *Id.* at 201 (emphasis added).
[72] *Id.* at 200.
[73] The last section consists of ¶¶ 17 to 19, *id.* at 201-02.
[74] *Id.*

subject to the people's veto: "The prudent enquiry," Madison writes, "ought surely to be not so much *from whom* the advice comes, as whether the advice be *good*,"[75] and this question is left to the people.

Thus, Madison portrays the Convention's act as a reasonable act of judicial construction, a necessary act of executive energy, and as a democratically reversible rendering of "advice." The Convention's action of exceeding its orders was either justified or required; if neither, it was simply immaterial, given the substantive merit—the good—of its product. This portrayal works to downplay the Convention's disregard for its lack of actual authority. When the Convention's act is disassembled into its various aspects, it is drained of danger.

At the same time, however, Madison intimates that these three modes of political thinking—the judicial, the executive, and the legislative—are imbued with the sort of intellectual independence that governance requires, however dangerous it might be.

In explaining how the Convention reasonably adjudged its own authority, Madison of course is pursuing the self-interested goal of defending the authority of a Convention of which he was a leading member. But, interestingly enough, he is also role-playing in the essay, showing how an adjudicator who *was* impartial might reason his way to a decision, even to uphold a change from the status quo. Some modern scholars agree with the objective correctness of his outcome.[76] Even if he is merely playing a part, Madison gives us some sense of the meaning of judicial independence—the ability to see the legality of controversial political change. Madison similarly suggests the scope of executive independence. He writes of fundamental change that must "be instituted by some *informal and unauthorized propositions*,"[77] "that in all great changes of established governments, forms ought to give way to substance."[78] He cites The

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[75] *Id.* at 202.

[76] Eric M. Freedman, Note, *The United States and the Articles of Confederation: Drifting Toward Anarchy or Inching Toward Commonwealth?*, 88 YALE L.J. 142, 164 (1978) ("the overall structure of the government chartered by the Constitution was similar in many respects to the one that already existed under the Articles"); *cf.* THE FEDERALIST No. 40, *supra* note 57, at 199 ("The truth is, that the great principles of the Constitution proposed by the convention may be considered less as absolutely new, than as the expansion of principles which are found in the articles of Confederation.").

[77] THE FEDERALIST No. 40, *supra* note 57, at 201 (emphasis in original).

[78] *Id.* at 200.

Declaration explicitly: The "precious right of the people 'to abolish or alter their governments as to them shall seem most likely to effect their safety and happiness.' "[79]

Finally, when he defends the Convention in its legislative function, he signals the broad scope of that function by stating that deviation from form is unproblematic, and that the only question for the people is whether the product is "good."[80]

Federalist No. 40 thus relies on its revolutionary heritage even as it tries to express itself in terms of political restraint. Like The Declaration which it cites, Madison's letter combines a defense of untethered political will with a vocabulary of commitment to an urgent public goal. The political action it justifies breaks with an established order, but in order's name; in effect, Madison asks his readers to do the same in the ratification process. Madison's discourse is thus designed to persuade by employing the different persuasive voices of judicial, executive, and legislative appeals to reason. In this discourse, the independent speaker's claim is that he has sought not simply to stand alone, but to create; that his creation deserves legitimacy because its essence is the naming of reimagined boundaries—the discovery of a new political language to herald a new order.

The problem is that the balance sought by discourse of this kind is supremely difficult to achieve in convincing fashion. While Madison walks the required fine line in Federalist No. 40, no doubt with an eye on The Declaration's persuasive flow of argument, he is in constant danger of falling off. His message, after all, is considerably more problematic than Jefferson's. He lacks a king for a target; the domestic context of Madison's own "declaration" creates an entirely different complexity. And while Jefferson's progress in The Declaration is from the loftiness of natural law and political philosophy to an image of solidarity, the way is more precarious for Madison: he *begins* with the *severance* of that soli-

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[79] *Id.* at 201 (paraphrasing while appearing to quote The Declaration).

[80] *Id.* at 202. After writing this section I came upon Professor Anastaplo's essay on The Declaration of Independence, which sees in The Declaration's references to God "an oblique anticipation of the separation of powers." George Anastaplo, *The Declaration of Independence*, 9 ST. LOUIS L. REV. 390, 404-05 (1965). I also see in Federalist No. 40 a structure related to the three powers of government. Anastaplo's point is that The Declaration anticipates the American "blending of the political and the religious." *Id.* at 406. My quite different point is that Federalist No. 40's tripartite scheme embodies the themes of generative action and restraint in the American discourse of independence.

darity, the departure from the people's instructions. Independence has been necessary, but it has taken the form of a breach. Trying to sustain the Union, the Convention has, at least in this respect, disregarded it. While Madison invokes restraint throughout the letter and concludes with an image of solidarity restored, he pushes Jefferson's discourse of generative independence just short of the breaking point.

C. Separation of Powers: Presidential Initiatives

The line, however, is crossed in the modern instances of claims of generative independence. These claims are made by Presidents in moments of crisis: Franklin Roosevelt invoking "executive power" in a bid to bring regulatory commissions under direct Presidential control;[81] Harry Truman invoking "inherent" powers as authority for seizing the steel mills in a period of economic distress and undeclared war;[82] and Ronald Reagan invoking "cost-benefit" regulatory oversight in the period of high inflation in the early 1980s.[83]

Each President attempted, in effect, to invoke a version of what I have called generative independence to justify a controversial executive action. Each was squarely rebuffed by the Supreme Court. One way of understanding the cases is to see that these Presidents lacked the Jefferson-Madison message that a crucial break from the past to solve a pressing national problem contained some variety of built-in limitation on the power being asserted. While Madison was barely able to keep balance on the tightrope, these three Presidents fell badly, at least in the eyes of the Court.

In *Humphrey's Executor v. United States*,[84] President Roosevelt in his first term of office fired an anti-New Deal Commissioner of the Federal Trade Commission (FTC), William E. Humphrey. Roosevelt declined to base Humphrey's discharge on one of the grounds for presidential removal specified by Congress in an apparent design to make the FTC independent of executive domination. According to New Deal historian William E. Leuchtenburg, President Calvin Coolidge had appointed Humphrey to

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[81] Humphrey's Ex'r v. United States, 295 U.S. 602 (1935).

[82] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[83] Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

[84] 295 U.S. 602 (1935).

the FTC in 1925 in "a deliberate attempt to force this 'independent' agency into line with the [Coolidge] Administration's policies."[85] Unapologetically pro-business, Humphrey helped "[transform] the FTC into an agency that served not as an overseer but a partner of business."[86] After Roosevelt took office in 1933, the FTC gained new powers under the National Industrial Recovery Act and the Securities Act of 1933.[87] Roosevelt's First Hundred Days became an effort no less than "to rebuild the government to enable it to cope with the enormity of the Great Depression."[88] His election "was no ordinary changing of the guard; if the New Deal did not mark a 'revolution' in American government, it did represent, in areas like regulation of Wall Street, a significant new departure."[89]

The President was "unwilling to leave a man of the old order in charge of administering the legislation of the new order."[90] Moreover, from Roosevelt's perspective, the FTC had surrendered its "independence" to regulated interests.[91]

Thus, the decision to fire Humphrey was not an "isolated episode," but "one encounter in Roosevelt's campaign to reshape the national government."[92] Roosevelt's leadership was intended to be generative—to change the nature of administrative relationships and thus to energize economic recovery. Roosevelt sought executive independence from Congressional restraint in the retention of personnel in key regulatory posts.

But Roosevelt's attempted exercise of generative independence omitted any language of self-limitation. Whereas Madison at least argued that the Convention's actions fell within given authority, Roosevelt made no effort to limit the scope of his claimed authority by either invoking one of the

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[85] William E. Leuchtenburg, *The Case of the Contentious Commissioner:* Humphrey's Executor v. U.S., *in* FREEDOM AND REFORM 276, 278 (Harold M. Hyman & Leonard W. Levy eds., 1967).

[86] *Id.* Commissioner Humphrey said, "I certainly did make a revolutionary change in the method and policies of the commission. . . . If it was going east before, it is going west now." *Id.* at 278-79.

[87] *Id.* at 280.

[88] *Id.* at 306.

[89] *Id.*

[90] *Id.*

[91] *Id.* at 307.

[92] *Id.*

statutory grounds for removal or proposing an interpretation of the term.[93] Nor did Roosevelt suggest boundaries on the executive's power under the "take care" clause.[94] Where Madison pleaded grave national necessity for the Convention's specific act, Roosevelt was less clear in pinpointing why direct executive control over the FTC was critical to national needs.[95] In its brief, the United States pointed only to the advent in New Deal legislation of "new concepts of Federal regulation in the public interest," requiring special presidential oversight of those "enforcing [the] new legislation."[96] It was also clear that Roosevelt's plan to mobilize the FTC did not require the firing of Humphrey to assure a voting majority in the agency.[97] Finally, where Madison sought to couch the Convention's act as "advice" of friends subject to the reflection and approval of the people, Roosevelt's plan, in effect, to take over the independent commissions[98] was hardly an initiative for legislative approval. Humphrey's discharge was the result of presidential pressure that drew attention only

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[93] Some 50 years later, in Bowsher v. Synar, 478 U.S. 714, 729-30 (1986), the Supreme Court implied that a similar statutory removal provision would leave the President considerable leeway in removing an "independent" decisionmaker. In Morrison v. Olson, 487 U.S. 654, 692 (1988), the Court indicated that, despite the statutory removal restrictions in that case, the Attorney General retained "ample authority to assure that the [independent] counsel is competently performing his or her statutory responsibilities in a manner that comports with the provisions of the Act." Justice Scalia, dissenting, said that "the Court greatly exaggerates the extent" of retained control. *Id.* at 706.

[94] In fact, the Brief for the United States argued for an expansive reading of Article II: "Faithful execution of the laws may presuppose wholehearted sympathy with the purposes and policy of the law, and energy and resourcefulness beyond that of the ordinarily efficient public servant." That this interpretation was not meant as a limitation on the President became clear in the Brief's next sentence: "The President should be free to judge in what measure these qualities are possessed and to act upon that judgment." Brief for the United States, *Humphrey's Ex'r* [hereinafter Brief for the United States], *reprinted in* 30 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 82, 104 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter LANDMARK BRIEFS].

[95] Roosevelt had simply informed Humphrey:

> I do not feel that your mind and my mind go along together on either the policies or the administering of the Federal Trade Commission, and, frankly, I think it is best for the people of this country that I should have a full confidence.

Humphrey's Ex'r, 295 U.S. at 619.

[96] Brief for the United States, *supra* note 94, at 104.

[97] William Leuchtenburg suggests that although Roosevelt "had enough vacancies on the FTC to control the agency," "[i]t seemed highly likely that Humphrey, as the senior member of a commission which now had added duties under the National Industrial Recovery Act and the Securities Act, would create dissension within the government." Leuchtenburg, *supra* note 85, at 306.

[98] As Professor Strauss has noted, Roosevelt essentially sought to prevent commissioners from "serv[ing] on terms other than those of a personal advisor." Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 615 (1984).

when Humphrey resisted and sued for back pay.

In ruling for Commissioner Humphrey, the Supreme Court relied on legislative history suggesting that the FTC was neither to be "in" the "executive department" nor to exercise "part of the executive power."[99] The Court concluded that Congress could restrict presidential removal authority in order to preserve the FTC's "attitude of independence"[100] in its judicial- and legislative-related duties. This explanation has been called "mechanistic,"[101] "open to question,"[102] and sadly "casual."[103] The Court devoted a single paragraph[104] to the meaning of the separation of powers generally, aside from the question of the FTC. The language of that paragraph strongly suggests that the Court's underlying concern in the case was not Congress' effort to limit the President, but the danger posed by the President's action, indeed the constitutional imperative of *limiting* the President. In essence, that paragraph shifted the question from whether *Congress* may constitutionally restrict the President's removal power to whether the *President* may constitutionally discharge a commissioner of an independent agency created by Congress. The Court declared that "the rule which recognizes [the] essential co-equality" of the branches prevents the President from encroaching into the domain of Congress[105]—that the President may not attempt to "[threaten] the independence of a commission."[106] This language indicates not only that the President's claimed authority to control the independent agencies was the Court's chief concern, but also that the President's failure *to limit his own claim* pushed the Court considerably further in framing the question and deciding the case than it had to go as a matter of law.[107]

In *Youngstown Sheet & Tube Co. v. Sawyer*,[108] President Truman's

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[99] *Humphrey's Ex'r*, 295 U.S. at 628.

[100] *Id.* at 629.

[101] Leuchtenburg, *supra* note 85, at 304.

[102] Strauss, *supra* note 98, at 611.

[103] Stephen L. Carter, *Constitutional Improprieties: Reflections on Mistretta, Morrison, and Administrative Government*, 57 U. CHI. L. REV. 357, 402 (1990).

[104] *Humphrey's Ex'r*, 295 U.S. at 629-30.

[105] *Id.* at 630.

[106] *Id.*

[107] The *Humphrey's Executor* case "was considered by many at the time the product of an activist, anti-New Deal Court bent on reducing the power of President Franklin Roosevelt." Morrison v. Olson, 487 U.S. 654, 724 (1988) (Scalia, J., dissenting).

[108] 343 U.S. 579 (1952).

claim of independence was, from one perspective, even more problematic. President Roosevelt's attempt to control the independent commissions was comparatively less direct and massive a stroke than President Truman's order that the government seize the nation's strike-threatened steel mills, fly the American flag atop the newly-taken plants, and perhaps negotiate a new labor-management agreement on wages.[109] Yet President Truman's initiative, from another vantage point, had a more compelling justification as a last-ditch response to a breaking emergency than did Roosevelt's "let's try this" approach to the independent agencies. A bolder, more dramatic direct blow—and a blow to private property—Truman's act was nevertheless framed as a necessary step to preserve United States' commitments abroad and to save lives of American troops in Korea.[110] Ruling against President Truman, six to three, the Court split into seven opinions, and thus it is hard to say precisely why the President lost.

One explanation may be, again, that the President miscalculated the nature of the generative independence that would be persuasive as political and legal argument. The Madisonian discourse of independence, including language of self-limitation, eluded the President. The significance of this miscalculation can be seen in the opinion of District Court Judge David Pine, who issued the preliminary injunction against Secretary Sawyer,[111] and in the opinion of Justice Robert Jackson, who thought Judge Pine's order was correct.[112]

First, Judge Pine questioned at least twice in his opinion whether the President's initiative would generate a desirable change. In referring to "fundamental principles of constitutional government, which I have always understood are immutable, absent a change in the framework of the Constitution itself in the manner provided therein,"[113] Judge Pine clearly suggested that the President's action, if sustained, would effect a basic change antithetical to "a government of limited, enumerated and delegated powers."[114] Balancing equities elsewhere in his opinion, Judge Pine

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[109] *See generally* MAEVA MARCUS, TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER 83-87 (1977).

[110] *Id.* at 74; *see also* ALAN F. WESTIN, THE ANATOMY OF A CONSTITUTIONAL LAW CASE 7-16 (1958).

[111] Youngstown Sheet & Tube Co. v. Sawyer, 103 F. Supp. 569 (D.D.C. 1952).

[112] 343 U.S. at 634-55.

[113] 103 F. Supp. at 573.

[114] *Id.*

stated "the contemplated strike, if it came, with all its awful results, would be less injurious to the public than the injury which would flow from a timorous judicial recognition that there is some basis for this claim to unlimited and unrestrained Executive power."[115]

Justice Jackson, too, considered the state of affairs that the President's action would generate. He explicitly noted the context of an undeclared war and worried that a President by committing troops "to some foreign venture" could "vastly enlarge his mastery over the internal affairs of the country" by declaring a war-related emergency.[116] Justice Jackson also noted another context: The Roosevelt legacy of "[v]ast accretions of federal power [that have] eroded from that reserved by the States" and that have "magnified the scope of presidential activity."[117] Truman's action would generate only more of a dubious commodity.

If a generative goal was elusive, Judge Pine and Justice Jackson intimated too that the absence of a Madisonian discourse of self-limitation was also alarming. Madison's interpretive mode was nowhere to be found in the President's invocation of "inherent" executive power,[118] to the chagrin of both judges.[119] In addition, the necessity argument used to some effect by Madison fell flat for Truman. Both Judge Pine and Justice Jackson indicated that a national emergency was not, by definition, the

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[115] *Id.* at 577.

[116] 343 U.S. at 642.

[117] *Id.* at 653. Justice Jackson's law clerk at the time of the Steel Seizure case, William H. Rehnquist, wrote that

> Jackson was viewed as an ardent New Dealer at the time of his nomination, but his votes proved to be a good deal less predictable than those of Justices Black and Douglas. Remarks he made to me at various times gave me the impression that Justice Jackson by 1952 no longer believed very enthusiastically that the New Deal formula of governmental solutions for the country's major problems would work.

WILLIAM H. REHNQUIST, THE SUPREME COURT, HOW IT WAS, HOW IT IS 84 (1987).

[118] The District Court opinion recounted the position:

> According to [defendant's] brief, reiterated in oral argument, he relies upon the President's "broad residuum of power" sometimes referred to as "inherent" power under the Constitution, which, as I understand his counsel, is not to be confused with "implied" powers as that term is generally understood, namely, those which are reasonably appropriate to the exercise of a granted power.

103 F. Supp. at 573 (citing McCulloch v. Maryland, 17 U.S. 316 (1819)).

[119] 103 F. Supp. at 573-74 (Pine, J.) ("non-existence" of inherent power authorizing President "to take such action as he may deem to be necessary . . . whenever in his opinion an emergency exists requiring him to do so in the public interest"); 343 U.S. at 653 (Jackson, J.) ("Such power either has no beginning or it has no end.").

exclusive province of the executive, and that other players, including Congress and the Union, would likely intervene to prevent calamity. "A crisis that challenges the President," wrote Justice Jackson, "equally, or perhaps primarily, challenges Congress."[120] Finally, where Madison justified the Convention's act by portraying it as a reversible rendering of "advice" by friends, Truman's action was taken without acknowledging a role for dialogue or consultation. Justice Jackson noted at length the *voluntary* steps taken by past Presidents to act in concert with Congress by requesting legislative authorization in times of crisis.[121] Justice Jackson could find in Truman none of the self-limitation exemplified by other executives.[122]

Justice Jackson concluded that "The executive action we have here originates in the individual will of the President and represents an exercise of authority without law."[123] Where independent action is a product simply of will, it lacks the crucial legitimating elements of the Madisonian discourse. The executive comes to resemble the king "and the description of . . . evils in the Declaration of Independence,"[124] and not the model of truly generative independence of The Declaration itself, or of Federalist No. 40.

A final example of a President exercising a defective variety of generative independence is Ronald Reagan in the situation of *Motor Vehicles Manufacturers Association, Inc. v. State Farm Mutual Automobile Insurance Co.*[125] President Reagan's generative plan was to "remove the Federal shackles and improve the economic environment within which the

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[120] 343 U.S. at 654; *see also* 103 F. Supp. at 576-77 (Pine, J.) (The President's claim of necessity "presupposes" that the union will strike, that federal law will not be "tried," that "Congress will fail in its duties, under the Constitution, to legislate immediately and appropriately to protect the nation from this threatened disaster.").

[121] 343 U.S. at 647-48 n.16 (quoting Woodrow Wilson and Franklin Roosevelt, and noting the Tudors' own "tactful . . . use of their powers" in never forcing the question of the legality of legislation by proclamation).

[122] Judge Pine, too, relied on a past President, William Howard Taft, who wrote that Article II's "grants of Executive power" are not expansive but in fact limit the President to "the field of action plainly marked for him." 103 F. Supp. at 574 (citing WILLIAM H. TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS (1916)).

[123] 343 U.S. at 655.

[124] *Id.* at 641.

[125] 463 U.S. 29 (1983).

automobile industry operates,"[126] and more generally, to provide "regulatory relief" wherever cost-benefit analysis could justify deregulation by executive agencies.[127]

State Farm was not a separation of powers case; instead, it concerned whether an executive agency's rescission of a rule was arbitrary and capricious under the Administrative Procedure Act.[128] The rule had not been mandated by legislation; it was the product of agency discretion, and its rescission was likewise a function of executive choice exercised under a non-specific organic statute.[129] Under such circumstances, there was ample room for the exercise of executive independence to revisit existing regulations and to take action based on changing circumstances and a new administrative philosophy. Under President Reagan's direction, the agency took action, only to be reversed as "arbitrary" by the Supreme Court during the first Reagan term.

The President's resounding defeat can be seen as another rebuke to a President's misassertion of generative independence. As in *Youngstown*, the Court doubted whether the agency, acting pursuant to President Reagan's celebrated Executive Order 12,291,[130] was indeed generative of a convincing objective. The Court indicated that the executive agency was perhaps fixated on deregulation—outright rescission of a final rule—and had failed to consider less dramatic revisions of the status quo.[131] In addition, the agency had relied on a decision-making methodology, a "cost-benefit analysis," as defined by the Executive Order,[132] that did seek to break ground in regulatory reform, but lacked Madisonian self-limitation.

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[126] Statement on Assistance for Domestic Automobile Industry, Public Papers 332, 332-33 (April 6, 1981).

[127] *See* George C. Eads & Michael Fix, *Regulatory Policy, in* THE REAGAN EXPERIMENT 129 (John L. Palmer & Isabel V. Sawhill eds., 1982).

