1978

Separation of Powers and the Scope of Federal Equitable Remedies

Robert F. Nagel
University of Colorado Law School

Separation of Powers and the Scope of Federal Equitable Remedies

Robert F. Nagel*

In recent years, both popular[1] and academic[2] attention has begun to focus on the innovative and expansive remedies that federal courts have utilized with increasing frequency, especially against state governments. These forms of relief raise the question whether the judiciary has begun to tolerate in itself a blending of functions that would never be tolerated in another branch of government.[3] Federal district courts largely have assumed the duties of administering a state mental health system[4] and a state prison.[5] Many feder-

* B.A. 1968, Swarthmore College; J.D. 1972, Yale Law School. Associate Professor of Law, University of Colorado. The preparation of this Article was supported in part by a fellowship from the University of Colorado Council on Research and Creative Work.

1. *E.g.*, NEWSWEEK, Jan. 10, 1977, at 42-47; N.Y. Times, Apr. 24, 1977, § 1, at 1, col. 2; *id.* Apr. 9, 1977, § 1, at 19, col. 3; *id.* Mar. 17, 1977, § 1, at 30, col. 4; *see* Miller, *Conflicting Signals*, THE NEW REPUBLIC, July 23, 1977, at 10.

2. *E.g.*, O. FISS, INJUNCTIONS (1972); Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109 (1969); Johnson, *The Constitution and the Federal District Judge*, 54 TEX. L. REV. 903 (1976); Robbins & Buser, *Punitive Conditions of Prison Confinement: An Analysis of* Pugh v. Locke *and Federal Court Supervision of State Penal Administration Under the Eighth Amendment*, 29 STAN. L. REV. 893 (1977); Roberts, *The Extent of Federal Judicial Equitable Power: Receivership of South Boston High School*, 12 NEW ENGLAND L. REV. 55 (1976); Taft, *Recent Developments in Social Welfare Law and the Doctrine of Separation of Powers*, 52 IND. L.J. 345 (1977); *Developments in the Law—Injunctions*, 78 HARV. L. REV. 994 (1965); Comment, *Enforcement of Judicial Financing Orders: Constitutional Rights in Search of a Remedy*, 59 GEO. L.J. 393 (1970); Note, *Receivership as a Remedy in Civil Rights Cases*, 24 RUTGERS L. REV. 115 (1969); Comment, *Equitable Remedies: An Analysis of Judicial Utilization of Neoreceiverships to Implement Large Scale Institutional Change*, 1976 WIS. L. REV. 1161; Note, *Monitors: A New Equitable Remedy?* 70 YALE L.J. 103 (1960); Note, *The* Wyatt *Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 YALE L.J. 1338 (1975).

3. *See* Johnson, *supra* note 2, at 904; Robbins & Buser, *supra* note 2, at 927; Note, *The* Wyatt *Case: Implementation of a Judicial Decree Ordering Institutional Change, supra* note 2, at 1379.

4. Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

5. Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd in relevant part sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971). Very recent cases demonstrate that such decrees were not isolated experiments. *E.g.*, Morgan v. Sproat, 432 F. Supp. 1130 (S.D. Miss. 1977); Rhem v. Malcolm, 432 F. Supp. 769 (S.D.N.Y. 1977).

al courts are intimately involved with operating public school systems,[6] and one court has placed a public high school directly under judicial control.[7] For some years, of course, courts have mandated state apportionment schemes.[8] One court has ordered the reorganization of an entire city government.[9] In short, courts have exercised traditionally executive functions by appointing executive and quasi-executive officers responsible to the judiciary and by determining administrative processes in elaborately detailed decrees; they have exercised legislative functions by setting policy standards for the operation of state and federal programs, including the setting of budgetary requirements.[10] As Professor Chayes bluntly stated:

> The decree seeks to adjust future behavior, not to compensate for past wrong. It is deliberately fashioned rather than logically deduced from the nature of the legal harm suffered. It provides for a complex, on-going regime of performance rather than a simple, one-shot, one-way transfer. Finally, it prolongs and deepens, rather than terminates, the court's involvement with the dispute.[11]

Not surprisingly, perhaps, in light of the judiciary's institutional needs and biases, the Supreme Court has held that the constitutional doctrine of separation of powers has no bearing on the problem of defining the limits of federal courts' equitable powers against state governments.[12] The more extreme implications of this position are unacceptable by nearly any standard.[13] As applied at the federal level, the fundamental assumption behind separation of powers is that because no branch of government can be trusted in its use of power, the power of each branch must be limited by some degree of

6. *See, e.g.*, Dayton Bd. of Educ. v. Brinkman, 97 S. Ct. 2766 (1977); cases cited in note 256 *infra*.

7. Morgan v. McDonough, 540 F.2d 527 (1st Cir. 1976), *cert. denied*, 429 U.S. 1042 (1977); *see* Roberts, *supra* note 2, at 55.

8. The trend started with Baker v. Carr, 369 U.S. 186 (1962), which held the constitutionality of state apportionment schemes to be a justiciable, nonpolitical question that need not rely on the clause guaranteeing a republican form of government. The one-person-one-vote standard was announced in Reynolds v. Sims, 377 U.S. 533 (1964). For more recent examples, see White v. Weiser, 412 U.S. 783 (1973); Minnesota State Senate v. Beens, 406 U.S. 187 (1972); Whitcomb v. Chavis, 403 U.S. 124 (1971).

9. Bolden v. City of Mobile, 423 F. Supp. 384 (S.D. Ala. 1976).

10. *See* Griffin v. County School Bd., 377 U.S. 218 (1964); Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973). *See generally* Hill, *supra* note 2; Comment, *Enforcement of Judicial Financing Orders: Constitutional Rights in Search of a Remedy*, *supra* note 2.

11. Chayes, *supra* note 2, at 1298.

12. Elrod v. Burns, 427 U.S. 347, 352 (1976); *see* text accompanying notes 26-36 *infra*.

13. This might account for the fact that even advocates of innovative forms of judicial relief often assume, despite the case law, *see* text accompanying notes 26-36 *infra*, that separation of powers is an applicable doctrine. *E.g.*, Chayes, *supra* note 2, at 1307; Johnson, *supra* note 2, at 904.

functional specialization.[14]

The federal judiciary is not immune from the need for limitations based on functional differentiation. James Madison observed that if the judicial power were joined with the legislative and executive powers, the judge "might behave with all the violence of *an oppressor*."[15] Subsequent history provides sobering examples of inadequate self-discipline by the judiciary in defining the limits of its own authority.

For example, the Supreme Court held in *In re Debs*[16] that the federal judiciary had the inherent power to punish union strikers for contempt when the strikers disobeyed an injunction issued to protect the free flow of commerce. Because the injunction did not enforce any specific statute, the Court in effect assumed for itself the authority to share Congress' plenary power to regulate interstate commerce.[17] Moreover, the efforts of the judiciary to enforce its own labor rulings involved the courts in the "essentially executive and military" power required to control civil unrest.[18] It is thus not too much to say that in *Debs* the judiciary assumed for itself that combination of all three essential governmental functions—legislative, executive and judicial—that Madison, the most pragmatic of the framers, had described as "the very definition of tyranny."[19]

The need for discipline in defining the authority of each branch does not evaporate when the federal government exercises power against state governments. It is not merely recent experience with malapportionment, segregation and inhumane prison conditions that demonstrates the extreme pressures that can exist for using the federal courts as substitutes for the other institutions of government. In the last century it became fairly obvious that under certain circumstances of fiscal mismanagement the constitutional protection against the impairment of contracts could be vindicated only by placing substantially all of the governmental functions of a bankrupt city into judicial receivership.[20] The Supreme Court rejected the conclusion that the Constitution permits, much less requires, the

14. THE FEDERALIST No. 51 (J. Madison). *See generally* M. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS (1967).

15. THE FEDERALIST No. 47, at 326 (J. Madison) (J. Cooke ed. 1961) (quoting Montesquieu).

16. 158 U.S. 564 (1895).

17. Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371, 382 (1976); *see* F. FRANKFURTER & N. GREENE, LABOR INJUNCTIONS 18-19 (1930).

18. 158 U.S. at 597 (quoting petitioner's brief).

19. THE FEDERALIST No. 47, at 324 (J. Madison) (J. Cooke ed. 1961).

20. *See* Meriwether v. Garrett, 102 U.S. 472 (1880).

right of self-government to be suspended in order to effect a particular constitutional guarantee,[21] and the conclusion should be equally rejected today. The substitution of government by the federal judiciary for local self-government involves dangerous disproportionality; it sacrifices fundamental democratic values in order to vindicate particular constitutional rights. Specific rights of specific plaintiffs are secured by autocratic mechanisms of broad impact.

Despite these dangers, neither courts nor commentators have attempted a thorough analysis of the implications of applying the principles of separation of powers to the federal judiciary's relationships with state governments. Even when assuming that separation of powers is an applicable doctrine, legal commentators have warned against attempting conceptual or doctrinal applications of the idea of separation of powers.[22]

The purpose of this Article is to suggest that separation of powers clearly does impose limitations on the authority of federal courts to undertake executive and legislative functions when ordering relief against state officials. Part I proposes that separation of powers restricts the power of any branch of the federal government when it operates against the states. Part II analyzes separation of powers theory and case law in light of the competing doctrine of checks and balances. This analysis identifies common, underlying principles by which the Court has reconciled these doctrines in defining the powers of each branch of the federal government. Part III applies the developed separation of powers principles to current judicial doctrines and practices, deriving principled limitations for the equitable powers of the federal courts over state institutions. This approach suggests that separation of powers not only is doctrinally relevant and useful, but is superior to recent Supreme Court attempts to justify restrictions on the equitable power of the lower courts.[23] The analysis provides an intellectual mechanism that could help correct for institutional bias by requiring the judiciary to define its own authority according to the same principles that limit the powers of the other branches.

I. SEPARATION OF POWERS AND FEDERALISM

Professor Gunther has described the principle of separation of

21. *Id.* at 520-21 (Field, Miller and Bradley, JJ., concurring in the judgment). *But see* note 265 *infra*.

22. *See* Chayes, *supra* note 2, at 1307; Frohnmayer, *The Separation of Powers: An Essay on the Vitality of a Constitutional Idea*, 52 ORE. L. REV. 211, 213-23 (1973).

23. *See* text accompanying notes 255-85 *infra*.

powers as a "horizontal" division of power among the three branches of the *national* government.[24] The "vertical" distribution of power between the national government and the states is thought to be encompassed sufficiently by the concept of "federalism."[25] The current position of the Supreme Court appears to be that this dichotomy is so neat as to liberate federal courts entirely from any formal constitutional constraints against assuming the functions of state executive or legislative departments.

A. *The Current View: Separation of Powers Does Not Apply to the Federal-State Relationships*

In *Elrod v. Burns*,[26] the Court dealt with the first amendment issue raised by the politically motivated firing of non-civil-service county employees. In holding that the patronage dismissal of employees in nonpolicymaking positions impermissibly burdens political affiliation, a plurality of the Court rejected the argument that the method of appointment and removal of executive officers was a matter for the executive branch: "The short answer to this argument is that the separation-of-powers principle, like the political-question doctrine, *has no applicability* to the federal judiciary's relationship to the States."[27]

This stark distinction between the horizontal and vertical application of separation of powers retains the content but not the modulation of decisions dating back to *Baker v. Carr*,[28] which approved judicial determination of the constitutionality of state apportionment schemes.[29] The *Baker* Court acknowledged that the principle of separation of powers imparts constitutional significance to the "political question" doctrine,[30] but suggested that this doctrine should be applied differently when "it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the 'political question.' "[31] Although the Court did

24. G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 400 (9th ed. 1975) (emphasis added).

25. *Id.*

26. 427 U.S. 347 (1976).

27. *Id.* at 352 (emphasis added). The plurality opinion was written by Justice Brennan, joined only by Justices Marshall and White.

28. 369 U.S. 186 (1962).

29. *Id.* at 229-37; *see* Neal, Baker v. Carr: *Politics in Search of Law*, in THE SUPREME COURT AND THE CONSTITUTION: ESSAYS IN CONSTITUTIONAL LAW FROM THE SUPREME COURT REVIEW (P. Kurland ed. 1965).

30. 369 U.S. at 210.

31. *Id.*

treat the "lack of judicially discoverable standards" as relevant to defining the courts' proper role with respect to the states,[32] the extreme conclusion in *Elrod* that separation of powers does not apply at all to the relationship between the federal judiciary and the states is presaged by the repeated emphasis in *Baker* on the irrelevance of "matters of state governmental organization."[33]

Similarly, when the defendant in *Mayor of Philadelphia v. Educational Equality League*[34] argued that elaborate judicial supervision of discretionary executive appointments would improperly involve the judiciary in executive functions, the Court replied that the case had "nothing to do with the tripartite arrangement of the Federal Constitution."[35] Again, however, the Court's rejection of a separation of powers argument was qualified by the admonition to the lower court to assign greater weight to similar considerations of democratic accountability and "delicate issues of federal-state relationships."[36]

Despite the opportunity that these cases and others[37] have provided for vertical application of separation of powers principles, the Court has refused to take that step; instead, it has adopted the position, typified by the conclusion in *Elrod*,[38] that separation of powers does not apply to the relationship between the federal courts and the states.

The distinction between vertical and horizontal separation of powers assumes that the power of judicial review inherently authorizes federal courts to do whatever is necessary to protect constitutional rights from infringement by less-than-coordinate branches of government.[39] The assumption has been that if a state legislature or executive does not cooperate to achieve the objectives of a federal judicial decree, the need to enforce the constitutional mandate must take precedence over concern for maintaining the separate definition of their functions.[40] For example, in *Wyatt v.*

32. *Id.* at 214, 217.

