PANEL V

THE ROLE OF THE COURTS IN SEPARATION OF POWERS DISPUTES

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Just last Tuesday, in the *Kirkpatrick* case,[1] the Supreme Court rearticulated the familiar principle that courts, in the exercise of the judicial power conferred by article III, are obliged to decide cases that are properly within their jurisdiction. That principle, re-embraced for a unanimous Court by Justice Scalia, lies at the heart of the critique of frequently attacked doctrines of restraint, such as the political question doctrine. This doctrine, it is said, is unprincipled. Courts should decide cases properly before them absent a clear textual commitment by the Constitution of that issue to another branch, or in the absence of judicially manageable standards, in which event the courts would be left rudderless, to their own ingenuity and creativity, rather than to the law.

In the arena of separation of powers, courts have at times shown discomfort similar to that evident in the sometimes articulated fears of entering the thicket of political questions. Notwithstanding the apparent discomfort, however, courts have tended not to back away from deciding separation-of-powers questions. Just as in *Marbury v. Madison*,[2] where Mr. Marbury's asserted right to his commission was at stake, so too in separation-of-powers cases very concrete, tangible interests are frequently at stake, such as the right to salary at issue in *Myers v. United States*[3] or the interest in remaining in the United States at issue in *Chadha*.[4] Thus, courts have not been willing to relegate such important structural principles of government to a mere hortatory or aspirational norm. The principle of separation of powers can be, and often is, a rule—a standard—that guides and controls decisions.

That being said, the thoughtful, respectful observer of the Court's work may, nonetheless, at times find it difficult to discern precisely what

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1. W.S. Kirkpatrick & Co. v. Environmental Tectonics, Corp., Int'l, 110 S. Ct. 701 (1990).
2. Marbury v. Madison 5 U.S. (1 Cranch) 137 (1803).
3. 272 U.S. 52 (1926).
4. INS v. Chadha, 462 U.S. 919 (1983).

legal standards are to be applied in separation of powers cases. To read, on the one hand, *INS v. Chadha*,[5] is to gain assurance, whether one agrees or disagrees with that decision, that the Court saw itself as applying substantive legal standards—the structural principal of bicameralism[6] and the specific language of the presentment clause.[7]

One senses something rather different in *Morrison v. Olson*.[8] It is not at all clear what principles of law the Court is applying, other than the fact that the Court is engaging in what Justice Kennedy, joined by the Chief Justice and Justice O'Connor called in a concurring opinion last term in *Public Citizen v. Department of Justice* (the ABA Standing Committee case),[9] "something of a balancing test."

Balancing is, of course, scarcely a stranger to constitutional adjudication, as seen most clearly in fourth amendment analysis, in certain aspects of first amendment analysis, and in procedural due process analysis, such as in *Mathews v. Eldridge*.[10] But its familiarity should not blind us to its inherently indeterminate nature, a characteristic that few would applaud as highly desirable in the law. After all, law by its nature should be knowable and thus determinate. Balancing may be what we do in our everyday lives, in our daily decisionmaking, and it may be what chancellors sitting in equity quite properly do in their work, but balancing is not a clear pathway to constitutional predictability.

What should the role of the courts be in this vital dimension of the way we are governed? To what extent does the basic structural principle of separation of powers have real teeth? Is separation of powers, as vigorously championed by the Court in *Chadha*,[11] *Bowsher v. Synar*,[12] and a generation before, in the *Steel Seizure* case,[13] a sound principle for invalidating a statute or a Presidential action, or should courts instead allow—in the tradition of restraint—nature to take its course, and let the chips fall where they may in the political process?

The proper role of the courts in separation of powers questions is a

5. *Id.*
6. U.S. CONST. art. 1, § 1.
7. *Id.* at § 7, cl. 2.
8. 487 U.S. 654 (1988).
9. Public Citizen v. United States Dept. of Justice, 109 S. Ct. 2558, 2581 (1989) (Kennedy, J., concurring).
10. 425 U.S. 319 (1976).
11. INS v. Chadha, 462 U.S. 919 (1983).
12. 478 U.S. 714 (1986).
13. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

matter to which our two distinguished panelists have devoted a goodly measure of their very considerable talents. We are honored to have with us two very distinguished academics: Professor Stephen Carter and Professor Kenneth Culp Davis.

STEPHEN CARTER*

One of the hazards of speaking as a member of the last panel of the day, as well as speaking at a time when I know that many of you are anticipating not this panel, but the next event, is that I know there will be those of you who feel yourselves growing fidgety and saying, "When are these people going to stop?" When I think of that, I am reminded of a comment by Pee Wee Reese, of whom some of you may have heard; some of you may have seen Pee Wee Reese play—for those of you who do not know who Pee Wee Reese is, he is a baseball player. He referred to baseball players who, rather than hang around the clubhouse after a game, rush off for a night's entertainment. He said, "If you are in a hurry to get out of the clubhouse, you are in a hurry to get out of baseball." So with that thought in mind, I will continue with remarks that are only somewhat shorter than what you have heard earlier today.

The subject of our panel, which General Starr so nicely introduced, is the role of the courts in the separation-of-powers disputes. I would like to begin by stating what I consider a bold and radical proposition. It is a proposition, I would argue, which is not reflected in the current separation-of-powers jurisprudence, and is often overlooked, even in the hallowed halls of the academy, where the correct views on the separation of powers are distilled. The proposition can be stated very simply: *The federal courts are a branch of the federal government.* That is the proposition. Now you will say, "Everybody knows that. That's not extraordinary. That's not revolutionary. What's the big deal?" What I hope to convince you of in these brief remarks, is that a good deal follows from the proposition that the federal courts are a branch of the federal government, and much of what follows has been ignored recently in the separation-of-powers jurisprudence. What I hope to make plausible in the next few minutes is that the courts play two very different types of roles depending on the sort of separation-of-powers dispute in which they may be involved.