[128] *See* 463 U.S. at 34. Justice Rehnquist, concurring in part and dissenting in part, gave implicit acknowledgement to the tension between the executive and legislative branches when a new administration introduces a new "philosophy" to regulatory programs. *Id.* at 59.

[129] *Id.* at 59 n.*.

[130] Exec. Order No. 12,291, 3 C.F.R. 127 (1982), *reprinted in* 5 U.S.C. § 601 (1982).

[131] 463 U.S. at 42 ("But the forces of change do not always or necessarily point in the direction of deregulation. In the abstract, there is no more reason to presume that changing circumstances require the rescission of prior action, instead of a revision in or even the extension of current regulation."); *see also id.* at 47, 49.

[132] *See generally* Bruce D. Fisher, *Controlling Government Regulation: Cost-Benefit Analysis Before and After the Cotton-Dust Case*, 36 ADMIN. L. REV. 179 (1984).

The political command to "unshackle" industry through cost-benefit inspection of rules appeared to skew the agency's logic,[133] or at the very least to rush the agency to its conclusions. The Court questioned whether the agency's "expertise" had "become a monster . . . with no practical limits on its discretion."[134] Labeling the agency's action "arbitrary and capricious" amounted to a determination that the President's approach to regulatory reform had been too sweeping, too perfunctory, too political. The daring of the Executive Order had not been tempered with a commitment to the process of self-study and reasoned explanation. The agency's deregulatory order was a paradigm of a defective discourse of executive independence in the rulemaking context: in over-striving to carry out a political agenda, it neglected the system's legitimating demands for managerial rationality.

D. Summary: Executive Independence

Executive independence was conceived in terms of a needed "practical security . . . against the invasion" of the other branches,[135] particularly the "enterprising ambition" of the legislature.[136] But structural autonomy is the beginning of the story, not the story itself. Autonomy provides a setting for the exercise of political independence. That exercise can involve dynamic political action in which the executive's effort to define its own public character becomes an effort to define the political character of the country. Presidents have used independent power to distinguish themselves from their predecessors and their public missions from the missions of other times. In this way, independence has meant not simply branch autonomy but independence from the politics of the past.

Presidents Roosevelt, Truman, and Reagan sought to generate political solutions that broke sharply from accepted norms. Resulting legal controversies assumed the stiff, unyielding language of separation of powers (or, in President Reagan's case, that subset of separation of powers law known as administrative law), but in the underlying dynamics of the cases a struggle raged about how far acts of generative independence by the exec-

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[133] 463 U.S. at 48 (noting illogic of failing to consider an obvious alternative to outright rescission); *see also id.* at 54 (noting illogic in agency conclusion on usage of detachable passive belts).

[134] *Id.* at 48 (citing Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 167 (1962)).

[135] THE FEDERALIST No. 48, at 250 (James Madison) (Garry Wills ed., 1982).

[136] *Id.* at 251.

utive could go. Thomas Jefferson and James Madison employed a rhetoric of generative independence that combined boldness with restraint, will with prudence, and singularity with solidarity. Each felt a duty to explain, to provide reasons, to indicate where their proposals would lead. In the legal failures of Presidents Roosevelt, Truman, and Reagan recounted above, we see the "energetic executive"[137] testing the limits of this rhetoric and eliciting a deep wariness on the part of the Supreme Court.

Perhaps the Court's message over time has been that generative independence of this magnitude by the executive alone lacks the sort of legitimacy that can only be accomplished through a measure of self-limitation. Such acts by the executive have been legal failures, falling short of Jefferson's and Madison's concept of independence.

In pursuing independence from the politics of the past, the executive must generate change in a vocabulary that simultaneously imagines boundaries. Is today's "energetic executive," embattled from all sides even in times of greatest power and often pressed by events to speak in extremes, capable of such a vision—a vision of the "bounded new"? The prescription appears paradoxical, even self-defeating, until it is recalled that the boundary for Jefferson and Madison was in fact the *object* of their generative imaginations—the imagined boundary of a mutual trusteeship. That limitation seemed to them a freedom.

II. Preservationist Independence: Tocqueville and the "Occult" Judicial Response to Democratic "Fickleness"

Alexis de Tocqueville spent his twenties and thirties discovering and writing about the United States. *Democracy in America*[138] was published in two books, the first in 1835 the second in 1840. Concerned that "a balance between the aristocratic and the democratic traditions had not been worked out"[139] in France's post-revolutionary period, Tocqueville came to America in search of something more than America: "I sought there the image of democracy itself, with its inclinations, its character, its

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[137] The Federalist No. 70, at 354-55 (Alexander Hamilton) (Garry Wills ed., 1982) (discussing need for a "vigorous executive" and listing the "ingredients which constitute energy in the executive": unity, reeligibility, salary protection, and "competent powers").

[138] Tocqueville, *supra* note 9.

[139] Phillips Bradley, *Introduction* to 1 Tocqueville, *supra* note 9, at x.

prejudices, and its passions, in order to learn what we have to fear or to hope from its progress."[140]

The duality of "fear" and "hope" runs throughout Tocqueville's study. As he compares the constitutional system's design with the way the system actually functions, Tocqueville finds paradox everywhere: equality but restraint;[141] individualism but despotism;[142] ambition but lowliness;[143] mastery but servitude;[144] and motion without progress.[145]

The prevalence of paradox suggests a destructive element in the lifeblood of the system. "Every government," according to Tocqueville, "seems to be afflicted by some evil inherent in its nature."[146] Democracy is no exception; Tocqueville sees it as a good with a propensity to turn on itself and commit mortal harm. And because Tocqueville does not treat democracy as an abstraction but as a vital system involving and affecting individuals, its inherent dangers involve the consciousness, even the psychology, of the individual. Tocqueville's ultimate theme is democracy's tendency to steer the individual towards a false freedom and away from an authentic independence. In the end, Tocqueville prescribes a *desirable* paradox for individuals who have chosen democracy: the "independence" of "dependent" participation in political choice and governance.[147] This condition of health would come not from legislation but from "a regeneration of the life-enhancing mores of a nation."[148]

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[140] 1 TOCQUEVILLE, *supra* note 9, at 14. An early reader of *Democracy in America* noted:

> it is evident that the problem that disturbed M. de Tocqueville and that brought him to the United States is the problem of European democracy. It is this very fact which gives to this book its grandeur, I might almost say its emotional quality, but which at the same time introduces a certain obscurity. Tocqueville describes America, but he thinks of Europe.

Bradley, *supra* note 139, at xxvii.

[141] 2 TOCQUEVILLE, *supra* note 9, at 262, 314.

[142] *Id.* at 318.

[143] *Id.* at 245-48.

[144] *Id.* at 319-21, 329-30, 334.

[145] *Id.* at 257, 263.

[146] 1 TOCQUEVILLE, *supra* note 9, at 137.

[147] ROGER BOESCHE, THE STRANGE LIBERALISM OF ALEXIS DE TOCQUEVILLE 51-52 (1987). Tocqueville wrote:

> I dread . . . lest [citizens] should at last so entirely give way to a cowardly love of present enjoyment as to lose sight of the interests of their future selves and those of their descendants and prefer to glide along the easy current of life rather than to make, when it is necessary, a strong and sudden effort to a higher purpose.

2 TOCQUEVILLE, *supra* note 9, at 263.

[148] BOESCHE, *supra* note 147, at 182. Metaphors of health and illness were prevalent in the

In the effort to promote such a regeneration, volumes I and II of *Democracy in America* address the theme of independence from a number of perspectives. I will examine Tocqueville's understanding of the independence of the President and of the Supreme Court, as well as his concept of "personal independence." Of most importance to the present study is Tocqueville's implicit linkage of judicial independence with the formalist thought and tradition of lawyers. Tocqueville is highly suggestive of a connection between the purposes underlying judicial independence and the shape assumed by the judicial mind, whether formal or non-formal, depending on the problem a court is asked to solve.

A. The President and the People

While Madison's concern in Federalist No. 40 is an act in excess of delegation, Tocqueville's subject in chapter VIII of his first volume is the President's inevitable *refusal* to perform a critical function delegated by the Constitution. The structure of the Constitution contemplates an executive exercising independent judgment concerning legislation and utilizing the veto power when necessary to prevent unwise bills from becoming law.[149] For Tocqueville, the Presidency itself is designed to safeguard against the "evil inherent" in democracy—the "people . . . perpetually drawing all authority to itself."[150] The Framers conceived

> that a certain authority above the body of the people was necessary, which should enjoy a degree of independence in its sphere without being entirely beyond the sphere of popular control; an authority which would be forced to comply with the *permanent* determinations of the majority, but which would be able to resist its caprices and refuse its most dangerous demands.[151]

In Tocqueville's view, however, the Constitution defeats itself by permitting Presidents to serve more than one term. Eligibility for reelection deters the first-term President from using the veto power; the President becomes "an easy tool in the hands of the majority," "adopts its likings and its animosities . . . anticipates its wishes . . . forestalls its complaints . . .

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literature of Tocqueville's time: "bourgeois society was seen less as a tyrant's tool and more as a pervasive addiction, disseminating itself slowly and inexorably." *Id.* at 83.

[149] THE FEDERALIST No. 73, at 372-74 (Alexander Hamilton) (Garry Wills ed., 1982).

[150] 1 TOCQUEVILLE, *supra* note 9, at 137-38.

[151] *Id.* (emphasis in original).

yields to its idlest cravings . . . ."[152]

Tocqueville appears to be making two points. First, the function of the independent executive is undercut by allowances that encourage only self-interested dependence on the part of the President. Second, Presidents are not generally capable of surmounting such pressure. The problem, then, lies not only in the constitutional provisions but in the character of individuals who occupy constitutional office. The latter point suggests that while executive independence is a critical aspect of constitutionalism, its vitality depends not on some self-executing structure, but on the political courage of a person. And in Tocqueville's vision, individual courage is more likely to exist to the extent that the society's "sentiments, beliefs, ideas, [and] habits of the heart" give it value.[153]

Tocqueville's portrait of the executive submitting to the majority's "idlest cravings" prefigures his more extensive portrait of the lack of intellectual independence among Americans generally. "I know of no country in which there is so little independence of mind and real freedom as in America," he writes. "[I]n America, the majority raises formidable barriers around the liberty of opinion; within the barriers an author may write what he pleases, but woe to him if he goes beyond them."[154] In America, Tocqueville finds the seeds of a "novel" despotism and the debasement of individual character.[155] He locates the evil's source in the American manner of pursuing equality itself. This quenchless pursuit, he says, leads persons to look inward, striving only for the sort of personal independence that becomes, in time, a prison of isolation.[156] The result is that "every man is apt to live apart, centered in himself and forgetful of the public."[157] Thus removed, man "mistrusts himself as soon as [others] assail him. Not only does he mistrust his strength, but he even doubts of his

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[152] *Id.*

[153] BOESCHE, *supra* note 147, at 183 (quoting ALEXIS DE TOCQUEVILLE, SELECTED LETTERS ON POLITICS AND SOCIETY 294 (Roger Boesche ed., 1985)).

[154] 1 TOCQUEVILLE, *supra* note 9, at 263, 264; *see also* JOHN P. DIGGINS, THE LOST SOUL OF AMERICAN POLITICS 238 (1984) ("It was this threat of society that tyrannized not man's body but his psyche and 'soul,' for the individual who wanted to think his own thoughts and act on his own convictions risked being abandoned by his peers and shunned by the community.").

[155] *See* 1 TOCQUEVILLE, *supra* note 9, at 266; 2 *id.* at 318, 329.

[156] *See* DIGGINS, *supra* note 154, at 239 (noting that the "rise of mass democracy" led not only to "equality and the leveling of distinctions to the point of uniform mediocrity; it also brought the atomization of society and the dissolution of the individual").

[157] 2 TOCQUEVILLE, *supra* note 9, at 256.

right . . . ."[158] Dissent and discussion end. Worse, isolation breeds apathy; men turn away from public concerns and political duties, abdicating governance to an ever more centralized authority. A grim paradox emerges: "those who equate freedom and personal independence might in fact beget the very collectivist despotism they fear."[159]

Tocqueville rejects the isolation of self-concern and embraces a notion of independence as reflective participation in political affairs. Or, as Tocqueville wrote: "So wrong it is to confound independence with liberty. No one is less independent than a citizen of a free state."[160] It is in "political and public interaction with others, rather than a self-interested withdrawal from society," that "men and women find independence, individualism, intelligence, and self-confidence."[161] But the change cannot come from constitutional structure or laws; it must flow from the culture.

In Tocqueville, then, we find virtually the opposite of the generative independence of The Declaration and Federalist No. 40. Instead we see a propensity of democratic people to become politically passive, isolated units. In the process, they create a vacuum inevitably filled by a centralized authority and they fall short of the degree of authentic personal independence made possible by political interaction with fellow citizens. The President's own nonreflective acceptance of legislation exemplifies this defective "habit of the heart" and illuminates the Constitution's reliance on more than "paper independence" in order to function.

Tocqueville thus gives us a risk model of independence in which authentic personal independence is necessary for the functioning of a non-self-executing constitutional structure. The risk is that such independence is beyond the capacity of a society committed to equality but blind to its avoidable side effects.

B. The Nature of the Judicial Response

Given this perspective on the failure of authentic independence at the level of the individual and of the Presidency, we can now understand the

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[158] *Id.* at 261.

[159] BOESCHE, *supra* note 147, at 143.

[160] *Id.* at 141 (quoting ALEXIS DE TOCQUEVILLE, THE OLD REGIME AND THE FRENCH REVOLUTION 275 (Stuart Gilbert trans., 1955)).

[161] *Id.* at 155.

complexities of independence suggested by Tocqueville's analysis of the Supreme Court and the legal profession. Tocqueville's enterprise is to highlight, account for, and warn against the Court's unprecedented power: "a more imposing judicial power was never constituted by any people."[162] Citing the language of Article III, Tocqueville notes the wide scope of the Court's jurisdiction, including interbranch disputes and controversies over federalism, and suggests, "The peace, the prosperity, and the very existence of the Union are vested in the hands" of the Court. Among the Court's duties are the protection of "the public interest against private interests" and the defense of "the conservative spirit of stability against the fickleness of the democracy."[163] The members of the Court are called upon to be "statesmen" in the resolution of legal questions that are for the most part political. This responsibility requires strength. The need for strength accounts for the structural commitment to judicial independence, but independence, even if necessary, presents danger. "[I]f the Supreme Court is ever composed of imprudent or bad men, the Union may be plunged into anarchy or civil war."[164] Like that of the Presidency, the independence of the Supreme Court entails risk. The mechanics of balanced independent powers are not sufficient; the vitality of independence is a function of public-regarding behavior of the judges themselves.

Elsewhere Tocqueville addresses the unique social role—indeed, the psychology—of lawyers and judges. In a later chapter discussing various "mitigations of the tyranny of the majority," Tocqueville states that "members of the legal profession" are "the most powerful existing security against the excesses of democracy."[165] Lawyers "derive from [their] occupation certain habits of order, a taste for formalities, and a kind of instinctive regard for the regular connection of ideas, which naturally render them very hostile to the revolutionary spirit and the unreflecting passions of the multitude."[166] Occupying a key niche in society, lawyers are able to "neutralize the vices inherent in popular government" by "oppos[ing] their aristocratic propensities to the nation's democratic instincts."[167]

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[162] 1 TOCQUEVILLE, *supra* note 9, at 150.
[163] *Id.* at 151.
[164] *Id.* at 152.
[165] *Id.* at 271-72.
[166] *Id.* at 273.
[167] *Id.* at 278.

The judge embodies the nature of the legal profession in the "control" of democracy, and in Tocqueville's view, should remain politically independent in order to fill that role.[168] Thus, Tocqueville opposes conversion of the bench into an elective office: such "innovations will sooner or later be attended with fatal consequences . . . it will be found out at some future period that by thus lessening the independence of the judiciary, they have attacked not only the judicial powers, but the democratic republic itself."[169]

But, however valuable Tocqueville finds the restraining *effects* of the legal profession, the *thought process* that he associates with lawyers and judges is hardly a model for the kind of reflective, intellectual independence he finds absent in the President or in the people generally. Tocqueville is ambivalent about the legal mind: on the one hand, he seems to praise the lawyer's "regard for the regular connection of ideas"; on the other hand, he writes with a certain coolness of the lawyer's "taste for formalities" and "love of order and formalities,"[170] and he notes that "the English or American lawyer resembles the hierophants of Egypt, for like them he is the sole interpreter of an occult science."[171] Similarly, Tocqueville tends to appreciate the restraint involved in the lawyer's deference to precedent, finding a "servitude of thought" and an "abnegation of [the lawyer's] own opinions."[172] Yet he notes the power of the "party" of lawyers in America and finds that it "acts upon the country imperceptibly, but finally fashions it to suit its own purposes."[173] Tocqueville never resolves the inconsistency between the legal profession's actions "to suit it's own purposes," and its supposed "servitude of thought."

From Tocqueville's separate discussions of the independence of the Supreme Court and the role of lawyers and judges in "controlling" democracy though "formalities" and the "occult science" of law, we can infer a connection between judicial independence and judicial thought process. In a democracy of "individualists" who retreat into private interest and of Presidents who shrink from independent action, the judiciary, in Toc-

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[168] *Id.* ("The courts of justice are the visible organs by which the legal profession is enabled to control the democracy.").

[169] *Id.* at 279.

[170] *Id.* at 273.

[171] *Id.* at 277.

[172] *Id.*

[173] *Id.* at 280.

queville's view, serves to guard against "the unreflecting passions of the multitude."[174] But the judiciary's tools are "formality," "occult science," and servile obedience to precedent—tools that secure the democracy against "fickleness" and perhaps serve the legal professions "own purposes" as well.[175] The rigidity of the multitude's self-interest is thus counterpoised by the rigidity of the law. Tocqueville's ultimate picture of the Supreme Court, then, is of a Court whose strength is bolstered by its independence, but whose independence expresses itself in legal science.

C. *Formalism, Self-Deception, and Independence*

Why would judicial independence express itself this way? Tocqueville does not answer this question explicitly. By juxtaposing the enormous power and constitutional responsibility of independent judges and the occult science of legal formalism as that power's peculiar instrument, he simply suggests that the command to the judiciary to be independent amounted to a command to be independent from politics, and that the preexisting voice of legal formalism was well-suited to, and became, the voice of supposedly apolitical judging.

As indicated above, Tocqueville surely had doubts about whether formalism was, or could ever be, apolitical. He indicated that formalism somehow involved both self-restraining "servitude of thought" and the virtually inaudible machinery of a class' subtle power. The intimation was that, at the very least, formalism amounted to a language of self-deception.[176] "Servitude of thought" *is* political—is in truth an effort, over time, to further the mentality and hence the preferences of a "party." Tocqueville hints that judges and lawyers evaded the question of whether their formalism was simply a technical trait of legal method or a characteristic that represented a political ideology.[177]

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[174] *Id.* at 273; *see also id.* at 278 ("When the American people are intoxicated by passion or carried away by the impetuosity of their ideas, they are checked and stopped by the almost invisible influence of their legal counselors.").

[175] *Id.* at 280.

[176] In her discussion of formalism, Professor Judith Shklar comments on the psychology of the judicial ethos: "both natural law theories and analytical positivism allow judges to believe that there always is a rule somewhere for them to follow . . . . To avoid the appearance of arbitrariness is a deep inner necessity for [the judge]." JUDITH N. SHKLAR, LEGALISM 12 (1964).

[177] I use "ideology" in the way of Professor Shklar: ideology "refers simply to political preferences, some very simple and direct, others more comprehensive." The word is not "one of simple

The evasions of formalism were particularly well-suited to express the ambivalences of judicial independence, especially as described in *Democracy in America* as another of Tocqueville's paradoxes: a blend of power and weakness, authority and vulnerability. Tocqueville saw judicial independence as the key to the survival of both the Union and the Constitution. But, to put it mildly, the nature of that independence, and its exercise, would be problematic. The Supreme Court's cases were political issues transmuted into legal controversies;[178] the Court's task was no less than to guard against democratic "fickleness";[179] the Justices were to be "statesmen," above politics;[180] the Justices' actual power would derive from public opinion, which unhappily enough was impossible to predict and fatal to fall short of or exceed;[181] the Justices were to expect perpetual challenges and pressures from the political branches.[182] In short, the concept of judicial independence placed huge demands on the act of judging, but provided no guidance about how the demands were to be met. The tenure and salary protections of Article III protected the judiciary from direct influence from the other branches, but said nothing about how the judiciary was to resist or to define itself with respect to more subtle pressures, or how the judges were to exercise such expansive independence in a given case.[183] It is thus not difficult to see that the evasions of the

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opprobrium." *Id.* at 4. She also writes of formalism: "This deliberate isolation of the legal system—the treatment of law as a neutral social entity—is itself a refined political ideology, the expression of a preference. . . . It means thinking of law only as it ought to be—as legalism wants it to be, not as it actually is." *Id.* at 34-35.

[178] 1 TOCQUEVILLE, *supra* note 9, at 280.

[179] *Id.* at 151.

[180] *Id.* at 152.

[181] *Id.* at 151.

[182] *Id.* at 152.