33. *Id.* at 218; *see id.* at 210, 223, 226.

34. 415 U.S. 605 (1974).

35. *Id.* at 615.

36. *Id. See also* Rizzo v. Goode, 423 U.S. 362 (1976); Carter v. Jury Comm'n, 396 U.S. 320, 341 (1970) (Black, J., dissenting); Lance v. Plummer, 384 U.S. 929 (1966) (Black, J., dissenting from denial of certiorari).

37. *See* notes 77-99 & 255-84 *infra* and accompanying texts.

38. 427 U.S. 347, 352 (1976); *see* text accompanying notes 26-27 *supra*.

39. *See* Baker v. Carr, 369 U.S. 186, 226 (1962).

40. *See, e.g.*, Robbins & Buser, *supra* note 2, at 929.

Stickney[41] the federal court ordered such pervasive changes in a state mental health program that the cooperation of the state executive and legislature was necessary for administering and funding the court's program. The possibility of noncooperation from these departments merely elicited from the court indications that it would then begin assuming those executive and legislative functions itself.[42]

The assumptions behind the Supreme Court's present position, then, are that separation of powers and federalism are unrelated concepts and that the vertical application of separation of powers would be inconsistent with the supremacy clause. Both of these assumptions are incorrect; they are dealt with in turn below.

B. *The Traditional View: Separation of Powers Applies to the Federal-State Relationship*

Separation of powers means that the powers delegated to each branch of the federal government are measured in part by contrast to the powers delegated to the other branches.[43] Article III of the Constitution vests the judiciary only with "the judicial Power,"[44] and separation of powers provides some of the principles that define the scope of the judicial power. Because the federal judiciary was never delegated any power other than the "judicial Power," the language of the 10th amendment strongly implies that the states are protected from the judicial exercise of legislative or executive powers.[45] To be

41. 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

42. 344 F. Supp. at 394.

43. In a case involving the legislative contempt power, the Supreme Court illustrated how the nature of one branch's function is used to mark the limit of another branch's function: "[T]he House of Representatives not only exceeded the limit of its own authority, but assumed a power which could only be properly exercised by another branch of the government, because it was in its nature clearly judicial." Kilbourn v. Thompson, 103 U.S. 168, 192 (1880). *See generally* cases cited in notes 161 & 162 *infra*.

44. "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1. The Supreme Court has stated, for example: "[Article III's restriction of judicial power to cases or controversies] expresses as well the Framers' desire to safeguard the independence of the judicial from the other branches by confining its activities to 'cases of a judiciary nature,' . . . and in this respect it remains fully applicable at least to courts invested with jurisdiction solely over matters of national import." Glidden Co. v. Zdanok, 370 U.S. 530, 581-82 (1962) (citations omitted).

45. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. This provision has been thought to be a protection from congressional exercise of power that exceeds the legislative function as defined by separation of powers. Marshall v.

sure, it is possible to argue from a literal interpretation of the 10th amendment that the states are protected only from the exercise of a power that has not been delegated to *any* branch of the national government. This literal reading, however, is inconsistent with considerable evidence that the 10th amendment was designed to protect the states by distributional, as well as substantive, limitations.

1. *The framers' intent.*

The history of the 10th amendment suggests that one of its specific purposes was to protect state institutions from federal violations of the principles of separation of powers. As the Supreme Court has indicated, the purpose of the 10th amendment was "to allay fears that the new national government might seek to exercise powers not granted."[46] One of those fears was expressed clearly at the Massachusetts ratifying convention: "We dissent because the powers vested in Congress by this constitution, must necessarily annihilate and absorb the legislative, executive, and judicial powers of the several States, and produce from their ruins one consolidated government, which from the nature of things will be an iron handed despotism . . . ."[47] Similar apprehensions were voiced at the Virginia and Maryland conventions.[48] It is not surprising that the states feared violations of separation of powers by Congress rather than by the judiciary. It was the potential scope of the legislative power that was most obvious at the time, due to recent experience with legislative "despotism" under the Articles of Confederation.[49] In contrast, the judiciary was assumed to be without "influence over either the sword or the purse," and was thought "to have neither Force nor Will, but merely judgment."[50]

Gordon, 243 U.S. 521, 536 (1917); Kilbourn v. Thompson, 103 U.S. 168, 182-95 (1880). The same result has been reached with respect to the executive power. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935).

46. United States v. Darby, 312 U.S. 100, 124 (1941).

47. 2 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 667 (1971).

48. In Virginia, George Mason warned that congressional authority over the national capital might lead to "unlimited authority, in every possible case." 3 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 431 (1876). He feared that the combination of functions delegated to Congress might interfere with the prosecutorial and judicial functions of the states. *Id.* at 431, 442. In Maryland, concern was expressed that Congress might use its powers to repeal state constitutions, many of which included separation of powers provisions. 2 B. SCHWARTZ, *supra* note 47, at 732. Similar apprehensions were voiced in South Carolina. *Id.* at 748-49. In North Carolina and other states, more general but nevertheless consistent fears were expressed about the possibility of a tyrannical or aristocratic government. *Id.* at 934 & *passim*.

49. *See* notes 126-31 *infra* and accompanying text.

50. THE FEDERALIST No. 78, at 523 (A. Hamilton) (J. Cooke ed. 1961).

Several states incorporated their concerns for separation of powers into proposed amendments to the new Constitution that literally prohibited violation of that principle by any branch of the national government.[51] The Virginia resolutions were the most important of these proposed amendments because Madison used them as a model when he first submitted the Bill of Rights to Congress.[52] The Virginians proposed *both* that "the legislative, executive, and judicial powers of government should be kept separate and distinct" and that "each state . . . shall . . . retain every power . . . which is not by this Constitution delegated" to the United States.[53] In presenting these amendments to Congress, Madison stated them in separate paragraphs of his eighth proposal.[54] The House passed both paragraphs and sent them to the Senate, which eliminated the separation of powers language. The likely explanation for this deletion is simply that the separation of powers clause was thought to be superfluous because the broader language of what is now the 10th amendment accomplished the same purpose.[55] This explanation is supported by evidence that the House altered the language of the two aspects of Madison's eighth proposal to make their parallelism highly apparent. Thus, one proposal stated:

> *The powers delegated by the Constitution* to the government of the United States, *shall be exercised as therein appropriated*; so that the legislative shall never exercise the powers vested in the executive or judicial; nor the executive the powers vested in the legislative or judicial; nor the judicial the powers vested in the legislative or executive.[56]

The next proposal stated: "*The powers not delegated by the Constitution*

51. 2 B. SCHWARTZ, *supra* note 47, at 666 (Pennsylvania dissenters); *id.* at 841 (Virginia); *id.* at 967 (North Carolina); *cf. id.* at 732 (Congress' power shall be limited to that expressly delegated by the Constitution (Maryland)). It is also noteworthy that all of the states that proposed amendments included language similar to the present 10th amendment, and this language in all probability was thought to include a prohibition against violations of separation of powers. *See* text accompanying notes 55-72 *infra*.

52. 2 B. SCHWARTZ, *supra* note 47, at 765, 1006-08.

53. *Id.* at 841-42.

54. *Id.* at 1028. The proposal stated: "Eighthly, That immediately after article 6th, be inserted, as article 7th, the clauses following, to wit:

"The powers delegated by this constitution are appropriated to the departments to which they are respectively distributed: so that the legislative department shall never exercise the powers vested in the executive or judicial nor the executive exercise the powers vested in the legislative or judicial, nor the judicial exercise the powers vested in the legislative or executive departments.

"The powers not delegated by this constitution, nor prohibited by it to the States, are reserved to the States respectively."

55. The Senate did not keep detailed records of its debates.

56. 2 B. SCHWARTZ, *supra* note 47, at 1123 (emphasis added).

. . . *are reserved to the states* respectively."[57] It must have seemed rather obvious to the Senate that the latter would include the former, assuming that the Constitution was thought to require separation of powers by its very structure—an assumption that was not doubted then[58] and is not doubted today. In short, the history of the 10th amendment strongly suggests that, to the same extent that the Constitution's structure incorporates the principle of separation of powers in defining the powers delegated to the federal government, the reserved power of the states explicitly is protected from federal incursions that violate that principle.[59] That the contrary conclusion is now accepted as constitutional dogma[60] is an ironic testament to the prescience of those who opposed the Bill of Rights on the ground that the specification of limitations on federal power would be construed to permit the exercise against the states of all powers not explicitly itemized.[61]

The contrary conclusion also requires tolerance for a number of other historically implausible ironies. First, some of those who opposed the Bill of Rights claimed that the amendments were unnecessary because separation of powers provided adequate restrictions on the national government.[62] It requires an assumption almost of intellectual dishonesty on their part to conclude that these men did not intend those same restrictions to protect the states at all. It would be doubly implausible to conclude that such protection—assumed to exist even without the 10th amendment—was not intended to exist after the 10th amendment *was* adopted.

Second, the contrary conclusion would require the supposition

57. *Id.* (emphasis added).

58. The evidence for this proposition is voluminous. *See, e.g.*, THE FEDERALIST Nos. 47, 51 (J. Madison); note 68 *infra*. Specifically, Roger Sherman, a congressional opponent of the first paragraph of Madison's eighth proposal, argued that the amendment was "altogether unnecessary, inasmuch as the constitution assigned the business of each branch of the Government to a separate department." 2 B. SCHWARTZ, *supra* note 47, at 1117. *See id.* at 1033.

59. The connection between the 10th amendment and separation of powers has, on occasion, been treated as rather self-evident by the Supreme Court. For example: "The Constitution of the United States delegates no judicial power to Congress. Its powers are confined to legislative duties, and restricted within certain prescribed limits. . . . [B]y the Xth amendment the powers not delegated to the United States . . . are reserved to the States respectively or to the people. . . . And any legislation by Congress beyond the limits of the power delegated, would be trespassing upon the rights of the States or the people . . . ." Gordon v. United States, 117 U.S. 697, 705 (1864). *See* cases cited in note 45 *supra*.

60. *See* text accompanying notes 24-42 *supra*.

61. Madison's summary of this argument can be found in 2 B. SCHWARTZ, *supra* note 47, at 1027, 1031.

62. This argument was made by Hamilton, *id.* at 858, and by Wilson, *id.* at 631-33, 648; it was answered by Madison, *id.* at 1030.

that the framers intended the single phrase, "the judicial Power," to denote a different and larger function when exercised against the states rather than against competing federal authority. History suggests, however, that the framers intended the federal judiciary, when operating against the states, to be vested with not more but *less* than full judicial power, as it is traditionally defined by contrast to executive and legislative power. The granting of only enumerated substantive powers to Congress narrowed the "legislative Powers" to less than what separation of powers might permit. Similarly, the limitations on jurisdiction in article III and the 11th amendment[63] demonstrate that the federal judiciary was expected to wield less power against the states than might a "court" defined only by reference to separation of powers theory.[64] As the Supreme Court recently has acknowledged, the Constitution was adopted only after its opponents were assured that the federal judiciary would not have the power to adjudicate the rights and liabilities of the states as parties defendant.[65] Given such concerns, it would be anomalous indeed if the framers intended to vest the federal courts with powers over the states that would be labeled executive or legislative at the federal level.

Third, the conclusion that the 10th amendment does not protect states from violations of distributional restrictions on federal power undercuts the arguments made by the framers for judicial review. For example, even Alexander Hamilton's nationalistic justification for judicial review in *The Federalist* No. 78 hinged on the premise that

> the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them. . . . The judiciary . . . has no influence over either the sword or the purse,

63. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

64. The framers were concerned that the federal courts "not . . . intrude unduly upon the general jurisdiction of the state courts." Glidden Co. v. Zdanok, 370 U.S. 530, 581 (1962). *See* 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 45-46 (rev. ed. 1937).

65. "The right of the Federal Judiciary to summon a State as defendant and to adjudicate its rights and liabilities had been the subject of deep apprehension and of active debate at the time of the adoption of the Constitution; but the existence of any such right had been disclaimed by many of the most eminent advocates of the new Federal Government, and it was largely owing to their successful dissipation of the fear of the existence of such Federal power that the Constitution was finally adopted." Edelman v. Jordan, 415 U.S. 651, 660 (1974) (quoting 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 91 (rev. ed. 1937)).

> no direction either of the strength or of the wealth of the society, and can take no active resolution whatever.[66]

This justification for judicial review loses its force if the judiciary can command the sword or the purse of the states.

Fourth, the belief that the framers did not intend separation of powers to limit federal authority over the states assumes that the very framers who guaranteed to the states a republican form of government[67] also vested the departments of the federal government with the power to violate, at the state level, those institutional limitations that were commonly considered an essential protection against tyranny.[68] Madison and Hamilton described a judiciary that is "not separated from the legislative and executive powers" as "a threat to general liberty,"[69] as potential "oppressors."[70] The framers, it need not be belabored, simply did not believe they were vesting the judiciary with the power to act as oppressors against the states.