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In one set of judicial identities, the federal courts are what Felix Frankfurter called "referees at prize fights."[14] Now, although Frankfurter is widely identified as the apostle of judicial restraint, this was a disparaging comment. He thought the federal courts should not be referees at prize fights. He said they are "functionaries of justice."[15] I think Frankfurter was, at least with respect to one sort of dispute, clearly wrong. The dispute I have in mind is the dispute that involves the other two branches of the federal government: the Congress and the President. With respect to a dispute between those branches, a court is and must be, only and completely, a referee. What I think is missing—and again, I will try to make it plausible in a moment—from our current conception of refereeing, is that the type of referee that we ought to have in disputes between the Congress and the President is not a restrained referee on the Frankfurtian model, but rather a boldly active referee.

That is one kind of separation of powers dispute. The other kind of separation of powers dispute is one in which the Court itself is a player, wherein the Court is not sitting there, working out the powers and the authority of the other branches, the Court is in conflict with the other branches—the Congress against the Supreme Court, the President against the Supreme Court. And this is where I try a little bit to turn our traditional understandings on their head, because it is my suggestion that this is the time for restraint. This is the time for deference. This is the time when the Court should be most careful of treading on the prerogatives of another branch.

Now that I have sketched an implausible thesis, let me try to make it plausible. Go back to my original statement: *The federal courts are a branch of the federal government.* What are the key words in that statement?—A branch, federal, and government. *A branch.* There are three branches in the federal government, not one. Three. Sometimes in the constitutional law classrooms and articles, and sometimes in judicial opinions, we tend to write or read as though the Court is the most important branch of the federal government, or at least *primus inter pares.* But this is not so. There are three political branches set up by the Constitution—articles I, II, and III—the last of which is the federal courts. I do not suggest that the federal courts are mentioned last because they are least important. But I do suggest that by mentioning them last, the foun-

14. *See* Johnson v. United States, 333 U.S. 46, 54 (1948) (Frankfurter, J., dissenting).
15. *Id.*

ders could not possibly have intended to place them first. Nevertheless, in our jurisprudence, we often act as though they are first, as though the Court is the only branch that matters. When people say it is the ultimate arbiter, they often talk as though the Court is the only arbiter of constitutional meaning.

This problem becomes particularly acute when the Court is, as I said earlier, in conflict with another branch. I give you the case of *Mississippi v. Johnson*.[16] I realize that is not widely studied in constitutional law class, but you remember *Mississippi v. Johnson*, right? Somebody came up and said, "Look! This is the federal court. The President is carrying out this law. Let's sue the President, not some lower-level functionary. Let's sue the President and see what happens. Why not?" And the Court said, "Well, you know, the President has the Army and all this other stuff. We don't really have very much, and this isn't our idea of a very exciting kind of lawsuit, especially at a time like this." This was in the Reconstruction era, as some of you know, when neither the Court nor the Presidency was, shall we say, at the zenith of its authority.

But that is all right, you might say, that was a separate era. Well, look at the lineal descendent. The lineal descendant of *Mississippi v. Johnson*, I suggest to you, is *Nixon v. Fitzgerald*,[17] which some of you may also remember, even though it is taught less and less, I understand, in constitutional law classes. In *Nixon v. Fitzgerald*, the Court said that the President is immune from civil damages for acts undertaken in an official capacity. I think both *Mississippi v. Johnson* and *Nixon v. Fitzgerald* recognize that, particularly when the Court is in direct conflict with another branch, it is important to tread cautiously. That is not to say that the other branch is always right, but that the court should be very careful not to tread on prerogatives of another branch of government.

Well, all right, a branch. A branch of what? The courts are a branch *of the federal government*. Well, what's so special about the word "federal?" What is so special about the word "federal" is that everyone knows where the federal government comes from: It comes from the Constitution, right? The Constitution is the source of federal authority, and by its terms, the Constitution is the source of *all* federal authority. There isn't a lot of stuff lying around that the federal government is just supposed to be doing. It is supposed to look to the Constitution for its

16. 71 U.S. 475 (1867).

17. 457 U.S. 731 (1982).

justification. I realize that is not a very popular way of looking at the powers of the federal government today. But think for a minute. Think about virtually every argument that is offered on behalf of the power of judicial review, even arguments offered by the most extreme, sophisticated, and powerful proponents of various forms of what we like to call "extra-textual review" with regard to say, the fourteenth or fifth amendments. Virtually every argument that is offered for judicial review is either from history, from structure, or from text, or from some combination of the three. That is how the judicial power is justified: by reference to history, structure or text.

My suggestion is that courts that believe, as I assume the federal courts believe—certainly the Supreme Court must believe—that the source of its authority is the history, structure, and text of the Constitution, would be well advised on occasion to say to another branch of the federal government, "Guess what? The source of *your* authority is also the history and structure and text of the Constitution. And just as we are limited to doing what this history, structure, and text allow us to do, you are limited to doing what this history, structure, and text allow you to do. That is your source of authority, and you ought to stick to it."

Now, on this point: There was some discussion yesterday about whether the future of separation-of-powers law is captured in a case like *Mistretta*[18] or in a case like *Bowsher*.[19] This was a hotly debated matter on one of the panels. Well, I am a constitutional scholar, and I look at these matters a little differently than I think some in the audience and on the other panels do. What is nice about this conference is that we have a mixture of scholars and people who are professionally involved in the issues because they have to make daily decisions in the federal government, and also practicing lawyers whose clients occasionally care about the way their cases come out. As a scholar, I have the luxury of not caring how the cases come out. I certainly am not affected by how the cases come out. I care about the reasoning of the cases.

My view is that to decide where the future of adjudication under separation of powers lies, you should look not to the results in cases like *Mistretta* or *Bowsher*, but to the methodology. If you look at the two most recent important separation-of-powers cases decided by the Supreme Court, *Morrison* and *Mistretta*, what they have in common is a

18. United States v. Mistretta, 488 U.S. 361 (1989).

19. Bowsher v. Synar, 478 U.S. 714 (1986).

very interesting methodology. It is not a methodology about history; it is not a methodology about text; it is not a methodology about structure. It is a methodology about deference. It is a methodology of deference to the political judgments and policy preferences of the Congress, occasionally working in tandem with the equally political President.