[183] Alexander Hamilton noted the special anxiety that would be felt by the independent judge: the concern to *preserve* that independence in the face of formidable pressures from without. Commenting on the "natural feebleness of the judiciary," Hamilton wrote that "it is in continual jeopardy of being overpowered, awed or influenced by its coordinate branches." THE FEDERALIST No. 78, at 394 (Alexander Hamilton) (Garry Wills ed., 1982). For Professor Resnik, the "moral courage" required of a Lord Coke to stand up to a James I is "unusual" and "may be a quality upon which we would rather not have to depend." Article III protections of salary and tenure thus serve as bulwarks for the moral independence that might otherwise be all too rare in our own judges. Judith Resnik, *The Mythic Meaning of Article III Courts*, 56 U. COLO. L. REV. 581, 613 (1985). Judge Kaufman worried, "Even relatively minor and remote threats to impartial decision-making" are to be avoided to preserve the independent judiciary. Irving Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671, 691 (1980). These writings suggest the human frailties of judges and the pressure points, subtle and direct, on independence. Professor Epstein notes an additional source of

supposedly apolitical thought process of legal formalism fit the judiciary's need, conscious or not, for a language of evasion that would facilitate the exercise of judicial independence in the American democracy. On the one hand, formalism would shore up the judiciary's independent position vis-a-vis the apparently stronger political branches; it gave judges external authority on which to rely and the appearance of apolitical legalism, thus affording judges a professionalized rhetoric[184] that might even be thought by some to carry tones of statesmanship. On the other hand, formalism would not shore up the judiciary *too much*;[185] it downplayed the expansive potential of judicial independence by seeming to confine judges to the resources of precedent, rule, and "original intent."[186] Thus, formalism would allow a welcome fog to hang over the exercise of judicial independence, a haze that would obscure the nature of independence itself, particularly the questions of whether abstract principles or political preferences were guiding judges and whether independence from politics was even possible. That fog perhaps extended to the judges themselves. Reliance on formalist analysis allowed the judge to think that his independence was complete and yet clearly bounded—that he was not acting as a political agent, or wholly so, and that his power was limited to rules and axioms

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anxiety for the independent judge: the very *exercise* of independence. Given Article III salary and tenure protections, judges "may even find it in their interest to do solely what they think is 'right' from a legal and moral point of view—at once an appealing and terrifying prospect." Richard Epstein, *The Independence of Judges: The Uses and Limitations of Public Choice Theory*, 1990 B.Y.U. L. REV. 827, 845 (1990).

[184] Tocqueville's comments on the legal profession were influenced by the work of Justice Joseph Story on the conservative role of lawyers in the society. *See* R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY, STATESMAN OF THE OLD REPUBLIC 262-270 (1985). Professor Horwitz has noted that the "ideology of the American legal profession from the beginning of nineteenth century [has been] that law is a science discoverable by reason and that its scientific character is what distinguishes law from politics. The distinction between law and politics is the primary intellectual premise of professionalization. It . . . legitimizes professional craft and technique and separates it from more commonly accessible forms of political knowledge." Morton J. Horwitz, *The Conservative Tradition in the Writing of American Legal History*, 17 AM. J. LEGIS. HIST. 275, 280-81 (1973).

[185] Hamilton saw the limiting principle in the independent judge's adherence to forms: "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case." THE FEDERALIST No. 78, *supra* note 183, at 399.

[186] Professor Schauer sees formalism as a species of decisionmaking concerned with "power and its allocation." Formalism is related to "modesty": "To be formalistic as a decision-maker is to say that something is not my concern, no matter how compelling it may seem." He concedes, "Modesty . . . has its darker side," but prefers modesty to the alternative of unilateral expansion of "decisional opportunities." Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 543-44 (1988).

from without. Tocqueville's juxtaposition of the independent judiciary and the "occult science" of law thus suggests that formalism was a function of, even a self-deceptive adjustment to, the open vistas of judicial independence.

From here it is possible to speculate further about the connection between judicial independence and the voice of formalism. The judicial mind perhaps assumes an even greater, or heightened, formalist mode when it perceives, or thinks it perceives, that the action under review smacks of a particularly illegitimate or unrestrained formlessness.[187] Tocqueville wrote that lawyers (and, we may say, judges) "are less afraid of tyranny than of arbitrary power."[188] An action of that kind, either by the executive or legislative branch, or both, would represent an abuse of independent power—an abuse the judge strives to believe he or she can and does avoid.[189] Sensing traces of an abuse of independence in the action of another branch, the judge's mode of review may assume a particularly arid or mechanical formalism in an effort not to resemble the form-disregarding actor under review. In effect, the judge will seek to bury any trace of similar bias, capture, or frolic on the part of the court itself. Through a heightened formalism, the judge is reassured that his or her own independent power has definite bounds and that it remains properly within those bounds. At the same time, the judge is able to signal that the court is truly "independent" of the perceived maneuverings and political frailties of the branch under review. Thus, extreme formalism again expresses a kind of self-deception. Believing a fairly raw and irresponsible exercise of power is being reviewed, the judge seeks comfort in his or her own eyes and legitimacy in the public's eyes by assuming the figure of a decision-maker who is both extremely modest in the use of power and completely set

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[187] Hamilton wrote that the "independent spirit in the judges" will be particularly crucial when facing "those ill humours which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information and more deliberate reflection, have a tendency in the mean time to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community." THE FEDERALIST No. 78, *supra* note 183, at 397.

[188] 1 TOCQUEVILLE, *supra* note 9, at 275. On this passage in *Democracy in America*, Professor Shklar writes: "One might add that, if they fear tyranny, it is because it tends to be arbitrary, not because it is repressive. The fear of the arbitrary, however, is what gives legalism its political use. That is why it is not a conservatism without content." SHKLAR, *supra* note 176, at 15.

[189] Recall Tocqueville's regard for the lawyer's respect for precedent and "servitude of thought." *See supra* text accompanying notes 170-73.

apart from a rough political world.

In other words, when the independent judge reviews an action that does not appear to be the fruit of legislative independence, he or she may review that action in a way that resembles the perceived legislative behavior as little as possible. The judge will be as pure as he or she feels that the legislature was impure, as unbendingly judicial as the legislature appeared pliantly legislative, and as formal as he or she considers that body informal or formless.[190] The judge will do this as a way of avoiding a recognition of his or her own capacity for abusing independence and perhaps as a way of avoiding a recognition of the vagaries of independence itself. A judge's formalism in the face of perceived legislative caprice amounts to an over-dependence on rules and axioms.

On the other hand, when the legislative product demonstrates reflection or deliberation, rather than what Tocqueville called "unreflecting passions," a less formal judicial response would be expected. There would be diminished need on the part of a judge to seek reassurance in limitation or to accentuate the judicial claim of independence from politics.

Thus, Tocqueville puts judicial independence in the context of faction and constitutional politics, and then suggests that ambivalences about the nature of judicial independence in such a system may lead some judges to rely on the reassuring rhetoric of formalism. Although much has been learned and written about formalism since the time of Tocqueville, formalist analysis continues today because at various times and in various cases, its message—that the law can be divorced from politics—is a message that judges for different reasons feel they must invoke. Several of the separation of powers cases of the 1980s utilize an extreme formalism; others do not. Tocqueville may help us to understand why one analytic mode appears in some cases and not in others.

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[190] Thus, rule-driven formalism by a court may be a response to a perceived *lack* of rule-driven formal behavior on the part of the branch under review. Of course, the judge may be in complete error to think that formal behavior of the branch under review is required, or is even a good thing; the judge may have misperceived the behavior in a particular case. My point is only that the judge's perception, right or wrong, may push him or her into a heightened formalist perspective.

D. Separation of Powers: Judicial Formalism in the 1980s

Tocqueville's implicit link between politics, judicial independence, and formalism is a link that illuminates several of the modern separation of powers cases. In Justice Brennan's opinion for the plurality in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,[191] and Chief Justice Burger's opinion for the Court in *INS v. Chadha*,[192] we can identify a three-part pattern consistent with the implications of Tocqueville. First, both Justices notice and characterize unfavorable facts about the congressional action under review, facts suggesting to them (rightly or wrongly) that Congress' own independence had been compromised by political pressures. Next, both Justices include a paragraph or more relating to judicial independence, as if Congress' compromised independence provoked concern about the Court's own ability to remain above politics in the adjudication of the case. Finally, both Justices reach the merits of the case and treat the issue of separation of powers with a formalism that has been rightly criticized as unconvincing and sterile. The three-part progression suggests that Tocqueville's linkage of politics, judicial independence, and formalism was prescient indeed.

After discussing *Northern Pipeline* and *Chadha*, I will look at variants of this progression. First, I will discuss the majority opinion in *Commodity Futures Trading Commission v. Schor*,[193] in which Justice O'Connor takes favorable notice of facts concerning the passage of the legislation at issue and adopts a functionalist analytic mode rather than resorting to formalism. Then turning to *Morrison v. Olson*,[194] initially I will examine Justice Scalia's angry dissent,[195] which sees only political spite, machinations, and dependence on the part of government players and the people. This view of "bad politics everywhere" leads *not* to a crisis about the complexities of judicial independence and then to an arid legal formalism in which law and politics are treated as separate, unblending forces. Instead, this view leads to an analytic mode that sees politics and law not as separate but as hopelessly intermixed. This analytic mode is not legal formalism—it is not a call for the judiciary to be independent of polit-

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[191] 458 U.S. 50, 52-89 (1982).
[192] 462 U.S. 919, 923-59 (1983).
[193] 478 U.S. 833, 835-59 (1986).
[194] 487 U.S. 654 (1988).
[195] *Id.* at 697-734.

ics—but rather *political formalism*, a call for political courts to return the Constitution to the lost time and world of the Framers. Then I will examine the majority opinion,[196] which employs a functionalism that is subject to several readings. I ask if this is merely a result-oriented functionalism born of the majority's desire to assert independence from the executive or if it is a promising effort to move from the impossible position of judicial independence from politics to a more candid, if less focused, understanding of the judicial function.

The statute at issue in *Northern Pipeline* was the Bankruptcy Act of 1978 that provided for non-Article III bankruptcy judges.[197] Congress vested those judges with jurisdiction over all matters "arising in or related to" bankruptcy proceedings and with "the 'powers of a court of equity, law and admiralty.' "[198] A split Court ruled that the Act violated Article III. Commentators fault the plurality opinion for its formalist analysis, particularly its insistence that the bankruptcy courts were unconstitutional because they did not "fall within any of the historically recognized situations" in which Article I "legislative courts" had been upheld in the past.[199] In addition, the plurality woodenly asserted that the bankruptcy courts could not be upheld as Article III "adjuncts" because they were too independent of the district courts.[200] The dissent attacked Justice Brennan's opinion as a "gross oversimplification," full of "fine rhetoric," but amounting to a "distracting and superficial gloss on a difficult question."[201]

Critiques of Justice Brennan's formalism have focused on the second half of the opinion, which addresses the arguments, primarily those of the United States, in favor of the constitutionality of the bankruptcy courts.

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[196] *Id.* at 659-97.

[197] 458 U.S. at 54 (quoting 28 U.S.C. § 1471(b) (1976 & Supp. IV 1980)).

[198] *Id.* at 54-55 (citations omitted).

[199] *Id.* at 76. Professor Sherry writes, "The plurality opinion [in *Northern Pipeline*] is a striking departure from the earlier practical and flexible decisions about legislative courts. The Justices posited a rigid separation between legislative and judicial powers, and invoked a strict formalistic rule. . . . The plurality opinion . . . evidences a strong tendency to appeal to authoritative sources such as the constitutional language and earlier, rigid-rule-bound precedent. . . . [It] signalled the beginning of the Court's move toward a formalistic approach to separation of powers." Suzanna Sherry, *Separation of Powers: Asking a Different Question*, 30 WM. & MARY L. REV. 287, 291 (1989).

[200] 458 U.S. at 76-87, 79 n.31.

[201] *Id.* at 93.

Little attention has been paid to the opening sections of the opinion.[202] There, Justice Brennan provides several indications as to what may well have prompted his much-criticized mode of analysis.

Just below the bland surface of these introductory sections, Justice Brennan strongly implies that the legislative background of the bankruptcy amendments reveals congressional caprice. First, he notes that while Congress vested the sweeping bankruptcy jurisdiction in district courts, it simultaneously redeposited that power in the new bankruptcy tribunals.[203] The implication is that the statute's drafting was at best disingenuous. Second, Justice Brennan takes note of the legislative history, particularly the "substantial doubts" expressed by the House of Representatives concerning the Act's constitutionality. He cites for the first of several times a House Report that found the Act unconstitutional under Article III.[204] Finally, Justice Brennan cites a law review article detailing House and Senate disagreement on the Article III issue and the lack of conference procedure leading to the eleventh-hour final version of the act.[205] Justice Brennan also paraphrases critical language from the appellee's brief, stating, "The bill that was finally enacted, denying bankruptcy judges the tenure and compensation protections of Art[icle] III, was the result of a series of last-minute conferences and compromises between the managers of both Houses."[206] The unmistakable tone of these observations is that Congress both insufficiently grappled with the constitutional question and intentionally tried to disguise the problem through sleight-of-hand draftsmanship.

At the same time, Justice Brennan recounts the history, purposes, and contemporary values of judicial independence,[207] ostensibly introducing the question of whether Article III required such independence for the new bankruptcy courts. But the discussion also seems to refer to the Court

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[202] *See generally id.* at 52-63 (Brennan, J.).

[203] *Id.* at 54 n.3.

[204] *Id.* at 61 n.12.

[205] *Id.* (quoting Kenneth N. Klee, *Legislative History of the New Bankruptcy Law*, 28 DEPAUL L. REV. 941 (1979)). Professor Klee's history of the act departs from blow-by-blow chronology long enough to make the point that "Nothing was normal . . . in the history of H.R. 8200." Klee, *supra*, at 956.

[206] Brief for Appellee, *Marathon Pipe Line Co., reprinted in* 128 LANDMARK BRIEFS, *supra* note 94, at 592-93.

[207] 458 U.S. at 57-60.

itself. Coming in the midst of the Court's characterization of Congress, the discussion intimates that even a Court *with* Article III protections must take care not to lose its independent judgment to short-term politics as Congress apparently had in its last-minute maneuverings with the Bankruptcy Act.

The opinion then steels itself into the required independence by stating the Court's constitutional authority to have the final say in separation of powers cases by "a delicate exercise in constitutional interpretation."[208] In 1982, this would seem to be a rather obvious, indeed a gratuitous, statement. However, it has the far from gratuitous effect of indicating that the plurality will be independent, that it will apply rules, and that its behavior will be a far cry from Congress' own. It is no surprise, then, that the analysis that follows is extremely formalistic. The opinion-writer perceives a nonformal Congress at work, its independent judgment distorted by political expedience. The opinion fixes on the need for the judicial branch to be pure. The purity will come from adhering to "occult science," formalist legal analysis.

The opening sections of the majority opinion in *INS v. Chadha*[209] have a similar thrust. Matter-of-factly, but undeniably, these paragraphs tell a story of legislative caprice, nondeliberation, and deception. The opinion's intimation of Congressional caprice comes in its rendition of the eleventh-hour timing of the House veto after a year-and-a-half of inaction and inattention.[210] The resolution introduced by Congressman Eilberg vetoed INS decisions to suspend deportation of six aliens, including Chadha. Chief Justice Burger makes a point of stating that "[e]xactly one year previous" to the resolution, the same Congressman had "introduced a similar resolution . . . in the case of six other aliens."[211] The sameness of the House's timing, schedule, and targeted number of aliens leaves the impression that consistency was, at least in this context, the very definition of arbitrariness.

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[208] *Id.* at 61-62 (quoting Baker v. Carr, 369 U.S. 186, 211 (1962)).

[209] 462 U.S. 919, 923-44 (1983).

[210] *Id.* at 926 (The Court stated, "The June 25, 1974 order of the Immigration Judge suspending Chadha's deportation remained outstanding as a valid order for a year and a half. For reasons not disclosed by the record, Congress did not exercise the veto authority reserved to it under § 244(c)(2) until the first session of the 94th Congress. This was the final session in which Congress . . . could act.").

[211] *Id.* at 927 n.3.

The Chief Justice's intimation of deception is even less veiled. He quotes the same Congressman's colloquy with a colleague about the previous year's resolution; in the colloquy the Congressman lies about whether the proposed veto would reverse the decision of the immigration agency. Chief Justice Burger labels these remarks "[c]learly . . . an obfuscation."[212]

The suggestion that the House failed to deliberate is found in the opinion's recital of the Congressman's unsupported argument for deporting Chadha and the others. Congressman Eilberg is quoted as asserting simply that "the aliens contained in the resolution did not meet these statutory requirements, particularly as it relates to hardship."[213] The opinion also makes a point of stating that the House resolution "had not been printed and was not made available to other Members of the House prior to or at the time it was voted on," and that it "was passed without debate or recorded vote."[214] As in *Northern Pipeline*, then, the opinion's tone discloses a sense of politics run amok. It suggests a House of Congress abdicating its authority to internally unchecked forces that in the span of four days succeed in navigating an unsupported resolution through sub-

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[212] *Id.*

[213] *Id.* at 926. What were the reasons for vetoing the INS' suspension of Chadha's deportation? One commentator posits a rationale based on a 1966 House Report accompanying the veto of the suspended deportations of 70 aliens. The Report addressed aliens who had been

> for the greater part of the minimum 7-year period [for eligibility for suspension] in a legal status or in a protected status. Such cases include but are not limited to visitors, students, diplomatic employees and beneficiaries of private bills . . . . It is not the intention of the committee to approve those cases which would tend to establish a pattern of immigration.

BARBARA H. CRAIG, CHADHA 24 (1988) (quoting H.R. REP. NO. 2151, 89th Cong., 2d Sess. (1966)). The thrust of the Report was to state a policy against suspension for those who appeared to have used nonimmigrant status to advance plans to remain permanently. *Id.* This policy had not assumed legislative form. "Exactly why is open to conjecture: there was not majority support in both houses to do so, or the issue was too minor to get the attention of other members, or the committee simply found vetoing a few cases now and then to be a more appealing means of getting its point across." *Id.*

[214] 462 U.S. at 926-27. Louis Fisher, among others, has written that the Court's apparent outrage at Congress' departure from expected legislative procedures was far from realistic: "What legislature is the Court describing? Certainly not Congress, where even the most casual observer can watch proceedings that fall short of being finely wrought and exhaustively considered. There is nothing unconstitutional about Congress' passing bills that have never been sent to committee. Both houses regularly use shortcuts: suspending the rules in the House of Representatives, asking for unanimous consent in the Senate, and attaching legislative riders to appropriations bills. Not pretty, but not unconstitutional either." Louis Fisher, *Micromanagement by Congress: Reality and Mythology, in* THE FETTERED PRESIDENCY 142 (L. Gordon Crovitz & Jeremy A. Rabkin eds., 1989).

committee and committee levels and securing its passage by the House.[215] The House is thus portrayed as anything but a collegial decision-making body of representatives in the Madisonian sense, distanced or relatively detached from legislative interests "so that they can bring reason and impartial judgment to bear on the resolution of the issue at hand."[216] Instead, with respect to the Chadha resolution, the legislative body appeared to be without independence, manipulated by a subpart whose own independent action—the resolution concerning Chadha and the other five aliens—carried little or no procedural legitimacy or substantive support.

The Court's factual account, slanted or not, appears to color all that follows in the opinion. Next, addressing seven threshold issues,[217] the opinion disposes of them all in a conclusory, concededly "technical" fashion. The opinion's perception of the legislature as capricious, deceptive, nondeliberative, and shorn of its independence, leads to an analytic mode with respect to the threshold issues that is doctrinal in the most arid sense of the word. It is here that the opinion seems to be reacting to its impression of severe legislative informality by over-striving for an austere judicial correctness.

For example, the opinion dismisses challenges to its appellate jurisdiction by noting that "the technical prerequisites" had been met.[218] Addressing concerns that the legislative veto provision of the immigration statute was not severable, the opinion provides the conclusory response that the legislative history "is not sufficient to rebut the presumption of severability raised by" the statute itself,[219] but then fails to provide an appropriate standard of sufficiency.

On the issue of whether the case presented a non-justiciable "political question," the Court rejects the suggestion that it lacks "judicially discoverable and manageable standards" to resolve the case.[220] The opinion asserts that relevant legal standards exist and that the Court would not rely

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[215] According to the opinion, Congressman Eilberg's resolution was introduced on December 12, 1975, was referred to the House Committee on the Judiciary, was discharged by the Committee, and was submitted to the full House for a vote on December 16, 1975. 462 U.S. at 926.

[216] GEORGE W. CAREY, THE FEDERALIST: DESIGN FOR A CONSTITUTIONAL REPUBLIC 35-36 (1989) (discussing The Federalist's concept of the national assembly).

[217] 462 U.S. at 929-44.

[218] *Id.* at 931.

[219] *Id.* at 934.

[220] *Id.* at 941-42 (citing Baker v. Carr, 369 U.S. 186, 217 (1962)).

on "non-judicial 'policy determinations' "[221]—in effect, the opinion insists that the Court could decide the case based on law and, therefore, could remain safely removed from political considerations. Thus, the Chief Justice makes the traditional claim of judicial independence—that the Court is above politics, that its adjudications are works of statesmanship, that its choices are limited by external legal authority. And yet the discussion of the political question issue does not stop there. Chief Justice Burger cites an 1892 case involving the lawmaking powers of Congress, where the Court acknowledged its duty "to give full effect to the provisions of the Constitution relating to the enactment of laws" and the fact that the Court "cannot be unmindful of the consequences that must result if this court shall feel obliged . . . to declare that an enrolled bill . . . did not become law."[222] Chief Justice Burger does not comment on the quotation; his use of it was no doubt to support his conclusion that lawsuits about the lawmaking powers of Congress are not by definition precluded from review under the political question doctrine. However, the inadvertent message of the quotation in its context in *Chadha* is that the exercise of judicial independence in a political system must be apolitical, but at the same time the Court cannot be unmindful of the political consequences of its actions. The opinion writer does not specify how detachment mixed with "mindfulness" is to be achieved—only that it *is* to be achieved. And in the next paragraph of the opinion, set off as a conclusion to the entire discussion of threshold issues, Chief Justice John Marshall is quoted: "Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is to exercise our own best judgment, and conscientiously to perform our duty."[223] This faith in "best judgment" appears to be all that the opinion writer can do to resolve the twin duties of detachment from politics and mindfulness of political consequence.