---

66. THE FEDERALIST No. 78, at 522-23 (A. Hamilton) (J. Cooke ed. 1961).

67. At the Constitutional Convention, Wilson first proposed art. IV, § 4 "merely to secure the States agst. dangerous commotions, insurrections and rebellions." 2 M. FARRAND, *supra* note 64, at 47. Randolph objected that the separate goal of securing the republican form of government also was necessary; he moved, and Madison seconded, that the wording be amended so that no state would "be at liberty to form any other than a Republican Govt." *Id.* at 48. Wilson then reworded his motion from a guarantee of "a Republican Constitution & its existing laws" to a guarantee of a "Republican (form of Governmt.)," at which point Randolph and Madison withdrew their opposition and the motion passed. *Id.* at 49. Although this debate does not necessarily imply that one particular set of institutional arrangements was to be mandated to the states, it surely is incompatible with the conclusion that the states were not to be protected from violations by the guarantor—the national government— of basic republican principles such as separation of powers. *Compare* Lance v. Plummer, 384 U.S. 929, 931 (1966) (Black, J., dissenting from denial of certiorari) (deputy sheriff removed from office by federal government pursuant to contempt power) *with* Sweezy v. New Hampshire, 354 U.S. 234, 255 (1957) (separation of powers not mandatory in state governments), *and* Dreyer v. Illinois, 187 U.S. 71 (1902) (separation of powers not required by due process clause).

68. Madison, for example, declared that the "accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many . . . may justly be pronounced the very definition of tyranny." THE FEDERALIST No. 47, at 324 (J. Madison) (J. Cooke ed. 1961). He quoted Montesquieu with approval: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*. Were it joined to the executive power, *the judge* might behave with all the violence of *an oppressor*." *Id.* at 326. He described the separation of powers principle as "essential to a free government." *Id.* No. 48, at 332. For discussions on the prevalence of this assumption at the time of the framing, see M. VILE, *supra* note 14, at 119-75; G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 548 (1969). *Cf.* 2 M. FARRAND, *supra* note 64, at 73-74 (the executive and the judiciary must be protected from legislative encroachments).

69. THE FEDERALIST No. 78, at 523 (A. Hamilton) (J. Cooke ed. 1961).

70. *Id.* No. 47, at 326 (J. Madison).

The framers knew that the states' constitutions required varying degrees of separation of powers.[71] This does not imply, however, that the application of separation of powers to the relationship between the federal government and the states is affected by the specific structures of state institutions. The authority to exceed the limits determined by principles of separation of powers never was granted to the federal government, regardless of how state institutions might be arranged. In fact, there is evidence that the framers assumed that the fundamentals of separation of powers would be maintained within the states and that, therefore, the people were *doubly* insured against violation of this fundamental principle of democratic government.[72] The assumption of such protection at the state level, of course, would have been incompatible with an assumption that the basic state institutional separation could be nullified by violation of separation principles by federal departments.

Clearly, the framers saw federalism and separation of powers as intertwined concepts, each designed to define and limit federal power for the protection of both the state governments and the people.[73] Then, as now, the exercise even of the delegated, substantive powers by the wrong branch of government presented unacceptable hazards arising from the absence of the special institutional constraints that are thought to be appropriate to the type of power assigned to each branch and that exist because of the particular organization of each branch. A "judicial" decision might improperly be subject to popular pressures,[74] a "legislative" decision might improperly be removed from the processes that assure democratic

71. *Id.* at 327-31; *see* 2 M. FARRAND, *supra* note 64, at 47-49.

72. "In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted *to each*, subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will controul each other, at the same time that each will be controuled by itself." THE FEDERALIST No. 51, at 351 (J. Madison) (J. Cooke ed. 1961) (emphasis added). This assumption has been shared by the Court: "It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrusted to government, *whether State or national*, are divided into the three grand departments . . . ." Kilbourn v. Thompson, 103 U.S. 168, 190 (1880) (emphasis added). *Accord*, Springer v. Philippine Islands, 277 U.S. 189, 201 (1928) (separation of powers implicit in federal and state constitutions); 2 J. ELLIOT, *supra* note 48, at 126-27.

73. *Cf.* Dorsen, *Separation of Powers and Federalism: Two Doctrines with a Common Goal: Confining Arbitrary Authority*, 41 ALB. L. REV. 53 (1977) (separation of powers applies only to the federal government, federalism to the federal-state relationship). *See generally* M. VILE, *supra* note 14, at 171.

74. *See* United States v. Brown, 381 U.S. 437, 441-46 (1965); *cf.* U.S. CONST. art. I, § 9, cl. 3 (Bill of Attainder clause restricts congressional exercise of judicial power, arguably because of fear of popular pressures).

accountability[75] or an "executive" decision might improperly be made by an institution lacking the hierarchy for effective coordination and control.[76] In any event, the risks are that such power could be used to excess, threatening individual liberties or state institutional arrangements, or that such power would be perceived as oppressive and illegitimate.

2. *The case law.*

The conclusion of the Supreme Court, reiterated since *Baker v. Carr*,[77] that separation of powers does not apply to the relationship between the federal and state governments, not only is at odds with constitutional history, but also is inconsistent with case law preceding and following *Baker*. The *Baker* Court took pains to demonstrate that prior findings of nonjusticiability had "nothing to do with [the claims'] touching upon matters of state governmental organization."[78] Thus the Court reduced a structural limitation on its power to a mere discretionary admonition not to decide issues for which "judicially manageable standards" are lacking.[79] The Court distinguished cases that undeniably had involved limitations on the judicial power with regard to state matters by asserting that "these decisions explicitly reflect only a traditional limit upon equity jurisdiction, and not upon federal courts' power to inquire into matters of state governmental organization."[80] This answer simply ignores the possibility that "traditional equity jurisdiction" had been limited by the courts as an implementation of separation of powers.

What the cases "explicitly reflect" is precisely the concern that an equity court not "invade the domain . . . of the executive and administrative department of the government,"[81] and that the proper role of the state legislature be protected from undue interference by federal courts.[82] Indeed, the history of equity jurisdiction dem-

75. *See, e.g.*, Yakus v. United States, 321 U.S. 414 (1944); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737 (D.D.C. 1971).

76. *See, e.g.*, Taft, *supra* note 2.

77. 369 U.S. 186 (1962). *See* text accompanying notes 26-37 *supra*.

78. *Id.* at 218.

79. *Id.* at 226. To the extent that the discovery of "judicially manageable standards" involves judgments as to what kinds of questions are properly legislative and therefore not judicial, it represents the same kind of abstract functional differentiation required by separation of powers doctrine. *See* texts accompanying notes 151 & 160-62 *infra*.

80. 369 U.S. at 231.

81. *In re* Sawyer, 124 U.S. 200, 210 (1888).

82. Colegrove v. Green, 328 U.S. 549, 551-56 (1946). In refusing to review a state apportionment scheme, Justice Frankfurter wrote for the Court: "The Constitution has many

onstrates that equity power long had been formulated in part by the vertical application of separation of powers. For example, in *Meriwether v. Garrett*[83] the Supreme Court prohibited a lower federal court from appointing a receiver to levy taxes in an effort to protect the bondholders of a bankrupt city.[84] A plurality of the Court was particularly concerned with federal judicial usurpation of the state legislative power.[85] Other cases demonstrate a similar regard for state executive functions.[86]

In *Baker*, the Supreme Court also ignored other doctrines that have implemented the vertical application of separation of powers. For example, the Court in *Younger v. Harris*[87] limited the judiciary's

commands that are not enforceable by courts because they clearly fall outside the conditions and purposes that circumscribe judicial action." *Id.* at 556. *See* Baker v. Carr, 369 U.S. 186, 268, 277-78, 282 (1962) (Frankfurter, J., dissenting).

83. 102 U.S. 472 (1880).

84. *Id.* at 502 (Field, Miller and Bradley, JJ., concurring in the judgment). *See also* Amy v. Shelby County Taxing Dist., 114 U.S. 387 (1885); Barkley v. Levee Comm'rs, 93 U.S. 258 (1876); Heine v. Levee Comm'rs, 86 U.S. (19 Wall.) 655 (1873); Rees v. City of Watertown, 86 U.S. (19 Wall.) 107, 116 (1873). These cases are of particular interest in light of the Court's general hostility to efforts by state legislatures to avoid bond obligations. *See* 2 C. WARREN, *supra* note 65, at 678.

Although separation of powers language is abundant in *Meriwether*, the plurality also attempted to explain its decision by the tenuous claim that no constitutional violation had occurred. This ambivalence, spawned by an unwillingness to acknowledge clearly that it might not be within the judiciary's powers to redress fully some violations, is still apparent in judicial opinions. *See* note 265 *infra* and accompanying text.

85. "The Federal judiciary has . . . brushed aside all legislation of the State impairing [the obligation of lawful contracts]. When a tax has been authorized by law to meet them, it has compelled the officers of assessment to proceed and levy the tax, and the officers of collection to proceed and collect it . . . . In some instances . . . all attempts at its repeal have been held invalid. But this has been the limit of its power. It cannot make laws when the State refuses to pass them. . . . If the State has provided incompetent officers of collection, the Federal judiciary cannot remove them and put others more competent in their place." 102 U.S. at 520-21 (Field, Miller and Bradley, J.J., concurring in the judgment).

86. *E.g.*, Yost v. Dallas County, 236 U.S. 50 (1915) (federal court has no authority to appoint a commissioner to collect taxes in order to satisfy a state's obligations on its bonds); Thompson v. Allen County, 115 U.S. 550 (1885) (federal court lacks equity jurisdiction to levy and collect taxes in order to satisfy a judgment against a state); Heine v. Levee Comm'rs, 86 U.S. (19 Wall.) 655 (1873) (no federal equity jurisdiction to levy and collect taxes to enforce the payment of a state's bonds). Of particular interest is the manner in which these cases defined "adequate remedy at law," making a rather obvious attempt at preventing the judiciary from unduly interfering with state legislative and executive functions. In cases in which writs of mandamus had been issued to require the collection of taxes to repay bond obligations but no one would accept the post of tax collector, the Court found the remedy at law adequate: "The remedy is in law and in theory adequate and perfect. The difficulty is in its execution only. The want of a remedy, and the inability to obtain the fruits of a remedy, are quite distinct . . . ." Thompson v. Allen County, 115 U.S. 550, 554 (1885) (quoting Rees v. City of Watertown, 86 U.S. (19 Wall.) 107, 124 (1873)). This peculiar definition of "adequate" served to keep the judiciary from appointing its own collection officers and thus from assuming legislative and executive functions. *See, e.g.*, 115 U.S. at 555-56, 559-60.

87. 401 U.S. 37 (1971).

authority to pass on the "facial" constitutionality of state statutes in light of the "fundamental conception of the Framers as to the proper place of the federal courts in the governmental process of passing and enforcing laws."[88] Similar concern for competing state decisionmaking processes has informed other decisions that help define "the basic functions of the Judicial Branch of the National Government under our Constitution."[89] Although this is not the place to attempt any exhaustive analysis of the derivations of the case or controversy requirement, it is noteworthy that the Court itself has described the associated doctrines of standing, ripeness and mootness as reflecting, in part, principles of separation of powers. For example, the Court has said that efforts to adjudicate "ill-defined" controversies would involve the judiciary in the "powers vested in the legislative or executive branches."[90] Similarly, the rule against advisory opinions "implements the separation of powers prescribed by the Constitution and confines federal courts to the role assigned them by Article III."[91] The Court has stated that to disregard the requirement of concreteness would "distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing 'government by injunction.' "[92] Such language is not restricted to cases involving the "horizontal" application of separation of powers. In cases involving the federal judiciary's relations with the states, the foundations of such requirements have been described as lying "in all that goes to make up the unique place and character, in our scheme, of judicial review of governmental action for constitutionality," in "the necessity, if government is to function constitutionally, for each [branch] to keep within its power, including the courts."[93] The underlying policies have been said to derive in part "from the fundamental federal and tripartite character of our National Government and from the role . . . of the federal courts . . . within that structure."[94] At the least, such cases demonstrate that the Court has applied "vertically" a range of doctrines that define the function of the judiciary partially by reference to principles of separation of powers, while simultaneously denying that separation of powers applies vertically.

88. *Id.* at 53.
89. *Id.*
90. United Public Workers v. Mitchell, 330 U.S. 75, 90 (1947).
91. Flast v. Cohen, 392 U.S. 83, 96 (1968).
92. Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 222 (1974).
93. Rescue Army v. Municipal Court, 331 U.S. 549, 571 (1947).
94. Poe v. Ullman, 367 U.S. 497, 503 (1961).

Moreover, the Supreme Court historically has grounded its reluctance to interfere with the state police power on the principle of separation of powers. In *Mugler v. Kansas*,[95] a representative case,[96] this "vertical" application of separation of powers was announced unequivocally as the Court declined to find that a state law prohibiting the manufacture of alcoholic beverages violated the manufacturers' right to due process of law. The Court first stated the truism that the initial authority to determine whether alcohol is injurious lies with the legislative branch,[97] and then proceeded to define the proper judicial role as evaluating whether the enactment has a "real or substantial relation" to the police power objectives.[98] The Court concluded that this degree of judicial deference was required because "it is a fundamental principle in our institutions . . . that one of the separate departments of government shall not usurp powers committed by the Constitution to another department."[99]

95. 123 U.S. 623 (1887).