Let me emphasize that the kind of deference I am talking about in these cases is not the same animal as the presumption of constitutionality to which we agree that every statute is entitled. This is not a presumption of constitutionality; this is what I call the presumption of "good idea-ness." What I mean by this is that when you boil *Mistretta* and *Morrison* down to the language that actually effectuates something, the Court seems to be saying that Congress thinks this is a good idea. The Congress thinks it is a good idea to insulate the Independent Counsel from executive control. The Congress thinks it is a good idea to establish the sentencing commission in a particular manner. Who are we to say otherwise? And the answer that those who understand that federal authority flows from the Constitution would like to see the Justices give to that question is: "We are the Supreme Court of the United States, that is who we are. And we are entitled to say whether it is a good idea, but subject to the particular strictures of our role. We can tell you only whether it is a constitutionally good idea or not. Not only *can* tell you, but *must* tell you whether it is a constitutionally good idea."

The problem with the opinions in *Morrison* and *Mistretta* is that they are not really opinions about what the Constitution requires. They are opinions about all the reasons that the Congress thought that the various programs it set up were good ideas. Well, maybe they are good ideas. But that's not what the Supreme Court is there to tell us. The Congress and the President already decided that. The Court has a different function.

Morrison and *Mistretta* and this policy of deference make me uneasy about the future of separation of powers. I do not think *Morrison* and *Mistretta* are legal descendants of *United States v. Nixon*,[20] as Judge Silberman suggested. Unlike what Judge Silberman implied in his remarks, I think that *United States v. Nixon* is a pretty good opinion. *Morrison* and *Mistretta* are descendants of another case that is rarely taught in constitutional law class—*Goldwater v. Carter*.[21]

20. 418 U.S. 683 (1974).

21. 444 U.S. 996 (1979) (mem.).

In *Goldwater v. Carter*, you might remember, the Supreme Court was asked to decide whether the President could unilaterally terminate the Mutual Assistance Pact between the United States and what we then referred to as the Republic of China. Well, a plurality opinion authored by Justice Rehnquist said, "This is not any of our business. This is a foreign affairs issue, and wherever the power is lodged, it is either in the Congress or President or both. We have nothing to do with it." This was styled as a political question opinion, and maybe it was, but it is really an opinion about deference. What it really says is, "The other branches can work this out; we want nothing to do with it." My suggestion to you is that an opinion like that, like an opinion such as *Morrison* or *Mistretta*, is an abandonment of the Court's responsibility to tell the other branches that its authority flows from the Constitution of the United States, and that it is the Constitution of the United States that it must not violate.

Notice that I have said nothing about whether any of these cases are right or wrong; for a scholar, that is not the issue. The question is: "Are they applying the correct methodology or not?" I cannot tell you what result the Justices would have reached in each of these cases had they applied the correct methodology. I can only tell you the methodology that they applied is one that I consider not a very good one.

I would like to say a word briefly about the last part of my description of the courts—a branch of the federal *government*. The courts often act, and scholars often write, as though in separation of powers disputes the courts are not governing anybody, as though nobody is affected by their decisions. But as General Starr said in his opening remarks, real people are affected by separation of powers disputes. Chadha either does or does not get to stay in the country.[22] Someone either is or is not investigated by an independent counsel. People either are or are not sentenced to prison under guidelines promulgated by an agency of questionable constitutional authority. The courts' separation of powers decisions affect the rights and privileges of people who are often not parties to the case. The way in which the courts can most clearly and cleanly protect and respect the rights of those other individuals is by doing what I've suggested from the outset, by reminding the other branches that there is a Constitution in place which has a separation of powers that is designed

22. *See* INS v. Chadha, 462 U.S. 919 (1983).

in part to protect individual rights, and what we want you to do is stick to it.

Now, I have one last, rather small point. I have not said very much about what it means for the courts to indulge in the methodology that involves history, text, and structure. I have written a lot about that, so I will not go into it now, except for one small point that has been sticking in my craw a little bit. My dear friend and colleague, Professor Elliott, spoke yesterday about how he thought that *Morrison* was a pretty good opinion, an opinion that showed courts struggling in a realistic way with some hard policy questions. My view is that those hard policy questions are not the questions with which the Court should be struggling. It is very difficult to reconcile *Morrison*, or for that matter *Mistretta*, with any idea of judicial review, because whatever the Supreme Court was doing in those cases, it was not engaging in constitutional review.

In the article about separation of powers, which Professor Elliott mentioned, he was kind enough to mention something I did not notice. The problem is that if I thought judicial review was not legitimate, if the courts got into all this text, structure, and history business, was it the wrong kind of judicial review that I was legitimating? What I would say in response is simply that what is involved in the kind of constitutional review about which he talks, and which *Morrison* and *Mistretta* address, is not judicial review at all. It is simply a continuing conversation about policy in which a court says either, "These policy reasons are good or these policy reasons are bad. And that is really all that we are, or want to be, involved in doing."

Now, I am not one who holds the founders to be perfect or venerates them. The founders believed in chattel slavery. The founders designed a Constitution in which the Vice-President presides at his own impeachment trial. (If you don't believe that, just look at the language and work it out and you'll see that that's true.) The founders designed a Constitution that didn't provide for military exigencies such as the Air Force. (It does refer expressly to "land and naval forces" and says nothing about forces that fly in the air.)[23] So it is not a perfect document.

Nevertheless, the Constitution is a document that is undergirded by a rich and bold political science. And my very strong view is that the courts, and those who study separation of powers questions, could do a

23. For this reason, when the Air Force was a separate branch of the armed forces following World War II, an enabling constitutional amendment was introduced (but not acted on).

lot worse than immersing themselves in this political science—not simply reading the pages of Madison's notes, which were not available to the ratifiers anyway and, therefore, cannot possibly have much continuing significance, but looking at the political science of their generation, studying what their constitutional design was all about. And the courts could do a lot worse—it would be a very good thing if they did do it—than telling the other branches that there was a wonderful, rich, and exciting political science behind this constitutional document, and it is that political science to which we are going to bind you until the time that the American people, through the amendment process, say otherwise.