In this progression of thought, the opinion seems to be only half-aware of the anxiety it expresses about judicial independence. It is claiming freedom from politics, insisting on awareness of politics, and concluding that, in such a conundrum, only our "best judgment" provides guidance. The citation to John Marshall is like a wish—that the faith in the traditional view of judicial independence, as somehow detached from politics, still had

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[221] *Id.* at 942.

[222] *Id.* at 943 (citing Field v. Clark, 143 U.S. 649, 669-70 (1892)).

[223] *Id.* at 944 (citing Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) (Marshall, C.J.)).

vitality, that even in the last decades of the twentieth century, Marshall's concept of independence could pass for truth.

After this, the analytic formalism of the Court's treatment of the merits should come as no surprise. The perceived abuse by Congress of its legislative independence has the effect of hardening the judicial mind, as if its own independence from present-day politics had been called into question. In the discussion of the threshold issues, we see both rigidity of legal thought and inklings of worry about the nature of judicial independence. This rigidity against a deeper uncertainty leads naturally to the formalism that follows in the opinion.

Thus, in both *Northern Pipeline* and *Chadha*, concerns about judicial independence triggered by a perception of a congressional *lack* of independence lead to formalist analysis. Such a triggering perception about Congress is nowhere to be found in Justice O'Connor's determinedly nonformalist opinion for the Court in *Commodity Futures Trading Commission v. Schor*.[224] There, Congress authorized an independent agency to administer a procedure under which aggrieved customers could seek remedies against their commodity brokers, and brokers could bring counterclaims.[225] The agency interpreted the statute to authorize agency adjudication of both statutory and common law counterclaims. The Court addressed whether Congress violated Article III by empowering non-Article III federal agency decision-makers to adjudicate common law counterclaims.[226]

Justice O'Connor's perception of the legislative action in the case—Congress' delegation of adjudicatory power—is wholly favorable. In the introductory paragraphs of the opinion, Justice O'Connor cites a House Report referring to Congress' goal of creating a "comprehensive regulatory structure" in the commodity futures context;[227] the sense conveyed is that Congress was rational in seeking to be comprehensive. Justice O'Connor also cites the House Report's stated intent to vest regulatory power in an agency "which would be relatively immune from the 'political winds that sweep Washington.' "[228] Her tone is approving: Con-

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[224] 478 U.S. 833 (1986).

[225] *Id.* at 836-40.

[226] *Id.*

[227] *Id.* at 836 (citing H.R. REP. No. 975, 93d Cong., 1st Sess. 1 (1974)).

[228] *Id.* (citing H.R. REP. No. 975, 93d Cong., 1st Sess. 44, 70 (1974)).

gress' effort was rational both in scope and in the bureaucratic structure it devised to be remote from politics. Later in the opinion, Justice O'Connor indicates a belief that Congress' intent with respect to counterclaims was not to dilute the jurisdiction of the federal courts: "[Congress'] primary focus was on making effective a specific and limited federal regulatory scheme, not on allocating jurisdiction among federal tribunals."[229] Justice O'Connor also refers to "evidence of valid and specific legislative necessities"[230] and indicates that the agency's assertion of jurisdiction in the case "is limited to that which is necessary to make the reparations procedure workable."[231] The overall picture is of a responsible Congress delegating a comprehensive regulatory program to a depoliticized agency that has not exceeded statutory or constitutional authority in the assertion of necessary jurisdiction to make its task workable. An enviable portrait!

In Tocqueville's words, Justice O'Connor sees no "unreflecting passions" on the part of Congress. Her ease with a functionalist approach is a direct result of her unalarmed perception of Congress. Far from scaling the formalist peaks of *Northern Pipeline* and *Chadha* to escape from political taint, Justice O'Connor, seeing no sign of legislative caprice, remains on Congress' own ground. Indeed, "the concerns that drove Congress to depart from the requirements of Article III"[232] are deemed appropriate considerations, in the Court's functionalist analysis of the merits, rather than factors extraneous to independent judicial review.

Morrison v. Olson,[233] in which the Court upheld the constitutionality of the independent counsel statute, provides a variation on the connection between politics, judicial independence, and analytic method. Justice Scalia's incendiary dissent resembles the *Northern Pipeline* and *Chadha* opinions to the extent that it works from an initial impression about the legislative process that produced the statute. Justice Scalia's focus is legislative motive. For him, "the whole object" of the statute is to reduce Presidential power;[234] "the very object" is to "eliminate [the] assurance of a sympathetic forum" in the executive branch for embattled Presidents and

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[229] *Id.* at 855.
[230] *Id.*
[231] *Id.* at 856.
[232] *Id.* at 851.
[233] 487 U.S. 654 (1988).
[234] *Id.* at 706 (Scalia, J., dissenting).

their aides;[235] its "whole object" is to "wound" the President.[236] Justice Scalia traces the statute to a partisan exercise in expedience: "How much easier it is for Congress," he writes, "instead of accepting the political damage attendant to the commencement of impeachment proceedings . . . on trivial grounds . . . simply to trigger a debilitating criminal investigation of the Chief Executive under this law."[237] Not only is the statute a "wolf,"[238] but its application to the *Morrison* facts is seen as prompted by an "angered" Congress, particularly some members of the Judiciary Committee who commissioned a staff report of which "many" members were ignorant.[239]

Thus, Justice Scalia dwells on what he believes is partisan politics governing both the passage and use of the independent counsel statute, particularly the illegitimate independent action of a few members of a powerful committee. But Justice Scalia's concerns about forms of independence do not stop there. For him, the Attorney General will lack the moral independence to resist spurious congressional pressures to request appointment of an independent counsel.[240] Judges receiving such a request may also be nonindependent "politically partisan" persons who could "select a prosecutor antagonistic to the administration" and thus one not "independent" at all.[241] Moreover, "the public" is portrayed as gullible and insufficiently independent-minded to grasp Congressional machinations.[242]

In this perspective, the world turns around self-interested politics where warfare and survival are all. Whereas Justice Brennan and Chief Justice Burger were influenced by perceptions of *legislative* caprice, Justice Scalia sees low political propensities and lack of independence in each of the branches. This more encompassing and darker vision does not lead to a statement of concern about the Justice's own ability to exercise judicial independence, nor does it lead to the kind of legal formalism of *Northern Pipeline* and *Chadha*. Justice Scalia does not become exclusively reliant on precedent (*Northern Pipeline*) or constitutional text (*Chadha*) in an

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[235] *Id.* at 712.
[236] *Id.* at 713.
[237] *Id.*
[238] *Id.* at 699.
[239] *Id.* at 700-01.
[240] *Id.* at 701-02.
[241] *Id.* at 730.
[242] *Id.* at 702.

effort to separate the legal function of the Court from politics of any sort. Instead, since he sees politics everywhere, the Court's role is inextricably connected to political concerns, although of a professedly higher nature. Justice Scalia's formalism is not legal formalism so much as it is a *political* formalism in which he seeks, through constitutional adjudication, to divorce one type of politics from another. In effect, he seeks to preserve good constitutional politics from usurpation by bad politics. The partisanship he sees underlying and flowing from the independent counsel statute is made distinct from the Constitution's grand tripartite design in which the electoral process and the threat of impeachment serve to check executive conflict of interest.[243] Although Judge Scalia's dissent begins with constitutional text and precedent, little of either supports his view of the merits, and thus he dwells mainly on unreferenced arguments about constitutional policy.[244] It is political formalism in the sense that he uses political argument to defend an unbending fidelity to constitutional forms. Its thrust is that the independent counsel statute promotes and ordains varieties of illegitimate independence among cabals in Congress and partisan judges and prosecutors, and abject fear and self-interest on the part of the Attorney General. Justice Scalia's position is that these sorts of independence threaten to swallow up the formally constructed independence of each of the three branches as conceived at the end of the eighteenth century.

Justice Scalia obviously believes that judicial independence is not defined as independence from all politics, but rather consists of independence from non-originalist politics, thus requiring the analytic method of political formalism. Justice Scalia strongly implies that the majority opinion of Chief Justice Rehnquist consists of a lame functionalism calculated to produce an expedient short-term result.[245] In addition, Justice Scalia all

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[243] *Id.* at 710-11.

[244] *Id.* at 709 (arguing the "utter incompatibility of the Court's approach with our constitutional traditions"); *id.* at 710 (noting a sort of equal protection argument: executive conflict of interest is no reason to deprive the President of exclusive prosecutorial power, since Congress has "exclusive power of legislation, even when what is at issue is its own exemption from the burdens of certain laws"); *id.* at 713 (noting congressional expedience argument); *id.* at 713 (noting possibility of eroding public support of the President); *id.* at 714 (noting budgetary impact of independent counsel activities, suggesting other than "normal" standards of investigation and prosecution).

[245] Justice Scalia castigates the majority opinion as an "ad hoc, standardless judgment," *id.* at 712; an exercise in "standardless judicial allocation of powers," *id.* at 715; a decision "ungoverned by rule, and hence ungoverned by law," *id.* at 733; employing a methodology whose "real attraction"

but says that the politics surrounding passage and use of the independent counsel statute forced the majority to stand by the statute in order to appear independent of the executive.[246] For Justice Scalia, then, the majority's independence is as spurious as that of the Congressional cabal on the Judiciary Committee, and the partisan judges and independent counsels who may skew the workings of the statute. The majority has opted for the short-term advantage of appearing to be independent of the President, thus ignoring its long-term duty to apply independent judgment in preserving one kind of politics from infection by another.

Perhaps that reading of Justice Rehnquist's opinion for the majority is correct, but another reading is certainly possible. Like Justice O'Connor in *Schor*, the Chief Justice neither states nor intimates a concern about Congress' procedural or substantive integrity in the passage of the statute. The aspersions of *Northern Pipeline* and *Chadha* are absent. The opinion's two references to legislative motivation betray no sense of alarm. The first recounts the congressional objective: "Congress, of course, was concerned when it created the office of independent counsel with the conflicts of interest that could arise in situations when the Executive Branch is called upon to investigate its own high-ranking officers."[247] The second brushes away the suggestion that Congress engaged in direct self-interest: "this case does not involve an attempt by Congress to increase its own powers at the expense of the Executive Branch."[248]

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aside from "work-saving potential" is that "[i]t is guaranteed to produce a result, in every case, that will make a majority of the Court happy with the law," *id.* at 734.

[246] In the first of a three-paragraph coda to his dissent, Justice Scalia speaks first of independent judges who are given "life tenure" in order to "acknowledge and apply" certain "realities," including the "reality" that not "every violation by those in high places" should be prosecuted. *Id.* at 732-33. He then states that while "many thoughtful men and women in Congress" probably agree, "it is difficult to vote not to enact, and even more difficult to vote to repeal, a statute called, appropriately enough, the Ethics in Government Act." *Id.* He adds: "If Congress is controlled by the party other than the one to which the President belongs, it has little incentive to repeal it; if it is controlled by the same party, it dare not." *Id.* Justice Scalia then shifts back to talking about the Court: "I fear the Court has permanently encumbered the Republic with an institution that will do it great harm." *Id.* One reading of this paragraph, as it shifts from Court to Congress to Court, is that Justice Scalia is indirectly commenting on what he perceives as the Court's own lack of courage in the face of a need to assert independence from the President. Like the "thoughtful men and women in Congress," the Court probably appreciates the unconstitutionality of the statute, but given the fact that invalidating the act would be an immediate boon to the President, the Justices either have "little incentive" to strike it down, or "dare not." *Id.*

[247] *Id.* at 677 (opinion of the Court).

[248] *Id.* at 694.

Along with these untroubled references to Congress, the Chief Justice's opinion provides a statement about the statute that contains a subtle slant of approval. In comprehensively recounting the Act's many sections, the roles it allocates to the three branches, its reenactment twice by Congress, and its sunset provision,[249] the opinion has the effect of portraying the legislation as balanced. Moreover, this description and the opinion's account of the *Morrison* facts suggest strongly that the players are indeed capable of non-spurious independent action. For example, the opinion explains that the Attorney General "is not required to accede" to requests that he apply for appointment of an independent counsel;[250] that in the *Morrison* case the Attorney General both declined to seek an independent counsel with respect to two executive officials and declined to refer matters about them to the independent counsel who was otherwise appointed;[251] and that a judge accepted a related decision of the Attorney General as final.[252] The opinion thus contains none of Justice Scalia's concern about the statute's genesis or the "real" way it functions. Hence there is no voiced concern about judicial independence and no drift into the legal science of *Northern Pipeline* and *Chadha*.

Instead, like Justice O'Connor in *Schor*, Chief Justice Rehnquist proceeds from a restrained view of the political milieu to a deferential treatment of the merits. His legal method is hardly rigid: narrow statutory construction to confine the scope of questionable statutory areas;[253] routine law application based on considerations derived from precedent;[254] and, balancing where functional considerations are prominent.[255] The opinion's functionalism is marked by a distaste for unchanging legal categories[256] and a preference for considering allowable legislative encroachment in

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[249] *Id.* at 659-69.

[250] *Id.* at 665.

[251] *Id.* at 666-68.

[252] *Id.* at 668.

[253] *Id.* at 682-83 (finding the power of the Special Division to terminate independent counsel office to exist only after investigation is complete).

[254] *Id.* at 673-77 (finding validity of interbranch appointments).

[255] *Id.* at 685-97. The Chief Justice stated that the separation of powers question is "whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty." *Id.* at 691.

[256] *Id.* at 689-90 (declining "to define rigid categories of those officials who may or may not be removed at will by the President").

cases concerning "executive power."[257]

The opinion does not hold law over the head of politics as if the two were wholly unrelated. Judicial independence is nowhere identified with nonpolitical value-free inspection. Separation of powers law, for example, is hardly presented as a set of unbending rules. It is rather invoked as an inquiry involving questions of fact, probability, and degree, along with a capacity to understand changing political needs. Judicial independence is exercised not as a way to correct politics through legal science, but as a way to review political action through law as another medium of value.

The problem with the *Morrison* opinion is that its concept of judicial value is uncertain. Once judicial independence ceases to define itself as "independence from politics," it does not know itself (not that it ever did). So it begins to balance—to take faltering steps towards a different sort of jurisprudence, while still leaving room for manipulation. It balances in order to discover what its connection to politics *is*, and what, if any, are the differences between law and politics as media of value and channels of decision-making. The result is that a dialogue takes place among judges, lawyers, and academics, and surely among the branches, on the relationship between law and politics. Functionalism is the voice of judicial independence struggling to articulate that from which the judiciary is now to consider itself independent.

E. Summary: Judicial Independence

The formalism of the separation of powers cases of the 1980s was a function of the anxieties of judicial independence and its search for a voice. The anxieties stemmed from the Court's perception of political contrivances underlying the actions reviewed and from the Court's interest in ensuring that it would not be similarly perceived. The sterility of *Northern Pipeline* and of *Chadha* can be seen as the Court's effort, overstrained as it was, to be faithful to an idea of independence from the politics of the present. Those opinions are examples of the persistent influence of political tensions not only on judicial outcome, but on judicial voice and framework.

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[257] *Id.* at 691-92 ("[W]e simply do not see how the President's need to control the exercise of [the counsel's] discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President.").

The *Schor* and *Morrison* opinions indicate that less strained analysis of separation of powers is likely when the political action reviewed is not suspect, or is treated as not suspect. The collision of views in *Morrison* concerns the search for a substitute for the formalism of Justice Brennan and Chief Justice Burger. Justice Scalia's view is clear: opt for political formalism and maintain the Court's independence. The *Morrison* majority's path is ambiguous; perhaps it is telling us that independence of *result* is enough (ruling against the President) and that the importance of voice and framework is comparatively minute.

III. Reformist Independence: Henry Adams, the "Habit of Doubt," and Legislative Isolation

Two aspects of independence have been tracked thus far. The first was a generative strain, defined as the shedding of political restraints for the purpose of imagining and producing a changed order or new set of political relationships. The second was a preservationist strain, defined as maintaining a formal distance from suspect political innovation in order to safeguard a particular vision of constitutional structure. A third strain of independence in American thought is discussed next.

The third strain originates as a reformist tradition, defined as a determined detachment from the evils perceived as afflicting society,[258] coupled with the deployment of "practical reason" to locate "a strategy and a rule that will reduce chaos to order."[259] It is a tradition of independence in the eighteenth-century sense of resistance to certain social conditions—indeed, resistance to a fallen world, requiring tireless human vigilance to perfect it.[260] A resistance thus defined includes separation of the political con-

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[258] I associate this tradition with the reform roots of the American revolution. *See* Bailyn, *supra* note 26, at 34-54 (discussing "the radical social and political thought of the English Civil War and of the Commonwealth period," *id.* at 34, with its links to the American colonies and its commitment to political reforms, *id.* at 47); Wood, *supra* note 26, at 107-10, 114-17 (noting colonial sense of British "conspiracy to numb and enervate the spirit of the American people" inspires "ideological response" of republicanism and its call for resistance to corruption). Professor Wood concludes: "Independence thus became not only political but moral. Revolution, republicanism, and regeneration all blended in American thinking." *Id.* at 117.

[259] Scott Buchanan, So Reason Can Rule 200 (1982) (discussing the nature of the legislative function from a classical perspective).

[260] *See* Henry Adams, The Education of Henry Adams 7 (1918) (associating "the instinct of resistance" with "the law of New England nature"); Wood, *supra* note 26, at 118 (In the Revolutionary period, "The traditional covenant theology of Puritanism combined with the political science

sciousness from whatever impedes pursuit and discernment of the public good.[261] While the generative strain seeks to renew aspects of the democracy by reinventing government roles, the reformist strain attempts to protect society from destructive or corrupting forces.

In the twentieth century, faith in the power and range of the reformist strain of independence loses steam. The culprit is said to be "complexity."[262] The conditions of the world that inspire resistance prove resistant themselves to comprehension, let alone reform. Competing agendas concerning what and how to reform contribute to delay and confusion; private groups engage in constant efforts to initiate, influence, or obstruct the process of change.[263] The political mind comes to be seen not as a shaper and molder of change, but as imperceptibly shaped and molded itself, so that it functions almost as an accomplice of dominating new forces of "progress."[264] Doubts are raised about the power, even the existence, of critical judgment in government that truly can stand apart from, and restrain, burgeoning "energies" of the modern era.[265] Perhaps the most remarkable

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of the eighteenth century into an imperatively persuasive argument for revolution.").

[261] Professor Edmund Morgan's account of John Adams' avoidance of "the web of royal appointments" in the 1760s and 1770s provides such an example. "Adams was sure that America could resist evil if men like himself stood out against the insidious process" of seduction by royal office-holding. EDMUND MORGAN, THE MEANING OF INDEPENDENCE 14-15 (1976).

[262] Samuel P. Huntington, *Congressional Responses to the Twentieth Century, in* THE CONGRESS AND AMERICA'S FUTURE 37 (David B. Truman ed., 1973) ("Legislation has become much too complex politically to be effectively handled by a representative assembly.") In Professor Huntington's view, Congress' ineffectiveness in responding to twentieth century problems stems from "the nature of its overall institutional response to changes in American society." *Id.* at 9. That response was marked by a gradual insulation from "new political forces" emerging in modern America, a dispersion of legislative power among many competing segments of the Congress, and a turn from lawmaking to administrative oversight. *Id.*

[263] *See* Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 890 (1987) ("[C]ontemporary political science research concerning interest groups and legislator behavior suggests a complex political world ill-fitting any simple formula."); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985) (discussing problem of faction). "[C]ongressional parochialism"—that is, unyielding commitment to local interests—is a "fact of legislative life" and produces "the foot-dragging, the sluggishness, the evasion of hard questions that are indelible elements in the congressional image." JAMES L. SUNDQUIST, THE DECLINE AND RESURGENCE OF CONGRESS 455-56 (1981). "The legislature daily loses ground because its energies are engaged over too vast an area and because the intense group conflicts of modern life weaken its cohesiveness." LOUIS JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 45 (1965).

[264] *Cf.* N. KATHERINE HAYLES, CHAOS BOUND 82 (1990) (analyzing theme of complicity and responsibility in the work of Henry Adams).

[265] MELVIN LYON, SYMBOL AND IDEA IN HENRY ADAMS 59 (1970) (tracing idea that "individuals are a relatively helpless part of an inevitable movement toward new stages of development. This

American doubter was Henry Adams, scion of a Founding family and consistent questioner of American political and cultural direction. By the advent of the twentieth century, Henry Adams found that the concept of resistance, of reform through the independent discernment of the public good, had become largely a fantasy of public life, an article of an obsolete political faith.[266] Instead of independent deliberation identifying the public good and operating on social needs, Henry Adams could only posit inexorable mechanical and economic "forces" controlling, defining, and threatening to absorb the freedom of judgment in America.[267]

Adams presented this thesis in his masterwork, *The Education of Henry Adams*.[268] The book's intellectual achievement, in a sense, argues against its deterministic vision, offering an example of relentless, even heroic, critical analysis of a civilization.[269] Yet Adams' stance was decidedly in the realm of abstraction and theory. His life, too, while strenuously committed to the political debates of his time, was lived at considerable remove from the rough-and-tumble of direct political participation.[270] The independence he achieved in both his work and his life is best understood in the ironic sense of isolation—withdrawal from political particularity to a level of breadth and abstraction that appeared to be the only position left from which to affect the society, however slight the effect would be.