96. *See, e.g.*, Labine v. Vincent, 401 U.S. 532, 537-39 (1971) (it is for the state legislature, not the Court, to choose among all possible laws regarding rights of illegitimate children); Dandridge v. Williams, 397 U.S. 471, 487 (1970) (the Constitution does not empower the Court to second-guess state officials charged with the responsibility of allocating public welfare funds); Ferguson v. Skrupa, 372 U.S. 726, 729 (1963) ("[I]t is up to legislatures, not courts, to decide on the wisdom and utility of legislation."); Helvering v. Davis, 301 U.S. 619, 644 (1937) (Congress, not the Court, has the power to establish social security program); Nebbia v. New York, 291 U.S. 502, 537 (1934) (state legislature is free to adopt any economic policy reasonably deemed to promote public welfare; the courts are without authority either to declare such policy or to override the legislature); Lochner v. New York, 198 U.S. 45, 74 (1905) (Harlan, White and Day, JJ., dissenting) ("The preservation of the just powers of the States is quite as vital as the preservation of the powers of the General Government."); Atkin v. Kansas, 191 U.S. 207, 223 (1903) (the judiciary should not abandon the sphere assigned to it by fundamental law and enter the legislative; legislative enactments should be recognized and enforced by the courts); Calder v. Bull, 3 U.S. (3 Dall.) 385, 398-99 (1798) (court cannot overturn a legislative act it believes to be contrary to the principles of natural justice, unless the state legislature acts beyond the scope of its authority). *See also* Meachum v. Fano, 427 U.S. 215 (1976); Goss v. Lopez, 419 U.S. 565 (1975); Pell v. Procunier, 417 U.S. 817 (1974); Procunier v. Martinez, 416 U.S. 396 (1974); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973); Whitcomb v. Chavis, 403 U.S. 124 (1971).

97. 123 U.S. at 660-61.

98. *Id.* at 661.

99. *Id.* at 662. More recent decisions implicitly acknowledge the need for judicial deference, recognizing judicial inability to deal with some problems and giving the states wide discretion in administrative and legislative areas. *See* Meachum v. Fano, 427 U.S. 215, 228-29 (1976) (states have wide discretion in administering prison systems); Goss v. Lopez, 419 U.S. 565, 578-80 (1975) (the Court required notice and hearing for cases involving short suspensions from school, but refused to require prior hearing, in part because state and local authorities bear responsibility for public education); Pell v. Procunier, 417 U.S. 817, 826-27 (1974) (prison officials were given latitude in drawing up guidelines for visitation with inmates); Procunier v. Martinez, 416 U.S. 396, 404-05 (1974) (courts traditionally are reluctant to interfere with state prison systems because the problems are complex, intractable and not readily susceptible to judicial resolution); San Antonio Independent School Dist. v.

In short, the present refusal of the Supreme Court to define the judicial power to grant equitable relief against the states by reference to principles of separation of powers represents a triumph of formalism. The vertical and horizontal paradigms that underlie the Court's position distort constitutional history and case law. They do not express adequately the underlying purposes of either federalism or separation of powers. Even if "federalism" is thought to be the only appropriate term for defining the limits of federal power against the states, separation of powers is one of its measures.

C. *Vertical Application of Separation of Powers and the Supremacy Clause*

Once it is understood that the doctrine of separation of powers is a measure of the authority delegated to the federal government, the significance of the supremacy clause[100] becomes problematical. It is not possible merely to dismiss state institutional arrangements as being subordinate to federal law, because the competing consideration is not simply the states' institutional arrangements, but the structural limitations of the Constitution on the power of the federal judiciary. The tension, then, is between the possibility that a clearly subordinate state policy might infringe a federal constitutional right, and the possibility that the method of protecting that right might itself violate the Constitution.[101] The proper resolution of this dilemma cannot be to abandon the constitutional decision-making structure.

Article III does not delegate all powers necessary fully to redress constitutional violations, but only "the judicial Power" to try cases arising under the Constitution. If an impermissible combination of functions is thought to be necessary to protect the constitutional rights under adjudication, the remedy does not "comport with the federal system of government embodied in the Constitution,"[102] and therefore the federal judiciary was never delegated the authority "fully"[103] to redress that violation. There is no reason, other than

Rodriguez, 411 U.S. 1, 40-44 (1973) (state legislatures have wide discretion in devising systems of taxation and education; the Court lacks the expertise and familiarity with local problems necessary to deal with these issues); Whitcomb v. Chavis, 403 U.S. 124, 161 (1971) (lower court erred in overturning state apportionment scheme "without solid constitutional or equitable grounds for doing so").

100. U.S. CONST. art. VI.

101. *See* text accompanying note 285 *infra*.

102. National League of Cities v. Usery, 426 U.S. 833, 852 (1976); *see* notes 104 & 305 *infra*.

103. For a discussion of the significance of the degree of redress to be achieved, see text accompanying notes 255-85 *infra*.

professional or institutional shortsightedness, to shrink from this thought. The Supreme Court has held that the Constitution has vested neither Congress with the power fully to regulate commerce under all circumstances,[104] nor the President with full power to

104. Just as the judiciary is granted the authority to decide cases "arising under the Constitution," Congress is granted the legislative authority to regulate interstate commerce. The power to regulate commerce, like the power to decide constitutional cases, can threaten underlying constitutional structures. In National League of Cities v. Usery, 426 U.S. 833 (1976), the Supreme Court held that the application of the minimum wage and hours requirements of the federal Fair Labor Standards Act to state employees did not "comport with the federal system of government embodied in the Constitution." *Id.* at 852. The Court referred to the impact that such regulation could have on state policy, but did not rest the decision on "particularized assessments of actual impact" because, in any event, the regulation would "significantly alter or displace the States' abilities to structure employer-employee relationships in such areas as fire prevention, police protection, sanitation, public health . . . . These activities are typical of those performed by state and local governments . . . . Indeed, it is functions such as these which governments are created to provide . . . . If Congress may withdraw from the States the authority to make those fundamental employment decisions upon which their systems for performance of these functions must rest, we think there would be little left of the States' 'separate and independent existence.'" *Id.* at 851. Thus, although the regulation of wages and hours was assumed to fall within Congress' authority over interstate commerce, the implied constitutional protection of the effective functioning of the states in the federal system was "an affirmative limitation" on the power expressly granted Congress. *Id.* at 841.

If constitutional structure affirmatively limits the commerce power, it must also limit the authority of the federal judiciary. Although there is no reason to assume that the express legislative power over commerce is somehow inferior to the express judicial power to decide cases arising under the Constitution, the Court, within months of deciding *National League of Cities* and with considerable nonchalance, rejected any such parity in Elrod v. Burns, 427 U.S. 347 (1976). *Elrod* involved the method of staffing a county sheriff's office, the duties of which presumably are similar to those of the police referred to in *National League of Cities*, a function "which governments were created to provide." National League of Cities v. Usery, 426 U.S. 833, 851 (1976). Despite *National League of Cities'* finding that Congress had threatened the "separate and independent existence" of the states when it set minimum wages and hours for such employees, the Court in *Elrod* rejected any such limitation on its own authority partially to control methods of appointment to such positions: "More fundamentally, however, . . . there can be no impairment of executive power, whether on the state or federal level, where actions pursuant to that power are impermissible under the Constitution. Where there is no power, there can be no impairment of power." 427 U.S. at 352. The same logic applied in *National League of Cities* would have required the conclusion that control over wages and hours of state and local employees was not an impairment of state authority at all. State actions inconsistent with federal standards would have been seen as impermissible violations of the constitutional grant to Congress of authority over interstate commerce, supported by the supremacy clause. Therefore, under the logic of *Elrod*, there was no conflict between federal and state power at all in *National League of Cities*.

The gaping inconsistency between the two cases was acknowledged by Chief Justice Burger, who suggested in his dissent in *Elrod* that the first amendment neither "requires nor justifies" the Court's "inroads on the powers of the States to manage their own affairs . . . [as defined by] the powers reserved by the Tenth Amendment." 427 U.S. at 375-76. This inconsistency demonstrates the powerful present need for the judiciary to reassess its assumptions regarding the definition of its own function with respect to the states. Regardless of its conclusions about the extent to which the judicial power exercised in *Elrod* threatened the

conduct wars successfully, even though he is commander in chief.[105] Indeed, the judiciary has limited its own authority to protect effectively the constitutional rights to privacy,[106] and even free speech,[107] because of the competing structural limitation represented by the power of Congress to act within its legitimate sphere.

Fully redressing violations of constitutional rights may often require the efforts of more than one branch of government, particularly if "redress" is defined broadly enough. If detailed standards need to be adopted and executive officers need to be employed to protect the people's rights, the Constitution provides the appropriate mechanisms, and it is not unimaginable that some of those mechanisms do not lie within the "judicial Power." The federal legislature and executive can and have supplemented the powers of the judiciary in order more fully to protect constitutional rights.[108] If neither Congress nor the executive has the *legal authority* in a particular instance to supplement the judicial remedy, then the desired remedy simply constitutes a form or degree of redress that the Constitution does not authorize.[109] If neither Congress nor the executive nor the state institutions have the *will* to cooperate with the judiciary to achieve the degree or form of redress desired by the court, then it is entirely possible that the court's objective is unwise. The great structural divisions of power in the Constitution were, after all, designed on the assumption that no single decisionmaker should be trusted.[110]

The dimensions of what is being suggested must be understood. The issue is not whether federal courts can authoritatively declare federal law nor whether they can take action to redress violations of that law. The issue is whether the principle of separation of powers defines relevant, and perhaps even flexible, limits to the judiciary's unilateral power to seek complete correction of the consequences of

essential functioning of the states, the Court should have acknowledged the underlying truth of the decisional principle in *National League of Cities*: The extent of the express powers must be limited by the underlying constitutional structure. One aspect of that structure is that the states and the people are protected from the exercise of the courts' power to try cases in a way that impermissibly combines its functions with those of the other branches.

105. *See* Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure Case), 343 U.S. 579 (1952).

106. Doe v. McMillan, 412 U.S. 306 (1973).

107. Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975).

108. This, of course, was the case with regard to school desegregation. *See* R. KLUGER, SIMPLE JUSTICE (1976); text accompanying notes 304-05 *infra*.

109. This possibility is unlikely in light of Congress' power under § 5 of the 14th amendment. *See* note 305 *infra*.

110. *See* notes 46-62 & 68-70 *supra* and accompanying texts.

a constitutional violation. Although "the moralist will find it difficult to sacrifice his aims in favor of structure and process," structure and process are "the essence of the theory and practice of constitutionalism."[111]

II. SEPARATION OF POWERS AND CHECKS AND BALANCES

The purpose of this Part is to identify the underlying separation of powers principles that the Supreme Court has used to define the functional limits of *each* of the branches of the federal government. Because these principles will be applied in Part III to the problem of limiting *judicial remedies*, it is necessary to explain the assumption that the judicial inquiries underlying the separation of powers doctrine and applied to the executive and legislative branches also should be applied consistently to the judicial branch.

In re Debs[112] represents judicial approval of an unusually dangerous combination of functions in the federal courts.[113] The use of the "labor injunction"[114] involved the courts in policymaking and policy-implementing functions, as well as in its own adjudicatory function, against union strikers. In contrast, *Ex parte Milligan*[115] represents an important effort by the Supreme Court to restrain the President from assuming both the legislative power to establish courts and the judicial power to try cases.[116] Because both cases involved significant pressures to ignore constitutional limitations—extreme labor unrest and the Civil War—the Court's widely differing responses are important illustrations of why the Court needs to be restrained by the same structural limitations that it imposes on the other branches. The Court's justification for the combination of functions approved in *Debs* depended largely on its departure from the standards that it previously had set for limiting the power of the President in *Milligan*.

In restricting the executive authority to adjudicate, the *Milligan* Court had relied on the fact that the normal courts were open and functioning.[117] The *Debs* Court acknowledged that Congress was functioning and could have legislated against the enjoined behavior,

111. A. BICKEL, THE MORALITY OF CONSENT 30 (1975).

112. 158 U.S. 564 (1895).

113. *See* text accompanying notes 16-19 *supra*.

114. *See generally* F. FRANKFURTER & N. GREENE, *supra* note 17.

115. 71 U.S. (4 Wall.) 2 (1867).

116. *Id.* at 121, 125 (President may not give a military commission the power to try a civilian in an area removed from the war zone).

117. *Id.* at 122.

but blandly concluded that legislative action was not the "only remedy."[118] Furthermore, although in *Milligan* the Court was realistically skeptical of the President's arguments that reliance on the normal judicial process would be futile,[119] the *Debs* Court argued that enlargement of its own contempt powers was necessary because reliance on normal jury trials might be ineffective to protect the flow of commerce.[120] Such explanatory inconsistencies are not merely inelegant; they serve to release the judiciary from the structural constraints that, when applied to the other branches, help to maintain the constitutional order. Thus, consistent application of doctrine might help to correct for institutional shortsightedness on the part of the judiciary when it defines the limits of its own function.

In order to identify the underlying separation of powers principles that traditionally have defined the functional limits of each branch of government and that could help define the proper relationship between the federal courts and state governments, the relationship between "separation of powers" and "checks and balances" must be examined. It is almost an American tradition not only to confuse the doctrines, but also to conclude that the success of "checks and balances" makes reliance on separation of powers unnecessary.

The two concepts are somewhat contradictory in substance and derivation but are consistent in purpose. Both doctrines were conceived as mechanisms for preventing tyrannical use of power.[121] Separation of powers relies on the implementation of an "intellectual distinction" among the three major functions of government to achieve this purpose;[122] accordingly, the relevant case law is replete with assertions that the branches of government must be kept distinct and each must not interfere with the functioning of the others.[123] In contrast, the doctrine of checks and balances buttresses the conceptual distinctions among the functions of government by providing for direct intervention by each branch into the functioning of the others;[124] power can be checked only if it is shared. Separation of powers has populist, democratic antecedents, while checks and balances derives from aristocratic and elitist influ-

118. 158 U.S. at 581-82.
119. 71 U.S. (4 Wall.) at 121-22.
120. 158 U.S. at 582.
121. THE FEDERALIST Nos. 47, 48, 51 (J. Madison).
122. M. VILE, *supra* note 14, at 146.
123. *See* cases cited in notes 161 & 162 *infra*.
124. M. VILE, *supra* note 14, at 18; THE FEDERALIST Nos. 48, 51 (J. Madison).

ences.[125] For historical, pragmatic and conceptual reasons, American scholars have tended to favor a theory of constitutional balance over the theory of separation of powers.