KENNETH CULP DAVIS*

Professor Carter has ably presented his view that the *Morrison* and *Mistretta* cases "amount to an abandonment of the Court's duty." Although I think the *Morrison* and *Mistretta* cases will and should become the long-term law—indeed, that they have already become the long-term law—I shall not debate those cases with Professor Carter, because my detailed treatment of those cases is in chapter two of the 1989 Supplement to my *Administrative Law Treatise*[24] which concludes that the Court was off balance in *Bowsher*, but recovered its balance in *Morrison* and *Mistretta*.

My present focus will be on the statement of the Federalist Society in its circular announcing this conference, that "it is emphatically the province and duty of the judiciary to say what the law is, and not what it should be."

The Society broadmindedly encourages the expression of all points of view, and it has graciously invited me to participate today. A main reason I accepted the invitation is to try to persuade the Society that in absence of constitutional or statutory provisions to the contrary, *it is emphatically the province and duty of the judiciary to say both what the law is, and what it should be.*

My position is entirely conservative; it is in full agreement with judicial practice that has long been uniform and deeply established. Anglo-American courts for centuries have been creating new law to answer new questions, re-examining and sometimes changing initial answers in light

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24. K. DAVIS, ADMINISTRATIVE LAW OF THE EIGHTIES, §§ 2:2-6 to 2:2-8 (1989).

of later and better understanding, responding to new legislative facts that affect the lawmaking, and reconsidering and sometimes changing established law in the light of later or better understanding.

On each of these four facets I agree with the courts, not with what seems to me to be the Society's radical assertion that the judiciary should not say what the law should be. If the courts had followed that radical assertion from the time the common law began, the courts could never have created the common law, because *every item of today's common law has been created by courts on the basis of ideas about what the law should be.*

The common law, in its entirety, is composed of judicial decisions on questions of what the law *should be.* No common law proposition has ever existed or ever can exist unless a court has created it. Every common law proposition is based on a court's ideas about what the law *should be.*

After spending half a century studying administrative law, I believe that many of the most valuable portions of administrative law are wholly the product of judicial creativity. Nearly all of today's administrative law has been created during the past half century. If the Federalist Society's opposition to judicial creativity had prevailed, the most valuable portions of today's administrative law could not have come into existence.

Of the 104 Supreme Court Justices since 1789, 104 have fully participated in saying what the law "should be." Not a single Justice has asserted the Federalist Society's radical idea that judges should not say what the law should be. Among the 104, the two outstanding legal philosophers might be Holmes and Cardozo. Justice Holmes specifically acknowledged that "judges do and must legislate."[25] Justice Cardozo declared, "When a rule . . . has been found to be inconsistent with the sense of justice or with social welfare, there should be less hesitation in frank avowal and full abandonment."[26] Cardozo even asserted that "the judicial process in its highest reaches is not discovery but creation . . . ."[27]

When previous law is nonexistent, conflicting, or of doubtful soundness, what do courts do and what should they do? The judicial answer is:

25. Southern Pacific Co. v. Jensen, 244 U.S. 205, 221 (1917).

26. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 150 (1921).

27. *Id.* at 166.

The courts do and should examine reasons, pro and con, and decide what the law should be. The prevailing judicial practice of American courts is precisely the opposite of the Federalist Society's assertion that the judiciary should not say what the law should be. The courts say what the law should be, and the collection of their statements about what the law should be is what we call the common law. The common law is composed of judges' decisions about what the law should be, and it is composed of nothing else.

The Federalist Society's assertion that the judiciary should not say what the law should be is radical, not conservative, because it is specifically the opposite of the practice of Anglo-American courts for many centuries. This practice entailed answering questions of law and thereby creating the Anglo-American common law, the whole of which is made up of judicial decisions declaring what the law should be. The conservative position is the one the Anglo-American courts have consistently followed for centuries. Its five facets include: (1) creating common law to answer new questions; (2) re-examining early answers in light of later or better understanding; (3) making full use of new ideas and newly developed legislative facts; (4) rejecting faulty or obsolete understanding even when it has previously prevailed; and (5) constantly re-examining established law in light of later or better understanding.

My assertion is the opposite of that of the Federalist Society. My assertion is that it is emphatically the province and duty of the judiciary to say what the law should be in order to keep it abreast of developing needs of the society and new or better understanding.

The Federalist Society fails to say how a court should answer a question that is governed neither by statute nor by precedent. Courts do answer new questions by deciding what the law "should be," but the Society says "emphatically" that they should not. The Society's position is wholly negative; it fails to reach the question of what the courts "should" do about a question not answered by statute or by precedent.

The judiciary's affirmative obligation to create new law is a main obligation, not an incidental one. Judges must create new law to answer new questions, to correct prior law that was based on misunderstanding or on insufficient understanding, to take account of legislative facts that are newly discovered or previously overlooked, and especially to develop better ideas about what the law *should be.*

American courts are apparently unanimous in their view that when a court is unguided by either a statute or a precedent, a court should de-

cide what the law should be. The Federalist Society's position is indeed queer: It rejects the courts' consistent practice, but it proposes nothing affirmative to take the place of what it rejects. It says what courts should not do, but it fails to say what courts should do.

The Society has no answer to the vital question of what a court should do about a question that has not been resolved by statute or by precedent. Common sense requires, in my opinion, that in absence of a statute or a precedent, a court should base its decision on what it thinks the law should be. That is what courts do, and that is what I think courts should do.

Never has any item of common law come into existence except through a judicial determination of what the law *should be*. The common law has not been found or discovered; it has been created by judges in the process of deciding what the law *should be*. Every item of Anglo-American common law is a determination of what the law *should be*. All of the common law answers questions of what the law *should be*. Not only have the courts created the common law, but they are still at work in creating and recreating it, and their creation of it is and always has been based on what the judges have believed the law *should be*.