The Education of Henry Adams represents another seminal tradition of independence in American thought—independence as isolation, the latter-day vestige of an original resistance. I suggest below that this tradition

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does not mean that individuals (and groups) cannot make choices that run counter to the stream . . . . [b]ut such reversals [as Napoleon's] are never more than momentary. Eventually, the inhibiting force is overcome, the movement of the stream accelerates until its accumulated force is spent, and it then resumes its normal pace." (footnote and citation omitted)).

[266] WILLIAM M. DECKER, THE LITERARY VOCATION OF HENRY ADAMS 262-64 (1990) (noting Adams' discovery of "the steady loss of all acceptably transcendent principles of unity, old and new").

[267] HENRY WASSER, THE SCIENTIFIC THOUGHT OF HENRY ADAMS 89 (1956) (Adams parted from "[m]ost philosophy [which] rested on the idea that thought was the highest energy of nature," and that "[t]hought, like the sun, could set energies to work and give the world form." Rather, Adams believed that thought was itself an energy and thus "subject to the same laws which governed the lower energies. It could not be an independent force.").

[268] *See* ADAMS, *supra* note 260.

[269] DECKER, *supra* note 266, at 261 ("The *Education* . . . ventures, even as it profoundly suspects, the ultimate rationality of the dialogic process.").

[270] *See generally* PATRICIA O'TOOLE, THE FIVE OF HEARTS (1990) (chronicling lives of Henry Adams, John Hay, and others in their circle).

informs the separation of powers cases involving the nondelegation doctrine.[271] In those cases, the Supreme Court sees Congress as isolated, doubtful of its own direction, torn by technical, political, and moral dilemmas of progress. In the Court's muted response to the greatly attenuated role of Congress we hear echoes of Henry Adams' own sense of the inevitable erosion of specific political capacity and its replacement by doubt and abstraction. The Court's attitude is expressed as a pragmatic tolerance of wide-open legislative delegations of regulatory authority in the face of perceived complexity. The recipients of legislative delegations are often administrative agencies established as "independent" from the political branches and designed to cope with complexity from a standpoint of specialization.[272]

The scope of the Court's tolerance of broad legislative delegations widened in the 1989 case of *United States v. Mistretta*.[273] The Court upheld a sweeping *non*regulatory delegation of a "seemingly intractable dilemma"[274] to a newly-minted independent agency. The agency was unusual; as dissenting Justice Scalia emphasized, its assignment was neither to enforce rules nor to adjudicate administrative cases, but to make law as an independent entity located in the judicial branch.[275] The *Mistretta* case thus provides a new variation on the connections between moral complexity, legislative isolation and administrative independence. The case suggests that the Court may be too wedded to an Adams-like determinism with respect to the capacities of Congress, and thus too reluctant to discriminate among types of delegations.

Perhaps the Court's hands-off approach to the legislative transfer of power in *Mistretta* should not be surprising. The perspective of Henry Adams, for all its darkness, is a potent aspect of independence in American thought.

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[271] *See* discussion *infra* part III.C.

[272] JAMES LANDIS, THE ADMINISTRATIVE PROCESS 23 (1938) (noting that the "central theme" of agency activity is "either the orderly supervision of a specific industry or, as in the case of the Federal Trade Commission, an extension of a particular branch of the police work of the general government"; defining "expertness" as the hallmark of administration—"that continuity of interest, that ability and desire to devote fifty-two weeks a year, year after year, to a particular problem").

[273] 488 U.S. 361 (1989).

[274] *Id.* at 384 (describing the problem of "excessive disparity in criminal sentencing").

[275] *Id.* at 420-21.

A. Adams and "Resistance"

The Education of Henry Adams is the semi-autobiographical meditation of the man who was a great-grandson of John Adams, a grandson of John Quincy Adams, and an intensely reflective analyst of the direction of American thought from the Founding period through the early 1900s. Self-described as a "child of the seventeenth and eighteenth centuries," Henry Adams comes of age in the nineteenth century only "to find himself required to play the game of the twentieth."[276] Chronicling his intellectual journey through a society in tumult, Adams evokes the country's distance from the principles of its past; from an understanding of new and baffling social, moral, and scientific problems; from a vital political vocabulary with which to address change; ultimately, from self-knowledge. Mirroring this theme, Henry Adams writes of himself in the third person. He thus withholds from the reader the intimacy of "I," and creates distances among the various selves inhabiting the text.[277] Of the "game" of the twentieth century, Adams wrote: "As it happened, [Henry Adams] never got to the point of playing the game at all; he lost himself in the study of it, watching the errors of the players . . . ."[278]

Adams consistently defines himself in terms of what is gone or out of reach. The book's suspense lies in the gradual disclosure of the fundamental condition that Adams senses to be disappearing from the American character. That condition is independence of mind, in the sense of the political vitality needed to recognize and grapple with new disintegrative forces at large in the republic. Adams hints at this theme in recounting a pivotal event early in his education: his grandfather's fall "on the floor of the House." The death in the Capitol of John Quincy Adams, who became a Congressman after serving as President, marks for Adams "[t]he end of [a] first, or ancestral and Revolutionary, chapter" in his life, a moment "when the eighteenth century, as an actual and living companion, vanished."[279] Adams connects his grandfather to "the eighteenth century and the law of Resistance; of Truth; of Duty, and of Freedom."[280] In

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[276] ADAMS, *supra* note 260, at 4.

[277] On Adams the author, Adams the narrator, and Adams the character, see HAYLES, *supra* note 264, at 62-63.

[278] ADAMS, *supra* note 260, at 4.

[279] *Id.* at 20.

[280] *Id.* at 22.

spotlighting the site of his grandfather's death, Adams connects resistance, truth, duty, and freedom to the American legislative role, at the same time implying that those virtues too are subject to erosion and death. By the end of chapter 1, as the boy witnesses an elaborate state funeral, the stage is set for a history of distance and displacement. New forces—the "railways, telegraphs, coal and steel"—are indifferent to the boy's "ancestral prejudices, his abstract ideals, his semi-clerical training."[281]

But what was the nature of the "resistance" that Adams associated with his grandfather[282] and that seemed ever receding in his own time? In the following matchless account, we hear not only the distinct note of puritanical New England individuality and Adams' love of dramatic isolation, but also the cadence of American moral and political independence:

> The atmosphere of education in which he [Henry Adams as a boy] lived was colonial, revolutionary, almost Cromwellian, as though he were steeped, from his greatest grandmother's birth, in the odor of political crime. Resistance to something was the law of New England nature; the boy looked out on the world with the instinct of resistance; for numberless generations his predecessors had viewed the world chiefly as a thing to be reformed, filled with evil forces to be abolished, and they saw no reason to suppose that they had wholly succeeded in the abolition; the duty was unchanged. That duty implied not only resistance to evil, but hatred of it. Boys naturally look on all force as an enemy, and generally find it so, but the New Englander, whether boy or man, in his long struggle with a stingy or hostile universe, had learned also to love the pleasure of hating; his joys were few.[283]

While Adams describes his own temperament as similar, he notes a difference; his attitude of resistance became extreme. An overabundance of the trait is attributed to an early childhood fever that leaves prophetic side effects:

> The habit of doubt; of distrusting his own judgment and of totally rejecting the judgment of the world; the tendency to regard every question as open; the hesitation to act except as a choice of evils; the shirking of responsibility; the love of line, form, quality; the horror

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[281] *Id.*
[282] *Id.* at 21.
[283] *Id.* at 7.

> of ennui; the passion for companionship and the antipathy to society—all these are well-known qualities of New England character in no way peculiar to individuals but in this instance they seemed to be stimulated by the fever, and Henry Adams could never make up his mind whether, on the whole, the change of character was morbid or healthy, good or bad for his purpose. His brothers were the type; he was the variation.[284]

In these passages, Adams gives us two accounts of what can be thought of as independence. The first is a stance of opposition to aspects of the world—the instinct for reform associated with the Founding generation. It is a vivid tapestry of religious underpinnings, psychological contradiction, political fierceness, and cosmic suspicion. It is the resistance that confidently (if grimly and single-mindedly) seeks abolition of social evil, much like the classical legislative impulse that sought to "reduce the chaos to order."[285] And it is an attitude not simply of an individual but of a group; for Adams this sort of resistance connotes revolutionary solidarity.

The second passage concerns a somehow stimulated resistance that not only opposes the world's error but finds fault in human efforts at reform as well. It is a latter-day variation that lacks the sense of group connection, "distrusts its own judgment," tends to regard "every question as open," and hesitates to act. It is this latter quality of mind, acknowledged as his own, that Adams presents in *The Education of Henry Adams* and that provides the present study with a third principal understanding of the concept of independence. It is independence in the ironic sense of distance and isolation, not simply from a world in need of reform, but also from any confidence in the ability to imagine or identify solutions. For Henry Adams, it becomes a spiritual state of profound doubt about the self's capacity to resist as before, coupled with an insistent sense of a society in the throes of rapid, disorienting change, resulting in the paralysis or removal of the political mind. Ultimately, it is an over-awareness of the fragility of action and the elusiveness of a persuasive response to change. Throughout his self-reckoning, Adams' thirst for education clashes with this "habit of doubt," creating a constant tension between involvement and indecision, between independent engagement and independence *from* engagement.

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[284] *Id.* at 6.

[285] BUCHANAN, *supra* note 259, at 200.

On the one hand, the Henry Adams depicted in *The Education of Henry Adams* plunges into his world, seeking experience in politics, the university, diplomacy, travel, and social debate. Adams' initial goal is "absorbing knowledge,"[286] identifying information and patterns of behavior to help answer the questions posed in chapter 1: "What was he—where was he going?"[287] and more generally, what change is possible in society? Education thus refers first to the process of actively connecting with the society in order to allow the independent mind to form and thus to prepare to take part in leadership and change, as a good Adams should.

On the other hand, Adams is uneasy about much of his experience, its value as education, its ability to instruct in anything but ignorance. Adams' constant deprecation of the instructional value of his experience also conveys a sense of danger. Instead of imparting wisdom, facilitating the growth of his judgment, or providing models of independent thought, society's particular lessons are indeterminate; they serve mainly to confuse, divert, even consume. Thus, after the statement that Adams was "absorbing knowledge" on his youthful travels, the author acknowledges, "He would have put it better had he said that knowledge was absorbing *him*. He was passive."[288]

For Henry Adams, then, independence is the measure of an individual's resistance to absorbing forces of a civilization in ferment. The individual is intensely aware of an ancestral background of revolutionary independence, an almost instinctive recoil that was group-based and charged with religious belief and a vocabulary of good and evil. That attitude survives, but dimly and in altered form. The religious aspect is diluted, if not wholly drained; group identification is weakened; and the discourse of dichotomies becomes inadequate. The political mind nevertheless still aims at reform—at fulfilling promises of an original plan—and seeks to identify society's disease and to imagine solutions. The mind attempts "to react, not at haphazard, but by choice,"[289] to the forces that operate on the society. But, to a large extent, the attempt is thwarted. Education proves

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[286] ADAMS, *supra* note 260, at 93.

[287] *Id.* at 21.

[288] *Id.* at 93 (emphasis added). Part of Adams' "dynamic theory of history" held that it was a "fiction that society educated itself, or aimed at a conscious purpose." *Id.* at 483. The advent of the compass and of gunpowder "dragged and drove Europe at will through frightful bogs of learning." *Id.*

[289] *Id.* at 314.

to be not simply the means of developing resistance to social evils, in the sense of forging independent judgment and a plan of action; it also serves to threaten and subvert the mind's development and the exercise of that very independence. *The Education of Henry Adams* demonstrates how the multiple and conflicting values, interests, and attractions of a convulsed industrial society plant a "habit of doubt" in the modern political mind and thus work to eclipse its independence.

Adams' strategy to defy paralysis is to push himself into ever-broadening inquiries in order to be able to assert *some* stance, offer *some* vision. In the end, he succeeds—but at an extreme distance from the world he describes. The resistance of his grandfather and the Founders becomes, in *The Education of Henry Adams*, the isolation of a theorist who, in search of an independent stance in politics and political thought, in effect must remove himself *from* most of politics until all he can contribute is a vision of a pattern of decline from an earlier era of energy and faith. It is a contribution of value because it cries out for new energy, new faith, a break in the pattern; in that sense it does take part.[290] But its breadth illustrates both the problem of attaining a vantage point of independent political judgment and action in a society where there is much to be held at a distance, and the risk that the independent stance, once attained, amounts only to self-preserving but ineffectual isolation. It is this complex relationship between Adams and his world—marked by a commitment to reform, yet a need to remain apart, resulting in an ultimate sense of qualified failure—that will be helpful in understanding the legislative mind's own relation and resistance to the world of chaos it confronts.

B. The Fate of the Independent Mind

The Education of Henry Adams follows Adams through a three-part intellectual journey. In the first part, Adams attempts "to learn the

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[290] In my view it is wrong to convict Adams of the same detachment that Professor Rogat finds in Justice Holmes. *See* Yosal Rogat, *The Judge as Spectator*, 31 U. CHI. L. REV. 213 (1964). Holmes, it is said, "simply did not care" about the fate of American government, could not be "deeply affected" by the direction of "society's aspirations and efforts." *Id.* at 255-66. Professor Rogat links Holmes' isolation to that of Henry Adams, but the two are different. It is true that they were both "fascinated by authority, domination and power," *id.* at 236, but Adams' lifelong literary project was anything but a stoic surrender to fate. *See generally* DECKER, *supra* note 266.

processes of politics in a free government"[291] by exploring the persons and events of his time. This is Adams' sojourn in particularity, his search through events and personalities for a law of political behavior or a principle of political truth.[292] Specifically, he considers the nature of "standing alone"—the political man's ability to confront and affect the world from a stance of independent judgment akin to the imagined "resistance" of his grandfather.[293] To his dismay, Adams finds that the realities of character and the circumstances of the historical moment severely qualify the development and exercise of independent judgment.[294] Moreover, he concludes that the more common contributions of men to politics are misunderstanding and ignorance and that the actual springs of a political situation, when examined at close range, are virtually impossible to discern.[295] Indepen-

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[291] ADAMS, *supra* note 260, at 158.

[292] Adams' project here is not simply to uncover "whether any politician could be believed or trusted," *id.* at 158, but to learn how to *see*, how to "[view] subjects all round," *id.* at 165, and hence how to differentiate between truth and deception among political persons, *id.* at 173.

[293] "Standing alone," or a variant thereof, is a phrase that recurs throughout *The Education of Henry Adams*. Henry Adams first uses it to describe his father, Charles Francis Adams, who was a member of the Free Soiler antislavery movement and the Union's envoy to Britain during the Civil War. Henry Adams writes that his father possessed "mental poise" and the

> faculty of standing apart without seeming aware that he was alone—a balance of mind and temper that neither challenged nor avoided notice, nor admitted question of superiority or inferiority, of jealousy, of personal motives, from any source, even under great pressure . . . [, an] unusual poise of judgment . . . not bold like [John Adams] . . . [, but] [w]ithin its range it was a model . . . . He stood alone.

Id. at 27-28. The phrase is also used to describe the mythos of George Washington, *id.* at 47-48, and the self-confidence of Adams' fellow students at Harvard, *id.* at 56. The phrase is echoed in descriptions of Senators Charles Sumner, *id.* at 31, and Henry Cabot Lodge, *id.* at 418-20, and appears in the account of the maneuverings of the British during the Civil War, *id.* at 160.

[294] For example, Charles Adams' independence was neither bold nor restless, only a model "within its range," *id.* at 27; George Washington's independence did not extend to "standing alone" in opposition to slavery, *id.* at 47; the Harvard students' independence only "seemed a sign a force" because "[t]o stand alone is quite natural when one has no passions; still easier when one has no pains," *id.* at 56. Politically courageous Senator Sumner's mind was ultimately a "pathological study"; it "had reached the calm of water which receives and reflects images without absorbing them; it contained nothing but itself." *Id.* at 252. Senator Lodge's independence from any one ideology was also qualified; he represented to Adams the propensity of independent judgment to lose strength and energy to a myriad of sympathies and attractions and thus to make no lasting impact. *Id.* at 419-20.

[295] As private diplomatic secretary to his father in London during the Civil War, Adams becomes convinced that British leaders are engaged in conspiracy to assist the Confederacy and subvert the Union. *See generally id.* at 145-66. Forty years later, Adams discovers that his youthful suspicions were quite wrong, that the secretly anti-Union British players "stood alone" in the British government in terms of supporting the Confederacy, *id.* at 160, that there had been no "single will or intention," *id.* at 166. Thus, when political men *do* "stand alone," their acts are misinterpreted; it is often in their interest to be misinterpreted. Moreover, Adams concludes that political situations are

dence in the context of politics is to be found, if anywhere, only ironically—in the solitary mind's vain effort to understand political motivations and behaviors surrounding particular events.[296]

Although these conclusions have a distancing effect on Henry Adams, he does not disengage from all involvement. In a second stage of thought, his concerns broaden as he becomes increasingly aware of various social forces, particularly technological developments and rampant economic powers—the great "energies"[297] unleashed in post-Civil War America. These are the forces of science, technology, and capital originating beyond the political halls of Washington and yet controlling the direction of the country and its consciousness.[298] Observing the dynamo at the Great Exposition of 1900, Adams senses that "man had translated himself into a new universe which had no common scale of measurement with the old. He had entered a supersensual world, in which he could measure nothing except by chance collisions of movements, imperceptible to his senses, perhaps even imperceptible to his instruments . . . ."[299] The dynamo becomes a symbol of "the sudden irruption of forces totally new."[300] From the upheaval of scientific discovery and its implications, Adams can only conclude that

> The work of domestic progress is done by masses of mechanical power—steam, electric, furnace, or other—which have to be controlled by a score or two of individuals who have shown capacity to manage it. The work of internal government has become the task of controlling these men . . . who could tell nothing of political value if one skinned them alive. Most of them have nothing to tell, but are forces as dumb as their dynamos, absorbed in the development or economy of power . . . . Modern politics is, at bottom, a struggle not

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impossible to assess at the time because of incomplete information, and that even with full information "the answer [would have been] equally obscure" due to the idiosyncracies of the judgment and the perception of the beholder. *Id.* at 165-66.

[296] *Id.* at 166.

[297] *Id.* at 238.

[298] "[T]he great mechanical energies—coal, iron, steam"—seemed to Adams virtually self-propelled and unchecked motors of change. *Id.* Moreover, Adams found that "the whole financial system was in chaos; every part of it required reform." *Id.* at 248. Because "[t]he world, after 1865, became a bankers' world," the need for reform was acute. *Id.* at 247. Adams also chronicles Jay Gould's effort to corner gold, *id.* at 269-71, and Congress' adoption of the gold standard, which Adams called the banks' effort "to force submission to capitalism," *id.* at 344.

[299] *Id.* at 381-82.

[300] *Id.*

of men but of forces.[301]

Juxtaposed to this account is Adams' invocation of "his eighteenth century, his Constitution of 1789, his George Washington, his Harvard College, his Quincy, and his Plymouth Pilgrims,"[302] a code for a system of politics and judgment that he feared was now incapable of addressing or containing the "forces" described.

Technological and economic change not only had outpaced the political system, but had affected the nature of the individual. Just as the ability to "stand alone" was undercut in the political world, Adams felt that independent judgment was a fading characteristic of citizens:

> The new American showed his parentage proudly; he was the child of steam and the brother of the dynamo, and already, within less than thirty years, this mass of mixed humanities, brought together by steam, was squeezed and welded into approach to shape; a product of so much mechanical power, and bearing no distinctive marks but that of its pressure.[303]

Adams, then, voices the disorientation of a political consciousness encountering disturbing new forces in the social environment and their leveling impact. Those developments raised a host of moral questions about responsibility,[304] powerlessness,[305] and the elusiveness of truth.[306] These matters were beyond the realm of conventional politics, beyond the control and understanding of the system. Adams arrives at a dead end.

In the third stage of *The Education of Henry Adams*, Adams finds a way to act, propelled by a need "to account to himself for himself somehow, and to invent a formula of his own for his universe."[307] He does this not by searching for a specific way to make the existing political system capable of controlling technology and capital, but by undertaking an even broader inquiry. In effect, he seeks to bring order to chaos through a provocative statement of a sweepingly broad, historical law. The profound

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[301] *Id.* at 421.
[302] *Id.* at 343.
[303] *Id.* at 466.
[304] *Id.* at 458-59.
[305] *Id.* at 397.
[306] *Id.*
[307] *Id.* at 472.

paradox of this effort is that the law he announces is one that says that there can be no formula except for disorder, that "Chaos was the law of nature; Order was the dream of man."[308] From his studies of politics and science, he has found only "evidence of growing complexity, and multiplicity, and even contradiction, in life,"[309] all of which lead to what appears to be an inescapably deterministic, "dynamic theory of history":

> The sum of force attracts; the feeble atom or molecule called man is attracted; he suffers education or growth; he is the sum of the forces that attract him; his body and his thought are alike their product; the movement of the forces controls the progress of his mind, since he can know nothing but the motions which impinge on his senses, whose sum makes education.[310]

This theory sees man as "the sum of the forces that attract him," a consciousness dominated and defined by "force," whether it be natural, physical, or occult.[311] To this "law of mind,"[312] Adams adds a "law of acceleration," which states that forces operating on the mind are ever-increasing in velocity, speeding man to destruction.[313] As the twentieth century dawns, Adams sees "[p]ower leap[ing] from every atom,"[314] and "forces" "grasp[ing] [man's] wrists and fl[inging] him about as though he had hold of a live wire or a runaway automobile."[315]

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[308] *Id.* at 451.