A. *Historical Bases*

The framers of the Constitution reacted against their experiences with a number of state constitutions that had relied too heavily on a conceptual separation of functions, a reliance that resulted in an inability to restrain state legislatures that often acted as democratic despots.[126] The early constitutions had created weak executives that did not share in legislative policymaking either through the veto power or the power to exercise discretionary authority.[127] The more radically democratic states also had weak judiciaries without the power of judicial review.[128] Two states even viewed the power to impeach as an unacceptable blurring of functions.[129] The Convention of 1787 reacted against these and other similar defects in the Articles of Confederation[130] by supplementing the separation of functions with mechanisms to check legislative power.[131] Thus the President was to share important appointive and foreign affairs powers with the legislature.[132] Moreover, the executive was to have a limited veto power,[133] and some assumed the judiciary would exercise the power of judicial review.[134]

Although the central contribution of the Constitutional Convention of 1787 was its unique insistence on both separation and balancing of functions, the Convention did not reject, but rather supplemented, the fundamental concept of separation of powers. Indeed,

125. M. VILE, *supra* note 14, at 136-39.

126. "But anarchy and the breakdown of government that it connoted no longer seemed an accurate way to describe all of what was happening in the 1780's. An excess of power in the people was leading not simply to licentiousness but to a new kind of tyranny, not by the traditional rulers, but by the people themselves— . . . a theoretical contradiction. . . ." G. WOOD, *supra* note 68, at 404. *See* M. VILE, *supra* note 14, at 143-75; Corwin, *The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention*, 30 AM. HIST. REV. 511 (1925).

127. M. VILE, *supra* note 14, at 134-75.

128. *Id.* at 138-75.

129. *Id.* at 142.

130. *See generally* Wright, *The Origins of the Separation of Powers in America*, 13 ECONOMICA 169, 179-80 (1933).

131. M. VILE, *supra* note 14, at 153-57; G. WOOD, *supra* note 68, at 550.

132. U.S. CONST. art. II, § 2.

133. *Id.* art. I, § 7.

134. *See* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 9 (2d ed. 1973) [hereinafter cited as HART & WECHSLER]; R. BERGER, CONGRESS V. THE SUPREME COURT (1969).

some of the major structural changes, such as the decision to elect the executive and the legislature separately and the decision to vest more appointment authority in the executive, are better described as efforts to separate functions than to merge them.[135] Nevertheless, scholars have seized upon the historical emphasis on balance to minimize the need for an abstract differentiation of functions.[136]

The framers' method of restricting power through a specific, limited sharing of functions could be construed as additional evidence of the importance of maintaining a general separation of functions. That is, because the framers specified where functions should be shared, separation might be implied wherever the text does not explicitly require concurrence. The Supreme Court sometimes has relied on this rule of construction.[137] The other bases for academic skepticism, however, cast considerable doubt that this rule, even if theoretically correct, is useful in deciding real cases.

B. *Pragmatic Bases*

Some scholars have argued that the doctrine of checks and balances vests in all three branches of the government the real authority to define the appropriate limit of power.[138] Because a definition of function necessarily is implicit in the exercise of concurrent powers such as treaty formation or the appointment process, "the institutions of the Presidency and Congress must bear primary responsibility for drawing many jurisdictional lines."[139] This is a pragmatic conclusion because effective political power does reside in the executive and legislative branches, and many separation of powers issues are, in fact, resolved by the political process. Standing alone, however, this argument fails to distinguish separation of powers decisions from other constitutional decisions. For example, because Congress may legislate in areas that might affect first amendment rights, it surely has the initial responsibility to

135. *See generally* M. VILE, *supra* note 14, at 18, 119-75; G. WOOD, *supra* note 68, at 519-64; THE FEDERALIST Nos. 67, 68, 75, 76 (A. Hamilton); Sharp, *The Classical American Doctrine of "The Separation of Powers,"* 2 U. CHI. L. REV. 385, 396 (1935). The Supreme Court has acknowledged very recently that separation of powers was central to the thinking of the framers. Buckley v. Valeo, 424 U.S. 1, 120 (1976). For a comparison between the appointment power under the Articles of Confederation and those under the Constitution, see Myers v. United States, 272 U.S. 52, 110 (1926).

136. *See, e.g.*, Frohnmayer, *supra* note 22, at 218-19. *See also* Levi, *supra* note 17.

137. *See* cases cited in notes 161 & 162 *infra*.

138. *See* Frohnmayer, *supra* note 22, at 216-19; Levi, *supra* note 17, at 386-91.

139. Frohnmayer, *supra* note 22, at 214.

determine that its legislation is consistent with those rights.[140] But it does not follow that the judiciary should not review such decisions.[141] Indeed, to the extent that an aggressive use of judicial review in other areas is justified as an effort to protect the integrity of the political process,[142] there is no reason in principle why the Court should enforce separation of powers principles any less diligently. The integrity of the process, including the need to preserve democratic accountability, is equally at stake when federal courts assume state executive and legislative roles.

The argument for a limited judicial function in applying separation of powers also rests, however, on a fundamental distrust of the doctrine itself. Formal application of separation of powers has been viewed as a threat to the effective functioning of government. Described as "mechanistic" and unrealistic,[143] a conceptual application of the doctrine is thought to threaten such modern necessities as a strong executive branch and independent administrative agencies.[144] In short, there is some tendency in American political thought to supplement the framers' accommodation between sep-

140. *See* P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 15-31, 44-46 (1975).

141. "The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive professes a constitutional or legal discretion, nothing can be more perfectly clear, than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear, that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy . . . ." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166 (1803).

142. "Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized . . . ." Reynolds v. Sims, 377 U.S. 533, 562 (1964) (announcing the one-person-one-vote rule). In the *Carolene Products* footnote, the Court included protecting the integrity of the political process among the areas that might justify aggressive or "strict" judicial review. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) ("It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation."). *See* G. GUNTHER, *supra* note 24, at 592-94. The justification for aggressive judicial intervention when legislation restricts the political process—because the political process must ordinarily be relied upon to repeal undesirable legislation—is equally applicable to justify strict scrutiny of lower federal courts' violations of separation of powers: A district court's unwise constitutional mandate is even more irreversible by the political process than is undesirable legislation passed by a corrupt political process.

143. *See* Frohnmayer, *supra* note 22, at 215 (quoting K. LOWENSTEIN, POLITICAL POWER AND THE GOVERNMENTAL PROCESS (2d ed. 1965)).

144. *Id.* at 217. *See also* W. WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS (1885).

aration and balance by simply substituting the power politics of checks and balances for the "parchment barriers"[145] of an intellectual, court-enforced separation of functions. This tendency is as evident now in the innovations in the scope of federal judicial relief as it once was in the innovation of the independent administrative agencies. Thus Professor Chayes and others defend new forms of judicial activism partly on the ground that the courts have been *effective* in achieving important policy objectives for many groups that have been relatively powerless in the political process.[146] The pragmatists urge, with equanimity, even eagerness, that the adaptation of the judiciary into a new and more forceful institution should be awaited and studied; the effectiveness of the new institution, not a priori arguments, should control the response of the other branches to this phenomenon.[147]

Highly effective measures, however, can be unconstitutional nevertheless. Some constitutional doctrines, including separation of powers, were designed in part to make government less efficient,[148] and they cannot be disregarded merely because they have their intended effect. The pragmatic American political tradition treats separation of powers as a special case, however, because that tradition also doubts that "separation of powers" really means anything.

C. *Conceptual Bases*

If there is no way to distinguish judicial, legislative and executive functions, separation of powers must be recast as an admonition to maintain three different departments of government—"not a government of separated powers, but rather a government of separated institutions sharing powers."[149] The classical identification of separate functions appears to be too simplistic. This identification was based primarily on the purpose with which power is exercised:[150] If the purpose was to set policy prospectively, the power was labeled "legislative"; if to implement those policies, it was "executive"; and if to adjudicate whether specific behavior violated those policies, it was "judicial" power. Secondarily, the classical identifications relied on

145. THE FEDERALIST No. 48, at 333 (J. Madison) (J. Cooke ed. 1961).

146. *E.g.*, Chayes, *supra* note 2; Denvir, *Towards a Political Theory of Public Interest Litigation*, 54 N.C.L. REV. 1133 (1976).

147. Chayes, *supra* note 2, at 1307-09.

148. *See* M. VILE, *supra* note 14, at 10. *See also* material cited in note 126 *supra*.

149. Frohnmayer, *supra* note 22, at 218-19.

150. *See, e.g.*, H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 185-90 (tent. ed. 1958); M. VILE, *supra* note 14, at 16-17; Frohnmayer, *supra* note 22, at 218.

the methods of exercising power.[151] Legislative decisions were thought to require predictive, value-laden judgments; executive decisions, to involve the implementation of legislative ends by a practical choice of means; judicial decisions, to require a judgment regarding past events that involved two or more parties whose legal rights and remedies turned on an application of the law to their behavior.

It is now clearly understood that a merging of functions is both desirable and unavoidable. The reasons for this unavoidable merging are varied. The delegated powers are not, of course, entirely defined, and therefore it is difficult to know when one branch is encroaching on the powers of another.[152] For example, the extent to which the executive power was intended to involve discretionary authority, whether in foreign or domestic policy, is a subject of continuing debate.[153] Even were the character of the delegated powers certain, the Constitution specifically provides for some concurrent exercise of powers.[154] The executive veto power, of course, is descriptively legislative and the Senate's power to approve specific appointments is descriptively executive. Finally, even were the powers not specifically concurrent, the exercise of any of the delegated powers necessarily involves some of the purposes and methods of decisionmaking indigenous to one of the other branches.[155] Executive "adjudication," such as terminating entitlements, occurs every day; courts make policy and control executive behavior by deciding cases; legislatures need the descriptively judicial contempt power to gather information necessary for legislating.[156] Therefore, the mere fact that one branch utilizes the purposes or methods of another branch is not sufficient to find a violation of separation of powers.

Moreover, even if a descriptive application of the doctrine were feasible, it is impossible to keep the separate functions of each branch from "interfering" with the functioning of the other branches because each branch constitutionally is entitled to influ-

151. *See generally* H. HART & A. SACKS, *supra* note 150. *See also* Chayes, *supra* note 2; Frohnmayer, *supra* note 22, at 218; Williams, *"Hybrid Rulemaking" Under the Administrative Procedure Act: A Legal and Empirical Analysis*, 42 U. CHI. L. REV. 401, 403-11 (1975).

152. Frohnmayer, *supra* note 22, at 218-20.

153. *Id.* at 220 & n.35. *See generally Symposium: Separation of Powers*, 52 IND. L.J. 311 (1977).

154. Frohnmayer, *supra* note 22, at 217.

155. *Id.* at 216-17; Parker, *The Historic Basis of Administrative Law: Separation of Powers and Judicial Supremacy*, 12 RUTGERS L. REV. 449 (1958).

156. McGrain v. Daugherty, 273 U.S. 135, 174 (1927).

ence the others profoundly. By its very nature, an executive pardon frustrates the legislative and judicial branches.[157] The congressional authority to control the jurisdiction of the courts can, in effect, decide cases,[158] and its authority to organize and set policy for executive offices similarly controls their functioning.[159] Similarly, the judicial decree can and does control the operation of the other branches.

In short, the two assumptions underlying separation of powers—that functions can be distinguished abstractly and that any one branch can be kept from interfering with the others—appear unrealistic. Therefore, the impulse is strong to rely instead on the political capacity of each branch to control the others. That capacity depends only slightly, if at all, on the first assumption and not at all on the second.

The pragmatic tradition, however, is at odds with almost two centuries of Supreme Court adjudication, for the Court, after all, has managed throughout its history to apply the doctrine of separation of powers to specific controversies. The pragmatic tradition's preference for balance rather than separation does not amend the Constitution. Nevertheless, the conceptual criticisms of separation of powers do provide useful insights for evaluating the established judicial standards for its implementation. There is no avoiding the conclusion that the standard articulations of the separation principle are rather unsatisfactory when set against the arguments that functional merging is inevitable. The following discussion indicates, however, that a close examination of these doctrinal inadequacies points to an underlying logic that is both sensible and usable.

1. *The basic judicial standard.*

The traditional judicial standard for implementing separation of powers utilizes the defined function of each branch to delimit the functions of the others. *Kilbourn v. Thompson*,[160] in which the Court restricted congressional investigations deemed "judicial" in nature, contained a typical statement of this approach:

157. *See* Boudin, *The Presidential Pardons of James R. Hoffa and Richard M. Nixon: Have the Limitations on the Pardon Power Been Exceeded?*, 48 U. COLO. L. REV. 1 (1976); text accompanying notes 169-70 *infra*.

158. *See* Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953); text accompanying notes 166-68 *infra*.

159. *See* Myers v. United States, 272 U.S. 52, 240 (1926) (Brandeis, J., dissenting).

160. 103 U.S. 168 (1880).