Although American courts have consistently rejected the idea that courts should not say what the law "should be," the British House of Lords, for several decades ending in 1966, sometimes denied itself power to overrule. Because of the impact on the development of English administrative law, I spent much of 1960 interviewing law lords, barristers, solicitors, and professors, and I then wrote a full-scale argument in favor of restoring the power to overrule.[28] One firm conclusion was that "the essence of judicial law making is and should be the development of opinions about policy."[29] Another conclusion was: "The human mind is incapable of deciding difficult questions in concrete cases and at the same time shutting out all concern for the policy problems involved."[30] The main conclusion emphasized the necessity for policy thinking by judges:

> Most of the judge-made public law that will govern England during the century from 1961 to 2061 is yet to be created. Some of the judges who will do the creative thinking are as yet unborn. Many of the facts they will use—social and economic facts—are yet to come into existence. The social

28. Davis, *The Future of Judge-Made Law in England*, 61 COLUM. L. REV. 201 (1961).

29. *Id.*

30. *Id.* at 212.

science that will guide them is largely to be developed in the future. . . .[31]

With everything else in process of further development, how can judge-made law remain the same?

My main position in that article was that the English courts were limiting themselves to the tasks of bricklayers and failing to play the role of architects. The fundamental point was that application of logic to precedents cannot serve the needs of the society and that judges must address policy questions; that is, judges must decide what the law should be. Parliament had the capacity to determine broad policies, but not the detailed policies that could best be worked out by courts and administrators.

American courts obviously had built a more satisfactory body of case law than English courts to govern judicial review of administrative action. The reason was not a greater capacity of American judges, nor was it more effective control by Congress than by Parliament. My search for the reason produced this conclusion:

> English judges have imposed shackles upon themselves that prevent them from using their own resourcefulness in frankly and avowedly creating a body of law of judicial review that would include consideration of what is good as a matter of social engineering. English judges purport to limit themselves to precedents and logic; they purport to have no concern for the policies on which law necessarily rests.[32]

A sample of the view that was prevailing in England was a statement by an outstanding judge, Lord Justice Scrutton: "This Court sits to administer the law; not to make new law if there are cases not provided for."[33] Lord Justice Devlin later said that "judges are . . . bound to say that it is for Parliament and not for them to make new law."[34] The British Committee on Ministers' Powers asserted in its 1932 Report:

> Bias from strong and sincere conviction as to public policy may operate as a more serious disqualification than pecuniary interest. The judge ought to be free to decide on purely judicial grounds and should not be directly or indirectly influenced by, or exposed to the influences of . . . opinions about policy or any other considerations not relevant to the issue.[35]

That statement by the British Committee is in essence the same as the Federalist Society's view that courts should not say what the law should

31. *Id.* at 213.
32. *Id.* at 210.
33. Harnett v. Fisher, (1927) 1 K.B. 402, 424.
34. 9 Current Legal Problems 1, 12 (1956).
35. REPORT OF THE BRITISH COMM. ON MINISTERS' POWERS 78 (1932).

be. Both the Federalist Society and the British Committee may take comfort in sharing each other's views. But what is most significant about the British Committee's statement is that the courts have decisively rejected it, and it is not now law.

At a 1962 meeting of British and American judges in London, the Columbia Law Review article criticizing British courts for refusing to emphasize policy considerations was a main subject of discussion; and Judge Walter Schaefer of the Illinois Supreme Court told me on returning from the meeting that he was sure the British judges had been persuaded. An opinion in the House of Lords shortly thereafter said, "My Lords, we are not bound to follow a case merely because it is indistinguishable upon the facts."[36] The House of Lords thus restored its power to overrule. After experimenting with a system in which courts lacked power to say what the law should be, the House of Lords decided that the courts do have a responsibility for performing the functions of architects of the law and cannot properly be limited to the tasks of bricklayers.

Even though the legal structure can be patched up and repaired by bricklayers without architects, one may be sure near the end of the twentieth century that the judicial molders of Anglo-American law during the twenty-first century will and should fully devote themselves to the problems of the architecture of the legal structure. Despite the Federalist Society's earnest, conscientious, and emphatic assertion that the judiciary should not say what the law should be, I am fully convinced that American courts will and should continue their long-term practice of saying what the law should be.

DISCUSSION

STARR: We just heard a rather vigorous defense of what Professor Carter has called the evolutionary approach to separation of powers questions—profiting from experience and asking the question, "Does it work?" Professor Davis used the word "pragmatic." And Professor Carter, before we move into the question-and-answer discussion from the floor, may want to say a word or two.

CARTER: Just a couple of things. Actually, I think Professor Davis and I disagree considerably less than he may think. Indeed, much that is

36. Chancery Lane Safe Deposit and Offices Co. Ltd. (1966) A.C. 85, 128.

in his talk I find completely unexceptionable. I would not take exception at all, for example, to the claim that courts have always been in the business of making law, and can hardly avoid it. I would not even take issue with his claim that we have no strict separation of powers. And indeed in my work, I have never argued that the Court should enforce the separation of powers; I have argued that the Court should enforce the original design of government, whatever that design may be, in the Court's judgment.

I would even agree that the Federalist Society has run afoul of the clear statement doctrine, and in fact has violated it most egregiously, in suggesting that there is such an animal (at least without further explanation) as saying what the law "is."

I willingly concede that both common law courts and constitutional courts say what the law "should be." After all, every case makes new law, that is certainly true. I think that our only dispute is over what the factors are that the courts should take into account in deciding what the law should be, or what the law is, whichever you prefer. (I think that these things are a matter of taste.) I suppose a common law court would say, "We think it is a good idea." I do not think a court involved in the adjudication of cases about the structure of government can feel free to do that, because to do that is to say, in effect, that the Constitution's structure is actually a bunch of suggestions, that the founders were saying, "Well, this is one neat way of doing this. You might have some other ways which you think are as good—and that's certainly fine, too. It doesn't really matter which way it is done, just so long as it all gets done."

I can tell you what the structural constitutional law, the law that involves the relationships among the branches of the government "should be." The law should be determinate; the law should be predictable; and the law should be firmly rooted in the text, structure, and history of the document itself.