[309] *Id.* at 397.

[310] *Id.* at 474.

[311] *Id.* at 474-77. Professor Hayles eloquently summarizes Adams:

> The theory rewrites the history of humankind as its encounter with increasingly powerful forces. Sequences are disrupted when a new and more anarchical force enters the stage of human action. Forces can be either physical or spiritual; Christianity qualifies as an epoch-initiating force, along with gunpowder and fire. The theory predicts that the world will end with a bang rather than a whimper, for the process will continue at an accelerating rate until the power of the captured forces exceeds the ability of humankind to control them.

HAYLES, *supra* note 264, at 78-79.

[312] ADAMS, *supra* note 260, at 492.

[313] *Id.* at 493.

[314] *Id.* at 494.

[315] *Id.* One scholar defines Adams' determinism as

> the ordinary man's . . . helplessness before enormous aggregates of supersensual energy. It was a new form of the oldest helplessness in the world—helplessness in the dark, helplessness in the felt, overawing presence of unseen forces, helplessness of the mind to understand the force that moved it, the helplessness, finally, of the spirit to maintain, or even to discover, its own aspiration in the face of the infinite.

This third stage is Adams' refuge in breadth and theory, the one vantage point available for independent action in a world of multiplicity. The law he announces is perhaps an anti-law, a cry of despair that law itself is impossible. And yet Adams intimates a constructive purpose. Perhaps his theory of mind, like education itself, is a way of "train[ing] minds to react, not at haphazard, but by choice, on the lines of force that attract their world."[316] Of his use of physics to envision a law of mind, Adams acknowledges that for some "it was profoundly unmoral, and tended to discourage effort," but he adds, "On the other hand, it tended to encourage foresight and to economize waste of mind."[317] Recent commentary confirms that *The Education of Henry Adams* should be viewed as a part of Adams' larger project that "always betrays the wish to be dialogically placed in a purposive and sophisticated national discussion."[318] And in the final chapter of *The Education of Henry Adams*, Adams calls for a "new man" and a new society to emerge[319] and sees his own work as part of the "education of the new American."[320]

Adams' three-stage journey is relevant to the legislator's own confrontation with the world, searching at first for a simple principle of truth, which quickly proves elusive, attempting next to remain unengulfed by what appears to be extra-political forces, and achieving in the end a "larger synthesis" to set in motion a program of reform. Yet Adams' theory is removed from the world of action. His theory is a triumph of the mind preserving itself against great odds, but this independence is won by a perhaps fatal isolation. The final paragraph of *The Education of Henry Adams* depicts a profoundly solitary Adams—sole survivor of a family, a circle of friends, a period, an education. The paragraph's motif is silence, and the image again is of independence, ironically understood as the mind removed—from others, from the time, from any confidence about the direction of human history.[321]

R.P. BLACKMUR, HENRY ADAMS 24-25 (1980).

[316] ADAMS, *supra* note 260, at 314.

[317] *Id.* at 501.

[318] DECKER, *supra* note 266, at 3; *see also* BLACKMUR, *supra* note 315, at 155 (Adams was concerned continually with "the possibility of intelligent action in affairs of policy.").

[319] ADAMS, *supra* note 260, at 500-01.

[320] *Id.* at 501.

[321] "To Henry Adams, master of irony, the separateness of human beings was unbearable—and inevitable." O'TOOLE, *supra* note 270, at 400.

C. *Separation of Powers: Legislative Delegation*

Henry Adams' notion of the transformation of "resistance" to isolation—from "standing alone" to standing apart—is a view of human control over history as imperilled, indeed critically wounded, but not extinguished. In the concluding chapter of *The Education of Henry Adams*, he connects his abstract "dynamic" theory to a specific American political context—the rise of corporations and Teddy Roosevelt's "Battle of Trusts."[322] Adams wrote: "The Trusts and Corporations stood for the larger part of the new power that had been created since 1840, and were obnoxious because of their vigorous and unscrupulous energy. . . . They tore society to pieces and trampled it under foot."[323] Adams wondered whether these economic forces were controllable. Because "[t]he attraction of mechanical power had already wrenched the American mind into a crab-like process," Adams was fearful that the government would fail and "progress would continue as before."[324] At the same time, Adams contemplated the emergence of "the new man" to manage the new forces,[325] and he half-hoped that his own book's bleak vision, for all its theoretical remoteness, would galvanize a political readership.[326] Though crab-like, the "American mind" showed traces of vitality.

Adams represents a distinct model of independence—the political mind's path of isolation and abstraction as a necessary, if paradoxical, means of engaging in the reform of an intractable world. This model can be associated with Congress, seen itself as a sort of Henry Adams: a body composed of multiple warring selves, attempting to live up to a distant mission of resistance, half-capitulating to and half-withstanding conditions that cry out for a legislative remedy, and moving into isolated abstraction as a mode of response. I suggest below that this vision of legislative independence informs Supreme Court decisions involving the degree to which Congress can remove itself from law making. These cases, which apply or otherwise make use of the nondelegation doctrine, do not involve legislative inaction so much as action taken in a way that raises questions about how much or little can be expected of the legislative role. The model of

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[322] ADAMS, *supra* note 260, at 500-01.
[323] *Id.* at 500.
[324] *Id.* at 501.
[325] *Id.* at 500-01.
[326] DECKER, *supra* note 266, at 259-62.

independence associated with Henry Adams arguably underlies the Court's understanding of both the limitations and the remaining utility of the legislative role.

1. The Delegation of Power

In cases upholding broad grants of decision-making authority to the fourth branch, the Court requires only that Congress supply " 'an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.' "[327] The Court justifies its deference by acknowledging the "practical understanding that in our increasingly complex society, Congress simply cannot do its job absent an ability to delegate power under broad general directives."[328] In reality, the Court requires considerably less than an "intelligible principle."[329] Furthermore, the Court is untroubled by the questions it begs in the last quoted sentence: How *can* Congress "do its job" if it is allowed to "delegate power under broad general directives"? More importantly, what is the job?[330]

The Court's utter lack of defensiveness about these sorts of questions signals a firm conviction that modern "complexity" admits of no other sensible judicial response. For the most part, that conviction is unremarkable. No more than an "intelligible principle"—and often not even that—can be expected of Congress, let alone required, in connection with intricate issues relating to the environment, energy, health and safety, deception in the marketplace, and other matters arising in the context of American industry and economics. Louis Jaffe wrote long ago that delegation is indispensable "where the relations to be regulated are highly technical or where their regulation requires a course of continuous

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[327] Mistretta v. United States, 488 U.S. 361, 372 (1989) (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) (alteration in original)).

[328] *Id.* at 372.

[329] BERNARD SCHWARTZ, ADMINISTRATIVE LAW 72-73 (1991) (In periods of perceived crisis, Congress tends to give to the Executive "virtual blank checks unrestrained by legislative controls"; courts, in turn, tend to "rush to sustain the grant, reading into the statute an implied standard that Congress did not bother to put into the statute.").

[330] For a "theory of modern legislation" arguing that "[m]odern legislation in its essence is an institutional practice by which the legislature, as our basic policy-making body, issues directives to the governmental mechanisms that implement that policy," see Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 372 (1989).

decision."[331]

However, certain regulatory questions are complex not because of technical obscurity or a need for continuous action, but because of the collision of significant interests within the framework of policy.[332] It is no great insight to say that complexity often inheres in the reconciliation of interests or the ranking of priorities. For this sort of task, James Madison would point to the need for the exercise of independent judgment of elected representatives who are sufficiently distant from the passions of their constituents to deliberate about the common good.[333] Madison's Federalist No. 10 posits a representative structure designed to "refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country."[334] But in the work of Henry Adams, the very ability of representatives to "discern the true interest" of the country is put in question.[335] When a statute contains no clear signal about an important issue, and the matter is redirected to an agency, the Court's normal response is to "interpret" the legislative product to give it meaning,[336] or to defer to a reasonable administrative interpretation[337] rather than to invalidate the statute on nondelegation (and hence separation of powers) grounds. In all this, the Court seems to accept an Adams-like vision of the limitations of independent political judgment in the twentieth century. The Court's willingness to avoid confronting Congress' minimalist performance reflects a view that agenda setting—in effect, broad topic selection—has become the primary legislative function. The real meaning of supplying an "intelligi-

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[331] JAFFE, *supra* note 263, at 36.

[332] *Id.* at 41-45; *see, e.g.*, Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607 (1980) (the "Benzene" case) (finding statutory imprecision on degree of agency regulation contemplated in the context of toxic substances in the industrial workplace).

[333] THE FEDERALIST No. 10, at 42-49 (James Madison) (Garry Wills ed., 1988).

[334] *Id.* at 46-47.

[335] For example, in recounting Congress' repeal of the Silver Act, Adams depicts the legislators as engaged in a "comedy" of preordained capitulation to forces of capital and "the whole mechanical consolidation of force . . . . against which one made what little resistance one could." ADAMS, *supra* note 260, at 343, 345.

[336] *Industrial Union Dep't*, 448 U.S. at 642 (finding that Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et. seq.* (1988), "implies that, before promulgating any standard, the Secretary must make a finding that the workplaces in question are not safe").

[337] Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) (upholding as reasonable the Environmental Protection Agency's interpretation of the statutory term "stationary source" in the Clean Air Act Amendments of 1977).

ble principle" may be deciding to address a topic.[338] Legislative judgment about secondary matters is dwarfed not simply by scientific vagaries, but by political forces that have been created by modern "progress." These forces are so interested in the regulatory topic and often so well-financed that they risk distorting the legislative process through their attempts to influence it. Delegation frequently results. The most that the Court will say is that Congress sometimes thinks that expert administrators are in "a better position" to "strike the balance."[339] Or the Court will opine that Congress was "unable to forge a coalition on either side" of a question, prompting legislators to decide "to take their chances" by delegating.[340] Thus, the Court seems acutely aware that technical complexity is not always the cause of delegation. And the Court appreciates that the political fatalism of legislators who "take their chances" through delegation is too commonplace to be legally condemned.

Besides falling prey to technical and political complexity, the legislative mind is subject to the sort of moral doubts that Adams found everywhere in the politics of his own time. Again, the Court is sympathetic. In the Benzene case[341] a plurality of the Court showed no real surprise that Congress had been reduced to incoherence over the level of intended regulation of toxic substances in the workplace. Justice Powell noted the fundamental tension between health and safety concerns and the reality that "the economic health of our highly industrialized society requires a high rate of employment and an adequate response to increasingly vigorous foreign competition."[342] On the other hand, an unsympathetic Justice Rehnquist identified the moral complexity that had stymied Congress as "a clear, if difficult choice between balancing statistical lives and industrial resources or authorizing the Secretary to elevate human life above all concerns save massive dislocations in an affected industry."[343] The plurality's willingness to uphold the statute stemmed from a basic premise about

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[338] As noted by Professor Richard J. Pierce, Jr., "In scores of statutes delegating economic regulatory powers . . . Congress made only one basic decision—that the market could not be trusted to produce acceptable results without several forms of regulatory intervention." Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 495 (1985).

[339] 467 U.S. at 865.

[340] *Id.*

[341] *Industrial Union Dep't*, 448 U.S. 607.

[342] *Id.* at 669 n.6 (Powell, J., concurring in part and concurring in the judgment).

[343] *Id.* at 685 (Rehnquist, J., concurring in the judgment).

cases concerning the legislative role: the essential point was not Congress' avoidance of moral complexity, but its selection of the topic (toxic regulation in the industrial workplace).[344] Legislative refuge in abstract terms such as "reasonably necessary and appropriate"[345] and "to the extent feasible"[346] was to be expected.

The Court saw its task as not to chide or strong-arm Congress into specificity, but to temper the zeal of the delegate, the Occupational Safety and Health Administration (OSHA). The Benzene plurality opinion is notable not only for the Justices' tolerance of a baffled Congress, but also for their wariness of OSHA's active idealism, its capacity for aggressive rulemaking where Congress had wavered.[347] If Congress suffered from an Adams-like habit of doubt, a case of reduced resistance, it did not follow that the expert designated to assist Congress would suffer in the same way. The Benzene case discloses an activist agency mounting resistance to safety problems of the workplace with a certainty informed by scientific expertise and energized by issue-specific political idealism. The plurality's caution with respect to this energy took the form of interpreting the organic statute in a way that would rein in the agency, at least to some extent.[348]

In the Benzene case, then, reformist independence—the classical attitude of resistance to societal evils—becomes a matter of topic selection. This topic selection is coupled with a struggle over statutory adjectives to transform moral quandaries into matters for prudential and moral balancing by a bureaucracy. Perhaps the Court does not give new life to the nondelegation doctrine because it sees open-ended delegation not only as a

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[344] The Court's assumption may well have been that "Congress is unable or unwilling to reenact [the statute] with standards that fall on the permissible side of the continuum of relative specificity," and that judicial invalidation of a "first-level policy decision" of this kind would be "destructive of the very separation of powers that the Court is required to preserve." Pierce, *supra* note 338, at 496.

[345] Occupational Health and Safety Act § 3(8), 29 U.S.C. § 652(8) (1970).

[346] *Id.* at § 6(b)(5), 29 U.S.C. § 655(b)(5).

[347] Professor Edley reads the Benzene opinions as "acknowledg[ing] . . . the positive and negative attributes of policy choice—the virtue of interest accommodation and accountability in making such difficult judgments on the one hand, and the vice of zealous over-regulation through a failure to exercise balanced judgment of the many decisional factors implicit in the organic statute." CHRISTOPHER F. EDLEY, JR., ADMINISTRATIVE LAW 89 (1990).

[348] The plurality interpreted the Occupational Safety and Health Act to require that the agency make a threshold finding of "significant risk" before a regulation could be promulgated. 448 U.S. at 642.

symptom, but also as a solution, to the ebbing independence of legislative politics. By delegating, Congress diffuses the key issues it has selected to other players and structures within the public law process. Congress takes its chances that diffusion will spark both dialogue and tension within the process, which in turn will spark creative political energies to grapple with the energies of progress. The hope is that public benefits emerge. Just as Adams' own abstractions were designed to prompt response and hence energy that could produce change, legislative delegations are opening salvos, invitations to other, perhaps more vital sources of independent thought to address complexity. At least the Court may think so: the Adams tradition of independence as a problematic and yet perhaps necessary stance of isolated abstraction within our political culture seems to underlie the Court's approach.

2. *Non-Regulatory Delegation*

The Court's apparent acceptance of this view in regulatory delegation cases has been almost total. But in a *non*regulatory case of the 1980s, the Court upheld a large delegation of power as well. *Mistretta v. United States*[349] suggests even more than the regulatory cases the extent to which the Court proceeds as if Congress has been engulfed by complexity. In *Mistretta*, the complexity is again of a political and moral variety, but the solution is to enlist the assistance not of the familiar administrative process, but of a variant.

Mistretta, which involved a separation of powers attack on the Sentencing Reform Act of 1984,[350] exemplifies the transformation of reformist independence into legislative isolation. In that statute, Congress addressed the much-discredited system of "indeterminate sentencing," whereby statutes set criminal penalties but "gave the sentencing judge wide discretion" in individual cases.[351] Congress' response was to create the United States Sentencing Commission, an independent agency "in the judicial branch of the United States."[352] Congress assigned to the Commission the task of devising sentencing guidelines for federal criminal cases.[353] An individual

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[349] 488 U.S. 361 (1989).
[350] 18 U.S.C. §§ 3551 *et seq.* (1982); 28 U.S.C. §§ 992-998 (1982).
[351] 488 U.S. at 363.
[352] 28 U.S.C. § 991(a) (1984).
[353] *Id.*

sentenced under one of the new guidelines attacked the Act on a number of separation of powers grounds, including the argument that the Act amounted to a standardless delegation of legislative power to the Commission.[354]

Writing for the Court, Justice Blackmun disposed quickly of the delegation argument, citing the familiar "intelligible principle" test and the earlier-quoted notion that "in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."[355] The "intelligible principle" requirement was met by the statute's catalogue of general goals and purposes; its prescription of the "guidelines system," with sentencing ranges not to exceed existing statutory maxima; its list of factors to "consider" (but not necessarily follow) in formulating offense categories and categories of defendants; and its provisions concerning terms of confinement for certain types of crimes.[356] Justice Blackmun never identified an "intelligible principle" as such; the statute apparently passed the Court's test because it contained "complicated instructions."[357] Although Justice Blackmun acknowledged the "significant discretion"[358] afforded the Commission by the Act, he concluded that the case was essentially about "complexity": "Developing proportionate penalties for hundreds of different crimes by a virtually limitless array of offenders is precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate."[359]

Alone in dissent, Justice Scalia agreed with the majority's conclusion that the statute could not be invalidated for a lack of standards.[360] However, Justice Scalia characterized the Commission's delegated task quite differently than the majority. Rather than seeing the task as largely an "intricate, labor-intensive task,"[361] Justice Scalia concluded that the Commission's work was "far from technical, but . . . heavily laden (or ought to

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[354] 488 U.S. at 371.

[355] *Id.* at 372.

[356] *Id.* at 374-77.

[357] I borrow the phrase from David Schoenbrod, *Separation of Powers and the Powers that Be: The Constitutional Purposes of the Delegation Doctrine*, 36 AM. U. L. REV. 355, 367 (1987).

[358] 488 U.S. at 377.

[359] *Id.* at 379.

[360] *Id.* at 416 (Scalia, J., dissenting).

[361] *Id.* at 379 (opinion of the Court).

be) with value judgments and policy assessments."[362] Justice Scalia noted a number of such "value judgments," drawing largely from the Commission's toughening of white-collar sentences.[363] Justice Scalia's emphasis on changes relating to "economic crimes"[364] revealed a perspective on the meaning of administrative independence. While the explicit point of his examples was to note the value-laden nature of the Commission's work, his implicit sense was that the Commission was pursuing its mandate with the tenacity and idealism of an OSHA—indeed, with an aggressive resistance to inequities in the criminal justice system. But agency activism, by itself, did not move Justice Scalia away from the majority on the delegation issue. He joined the Court's rejection of the delegation argument not because he could point to an "intelligible principle," but because the doctrine forbidding Congress from making standardless grants of power "is not . . . readily enforceable by the courts."[365] Justice Scalia doubted the competence of judges to "second-guess the Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law."[366]

However, Justice Scalia believed that another, more fundamental delegation problem rendered the statute unconstitutional. Whether the statute contained an "intelligible principle" was ultimately "irrelevant."[367] The Act's fundamental flaw was that it delegated a "lawmaking function" that was "completely divorced from any responsibility for execution of the law or adjudication of private rights under the law."[368] In Justice Scalia's view, a delegation of authority is constitutional if the exercise of authority will amount to execution or adjudication of law. If, however, the delegation is to a nonexecutive, nonjudicial recipient, then the delegation can only be seen as a "pure delegation of legislative power,"[369] a "naked"[370] authorization to a "junior varsity Congress."[371] Having reasoned this far,

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[362] *Id.* at 414 (Scalia, J., dissenting).

[363] *Id.* at 413-14.

[364] *Id.* at 414 (quoting the United States Sentencing Commission Guidelines Manual (June 15, 1988)).

[365] *Id.* at 415.

[366] *Id.* at 416.

[367] *Id.* at 420.

[368] *Id.*

[369] *Id.*

[370] *Id.* at 421.

[371] *Id.* at 427.

Justice Scalia seemed to search for a deeper concluding statement of his own meaning. This, however, eluded him. He could only break off, rather anti-climactically, with a declaration of constitutional policy, akin to the political formalism of his *Morrison* dissent discussed in part II above. The delegation, he declared, was "undemocratic" and "incompatib[le] with our constitutional institutions . . . ."[372]

Justice Scalia's premise appears to be that delegation in general is a practical necessity made palatable by the fact that it transfers executive or judicial power not to a single entity but to a "political process."[373] The incapable legislature sends issues to a system with an expert problem-solver acting not simply as a technician, but also as a public servant on a mission of reform. According to this scenario, policy will emerge from the interplay of a number of participants within the process; agency zeal will spark the process, will serve as a basis for debate among the players, and will be tempered (or not) according to circumstances. In this way, resistance to the ills of society remains at least possible, even in a world like the one Henry Adams witnessed and foretold.

The Sentencing Reform Act, however, follows an altogether different script. The Act delegates authority to an agency that is not part of the now-familiar administrative process. In effect, the Sentencing Commission is its own process.[374] Absent opportunities for creative exchange with other players and for the tempering of administrative zeal, what remains is simply a "junior varsity Congress" exercising a varsity independence[375]—power that is unfamiliar in any hands other than Congress' own. This is Justice Scalia's first concern: an unsituated administrative

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[372] *Id.* at 422.