> It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrusted to government, whether State or national, are divided into the three grand departments . . . . That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants . . . . It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other.[161]

This is, in a sense, a "hydraulic" model: The fluid nature and scope of each branch's functions expand to fit circumstances until they reach the limit set by a competing branch's function. This formulation at least has the advantage of not limiting each branch to a rigid, preconceived form. It acknowledges constitutionally mandated merged functions only as "important exceptions."[162]

This traditional formulation is difficult to apply, however. Although it validates, as it must, the legitimacy of such specified exceptions as the veto and pardon powers, it does not provide standards for identifying when the exercise of an overlapping power is excessive, nor even for identifying the boundary between two generic functions. *United States v. Klein*[163] exemplifies the first of these deficiencies. The conflict under examination in *Klein* was between two overlapping sets of functions: the executive pardon power, which overlaps the legislative function of prescribing punishments, and the congressional power to determine judicial jurisdiction, which overlaps the judicial function of trying cases. The Supreme Court held, first,[164] that although the President effectively

161. *Id.* at 190-91. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935); Springer v. Philippine Islands, 277 U.S. 189, 201-02 (1928); Myers v. United States, 272 U.S. 52, 116-20 (1926); Marshall v. Gordon, 243 U.S. 521, 536-40 (1917); United States v. Klein, 80 U.S. (13 Wall.) 128, 147-48 (1872); Gordon v. United States, 117 U.S. 697, 700-03 (1864); *cf.* cases cited in note 84 *supra* (legislative power of taxation delimits judicial authority); cases cited in notes 86-96 *supra* (case and controversy requirements).

162. *E.g.*, Myers v. United States, 272 U.S. 52, 127 (1926); Marshall v. Gordon, 243 U.S. 521, 536 (1917); Mugler v. Kansas, 123 U.S. 623, 662 (1887); Kilbourn v. Thompson, 103 U.S. 168, 191 (1880); Meriwether v. Garrett, 102 U.S. 472, 515 (1880) (Field, Miller and Bradley, JJ., concurring in the judgment).

163. 80 U.S. (13 Wall.) 128, 147-48 (1872).

164. The *Klein* opinion apparently considered the legislative-judicial conflict first, and only after holding the conditional removal of jurisdiction to be an unconstitutional legislative incursion into the judicial role did the opinion go on to hold: "The rule prescribed is *also* liable to just exception as impairing the effect of a pardon, and thus infringing the constitutional power of the Executive." *Id.* at 147 (emphasis added). *See* note 168 *infra*. The two separation of powers conflicts are presented here in this order merely for descriptive convenience.

had thwarted the legislative policy of punishing Civil War insurgents, Congress was without authority to limit the presidential pardon power.[165] The second functional conflict involved the congressional specification of the method for proving the loyalty of Southerners for purposes of regaining confiscated property, and the enactment of a statute granting the Supreme Court appellate *jurisdiction* only to dismiss appeals when the judgment below rested on other types of evidence of loyalty, including evidence of an executive pardon.[166] The statute would have controlled the outcome of cases pending at the time it was passed, including *Klein* itself.[167] The Court found that Congress had "prescribed a rule for the decision of a cause in a particular way," and, therefore, had "passed the limit which separates the legislative from the judicial power."[168]

The significance of these two holdings is that they demonstrate both the need for and the inadequacy of the traditional judicial separation of powers standard. By its nature, the pardon power must interfere with the general legislative power; the limit of the pardon power, therefore, cannot be defined by identifying the scope of the legislative power. Instead, the traditional judicial logic followed in *Klein* sets the limit of the general legislative power by identifying the scope of the exceptional power, here the pardon power. The general and exceptional powers are descriptively alike, however, so this formulation can permit the exception to swallow the rule. If, as the Court held in *Klein*, the President can pardon whole categories of people with such conditions as he wishes, and if, as other cases indicate, he can do so even before indictment,[169] it is difficult to distinguish the pardon power from the legislative power

165. 80 U.S. (13 Wall.) at 139-41.

166. *Id.* at 145.

167. *Id.* at 143.

168. *Id.* at 146-47. Another, perhaps preferable, explanation of *Klein* is that it held no more than that it is unconstitutional for Congress to "bind the Court to decide a case in accordance with a rule of law independently unconstitutional on other grounds." HART & WECHSLER, *supra* note 134, at 316. *See* G. GUNTHER, *supra* note 24, at 56-57. On that interpretation, the withdrawal of appellate jurisdiction was unconstitutional only because it would require the Court to give effect to Congress' unconstitutional impairment of the pardon. This interpretation does not rest on separation of legislative and judicial powers at all, but merely on the narrow holding of Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). The *Klein* opinion, however, clearly treated the case as involving two distinct separation of powers issues, and the language even suggests that the consideration of the congressional impairment of the pardon might be dicta. *See* note 164 *supra*. Furthermore, the Court has treated *Klein* as a separation of powers case rather than a *Marbury* issue. Glidden Co. v. Zdanok, 370 U.S. 530, 568 (1962). In any event, the *Klein* opinion is used here for illustrative purposes, and the discussion is based on the Court's language.

169. *E.g., Ex parte* Garland, 71 U.S. 333, 380 (1867).

to prescribe punishments,[170] at least whenever Congress prescribes broader or more severe sanctions than the President desires.

The *Klein* Court's second holding responds to this need to limit the "exceptional" constitutional checks, yet as a decisional principle the traditional standard cannot explain the outcome. Of course, a jurisdictional statute might affect the outcome of a pending case just as it necessarily affects the outcomes of future cases. To this extent the judicial power and the legislative powers overlap, and the hydraulic model would seem to require the subordination of the judicial function to the exceptional legislative power to define jurisdiction. By its nature, the power to define jurisdiction affects case outcomes and cannot be improper simply because it looks like the judicial power in this respect.[171]

The difficulty in *Klein* is not that the Court attempted to limit the exceptional power of Congress to affect case outcomes by restricting jurisdiction. Without such limitation, the congressional power over jurisdiction threatens the general judicial power itself,[172] just as the pardon power as upheld in *Klein* appears to threaten the general legislative function. Rather, the difficulty is that the decisional principle cannot explain why the exceptional power should be limited at all. If functions are generally independent, *but not where the constitutional text requires merger*, there is no apparent limit to the exceptional power. That the exceptional power appears to be identical to the more general power, which is the only limit the traditional hydraulic model recognizes, is irrelevant when powers are specified textually as concurrent. In short, the traditional maxim by itself cannot explain which branch should prevail in a conflict between concurrent powers.

The second problem with the traditional hydraulic model is that it provides no real guidance even when the functions are not textually defined as overlapping. The generic, delegated powers are not self-defining; the proper scope and means of executing such broad

170. *See generally* Boudin, *supra* note 157.

171. Indeed, *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869), upheld a withdrawal of appellate jurisdiction for habeas corpus, even as applied to a case in which the Court already had granted jurisdiction for the appeal and had heard arguments on the merits. The *Klein* Court did not even discuss *McCardle*. If the *Klein-McCardle* distinction is to be sustained on a separation of powers rationale, it must hinge on the fact that *Klein's* withdrawal of jurisdiction was conditioned upon a finding of fact, whereas the *McCardle* withdrawal of jurisdiction was unconditioned. *See* Glidden Co. v. Zdanok, 370 U.S. 530, 568 (1962).

172. *Cf.* Hart, *supra* note 158, at 1363 (congressional power to limit jurisdiction difficult to reconcile with "the basic presuppositions of a regime of law and of constitutional government").

powers as the "judicial Power" are open to reasonable differences of opinion. It is not convincing, for example, to claim as the Court did in *Kilbourn*[173] that Congress cannot use the contempt power because it is judicial in character. If Congress requires the contempt power to conduct its legislative business, it is irrelevant that such power "looks like" a judicial power, for that similarity merely indicates that the power is held concurrently in some instances. In *Kilbourn*, the Court attempted to avoid this difficulty by finding that the subject under legislative inquiry was presently before the courts and therefore could be resolved only by the courts.[174] This finding was patently inconclusive because the same information may be relevant both to a case before the courts and also to legislation being drafted to prevent similar cases from arising in the future. It makes entirely as much sense to state that in *Kilbourn* the judicial power to try cases interfered with the legislative power to obtain information as it does to argue the reverse. In short, the traditional model of limiting functions by reference to the nature of the functions of the competing branches is question-begging unless there is some independent method of establishing that the asserted functions are neither explicitly nor impliedly concurrent.

2. *Internal and external functions.*

Because the hydraulic model by itself cannot define the limits of concurrently held functions, the courts have attempted to supplement it with a distinction between the "internal" and "external" exercise of such functions. The broadest example of the resulting standard was the Jeffersonian argument for limitation of the power of judicial review. These democrats argued that a shared function should not be used by one branch so as to affect the coordinate functioning of another branch. Specifically, they argued that each branch should have "an equal right to decide for itself what is the meaning of the constitution in the cases submitted to its action."[175] Taken to this extreme, the argument against the "external" application of a shared function is authority for chaotic, continuing conflict among the branches:[176] Within its own sphere, each branch could act independently of the other branch's constitutional interpretations.

173. 103 U.S. 168, 192-93 (1880); *see* text accompanying note 160 *supra*.

174. 103 U.S. at 193.

175. Letter to Judge Spencer Roane, Sept. 6, 1819, *reprinted in* X THE WRITINGS OF THOMAS JEFFERSON 140, 141 (P. Ford ed. 1899). *See* G. GUNTHER, *supra* note 24, at 26-31; Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1008 (1965).

176. M. VILE, *supra* note 14, at 164-75.

A more limited version of the same distinction occasionally has been adopted by the Court. For example, the Court suggested in *Michaelson v. United States*[177] that legislative authority to control the judicial contempt power is narrower when that power is used to assure orderly proceedings in the courtroom than when used to enforce compliance with judicial decrees outside the courtroom.[178] Thus the location of the dividing line between the legislative and judicial control over the contempt power was thought to depend in part on whether the internal functions of the judiciary were implicated. Similarly, the Court has suggested that the legislative contempt power interferes less with the judicial function when the legislature seeks merely to protect the internal integrity of its committee proceedings.[179]

The difficulty with the labels "internal" and "external" is that they merely represent conclusions, not explanations of the scope of governmental functions. A judicial contempt decree is not necessarily less "internal" to the judicial function merely because the physical location of the affected conduct is outside the courtroom. Indeed, the object of a court's decree may not be "near" the legislative proceeding either, yet in *Michaelson* control over conduct occurring entirely outside any legislative proceedings apparently was thought more "internal" to the legislative function than to the judicial. It is entirely possible that essential aspects of a particular judicial function could depend on controlling behavior that is surely "internal" to the executive function, such as compelling disclosure of secret presidential conversations.[180] The exercise of the veto renders one "internal" legislative vote futile and partially controls the procedures within the legislative branch for the next vote; the judicial equity power is useless unless the actual behavior of executive officers engaging in clearly executive functions can be coerced. The different governmental departments necessarily must affect the internal

177. 266 U.S. 42 (1924).

178. *Id.* at 66-67. The Court held that the power of contempt is an inherent judicial power but that Congress in the Clayton Act had properly restricted this power because its restrictions applied only to acts also punishable as crimes and not to acts committed in the presence of the court.

179. Marshall v. Gordon, 243 U.S. 521, 542-44 (1917); *see* Doe v. McMillan, 412 U S. 306 (1973) (distinguishing between dissemination of material within Congress and outside Congress, for purposes of determining subordinate legislative employees' liability for invasion of privacy).

180. *Cf.* United States v. Nixon, 418 U.S. 683 (1974) (President's generalized interest in confidentiality of conversations outweighed by fundamental demands of due process in the fair administration of criminal justice). *See* text accompanying notes 195-99 *infra*.

operations of the other branches because the checks imposed by the Constitution cannot be effective unless they have an "external" impact.

3. *Essential and nonessential functions.*

If it is not possible to distinguish meaningfully between internal and external functions, it still might be possible to distinguish between interferences that only "check" a coordinate branch and those that threaten its existence. Madison at one point construed Montesquieu to mean not that agencies should have "no *partial agency* in, or . . . *controul* over, the acts of each other," but that "where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution, are subverted."[181]

On its face, this proposition appears insufficient for deciding any imaginable case, because only the virtual elimination of one branch by another amounts to a violation of the rule. If the extreme Jeffersonian argument against "interference" was in fact an attack on the idea of a balanced Constitution,[182] Madison's formulation was an uncharacteristic attack on the idea of separation of powers itself. The argument requires separate institutions but not separate functions. Nevertheless, a variant of this position has found its way into judicial standards. Courts have designated some functions as "essential" and have limited the scope of a shared function when it interferes with such an essential function. Justice Story asserted in *Martin v. Hunter's Lessee*,[183] for example, that congressional authority to determine jurisdiction could not be used to interfere with the essential judicial role.[184]

It is debatable how much jurisdiction is "essential," but similar statements regarding essential functions have been accepted with respect to the powers of the other branches. In *Myers v. United States*,[185] for example, the Court held that the power to remove postmasters is essential to seeing that the laws are faithfully executed and therefore is an essential executive function protected from

181. THE FEDERALIST No. 47, at 325-26 (J. Madison) (J. Cooke ed. 1961).

182. *See* notes 175-76 *supra* and accompanying text.

183. 14 U.S. (1 Wheat.) 304 (1816).

184. "The judicial power must, therefore, be vested in some court, by Congress; and to suppose that it was not an obligation binding on them, but might, at their pleasure, be omitted or declined, is to suppose that, under the sanction of the constitution they might defeat the constitution itself." *Id.* at 329.

185. 272 U.S. 52 (1926).

legislative incursion.[186]

Despite the Court's protection of these essential functions, the framers may have intended to give each branch some power over the essential functioning of the others. Whatever the precise limits of such checks and balances as the veto power, the impeachment power, the subpoena power, the power of judicial review, the power to appropriate money, and the power to control the method of executive appointments, it is at least certain that each empowers one branch to interfere fundamentally with the powers of another branch—surely more fundamentally than the power to approve the removal of a postmaster interferes with the executive function.[187] Although limitations on the scope of constitutional checks and balances must be determined somehow, the "essentialness" of the function interfered with is as much a measure of the effectiveness of the constitutional "check" as it is proof of a violation of separation of powers.