One last tiny point with which I would like to take issue. Professor Davis suggests that nobody really wants to change the way that the courts analyze these questions. It is true that outside of Washington, D.C., and a few academic conferences, separation of powers does not have a lot of drawing power. Most people, even most practicing lawyers, do not care about separation of powers very much, unless it so happens that they have been investigated or perhaps prosecuted by an individual who is beholden to no one, and appointed by persons, unknown and, if

convicted, sentenced to prison under guidelines promulgated by a commission beholden to no one, and with powers of uncertain constitutional origin.

QUESTIONS AND ANSWERS

WM. BRADFORD REYNOLDS:* I will be as brief as I can. I would like to direct a short question to each of the panelists. Professor Carter, first of all, I happen to agree with a great deal of what you said. I am not sure that I fully understand the distinction between the two roles that you assigned the court: first, when the judicial branch is an adversary, or involved in the case, as opposed to, second, when it is in dispute with the two other branches. My question in that regard is, when the court is asked to act as a referee in a prize fight, which is the way you characterized it, you indicated that you had some sense that there is a reason for it to be more active, and perhaps less restrained; does that suggest that it should adopt a different methodology than the less activist one you assigned to it in its other role, that it should move away from a grounding in the "text, structure and history" in arriving at whatever decision it makes?

CARTER: Well, it is true that I did not say very much in my remarks about the role of courts when they are themselves involved in disputes, in the sense of being at odds with one of the other branches of government. While I suppose I would not say that should be different, I think I would say that the courts should carry out the disputes, should resolve the disputes with a greater sense of the institutional limitations. That might be built into the Constitution precisely to make it difficult for the courts to issue orders of a particular type.

REYNOLDS: Now for Professor Davis, whom I must say, I happen to disagree with more than I have agreement. I personally am not at all uncomfortable with the idea that the courts should be attentive to what the law is, and not to be about the business of discerning what the law should be. First, with reference to your statement that the courts have an affirmative responsibility to make a major decision in those circumstances in which a decision has not otherwise been made before (I guess that is the easiest way to include all those kinds of situations you men-

* Ross & Hardies, Washington, D.C.

tioned); my question is where does that "affirmative responsibility" come from? I daresay that if we were to engage in the exercise, I could find as many Justices on the Supreme Court who had said that they believed that the role of the Court is to determine what the law *is*, as Justices you could find on the Court who said that their role is to determine what the law *should be*. My guess is that we would probably come up with many of the same names for both propositions, and it would just be a question of the number of times each of those positions had been stated.

I would like to know where the "affirmative responsibility" comes from, since we do not submit the matter to a vote in the House of Lords, and it is somewhat less than authoritative to look to how many times a Justice or Justices of the Supreme Court has mouthed a particular phrase of what the law is or should be.

DAVIS: The question is: Where does the Supreme Court's power to overrule come from? The answer seems obvious. The Court has the power under article III of the Constitution, which confers judicial power. The judicial power includes creating new law, changing old law, overruling old law, and deciding new questions. I see no room for difference of opinion; for the Court has always unanimously held that it has power to overrule. I think it was Justice Jackson who wrote an elaborate opinion about the Court's overruling. The occasion was to justify his own action in overruling.

Probably if we were to look at the action of all of the 104 Justices we have had, we would find that all or nearly all have participated in overruling, and none has denied that the power exists.

QUESTION: Professor Carter, in your system of jurisprudence, which requires the courts to explain to the legislative and executive branches their roles in the scheme of government, what role, if any, does the deferential political question doctrine play?

CARTER: I am a big believer in the political question doctrine, but not in the sense of *Goldwater v. Carter*.[37]

My view is that there are two very important roles for the political question doctrine to play in structural cases. One of them, for lack of a better way to describe it, is that the Court can't find an answer to the question. The Court has been to the sources and is in equipoise. I think it is perfectly appropriate in a case like that to use the political question

37. 444 U.S. 996 (1959).

doctrine—and here I agree with Lou Henkin,[38] because I do not know if it is right to call it a political question doctrine or not—in the cases involving powers that are clearly committed to other branches, powers with which the federal courts should not interfere. One example is the pardon power. A stronger example is the President's veto. For example, if the President was accused of vetoing a statute on an otherwise impermissible ground—racial discrimination, for instance—then even though I have very strong views about racial discrimination generally, I would say this is not a subject for judicial inquiry. Or if a claim was made that someone had been impeached and removed from office for illegitimate reasons, I would say this is not a subject for judicial inquiry. And the reason that the Court knows that the political question doctrine comes into play is from a study of the text, structure, and history of the Constitution.

QUESTION: Professor Carter, would you then say that the Congress exceeded its constitutional limitations in Powell v. McCormack*?*[39]

CARTER: Well, as I said, I'm not in the business of right or wrong, I'm in the business of looking at the reasoning. I just look at the results. The Court, mining the history, announced that as a matter of original understanding, there were certain very clear regulations on a refusal to seat as opposed to expulsion. That may be a right or a wrong historical conclusion. I have not done that work. But it is the correct methodology.

QUESTION: Professor Davis, under your approach to judicial decisionmaking and absent prior authority, what guidelines should a judge use in order to decide a case—other than what seems to be a good idea, and what the judge likes or thinks—and what check is there on judicial power?

DAVIS: You ask what a court does when it has no previous law on a subject. I like your question, because it gives me a chance to emphasize that courts often have to be creative.

When the Supreme Court has no previous law on a question it must answer, it has to make law, and it often does. Observers do not disagree that the Court must answer questions properly presented, whether or not previous law guides it. The Court does essentially what anyone else

38. *See* Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976).

39. 395 U.S. 486 (1969).

would do in trying to answer a new question. It considers arguments pro and con, adds its own ideas, and makes a decision.