[373] *Id.*

[374] For a description of that process, see Ronald F. Wright, *Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission*, 79 CAL. L. REV. 2 (1991). Professor Wright notes that the Sentencing Commission "is less politically accountable than virtually any other federal agency," *id.* at 5, that an "ongoing threat" exists that the Commission "will abuse its power," *id.* at 40, that the judicial review provisions of the Administrative Procedure Act (APA) do not apply to decisions of the Commission, *id.* at 41, and that the "precise boundaries" of non-APA judicial review "remain undefined," *id.* Professor Wright calls for courts to develop "a working relationship" with the Commission that will "improve both the legality and rationality of Commission decisions." *Id.* at 89; *see also* Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1730-40 (criticizing the relationship between the Sentencing Commission and the reviewing courts).

[375] 488 U.S. at 427 (Scalia, J., dissenting).

independence that will be more powerful, but less wise, than what has become the norm.

Justice Scalia's second concern is that such an entity will become a favorite of Congress because it allows for "complexity" to be delegated and thus power to be transferred—*but not* to the President or the executive branch.[376] The availability of this device may encourage Congress to see complexity even more frequently in the issues before it, and to pass similar sorts of painless delegations.[377] Over time, use of a legislative instrument of this kind could further isolate Congress and even bypass the benefits of the customary administrative process. Despite the overheated tone of Justice Scalia's opinion, his worry is worthy of attention: large-scale delegations may be made in the future not so much in response to complexity as to "currently perceived utility."[378]

D. Summary: Legislative Independence

The *Mistretta* majority accepts delegation as a practical necessity regardless of the nature of the particular transfer or its recipient. This undiscriminating approach assumes that any delegation seeking to address an "intractable dilemma"[379] should be upheld. Justice Scalia's concern is that with the demise of legislative judgment the Court must be a vigilant overseer of this allocation of power and must recognize that not all forms of administrative independence should be accepted.

Mistretta stands in vivid contrast to several other separation of powers cases of the 1980s, particularly *INS v. Chadha*, discussed in part II above,[380] and *Bowsher v. Synar*.[381] In both cases, although Congress had delegated power, it preserved avenues through which individual legislators could exert informal pressures.[382] After *Mistretta*, the Court's signal ap-

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[376] *Id.* at 422.

[377] *Id.* (predicting "all manner of 'expert' bodies, insulated from the political process, to which Congress will delegate various portions of its lawmaking responsibility").

[378] *Id.* at 427.

[379] *Id.* at 384 (opinion of the Court).

[380] 462 U.S. 919 (1983); *see supra* text accompanying notes 209-23.

[381] 478 U.S. 714 (1986).

[382] The legislative veto, at issue in *Chadha*, permitted a questionable dynamic to take place between the delegate and the individual legislators. In case studies of several administrative programs, that dynamic was graphically described. Harold H. Bruff & Ernest Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369 (1977).

pears to be that while Congress may delegate broadly, it may neither employ a legislative veto to wield influence in delegated areas[383] nor retain removal power over delegates engaged in executive functions.[384] In *Mistretta*, the Court generously tolerates legislative isolation as inevitable, but in *Chadha* and *Bowsher* the Court declines to tolerate legislative individualism—the efforts of single members, committees, or staff to maintain significant leverage over agency policy in delegated areas.[385] For the Court, isolation is understandable in the world described by Henry Adams, but individualism rates condemnation. Instruments such as the legislative veto and the power to remove an executive official amount to admissions that perhaps the world is not so complex after all—that if members of Congress are capable of exerting such pressures, then they are capable of legislating in more specific terms. The veto and the removal power suggest a

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Bowsher involved the constitutionality of the Balanced Budget and Emergency Deficit Control Act of 1985, 2 U.S.C. §§ 901 *et seq.* (1988 & Supp. II 1990). Congress delegated budgetary authority to the Comptroller General, but retained "for cause" removal authority of the Comptroller. 31 U.S.C. § 703(e)(1) (1988).

In his opinion for five members of the Court, Chief Justice Burger concluded that the statutory grounds under which Congress might remove the Comptroller were "very broad and, as interpreted by Congress, could sustain removal of a Comptroller General for any number of actual or perceived transgressions of the legislative will." 478 U.S. at 729. The unstated emphasis is Congress' power to influence, given the sweep of removal authority. Concurring in the judgment, Justice Stevens (joined by Justice Marshall) focused not simply on Congress' removal authority but on the entirety of the Comptroller's "statutorily required relationship" to Congress, and determined that overall the Comptroller "serves as an agent of the Congress." *Id.* at 741 (Stevens, J., concurring). Justice Stevens expressed "concern about the need for a 'due process of lawmaking,' [particularly] [w]hen a legislature's agent is given powers to act without even the formalities of the legislative process." *Id.* at 757 n.23. Again, the implicit worry is the matter of informal manipulation by individual representatives. *See also id.* at 757 n.22 (citing New York case involving unilateral acts by legislative committee chairmen).

[383] 462 U.S. at 951-59.

[384] 478 U.S. at 732-34.

[385] A number of works concern legislative "individualism" in a somewhat different, but related, sense. *See* GLENN R. PARKER, CHARACTERISTICS OF CONGRESS: PATTERNS IN CONGRESSIONAL BEHAVIOR 1-19 (1989) (members of Congress "exercise considerable latitude and freedom in the pursuit of personal goals within Congress. They pursue these goals generally unfettered by electoral reprisal on the part of constituents or punishment at the hands of party leaders."); BARBARA SINCLAIR, THE TRANSFORMATION OF THE U.S. SENATE 206, 212, 70, 71-101 (1989) (The "clubby, restrained Senate of the 1950s," marked by "norms of specialization, legislative work, reciprocity, and apprenticeship," is replaced by new politics in which Senators seek "high activity across a variety of issues and in multiple arenas," and insist on fairly complete independence from institutional norms.); SUNDQUIST, *supra* note 263, at 369-72 (tracing "gradual transformation in this century of the political system from which the holders of elective offices emerge," the "dominant element" of which is "political individualism—the antithesis of party regularity and party cohesion").

willingness to manipulate and be manipulated. It is this sort of perceived legislative behavior that the Court has not tolerated. The incapacity that is upheld is the sort that partially makes up for itself by transferring an issue to a dynamic process. Congress wins the delegation cases, even a variant such as *Mistretta*, because the statutes at issue are at least positive actions of resistance. In contrast, a legislative effort to preserve an informal presence in a delegated area is interpreted not as a cure but as a symptom of what needs resistance in the first place.

IV. Alienated Independence: Faulkner's Idealist

A fourth strand of the American concept of independence is the stance of alienation—the self's abandonment of a political society that falls short of a visionary ideal. William Faulkner's novel *Go Down, Moses*,[386] comprised of seven related stories about the McCaslin family of Yoknapatawpha County, gives voice to this tradition, presenting both the power and impotence of a dissenting consciousness.

In two of the stories, "The Bear" and "Delta Autumn," Faulkner's principal character is Isaac McCaslin ("Ike"). Faulkner first traces Ike's boyhood as the youngest member of a hunting party pursuing a virtually mythical bear in the Southern wilderness. Ike's growth continues with his discovery of the McCaslin family's history as owners and abusers of slaves and his decision to break with the past by repudiating his inheritance. In Ike we see independence as a profound separation from a society composed of incomplete and inhumane relationships. Unlike Henry Adams, whose independence is ultimately a matter of isolation based on the confusions of modern change, Ike's solitary stance is borne of an emotional certainty—that the white race and white society are all too clearly corrupt. Faulkner delineates the multi-layered background of Ike's retreat and the ambiguous consequences of his declaration of independence at the age of twenty-one, when, in the act of abandoning the McCaslin legacy, Ike says with complete conviction and perhaps greater innocence, "I am free . . . ."[387]

Go Down, Moses studies independence as alienation on several levels. Ike's story depicts the genesis of a particular Southern response to the

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[386] Faulkner, *supra* note 9.
[387] *Id.* at 299.

past, the boy's shame and sense of imprisonment in a history of evil and denial of love,[388] and his longing for a rupture in the pattern. The voice of the narration, passionately attuned and even sympathetic to Ike's imagination and its dilemma, nevertheless raises questions about his idealism[389] and about the value of heroic withdrawal. These questions inevitably implicate Faulkner's own act of writing as well, his own imaginative project, seen itself as a kind of withdrawal from society, or more broadly as a dreamed re-working of existence.[390] On both levels, *Go Down, Moses* broods about balance, about the possibility of declaring "I am free," without merging into another and equally insidious state of dependence or enslavement.

After analyzing the nature of Ike's alienation, I will reexamine *Morrison v. Olson* from the standpoint of this aspect of independence, viewing the independent counsel statute as a problematic effort to bring into government the energies of the disaffected vision.

A. *Ike McCaslin: Wilderness and Commissary*

The first sentence of *Go Down, Moses* finds Ike an old man:

> Isaac McCaslin, 'Uncle Ike,' past seventy and nearer eighty than he ever corroborated any more, a widower now and uncle to half a county and father to no one . . . .
>
> . . . [A] widower these twenty years, who in all his life had owned but one object more than he could wear and carry in his pockets and his hands at one time, and this was the narrow iron cot and the stained lean mattress which he used camping in the woods for deer and bear or for fishing or simply because he loved the woods; who owned no property and never desired to since the earth was no man's but all men's, as light and air and weather were . . . .[391]

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[388] A perceptive essayist has noted, "What saddens [Ike] most is the absence of love, or at least the acknowledgement of love." J. Douglas Canfield, *Faulkner's Grecian Urn and Ike McCaslin's Empty Legacies*, 36 ARIZ. Q. 359 (1980).

[389] In Faulkner's fiction, "there are many hints that idealism is more often than not a mere hiding place from the ugliness of real life." André Bleikasten, *For/Against an Ideological Reading of Faulkner's Novels*, *in* FAULKNER AND IDEALISM: PERSPECTIVES FROM PARIS 38 (Michel Gresset & Patrick H. Samway eds., 1983).

[390] Bleikasten notes that for Faulkner, writing "was first a means of self-assertion and self-creation, within but also against society, and even against reality itself." *Id.* at 36.

[391] FAULKNER, *supra* note 9, at 3.

The passage hints at Faulkner's entwined views of the character.[392] Ike's lack of fatherhood suggests a kind of sterility, yet his choice of an utterly simple existence approaches an imitation of Christ. His devotion to "the woods" and his unwillingness to partake of ownership stem from a concept of communal stewardship, yet isolation from community may be the only practical result of a belief that property is no different from "light and air and weather." This is the Ike of "Delta Autumn," both saint and old clown. The root of his double nature—the boyhood drama that shaped his own independent stance—is detailed in "The Bear."

For three of its five sections, "The Bear" is the story of initiation, a boy's introduction to challenges, traditions, and virtues associated with a twice-yearly hunt for deer and bear in a vast Mississippi woods. In the hunting party are two Southern aristocrats (military veterans of the Civil War), a few former slaves, and some men of mixed race (black-white, black-Indian, white-Indian). But the party's destination, the wilderness, is not a setting for the racial hierarchies of town or plantation; it is a place for "men, not white nor black nor red but men, hunters, with the will and hardihood to endure and the humility and skill to survive . . . ."[393] Faulkner describes this different world in a rhetoric that has the sound of myth. In dream-like evocations of landscape, time and mood, the narration seems at once to embody, to celebrate, and to set apart the powers of the imagination. Here is "the tall and endless wall of dense November woods under the dissolving afternoon of the year's death, sombre, impenetrable."[394] And here is a place full of stories, the source of "the best of all talking . . . the best of all breathing and forever the best of all listening, the voices quiet and weighty and deliberate for retrospection and recollection of exactitude . . . ."[395] The stories are about the hunt and the development of virtues in relatively stark tests of man by nature. Presumably, the stories are not about man's inhumanity to man or a society's loss of values.

The old, grave guide, Sam Fathers, sets in motion Ike's "apprenticeship in the woods,"[396] "his novitiate to the true wilderness,"[397] which turns out

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[392] For a detailed and illuminating discussion of the opening of *Go Down, Moses*, particularly its multiplicity of voices, see DIRK KUYK, JR., THREADS CABLE-STRONG 15-24 (1983).

[393] FAULKNER, *supra* note 9, at 191.

[394] *Id.* at 194-95.

[395] *Id.* at 191-92.

[396] *Id.* at 194.

[397] *Id.* at 195.

to be an education in the virtues of humility and pride.[398] Central to this training is the hunting party's continual but half-hearted pursuit of Old Ben, the legendary bear that "ran in [Ike's] knowledge before he ever saw it."[399] The bear seems to embody this wilderness, this other world, immune to men and the country of men:

> [The bear] loomed and towered in [Ike's] dreams before he even saw the unaxed woods where it left its crooked print, shaggy tremendous, red-eyed, not malevolent but just big, too big for the dogs which tried to bay it, for the horses which tried to ride it down, for the men and the bullets they fired into it; too big for the very country which was its constricting scope.[400]

The wilderness and its emblem are thus portrayed in rich, mesmerizing prose that constantly searches for another adjective, another phrase, to capture the meaning of the woods for Ike's imagination and perhaps for Faulkner's as well. For Ike, the wilderness suggests an ideal world where "truth" can be sensed, fostered, and storied. For Faulkner, the setting of the wilderness provides an opportunity for an almost trance-like involvement in language, a sanctuary of imagination.[401] For both, however, the wilderness presents dangers.

The risk for Ike is that the wilderness will prove so inviting that the boy will be blind to certain of its cautionary lessons. An example occurs in part 1 of the story. Sam Fathers teaches Ike that in order to be able to see the elusive bear, Ike must learn humility, in the sense of accepting human limitations in the face of nature. Ike then puts down his gun, the "tainted" tool of civilization.[402] By "his own will and relinquishment,"[403]

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[398] Ike's goal is "to earn for himself from the wilderness the name and state of hunter provided he in his turn were humble and enduring enough." *Id.* at 192. In pursuit of the bear, Ike "would be humble and proud that he had been found worthy to be a part of it too or even just to see it too." *Id.* at 226. Ike is "a boy who wished to learn humility and pride in order to become skillful and worthy." *Id.* at 295. See Frances L. Utley, *Pride and Humility: The Cultural Roots of Ike McCaslin*, *in* BEAR, MAN, AND GOD: SEVEN APPROACHES TO WILLIAM FAULKNER'S THE BEAR 233-60 (Francis L. Utley et al. eds., 1964), for an illuminating treatment of "The Bear" through the prism of Faulkner's pride/humility motif.

[399] FAULKNER, *supra* note 9, at 193.

[400] *Id.*

[401] "Faulkner's apparent failure to separate his own voice from Ike's is not a failure but a sign of his complicity . . . in Ike's desire" for transcendence. Canfield, *supra* note 388, at 381.

[402] FAULKNER, *supra* note 9, at 207-08.

[403] *Id.* at 207.

Ike surrenders himself to the woods. He becomes "alien and lost in the green and soaring gloom of the markless wilderness."[404] At this point in the story, Faulkner himself appears as seduced by the wilderness as Ike. Just as Ike seeks a vision through relinquishment of civilization, Faulkner himself seems to seek an image—a sense of his own meaning, perhaps even a judgment on his own glorification of the ideal. As Ike puts down not only his gun but also his compass and watch, and becomes truly lost, we sense Faulkner, too, moving through a brilliant imaginative construct for a clue to its significance.[405]

On the verge of panic, Ike suddenly sees the bear's "crooked print" in the soggy ground, filling with water. He follows the tracks, each dissolving as soon as he sees it. They lead him back to familiar territory:

> the wilderness coalesced. It rushed, soundless, and solidified—the tree, the bush, the compass and watch glinting where a ray of sunlight touched them. Then he saw the bear. It did not emerge, appear: it was just there, immobile, fixed in the green and windless noon's hot dappling . . . Then it was gone. It didn't walk into the woods. It faded, sank back into the wilderness without motion as he had watched a fish, a huge old bass, sink back into the dark depths of its pool and vanish without even any movement of its fins.[406]

Here the first section of "The Bear" abruptly ends, but what has happened? Perhaps one thing has occurred for Ike and another for Faulkner. For Ike, the act of relinquishing the tools of civilization has entitled him to see the mythic bear. And he sees the wilderness "coalescing" *into* the bear, and then the bear "fading" back into the wilderness "without motion." The bear recalls for Ike a "huge old bass" sinking back into a pool with no movement. Both the vision of the bear and the simile of the bass speak to Ike of unity—the oneness of the bear and woods, the oneness of the fish and the pool, and the oneness of the wilderness and everything in it. Relinquishment has seemingly worked for Ike; it has made possible a vision, perhaps even a promise of his own possible union with the wilderness, or with a consciousness based entirely on an ideal. However, Ike

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[404] *Id.* at 208.

[405] Bleikasten sees Faulkner's "oratorical attempts to transcend the local and the temporary by raising trivial events and characters to legendary status," as possibly "symptoms of a regressive dream." Bleikasten, *supra* note 389, at 44.

[406] FAULKNER, *supra* note 9, at 209.

does not seem to grasp the importance of a salient detail: that the bear led him *back* to his tools of civilization. The vision, in fact, was not a promise of unity with the ideal but the exact opposite: a signal of the impossibility of such union. But there is no hint that Ike understands this signal.[407]

What has happened in this vignette for Faulkner? He too has been lost in a wilderness of pure imagination and exalted verbal beauty. Faulkner's own wandering ends with a literary vision: the simile of the "huge old bass." The image of the bass spoke to Ike of the coalescing of mind and ideal—a comforting, benign image with an emphasis on "sinking back" as unity. For Faulkner, however, the "huge old bass" may be a slightly sinister figure; the combination of age, size, darkness, sinking, vanishing, and "depths" sound a note of death. Faulkner's intoxication with his own rhetoric of the woods, the facile didacticism of the wilderness motif, and its intense idealization, lead to the subtly disturbing image of the huge old bass, an image that presents itself as a kind of warning, not only that Ike's "relinquishment" of civilization somehow portends of death, but also that Faulkner's own infatuation with the ideal could be both morally and imaginatively suspect. In a number of ways, then, the narrative seems to cast doubt on the sort of independence associated with complete withdrawal into an ideal.

In part 4 of "The Bear," the scene shifts from the woods to the McCaslin plantation and its commissary. Ike faces a dilemma far more complex than the trials of the hunt and responds through an act of independence shaped by the wilderness virtues. Humility and pride have been the objects of his education: humility in the sense of an awareness of limitations, pride in the sense of self-assertion based on an intuition of truth, despite one's limitations and for the good of the group. These virtues have been the soil of Ike's identity. Now on the plantation, he must apply them; he must play out the meaning of his independence. Throughout this part of the story, as before, Faulkner himself remains ambivalent: Ike's gesture in the commissary is heroic in that he sacrifices himself in atonement, but futile because a genuine solution to the condition that he defines surely requires more, even from one person. Ike's independence in this sense ultimately amounts to a mis-channeling of imagination, a thwarted act of

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[407] Professor Kuyk writes that the bear, "by guiding [Ike] back to the compass and watch, reveals the futility of relinquishment." KUYK, *supra* note 392, at 100.

penance.

Although part 4 begins with Ike at age twenty-one, situated in the plantation commissary with his cousin Cass, engaged in a moral and historical debate that will alter Ike's life forever, this part also recounts a discovery that takes place in the icy confines of the commissary when Ike is sixteen. The month after the hunting party finally and almost reluctantly tracks and kills Old Ben, and Ike's mentor, Sam Fathers, also dies in the wilderness, Ike returns to the plantation. He begins to read the family ledgers, the books of account containing not only the yearly sums of income and expense, but almost an annotated history of the farm and its people. These annotations, unlike the stories in the wilderness, "the best of all talking," are about race, about the purchase, sale, and abuse of people, and about later remorseful efforts to redeem the past. At the heart of his reading, Ike discovers a story of exploitation and despair. Ike's grandfather, the patriarch Carothers McCaslin, had bought and then impregnated a slave woman, Eunice. A daughter had been born. Ike deduces that Carothers later impregnated this daughter, and that Eunice committed suicide soon afterwards. Ike imagines Eunice's act as "solitary, inflexible, griefless, ceremonial, in formal and succinct repudiation of grief and despair who had already had to repudiate belief and hope."[408] The daughter dies giving birth and an inexorable chain of misery, flight, and regret is set in motion.

The story is too much for Ike; he feels that it epitomizes an entire people's indifferent degradation of another people. At age twenty-one he tells Cass that he will "relinquish"[409] his inheritance of the McCaslin land and business, as if recalling how the relinquishment of a compass and watch had "worked" in the wilderness, relieving him of "taint" and infusing him with a vision of unity. But Ike also uses the word "repudiate," echoing the word associated with Eunice's self-inflicted death. He attempts to apply the lessons of the woods to the issues that arise in the commissary; in striving for the purity of an ideal of virtue associated with "relinquishment," he risks the kind of suicide associated with "repudiation." In other words, Ike seeks independence from his own blood, history, and society, an independence defined by idealism, by a yearning for a state

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[408] FAULKNER, *supra* note 9, at 270-71.
[409] *Id.* at 256.

of grace in the present, by a claimed ability to transcend what is.[410] The problem is whether this independence is in reality another form of dependence, an escape into a dream.