4. *The Jackson formulation.*

Justice Jackson's concurrence in the *Steel Seizure Case*[188] represents another effort to develop judicial standards for the application of separation of powers. He contended that the extent of presidential powers fluctuates "depending upon their disjunction or conjunction with those of Congress."[189] According to this view, executive power is most legitimate when explicitly or implicitly authorized by Congress; its legitimacy is most indeterminate when exercised in the face of congressional silence because it then relies only on inherent presidential authority; and it is least legitimate when asserted in the face of congressional opposition, for then the President can prevail only by maintaining that Congress is acting beyond its authority.

The primary organizing criterion in this framework is the extent to which the branches agree on how to allocate power: The degree of judicial scrutiny varies according to the extent of agreement between the executive and legislature. In this respect, the proposal does not utilize a descriptive differentiation of function and thus is

186. *Id.* at 117.

187. Professor Black has commented that, on the basis of constitutional text, Congress "could cut the President down to nothing but his salary, could, indeed, put the White House up for auction," to which his co-author could only respond: "It could take the clerks away from the Supreme Court." B. ECKHARDT & C. BLACK, THE TIDES OF POWER 6 (1976).

188. Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure Case), 343 U.S. 579 (1952).

189. *Id.* at 635 (Jackson, J., concurring).

responsive to the reality of political outcomes rather than to the theory of separation of powers. The political outcome may be influenced by each branch's concept of the proper functions of the competing branch, but Justice Jackson's formula does not assist any branch in determining proper allocations. It merely assures each branch that its judgment will influence the level of judicial scrutiny.

To the extent that the Jackson formulation acknowledges factors other than the extent of agreement among the branches, it slides over the difficult separation of powers problems. For example, although the rule states that executive authority is "at its maximum" when the President acts with congressional approval, it fails to indicate when this authority would exceed both its inherent scope *and* what Congress "can delegate."[190] To say that only rarely would the executive exceed both his authority and what Congress can authorize is not to explain how to identify it when it occurs.[191] Moreover, when the President acts in the face of congressional silence, the formulation explicitly commits the outcome to "the imperatives of events" rather than to any effort to differentiate functions.[192]

Only in the third category, when there is disagreement between the executive and legislative branches regarding proper power allocation, does the formulation face the problem of functional differentiation. Here Justice Jackson assumes that the constitutional text will give adequate guidance to identify when one branch has exceeded the limits of a concurrently held power, such as the war power. Although the phrases "commander in chief" and "to raise and support armies" are suggestive, they are by no means conclusive.[193] Moreover, even to the extent that reliance on text is persua-

190. *Id.*

191. *See, e.g.*, Mora v. McNamara, 389 U.S. 934, 935 (1967) (Stewart, J., dissenting from denial of certiorari) ("If the Joint ['Tonkin Gulf'] Resolution purports to give the Chief Executive authority to commit United States forces to armed conflict limited in scope only by his own absolute discretion, is the Resolution a constitutionally impermissible delegation of all or part of Congress' power to declare war?"); Prize Cases, 67 U.S. (2 Black) 635, 693 (1862) (Nelson, J., dissenting) (the power to declare civil war "cannot be delegated or surrendered to the Executive").

One commentator essentially adopted the Jackson formulation: "[A]ny attempt to brand particular conflicts as constitutional or unconstitutional is likely to be of little consequence. The constitutional analysis is better viewed as yielding a working directive to the executive and legislative branches that the commitment of the country to war be accomplished only through the closest collaboration possible, rather than an automatic formula for condemning or approving particular presidential action." Note, *Congress, the President, and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771, 1794 (1968).

192. 343 U.S. at 637 (Jackson, J., concurring).

193. *See generally* Frohnmayer, *supra* note 22, at 219-20. President Nixon stated that the War Powers Resolution of 1973, 87 Stat. 555, H.R.J. Res. 542, 93d Cong., 1st Sess., 119 CONG.

sive, it does not necessarily utilize the underlying character of the functions to separate the great powers of government. There remains something compelling about Justice Black's apparently naive explanation that the President could not seize private steel mills because the "Founders of this Nation entrusted the lawmaking power to the Congress alone."[194]

D. *Comparative Functional Differentiation*: United States v. Nixon

Although each of the articulated judicial standards by itself is an inadequate general formulation of separation of powers, together they suggest that abstract differentiation of function can be useful in defining the limits of express or implied concurrent powers. Underlying the articulated standards is a reasoned response to the dilemma of two contradictory structural principles in the Constitution: The principle of separation requires that the branches be independent and coordinate; the principle of balance requires that the branches be dependent on and, to some indeterminate extent, subordinate to each other. Where neither constitutional text nor history provides definitive guidance to the limits of a concurrent power, the dual requirements of separation and balance have been reconciled through an abstract functional differentiation that locates the boundary that least restricts the power of *each* branch. This resolution assumes that in any conflict each branch makes equal claims to the contradictory goals of autonomy and interference. It assumes that both claims for the right to "check" the other branch cannot be validated because they are inconsistent. Consequently, the only basis for separation is to identify the division of power that least reduces the general power of each branch, thus maximizing the potential in each of the competing branches for both independent action and interference. The following proposition summarizes this general and implicit standard used by the Court to give the greatest possible effect to two inconsistent organizational principles: With respect to two inconsistent claims for power, deny the claim that represents the greater intrusion into, but not necessarily a more effective "check"

REC. 36,198 (1973), was unconstitutional because it automatically would terminate his "constitutional powers as Commander-in-Chief" if Congress failed within 60 days to declare war or extend the period after commitment of forces to combat. MESSAGE FROM THE PRESIDENT OF THE UNITED STATES VETOING HOUSE JOINT RESOLUTION 542, A JOINT RESOLUTION CONCERNING THE WAR POWERS OF CONGRESS AND THE PRESIDENT, H.R. DOC. NO. 171, 93d Cong., 1st Sess. 1-3; 119 CONG. REC. 34,990 (1973).

194. Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure Case), 343 U.S. 579, 589 (1952).

of, the classically or textually defined function of the competing branch.

This proposition is illustrated by *United States v. Nixon*,[195] in which the President claimed that his inherent power to maintain the secrecy of presidential conversations must prevail over the judiciary's power to subpoena information relevant to a criminal trial. Descriptively, each branch's claim easily falls within its decisionmaking powers: The Court described its subpoena power as "essential" to the classical judicial function of determining guilt or innocence;[196] similarly, it acknowledged an inherent executive power to maintain the confidentiality of communications as an essential part of executive decisionmaking.[197] Nonetheless, these two classic purposes—to decide cases and to operate the machinery of government—necessarily involve each branch in the functions of the other: The President's actions can affect the guilt-determination process, and the Court's role can affect the process of operating the government. The claims are inconsistent and both cannot be validated—the President cannot maintain the confidentiality of his conversations while a court is using them as evidence. The principle of balance, which relies on the sharing of functions among the branches, cannot resolve such inconsistent claims. Moreover, the traditional hydraulic separation of powers model is of no apparent use because to assert that the executive function can extend only to the point at which it usurps judicial functions equally implies the opposite assertion that the judicial function must yield when it usurps executive functions. Finally, neither the process of adjudication nor the process of presidential decisionmaking can be described meaningfully as external or nonessential.

The Court decided *Nixon* primarily by acknowledging the equality of the competing claims and by finding the least restrictive means of reconciling the powers of both branches. This was accomplished by comparing the relative degrees of intrusions into the classically defined functions of the competing branches. Thus the Court admitted the power of the chief executive to withhold information from the judicial process,[198] as well as the power of the Court to compel disclosure. Both prerogatives were approved with the qualification that the general authority of each branch would be permit-

195. 418 U.S. 683 (1974).
196. *Id.* at 711.
197. *Id.* at 708.
198. *Id.* at 705-06.

ted to interfere with the operations of the competing branch only if supported by a preponderance of specific need, defined with reference to the classically defined functions at stake in the specific conflict. This rule explains the conclusion in *Nixon* that the "*generalized* assertion" of executive privilege must yield to the "demonstrated, specific need for evidence" in the criminal trial.[199]

The Court's demand for proof of specific institutional need for claimed authority suggests two interrelated types of functional comparisons that are relevant to assessing the relative degree of intrusion into the opposite branch's function: comparisons of the *depth* and *breadth* of the intrusions. The first is a more abstract inquiry into the quality of the governmental purpose inherent in each competing claim for power, and the second is a more practical inquiry into actual operational impact of the claims on the competing branch.

The relative *depth* of the intrusions in *Nixon* was measured by how directly and persuasively each claimed power was related to the classically or textually defined purposes of that branch of government. The claim represented by the highly specific subpoena was persuasively related to the classical judicial purpose of trying criminal cases. The highly general claim of executive secrecy was less clearly related to the executive purpose of operating the machinery of government. A more specific executive claim, such as one based on the need for military secrecy, might be more convincingly related to executive functions, and the Court noted that such a claim might require a different result.[200] To the extent that the executive power claimed in *Nixon* was so general as not to be plausibly or closely related to a legitimate executive purpose, denying the President's claim would intrude less into the executive function than denying the subpoena power would intrude into the judicial function of trying cases.

The demand for proof of specific institutional need also suggests that the relative degree of the intrusion can be measured by the *breadth* of the intrusion into the actual operations of the competing branch. An undifferentiated institutional need is more likely to be

199. "[W]hen the ground for asserting privilege as to subpoenaed material sought for use in a criminal trial is based only on the *generalized* interest in confidentiality, it cannot prevail over the *fundamental* demands of due process of law in the fair administration of criminal justice. The *generalized* assertion of privilege must yield to the demonstrated, *specific* need for evidence in a pending criminal trial." *Id.* at 713 (emphasis added).

200. *Id.* at 710, 712 n.19.

claimed frequently. The subpoena in *Nixon* specified exact information required for a specific criminal case; such claims for executive information are unlikely to be made frequently. The Court noted that such "infrequent occasions of disclosure" would not be likely to cause presidential advisors "to temper the candor of their remarks."[201] In contrast, generalized claims of executive privilege could be asserted over a broad range of circumstances and thus intrude frequently into the judicial function.

It should be noted that the Court in *Nixon* only denied finality to the relatively broad claim of the executive branch. The *Nixon* standard requires that the losing claim be subordinated only to the minimum extent necessary to resolve the conflict between the branches.[202] Thus, *Nixon* does not prevent the President from classifying documents for purposes of secrecy nor from, in effect, "adjudicating" whether they appear necessary for the criminal trial in the first instance. The President's claim of privilege is "presumptively" valid before the district court.[203] In short, the President is permitted to share the adjudicatory responsibility, but his decision is subordinate to the final decision of the courts. The sharing of the methods and purposes of decisionmaking is prevented only to the extent that one of the asserted powers must yield, and then only to the minimum extent necessary to resolve the conflict between the branches.

Nixon, then, is a refined application of all four of the traditional judicial standards for separation of powers. It adopts the hydraulic assumption that the power of each branch is delimited by the function of the competing branch. The "essentialness" of the function is relevant as a comparative measure of the degree of intrusion into each branch's function, considered in the abstract. The distinction between "internal" and "external" uses of power is restated as a more general inquiry into the comparative degree of intrusion into the actual operations of each branch. The Jackson formulation is

201. *Id.* at 712.

202. Some claims might be so broad that merely granting finality to the more appropriate branch would not prevent an overbroad intrusion. For example, an executive claim of the power to make rules for the general public, without any guidance at all from the legislature, might be too broad even if such rules were expressly subject to legislative "veto." To permit the President so to dominate the legislative agenda would amount rather clearly to a reversal of functions, so the mere preservation of final authority to Congress would not be sufficient. *See* National Cable Television Ass'n v. United States, 415 U.S. 336 (1974); Yakus v. United States, 321 U.S. 414 (1944); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935).

203. 418 U.S. at 713.

followed insofar as it suggests that the authority of one branch should not be invalidated unless there is an actual conflict with another branch, and then only to the minimum extent necessary to resolve the conflict.

The *Nixon* Court's methods of inquiry into the relative degrees of intrusion use the traditional judicial standards in a way that reconciles the competing doctrines of checks and balances and separation of powers. The power of each branch to "check" the other is not denied, and the Court acknowledged that the necessary interference might be significant. Thus a specified and substantiated claim of executive privilege might be upheld despite its direct interference with essential judicial functions.[204] The Court also acknowledged the significance of the judicial intrusion into the privacy of the presidential decisionmaking process.[205] In these ways, the decision is faithful to the concept of constitutional balance by acknowledging equal claims to overlapping authority. Yet it also responds to the obvious necessity for drawing some limit for the exercise of inconsistent, concurrent powers by expanding the power of each branch in a way least likely to interfere deeply and broadly with the classically defined functions of the other branch. To this extent, the decision is faithful to the concept of separation of powers.

E. *The Traditional Judicial Standards Reevaluated*

Previous cases are more understandable in light of the separation of powers formulation that emerges from *Nixon*. The general hydraulic rule that no branch shall "encroach upon the powers confided to the others"[206] except according to specific constitutional exceptions is overgeneralized but not useless. The classically defined core of each branch's general functions can be used to mark the limit of the other branch's powers when two asserted powers are inconsistent and when the exercise of one such power would intrude more deeply and broadly into the competing branch's sphere than would the exercise of the other. An example is *United States v. Klein*,[207] which held that Congress had exceeded its power to prescribe regulations for the Court's appellate power when it proscribed appellate jurisdiction of cases where proof of loyalty to the Union had been based on an executive pardon.[208] The Court, of course, acknowl-

204. *Id.* at 710, 712 n.19.