The Justices and their law clerks do not always limit themselves to the record, the briefs, and the arguments; they study whatever materials are available, including extra-record legislative facts and ideas. To some extent, the Justices guess about extra-record facts that bear on policy issues. In some cases, the Supreme Court even invents entirely new ideas. In other cases, the Court departs from prior law. The Court has expressly overruled more than a hundred cases, and probably it has implicitly departed from as many as a thousand cases; counting them is difficult or impossible because many are borderline.

Many questions of law that appellate courts decide are not questions of fairness but are questions of policy, such as whether a decision one way will serve better than a decision another way. The court's inquiry may be into troublesome areas of economics, political science, history, philosophy—or vast mixtures.

Although our theory is that our legislative bodies are the makers of governmental policy, the reality is that courts make much of our governmental and legal policy. Five-to-four decisions are seldom centered on questions of sheer interpretation; they are usually questions involving fundamental choices about policy.

Probably the best answer to your question is simply this: I suggest you read Cardozo's *Nature of the Judicial Process*.[40] He tells the truth about courts' policymaking. He strongly supports his assertion that the judicial process "in its highest reaches is not discovery, but creation."[41] His view is the sophisticated one. The idea that judges do nothing more than apply previously existing law is usually false and sometimes ridiculous.

Cardozo's answer is precisely the opposite of the Federalist Society's statement that judges should not say what the law should be. I fully agree with Cardozo that appellate judges properly say what the law should be on questions having no previous authoritative answer. My view is specifically the opposite of the Federalist Society's statement that courts should not say what the law "should be."

QUESTION: When the courts address a case not wholly new, would you agree that the text, structure, and history of the Constitution alone are

40. CARDOZO, *supra* note 26.

41. CARDOZO, *supra* note 26, at 166.

determinative, and that the courts are duty-bound to follow that, or do we evolve?

DAVIS: The text, structure, and history are usually determinative, but not always. In cases in which they are not determinative, the Court still has the problem to decide. The Court normally does decide the question if it is one that is appropriate for a decision. Even though there is no precedent, no previous law on the subject, the Court creates law to take care of the problem; that is what it has done throughout its history.

QUESTION: Professor Stith, addressing what she described as the problem of the unstoppable force bumping into the immoveable object, argued that the President's corrective response by the veto is not a realistic device to invalidate an unconstitutional statute. But we can at least be sure that the President has standing to challenge the statute. Professor Miller replied, "Wait a minute, wait a minute, only as a last resort!" I am curious to hear either of the current panelists' views on that exchange.

STARR: The question concerns whether the President should repair to Court if, in the President's view, the exercise of his veto power with respect to a piece of legislation is impracticable; and what should the courts' attitude be to that.

DAVIS: I do not know what the President should do; I would need to know why he cannot veto, and what is involved.

CARTER: I will risk the wrath of the group by speculating in the following fashion. I have the very strong view that judicial review involves a dialogue. You're probably all familiar with Bickel's metaphor of an "endlessly renewed educational conversation" between the Court on the one hand and its constituents on the other.[42] One of the things that Bickel reminds us of in *The Morality of Consent* is that it is not a monologue, but a conversation. The point is that the President has many ways to respond to the Congress and many ways to respond to a court. I don't think the President's options are just to veto or to go to court. One of the things that I think has been overlooked in this entire conference, until Professor Davis quite correctly reminded us, is that we do not just have a separation of powers, we have a system of checks and balances. Lawyers have a tendency to get too legalistic and to think the only question about

42. A. BICKEL, THE MORALITY OF CONSENT 111 (1975).

an appropriations rider is, "Is this constitutional or not? Must the President obey?"

But there are other questions. There are other things the President can do. Presidents have a lot of power. A President can say, "Fine. If you insist on passing these appropriations riders, I insist on vetoing this next pork barrel bill that I don't like—that I would otherwise sign because I want a good relationship with Congress." And Congress can say, "Fine! If you do that, we will not confirm your next judicial nominee." The President can say, "Fine!" It can go on and on like this.

It is important to try to stay away from a very bipolar model wherein the President and Congress are tugging on a single cord, and that is all there is to the very rich and wonderful interplay of forces in the Constitution. There is much more. There are many more options available to President and Congress than just to go to court and fight over the constitutionality of this one little action.

QUESTION: Professor Carter, you said that the Court should be especially restrained when the conflict that it is sure to resolve involves its own power. I was wondering if that should be the case in a situation in which Congress has aggrandized the power of the Court, as in Morrison *or* Mistretta*, at the expense of the executive branch? The Court, then, has to decide whether this aggrandizement that is being thrust upon it by Congress is legitimate. Is the Court restraining its own power by invalidating a law that is a basic concern of a congressman's constituency?*

CARTER: I didn't exactly mean "restrained." I meant "cautious." A court should be cautious about trampling down another branch, where another branch is asserting, "I can do this and you can't stop me. You can't do anything about it; you, the Court, cannot control this action." It is there that the Court must be very cautious. Unlike Justice Jackson, I think that the power of a branch of government is at its zenith not when it possesses all of its constitutional authority plus all the statutory authority the Congress wants to give it, but when the branch asserts its authority most strongly.

We live in a political world. And the more strongly a branch is willing to say, "This is my position; I will not retreat," the more power that branch gathers to itself. So my view on these matters is that it is at the moment when a branch is making a stand, and putting all of its prestige into it, that the Court must be most cautious. This is not to say the other branch has to win. But the Court should think very carefully about what

are the institutional intricacies of the Constitution that have caused the other branch at this time to gather this power, to assert this power, to claim this absolute immunity.

Maybe, as in *United States v. Nixon*,[43] the Court will say, "Tough! We think you're wrong!" But the Court should think long and hard before rejecting such a strong claim by another branch of government.

STARR: Professor Carter, because you were citing examples of when the Supreme Court should stay out of other branches' business, I was wondering if you might want add to those examples. I refer to the case of *Rostker v. Goldberg*[44] in 1981 in which the Supreme Court ruled that it was all right for Congress to exclude women from registering for the Army or for the Armed Services. That was the case in which Justice Rehnquist spent six to eight pages deferring to Congress and the President's power to make foreign policy decisions. And I was wondering what is your response?