Faulkner expresses his own ambivalence about Ike's choice in a number of ways, three of which are important here. First, the decision to relinquish is subjected to a sixty-page debate between Ike and Cass, with Cass offering a counter-vision, an argument that the McCaslins—and indeed, many in the South—had already begun to expiate the corruption of the past and that in any case, Ike's abandonment could be a gesture of little practical worth.[411] This dialectic allows Faulkner to undercut Ike's own thought processes through Cass' skepticism and cross-examination. Far from the "best of all talking," the conversation points to Ike's essential confusion—which at one point even Ike acknowledges[412]—about the sort of relationship he is willing to have with his own society.

Faulkner also suggests that Ike's choice stems from degenerate forms of the wilderness virtues, a skewed pride, and a distorted humility. In effect, Faulkner dissects the components of Ike's idealism. The pride learned from Ike's mentor, Sam Fathers, in the wilderness was an awareness of self not in the sense of a "surging and straining" precociousness in mastering the woods or tracking the bear,[413] but in the sense of assuming one's role in the hunting party. In the wilderness, Ike initially believed that he or his mentor would be the appointed one to kill the bear; later he learned to be proud simply "that he had been found worthy to be part of [the event] . . . or even just to see it too."[414] Individuals must be proud

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[410] Ike's decision is part of Faulkner's "myth of transcendence." Canfield, *supra* note 388, at 380.

[411] FAULKNER, *supra* note 9, at 261, 299-300.

[412] Frustrated, Ike says:

> Let me talk now. I'm trying to explain to the head of my family something which I have got to do which I dont quite understand myself, not in justification of it but to explain it if I can. I could say I dont know why I must do it but that I do know I have got to because I have got myself to have to live with for the rest of my life and all I want is peace to do it in.

Id. at 288.

[413] The mongrel dog, the fyce, at one point races to within inches of the bear in an absurd attempt to bring it to bay. *Id.* at 211-12. The fyce's "surging and straining" courage is an emblem of the sort of extreme and impatient spirit that Ike must temper within himself. *See* Utley, *supra* note 398, at 246.

[414] FAULKNER, *supra* note 9, at 226.

enough to "act" in their lives, but they must also temper that pride by accepting a part within the social order. In the commissary debate with Cass, Ike embodies a more extreme sense of his own importance. Citing the history of the world since Genesis, he sees the story of redemption as finally dependent on his decision.[415] Ike downplays Cass' suggestion that many Southerners already had done much to dismantle the effects of slavery without separating themselves from tradition and history in the final and drastic fashion intended by Ike.[416]

As for humility, the wilderness virtue had been marked by an appreciation of the folly of ownership, possession, and dominance, whether of people or land. Like "pride" rightly understood, humility meant an acceptance of the limitations of human power.[417] In the commissary debate, however, Ike's humility goes much further; it approaches despair. His identification with his corrupt ancestor signals a hate and distrust of himself. Reading entries that he himself had written in the ledgers about one of his lost mixed-race cousins, Ike notices "his own hand now, queerly enough resembling . . . . that of his grandfather's . . . ."[418] This uneasy recognition intimates a fear that Ike's obsession with protecting the fates of the former slaves and their children represents another form of belief in racial superiority. Later he realizes that "even in escaping he was taking with him more of that evil and unregenerate old man . . . than even he had feared."[419] Ike worries that he himself cannot truly see blacks as equals.

Faulkner thus suggests that Ike's declaration of independence is a product of extreme versions of *both* pride and humility, a radical selfishness as well as a profound fear of the self. The wilderness had impressed simple forms of these attributes in the boy, but they become complicated and unfamiliar in the young man and finally press him into abandoning any effort to allow them to mature in the world of human affairs.

Finally, Faulkner undercuts Ike by placing Ike's act of repudiation next to others that seem neither heroic nor wise. The dialectic of part 4 is interspersed with stories of other figures who declare their independence

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[415] *Id.* at 259.
[416] *Id.* at 261.
[417] *See* Utley, *supra* note 398, at 245.
[418] FAULKNER, *supra* note 9, at 273.
[419] *Id.* at 294.

from slavery of various kinds. Faulkner portrays these figures as comic,[420] pathetic,[421] mercenary,[422] or childish.[423] Ike's own declaration inevitably takes on aspects and shadings of these other stories. Only the figures of John Brown and of the slave Eunice are unqualifiedly heroic.[424]

Thus, while Faulkner shares Ike's horror at the rapacity of white culture, he is at the very least ambivalent about the nature of Ike's response—the decision simply to abandon the McCaslin land and business and to walk away from the South's old code without any positive action on behalf of change. In "Delta Autumn," the limitations of Ike's dream-bound gesture are underscored. Ike is now an old man, still venturing into the diminishing wilderness each year to hunt, the senior figure in a party consisting of the grandsons of those who entered the "wall of dense November woods" with him years before. While the young men have affection for Ike, they inevitably question the life of alienation and purely negative atonement that he has chosen. One asks, "Where have you been all the time you were dead?"[425]

On the hunting expedition that is the setting of "Delta Autumn," Ike lies awake on his cot, recalling the past silence of the woods. With his hands crossed on his chest, Ike represents an image of death-in-life.[426] But Ike sees his life differently; he likens himself to the wilderness and sees

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[420] The ledgers recount the story of the slave Percival Brownlee, who can never find a "true niche" and goes from slavery to preaching to involvement with a Yankee paymaster to running a brothel, and who, seeing Ike's father "gave him one defiant female glance and then broke again, leaped from the surrey and disappeared this time for good." *Id.* at 263-65, 292-93.

[421] Ike recalls the flight of his mixed-race cousin Fonsiba from the McCaslin plantation to a stark Arkansas farm with a husband as dream-bound as Ike. Fonsiba refuses to come back to the plantation, despite her poverty; her only words echo Ike's own words to Cass: "I'm free . . . ." *Id.* at 280.

[422] Lucas, another mixed McCaslin cousin, demands a share of the McCaslin legacy: "Whar's the rest of the money old Carothers left? I wants it. All of it." *Id.* at 281-82.

[423] Ike's uncle Hubert, "roaring . . . innocent . . . indomitable," seeks his own independence from the expectations of his own (white) race by remaining child-like throughout his life. *Id.* at 304. When his relationship with a black woman is discovered by his sister, he is stung by her unforgiving disapproval. *Id.* at 303.

[424] Ike's theory is that John Brown's act of repudiation of slavery moved God not to destroy humanity. *Id.* at 284-85. Eunice's "griefless" suicide is also portrayed as a gesture of independent defiance. *Id.* at 271.

[425] *Id.* at 345.

[426] *Id.* at 349-55. Professor Kuyk writes that images such as Ike on his cot "support the narrative's thematic judgment on Ike: his choices have left him a 'boy innocent' . . . and his quest for the life-in-death has led him instead to a death-in-life." KUYK, *supra* note 392, at 159.

both "running out together; not toward oblivion, nothingness, but into a dimension free of time and space." It is a dimension containing

> the names, the faces of the old men he had known and loved and for a while outlived, moving again among the shades of tall unaxed trees and sightless brakes where the wild strong immortal game ran forever before the tireless belling immortal hounds, falling and rising phoenix-like to the soundless guns.[427]

This is a dream of death, time, and history transcended, and the richness of Faulkner's language lends Ike a marvelous human dignity. Ike here is evocative of the artist imagining his past creations "moving again among the shades." Inevitably, however, Ike is confronted with the realities of the South's continuing cycle of racial division; the story examines again the nature of Ike's response. A young woman enters the camp. She is one of the mixed McCaslins and has had a child by one of the white McCaslins. Ike recoils; he can only see the family cycle of exploitation continuing, and he urges the woman to leave, to save herself, to marry "a man in your own race."[428] Again, his solution is negative—escape, separation—based on a sense that only time, not positive human action or love, can heal the legacy of oppression. It is as if the pure vision of the ideal that he experienced in the wilderness had rendered the commissary's vision of evil doubly horrifying, so that retreat into an existence based solely on the ideal is all that Ike can imagine as a response. It is a choice of either/or.

The result is a life marked by one moment of courageous repudiation followed by stasis. The alienated man has pursued a dream of transcendence, but it has been largely a private dream of small use to those around him.[429] Ike's brilliantly evoked longings secure his independence, but it is an ambiguous freedom, perhaps even a kind of uncomprehended death.

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[427] FAULKNER, *supra* note 9, at 354.

[428] *Id.* at 363.

[429] Professor Canfield eloquently points out that although Ike's "desire for transcendence" is empty, "who can blame Faulkner or us for wishing Ike's vision true. For the heart holds to it, desires it. Faulkner must use words themselves to reveal their inadequacy, their essential emptiness. But the words are magnificently moving, 'the best of all listening.'" Canfield, *supra* note 388, at 383.

B. Separation of Powers, Alienation, and Idealism

It is this strand of independence—the alienation and withdrawal of the idealist—that suggests a final reading of *Morrison v. Olson*. I have already examined the Supreme Court's decision in *Morrison* in the context of the anxieties of judicial independence.[430] *Morrison*, however, has a second dimension. The independent counsel statute attempts what Cass attempted in his debate with Ike in the commissary: to keep the energies of alienation and idealism engaged in the processes of society, particularly in the public scrutiny of government.

In "The Bear," Cass listens to Ike, argues with him, gently mocks him, labors to reconnect him with the familiar modes of "amelioration."[431] Cass points to the actions of Ike's own father, who modified the McCaslin plantation's hierarchy by turning over the main house to the slaves, by allowing them some freedom of movement, and in a sense by "sharing" the land with them.[432] This is internal, incremental change on a very small scale; still, it is a step, an acknowledgement. Ike, however, has too large a sense of the McCaslin sin to believe that it can be changed "from within." He has too insistent a sense of his own role as sacrificial victim and too powerful a fear of his own capacity for evil to trust himself to remain connected as Cass is connected. Moreover, for Ike, Cass' way is ultimately false because it chiefly perpetuates the "solvency," "efficiency," and growth of a "cursed" system.[433]

The independent counsel statute, passed in the wake of Watergate and in an era of widespread public mistrust of government, attempts to integrate the alienated vision into a constructive societal role through a governmental apparatus. That apparatus is designed to apply the "rule of law" to situations of possible executive misconduct and yet from a broader, symbolic perspective it attempts considerably more. It invites the alienated idealist to temper his "wilderness independence" through identification with a practice of social responsibility. It offers a focal point for the exercise of mature pride and humility, a national playing-out of those virtues vis-a-vis the government as an embodiment of the culture itself. It

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[430] *See supra* text accompanying notes 233-57.

[431] FAULKNER, *supra* note 9, at 261.

[432] For a discussion of the "sharing" motif, see KUYK, *supra* note 392, at 139-41.

[433] FAULKNER, *supra* note 9, at 298.

is a mechanism to domesticate the idealism of an Ike McCaslin so that the strengths of his vision can be a positive, rather than a passive, force in a political society in need of challenge and renewal. The problem is that in striving to domesticate the alienated vision of an Ike McCaslin by incorporating it into the fabric of the federal government, we may succeed not in maturing the idealist's absolutism, but only in giving authority to the skewed pride and humility that ultimately stunted Ike's own vision. Such idealism may be a far cry from the sort to which we would like to entrust governmental, particularly prosecutorial, power.

In his book on Watergate,[434] Special Prosecutor Leon Jaworski includes a confidential memorandum written by one of his assistants, George Frampton, on whether the Special Prosecutor should proceed with an indictment of the recently-resigned Richard Nixon. Frampton, who Jaworski says "represented the thoughts of most of the others" on the Special Prosecutor's team, viewed the Special Prosecutor as an "extra-constitutional" device, a "constitutionally precarious institution" whose "unique risks of failure" necessitated close observance "to a very few fundamental principles."

> These are: that we will pursue charges of wrongdoing to a conclusion wherever they lead, without regard to political influence or considerations but with regard only to the truth; that we will do our utmost as lawyers and human beings to make "just" decisions, however unpopular or misunderstood they may be, while recognizing the infirmity of any one view (or even a majority view) of what is just; that we will be scrupulous in conduct of our investigations and trials; and that in every matter we will proceed upon well-settled and established precedent and principles of law and practice.[435]

In a brief comment on this passage, Professor Philip B. Kurland writes that the statement's "self righteousness . . . may seem reminiscent of the public statements of the Nixon administration, engaged in 'extra-constitutional' activities for the preservation of the Nation."[436] Professor Kurland goes on to make a distinction between "extra-constitutional" and "unconstitutional" and to suggest that the Special Prosecutor's office was in fact consistent with the Constitution and that therefore Frampton's solemn

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[434] LEON JAWORSKI, THE RIGHT AND THE POWER (1976).

[435] *Id.* at 225-26.

[436] PHILIP B. KURLAND, WATERGATE AND THE CONSTITUTION 75 (1978).

claims of principle were beside the point. The question of legality aside, does it make sense for Professor Kurland to jab at Frampton's lofty tone? Do we hear more of Ike's voice in Frampton's than we would like? Perhaps it is the air of innocence in Frampton's recitation of claimed virtues. Perhaps it is the over-inclusiveness of the words "wherever," "only . . . the truth," "utmost," "in every matter." Perhaps it is a disingenuousness in the sentence that acknowledges competing views of "what is just" without seeming to care. Kurland might say that the Ike of the commissary dialogue is too present here, that no domestication of idealism is evident.

A far less oblique example of the voice of idealism in such a context is found in a recent first-person account of an investigation and prosecution of an executive official by an independent counsel.[437] The author, Jeffrey Toobin, worked for Lawrence Walsh, the independent counsel charged with investigating the Iran-Contra scandal and Oliver North. Admittedly, this insider's account is not Lawrence Walsh's, but that of a junior staff attorney; it therefore can hardly be read as authoritative of Walsh's own attitude in the probes of North, Elliott Abrams, and others. But it illuminates the thought process of one sort of American idealist: the well-educated, well-connected innocent whose political morality has been shaped by Watergate, who finds himself in a new context of inter-branch conflict and accusations of criminality, and responds with an exaggerated belief in the applicability of his or her own preconceptions of good and evil.

Toobin writes that "the dominant political event of my childhood" was Watergate, and that his imagination as a twelve-year old was "captured [by stories] of the young lawyers working for Special Prosecutor Archibald Cox, who seemed, through the prism of television, like they were changing the world."[438] Hired by Walsh after graduation from Harvard Law School and partial completion of a prestigious judicial clerkship, Toobin exults:

> The Walsh office would take on Reagan and all the President's men, with their contempt for the Constitution, disdain for Congress, and hostility to the truth, the qualities epitomized by the diversion scheme. We had nothing less than a blank check to uncover and rectify the misdeeds of a corrupt and dishonorable administration.

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[437] JEFFREY TOOBIN, OPENING ARGUMENTS, A YOUNG LAWYER'S FIRST CASE: UNITED STATES V. NORTH (1991).

[438] *Id.* at 15.

> We wouldn't stop until we reached the top.[439]

This is Frampton's righteousness writ large. It is also perhaps Ike McCaslin in caricature; Toobin's grandiosity is reminiscent of Ike's habit of seeing himself as the Moses who would "set at least some of [God's] lowly people free."[440] By the end of Toobin's memoir, however, the somewhat chastened young prosecutor admits:

> My initial ambitions for the job were more those of an adolescent than a prosecutor. Prosecutors thinking broadly put all of us at peril. To expand criminal law into anything less fundamental than enforcement of specific statues [sic]—into the realm of honest disagreement, policy tussles, and close calls—jeopardizes the whole edifice of the law.[441]

Thus, Toobin's Ike-like romantic absolutism ultimately changes. The child of Watergate comes to the astonishing conclusion that gross political wrongs are not always crimes. But in his last word on Oliver North, Toobin tries to have it both ways. On one hand, he concludes that North "did not so much violate the law as vault around it."[442] On the other hand, he believes that the United States Court of Appeals, in reversing North's conviction, "missed the opportunity to send a message that proximity to power, like power itself, is a responsibility, not an excuse."[443] Are the two statements consistent? Was North guilty of violating the law or not? Toobin still cannot separate his political idealism from his prosecutorial professionalism. With Ike in the commissary, Toobin might say, "I'm trying to explain . . . something . . . which I dont quite understand myself, not in justification of it but to explain it if I can."[444] Idealism, even when it purports to have "grown," can still breed confusion.

Justice Scalia's opinion in *Morrison* provides another perspective on the limitations of idealism in the context of the independent counsel statute. Toward the end of his long, biting dissent, Justice Scalia turns from his main theme—the political manipulability of the independent counsel stat-

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[439] *Id.* at 17.
[440] FAULKNER, *supra* note 9, at 259.
[441] TOOBIN, *supra* note 437, at 353.
[442] *Id.*
[443] *Id.*
[444] FAULKNER, *supra* note 9, at 288.

ute—and addresses the idealism apparently embraced and expected by the statute. Scalia writes:

> The notion that every violation of law should be prosecuted, including—indeed, *especially*—every violation by those in high places, is an attractive one, and it would be risky to argue in an election campaign that that is not an absolutely overriding value. *Fiat justicia, ruat coelum.* Let justice be done, though the heavens may fall. The reality is, however, that it is not an absolutely overriding value, and it was with the hope that we would be able to acknowledge and apply such realities that the Constitution spared us, by life tenure, the necessity of election campaigns.[445]

For Justice Scalia, the idealism of the Latin phrase is "attractive" but hollow. In his view, vote-grubbing politicians advance the idea of the independent counsel statute because such idealism—the pursuit of justice in high places at any cost—sounds good in election years. This sort of idealism is not only subject to political insincerity but also dangerously blind to broader concerns, in this case the statute's "harmful effect upon our system of government, and even upon the nature of justice received by those men and women who agree to serve in the Executive Branch."[446]

A group of former attorneys general filing an amicus brief in *Morrison* also displayed a distrust of what they perceived as an unchecked idealism encouraged by the statute. According to Edward Levi, Griffin Bell, and William French Smith, the premise of the Constitution was that men are *not* angels. "[T]he Framers . . . were . . . concerned with excesses of what might otherwise be admirable qualities, such as ambition or zeal."[447] Thus, while Justice Scalia worried about the tunnel vision of idealism, the attorneys general harked back to the Federalist Papers in fearing the excessive zeal of the good citizen.

C. *A Necessary Myth?*

Perhaps in striving to find a place for Ike's idealism and bring his alienated vision in house, the independent counsel statute succeeded only

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[445] Morrison v. Olson, 487 U.S. 654, 732-33 (1988).

[446] *Id.* at 733.

[447] Brief for Edward H. Levi, Griffin B. Bell, and William French Smith, Amicus Curiae in Support of Appellees, *in* 177 LANDMARK BRIEFS, *supra* note 94, 1987 Term Supplement, at 562.

in creating a forum for self-righteousness, tunnel vision, and excessive zeal. Perhaps it is only another dangerous dream to think that the best of Ike's perspective—the independence shaped by genuine pride and humility—can be safely channeled into government, with the worst—the unchanging alienation, the self-aggrandizement and self-hatred—omitted. Perhaps this sort of independence, while emotionally attractive, is too unpredictable in practice. Men are *not* angels.

And yet, for all this, perhaps the independent counsel statute survives review because the myth that we can incorporate the best of Ike McCaslin's independence, without the worst, is a necessary myth. Even though the essential design of the Constitution is based on a skeptical view of the tendencies of human ambition, a role in government for an institution based on an alternative view of human nature may be "fitting for our time."[448] This view emphasizes the human search for what is true and the instinct to identify and call upon principle, especially in a context where other voices speak only the language of pragmatics. Jeffrey Toobin's immaturity should be a warning about the importance of experience and judgment in this role, not a reason for arguing that such a role can never be wisely carried out. And Justice Scalia's concern with tunnel vision underestimates the possible worthy effects of trying to incorporate the best of Ike's idealism in government. It is a way of uniting Ike's passion with Cass' sobriety, Ike's capacity for critical reflection with Cass' sense of responsibility to the community. If this unity is a myth, it should not be a matter of shame that we are not yet willing to abandon it.

V. Conclusion

One of the purposes of this paper has been to establish links between political and literary traditions of independence and to examine the legal treatment of cases where some aspect of independence in public law is a primary factor. Constitutional law, particularly separation of powers law, should be viewed as part of a broader set of cultural ideas, norms, and nuances. In considering The Declaration of Independence, Madison's essay, Tocqueville's cultural analysis, Henry Adams' self-portrait, and

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[448] Judge Ruth B. Ginsburg, dissenting from the District of Columbia Circuit's opinion invalidating the independent counsel statute, used this phrase describing the act as "a measure faithful to the eighteenth century blueprint, yet fitting for our time." *In re* Sealed Case, 838 F.2d 476, 536 (D.C. Cir. 1988) (Ginsburg, J., dissenting), *rev'd sub nom.* Morrison v. Olson, 487 U.S. 654 (1988).

Faulkner's fiction, I have attempted to show that works of political and literary import can illuminate attitudes that are barely articulated in, but certainly inhabit, judicial opinions.

My other purpose has been to indicate that public law is one of the areas of our present culture that explicitly honors the non-selfish strain of individualism. Independence is not a government figure's autonomy to act by whim or bias. It is a concept grounded in responsibility. What is human, and therefore interesting, about the concept of independence is the way in which missions of responsibility can be taken to an extreme. Generative independence can become excessive, as with Presidents Roosevelt, Truman, and Reagan. The anxieties of judicial independence can lead to the extremes of mechanical analysis. Legislative independence in the sense of resistance to a culture in need of reform can mutate into independence in the sense of abdication from issues of value. And the independence of alienation can be blind and unfair. Still, it is somehow heartening that despite these frequent excesses, the American public law system, at its core, has faith in both the judgment and responsibility of individuals.