CARTER: Well, I cannot briefly discuss my views about cases in which claims of fundamental right are asserted. In those cases I have a rather different, although not starkly different, jurisprudence than in structural cases. What I will say about *Rostker v. Goldberg* is that one of the reasons that the Court was able to get away so easily with deference is the procedural posture in which the case arose.

What you have to remember about *Rostker v. Goldberg* is that there was no claim that it was unconstitutional to forbid sending women into combat because that was not challenged. The Armed Forces said, "In the event of a mobilization, we will need this many combat troops and this many support troops." And it turned out that the draft was for the combat troops; they had all the support they needed. So what the Court said in *Rostker* was, "Well, there is no challenge to the policy of keeping women out of combat. If you have a draft, it will only be for combat troops which can only be men. Therefore, there is no reason for women to register." That was the gist of the Court's opinion. It was made very easy, as I said, by the fact that there was no challenge in the case to the underlying policy.

STARR: Returning to interbranch conflicts, I would be interested in the panelists' reactions, in light of the different approaches that we have

43. 418 U.S. 683 (1974).
44. 453 U.S. 57 (1981).

heard, to the Court wrestling with issues arising under the article III power and Congress' institution of various reforms such as the bankruptcy laws, and the vesting of non-article III authority with power the Court determines, and what some academics might view in a formalistic way, as being judicial power.

CARTER: Well, I should first say very clearly that even though two panelists warned about the tendency of academics to make up new words, to not speak a common language, I do not like the word "formalism." It carries very little information. I figure that all of law is basically formalism anyway, so that cannot be what critics of certain methodologies are really concerned about.

To the extent that in article III cases, the courts pay much closer attention to text, structure, and history than they do in other cases, we should not be very surprised because, as I mentioned at the outset of my remarks, even the most extra-textual judges and scholars always come back to a textual or structural or historical basis for judicial review itself. Justices of the Supreme Court are not foolish people. They are keenly aware of the fact that their authority hangs entirely, as a legal matter, by these structural and textual and historical arguments. I do not consider them formalistic; I just consider them correct. Consequently, it should be not unsurprising, and indeed a good thing, that the Justices, when their authority is most threatened, go back to the arguments about structure, text and history.

The one thing I will say that I find a little disappointing, is that when the courts are considering the constitutional status of administrative agencies, that have what look much like some article III powers, they very rarely talk much about structure, text, and history. I am not here asserting that administrative agencies with adjudicative powers are unconstitutional; I am just saying that it would be very nice if the courts that keep sustaining and approving them would occasionally tell us *why* they are constitutional.

QUESTION: Professor Carter, once again, your approach directs us to the reasoning and methodology that the Court sets out in its opinions. I think that would be unproblematic if the Court in fact adhered to your theory. But someone once accurately described modern Supreme Court opinions as press releases the Court issues to accompany its judgment. Given the character of the Court's opinions today, I wonder whether you can gain a

great deal by focusing on what the Court actually says and taking it seriously.

CARTER: Well, I happen to have a great deal of fun talking about methodology and reasoning, so it is certainly unproblematic for me. As to the rest, all I can say is that yes, of course, it is true that the courts do not follow my views. My views keep getting rejected by votes like 8 - 1, 7 - 2, and occasionally 9 - 0. So, I have no pretense that what I am writing is going to persuade the Court.

Philip Soper once wrote something along the lines that the volumes and volumes of judicial opinions that do not cite a single law review article testify to the utter irrelevance of constitutional theory. There is probably something to that, except for one thing: one of the privileges of being a law professor is that you get to teach your students, and even though they resist with all their might, occasionally you change a view or two. And, sometime in the future, the students may become judges, and may even, thinking back, say: "Well, didn't I study that in Professor Carter's seminar? No, it couldn't be, because it sounds too persuasive to have come from Professor Carter."

I think that if you take a long-run view, which I think that I, as a scholar, have a responsibility to do, I think you can imagine incremental changes over time. I recognize that does not give much guidance to policy-making, but as I said, I am not trying to resolve particular controversies. I am trying to correct what I see as errors in judicial opinions. To do what you suggest, would require a constant delving into all the history on each issue confronted by the Court, which is something I am not willing to do unless the subject really interests me.

QUESTION: That is an interesting answer, but it did not answer the question I was trying to ask. What I meant was that I think it is a lamentable fact that courts generally do not take your view—that reasoning and methodology are what is most important in opinions—as seriously as you and I would. And if courts do not take it seriously, how can we?

CARTER: Well, I think that's a little bit right and a little bit wrong. Walter Murphy wrote that judicial opinions are justifications for results. We cannot pretend for a moment that we can imagine a perfect judge who makes every decision without a scintilla of bias in any direction. That just would not happen.

I think, however, that by requiring reasoning of a particular kind, we

can bring a kind of discipline to the process through the requirement of justification. The harder the result is to justify, the more far-fetched the result will be; and in my view, the more likely the opinion is to be dumped in the trashcan of history at sometime in the future.

STARR: I am reminded of Justice Scalia's comments about *Humphrey's Executor*[45] and his dissent in *Mistretta* about how opinions find themselves eviscerated without a great deal of ado. One final question.

QUESTION: Professor Davis, we are taught in law school that the reason we have judges that serve for a lifetime is so they will not be affected by the politics of the day. If we want them to make laws or tell us what the laws should be, would you support making sure that we do not have the same few men and women telling us what the law should be, and instead have younger people vote Justices in or out every ten or fifteen years?

DAVIS: Well, I do not think so. I do not want the electorate to try to pass judgment on judicial performance. Judging is often quite sophisticated. I can imagine a few questions that would be appropriate for the electorate, but no more than a few. I certainly would not change the lifetime appointment of federal judges.

STARR: I think Professor Davis is happy with article III the way it is.

DAVIS: The way it is interpreted.

STARR: And the way it is interpreted. The last word from Professor Davis, whom we thank along with Professor Carter for their presentations and participations in the question and answer period which reflected on an important dimension of the separation of powers question.

45. Humphrey's Ex'r v. United States, 295 U.S. 602 (1934).