205. *Id.* at 705-06, 714-15.

206. Kilbourn v. Thompson, 103 U.S. 168, 191 (1880). *See* text accompanying notes 160-61 *supra*.

207. 80 U.S. (13 Wall.) 128 (1872).

208. *See* text accompanying notes 163-68 *supra*.

edged the power of Congress to make exceptions to the appellate jurisdiction but found that a conditional use of this power encroached on the judicial power to determine facts in a pending case when its purpose was "to deny to pardons granted by the President the effect which this court *had adjudged* them to have."[209] The judiciary claimed only the right to find facts and decide pending cases according to applicable law—a claim that carves from Congress' "jurisdiction" only cases already pending at the time it legislates.[210] Congress essentially had asserted the power to prescribe a rule of decision in a pending case.[211] The judicial claim left Congress with its normal power to regulate jurisdiction unconditionally for nonpending cases. Moreover, although *affecting* the outcome of cases is necessarily a legislative function to the extent that it is a necessary result of regulating jurisdiction, the power to *determine* the outcome of pending cases by manipulating jurisdiction is not necessary to the general function of controlling jurisdiction. At least, it is less closely related to that function than the judicial role of applying existing law to specific cases is related to the classical adjudicatory function.

Klein's other holding, which protected an extremely broad use of the presidential pardon power against legislative efforts to protect the integrity of its penalty-prescribing powers,[212] represents an application of the same principles. Both power claims were extremely broad in their potential impact on the powers of the competing branch, so a comparison of the breadth of actual impact is inconclusive. In effect, Congress claimed the power to nullify presidential pardons and the President claimed the power to nullify the effects of congressional legislation on disloyalty to the Union.[213] There is a difference, however, in the relative *depth* of the incursions into the essential nature of each branch's functions, as textually defined. A pardon for past actions, even if granted to whole categories of people, is still directly related to the purposes of the pardon power;[214] legislation aimed at past behavior already defined as criminal

209. 80 U.S. (13 Wall.) at 145 (emphasis added).

210. Indeed, it may not even restrict Congress' power to withdraw appellate jurisdiction for pending cases so long as the withdrawal is not conditioned upon a finding of fact. *See Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869); note 171 *supra*.

211. *See* text accompanying notes 167-68 *supra*.

212. *See* note 165 *supra* and accompanying text.

213. 80 U.S. (13 Wall.) at 140-41.

214. *See* Schick v. Reed, 419 U.S. 256, 266 (1974); *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 380 (1866).

and already pardoned is related less directly to the general legislative purpose of prospectively controlling conduct. As the Court noted, the "great and controlling purpose" of such legislation was simply to deny the effect of pardons already granted by the President,[215] a purpose only dubiously related to general legislative power. If the Court had permitted Congress to rescind executive pardons in this manner, in principle the pardon power itself would have been threatened. On the other hand, the Court's resolution leaves intact the general legislative power to define penalties prospectively.[216]

Kilbourn v. Thompson[217] also is consistent with the *Nixon* principle. If Congress can use its contempt power to enforce a highly general claim of need for information,[218] even when not relevant to any pending legislation and regarding a matter already in litigation,[219] the usurpation of the general adjudicatory function is profound.[220] The potential for judicial interference with the legislative need for information is relatively less preemptive because the judicial claim is restricted to matters related to a pending case, especially when, as in both *Kilbourn* and *Nixon*, the balance can be changed if a more specific legislative need for the claimed authority is shown.[221]

215. 80 U.S. (13 Wall.) at 145.

216. A broader executive claim might require the opposite outcome, however, if the character of the pardon were, on balance, too close to normal legislative purposes to be related directly to the traditional purposes of an executive pardon. The depth of the incursion into essentially legislative functions would increase as the pardon conditions were less clearly reductions in sentence and more like changes in the sentence. *See* Biddle v. Perovich, 274 U.S. 480 (1927) (President cannot substitute one kind of punishment for another). Furthermore, the breadth of the incursion would increase as the behavior pardoned becomes less specific and more prospective. In any of these circumstances, it becomes more difficult to justify the pardon as the traditional executive act of mercy. *See Ex parte* Garland, 71 U.S. (4 Wall.) 333, 380 (1866); 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §1498 (4th ed. 1873). *See generally* Boudin, *supra* note 157.

217. 103 U.S. 168 (1880). *See* text accompanying notes 160-61 *supra*.

218. 103 U.S. at 194-95.

219. *Id.* at 193. *See* Sinclair v. United States, 279 U.S. 263 (1929) (Congress may require disclosure of information in aid of its constitutional power even if the information may be of use in a pending suit).

220. The case thus illustrates the Court's assumption that a branch can "intrude" upon the abstract function of another branch by usurping its function even if its operations are not being impeded directly. The Court apparently viewed the legislature's purpose as being the judicial one of imposing punishment for past conduct and thus constituting an intrusion into the judicial function. If a legislature were to "act like" a court in its use of the contempt power, but for a purpose more clearly legislative in nature, there would be relatively less "intrusion" into the judicial function. *See, e.g.*, McGrain v. Daugherty, 273 U.S. 135 (1927). Although *Kilbourn* might be explained today in terms of witness' first and fifth amendment rights, the Court clearly intended to rely on separation of powers.

221. 103 U.S. at 194-95; *see* McGrain v. Daugherty, 273 U.S. 135 (1927) (upholding congressional power of inquiry and compulsory process in aid of "contemplated legislation").

Similarly, the contempt power cases[222] rationalized by the distinction between "internal" and "external" functions make more sense if the significance of the "internal" nature of the contempt power—to protect the department's decisionmaking process—is seen as an index of the relative narrowness of that branch's claim, rather than as some absolute method of separating shared functions.

The traditional judicial explanation that one branch may not interfere with "essential" functions of another branch also is better understood in light of the *Nixon* principles. Although the doctrine of constitutional balance does involve the possibility that one branch legitimately might interfere with an essential function of another, "essentialness" is also a measure of the depth of interference that must be evaluated in order to maximize the functions of both competing branches. The Court's protection of the presidential power to remove executive officers in *Myers v. United States*[223] was based partly on the defensible judgment that requiring congressional approval of specific executive removals would intrude more deeply on the presidential responsibility to enforce the laws than the presidential power of removal would detract from the largely intact power of Congress to set policies for executive implementation.[224] A different balance was struck, however, in *Humphrey's Executor v. United States*,[225] when the presidential removal power was asserted against congressional efforts to set standards for removal. The congressional standards demonstrably were related to the achievement of the policies that the executive branch was required to implement.[226] Therefore, presidential removal power would have cut deeply into congressional policymaking authority. The degree of legislative intrusion into classical executive authority was less,

222. *See* texts accompanying notes 160, 173 & 177-78 *supra*.

223. 272 U.S. 52 (1926); *see* text accompanying notes 185-86 *supra*.

224. 272 U.S. at 128, 134-35.

225. 295 U.S. 602 (1935).

226. The Court stated: "The [Federal Trade] commission is to be nonpartisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law. Its duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative. Like the Interstate Commerce Commission, its members are called upon to exercise the trained judgment of a body of experts . . . .

"The legislative reports in both houses of Congress clearly reflect the view that a fixed term was necessary to the effective and fair administration of the law." *Id.* at 624. The labels "executive," "quasi-judicial" and "quasi-legislative" are misleading, however, because the purpose of the Commission was unquestionably to enforce the statute. These phrases are better understood as referring to the extent to which statutory removal criteria are related to the underlying purposes of the legislation.

though, because specific presidential decisions were not to be reviewed by Congress. These two removal-powers cases maximize the powers of both branches within the same decisionmaking arena, favoring the less burdensome interference but not denying that significant interference is constitutionally permissible.

Finally, the *Nixon* principles explain some of the force behind Justice Black's insistence that the presidential seizure of the nation's steel mills contradicted the basic rule that the Constitution entrusts the lawmaking authority to Congress.[227] Because the President shares, to some indeterminate degree, legislative policymaking for the use of armed forces, it is not sufficient to ground the *Steel Seizure*[228] decision merely on a description of the seizure as a "legislative" act.[229] Nevertheless, it is possible to *compare* the depth and breadth of the executive's intrusion into the legislative function with the competing congressional interference in acknowledged areas of executive responsibility. The presidential claim was limited mainly by its dependence on the existence of armed hostilities in Korea and by the emergency that was said to threaten the army commanded by the President if reliance were placed solely on the policies set by Congress.[230] Neither of these limitations, however, persuasively describes a potentially narrow intrusion into legislative functions. Although the first would permit presidential displacement of Congress only during armed hostilities, the displacement could extend to all of the "internal affairs of the country" that conceivably could affect the operation of the armed forces.[231] The second limitation is also an extremely broad justification for displacement of legislative authority because the claim of emergency or necessity was grounded specifically on the consequences of decisions made by the competing branch of government. If one branch can avoid displacement only by acceding to the outcomes desired by the competing branch, real decisionmaking authority has been transferred. If, for example, courts could be displaced by executive tribunals simply because the judicial and executive adjudications might yield different outcomes, the general judicial power would exist in name only.[232] In contrast, although the power claimed by Congress in the

227. Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure Case), 343 U.S. 579, 587-88 (1952); *see* text accompanying notes 188-94 *supra*.

228. 343 U.S. 579 (1952).

229. "This is a job for the Nation's lawmakers, not for its military authorities." *Id.* at 587.

230. *Id.* at 642-54 (Jackson, J., concurring).

231. *Id.* at 642 (Jackson, J., concurring).

232. *Cf. Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 127 (1866) (martial rule can never exist when the courts are open and can exercise jurisdiction properly and without obstruction).

Steel Seizure Case could affect significantly the timing or success of particular military operations, it did not threaten generally the President's essential authority to command the armed forces. Congress did not seek power to make or overrule particular tactical decisions or even to influence the fundamental decision to commit troops to Korea.

Abstract functional differentiation, based on constitutional text and classical definition of function, is central to the process of reconciling claims for power in the face of the dual structural requirements of balance and separation. The necessary judicial inquiries are difficult, to be sure, but not impractical. Comparative determinations can be made of the depth of the intrusion into each branch's abstract function and the breadth of the intrusion into each branch's actual operations. The resolution least restrictive to both branches can be determined through such inquiries and can be used to accommodate the principles of balance and separation.

III. THE LIMITS OF EQUITABLE RELIEF

The discussion in Part I argued that separation of powers principles should apply to federal-state relationships as well as to wholly federal relationships. Part II described the underlying judicial analysis that has been employed to apply separation of powers, at least at the federal level. The purpose of this Part is to explore the ramifications of applying this same separation of powers analysis to federal-state relationships, particularly the relationship between federal courts and state executive and legislative branches.

Utilization of separation of powers principles is not, of course, a substitute for efforts to define substantive limitations on federal power. Wherever the substantive boundary of federal-state relations is drawn, however, separation of powers principles provide an independent measure of the appropriateness of a *particular federal branch's* interference with a state government. Thus the present analysis is useful, not for determining whether *some* interference by the federal government is authorized or required, but for determining the proper method and scope of the interference.

Application of separation of powers principles to federal-state relationships raises a host of difficult questions. For example, what are the limits to the power of Congress to interfere with state executive functions,[233] or to the power of the federal executive to

233. *See* note 104 *supra*; note 305 *infra* and accompanying text.

interfere with state legislatures? Does the guarantee of a republican form of government impose restrictions, enforceable by *Congress*, on the wholly internal structure of state governments?[234]

The discussion in this Part, however, will be limited to that increasingly common form of federal interference: the federal courts' interference with state executive branches and, to a lesser extent, with state legislative branches. In particular, the separation of powers principles derived in Part II will be applied to the problem of defining the limits of federal equitable remedies directed against recalcitrant state executives and legislatures.

A. *Measuring the Relative Degree of the Intrusion*

At first glance, functional differentiation appears inapplicable to the array of modern equitable remedies because judicial remedies, like pardons and vetoes, represent one of those merged functions inherent in a balanced Constitution. It is impossible to evaluate the propriety of such tools as regulatory injunctions or receiverships simply by descriptively comparing their purposes or processes with those of the other branches. It is equally impossible, however, to tolerate the conclusion that the general functions of one branch can be engulfed or displaced by a single constitutional "check," for the general functions have a presumptively equal claim to constitutional authority. Short of total displacement, it is not enough to say that constitutional balance requires functional overlap and interference because, at the points of conflict, the concurrent powers cannot both be implemented fully. It is possible, however, to employ functional differentiation to maximize both competing claims, subordinating to the minimum extent possible the broader or less essential claim to authority.

As indicated by the discussion in Part II, the most convincing judicial efforts to implement separation of powers have been based on a comparison of the depth and breadth of the competing intrusions into the textually or classically defined functions of each branch. These same comparisons are useful in determining the proper scope and form of federal equitable remedies against state institutions. Two characteristics of modern equitable remedies, their detail and their range, illustrate how the competing intrusions can be compared for purposes of resolving separation of powers problems.

234. U.S. CONST. art. IV, § 4; *cf.* Luther v. Borden, 48 U.S. (7 How.) 1 (1849) (political question limitation prevents the *Court* from enforcing the republican guarantee).

1. *Detail in the decree.*

The tendency to find very specific requirements in the Constitution's general language has increased greatly since 1960, especially among the lower courts.[235] The Supreme Court has defined the precise warning that must be given criminal defendants to assure the voluntariness of confessions[236] and has determined the nature of the states' interests in unborn life at each stage of pregnancy,[237] but the lower courts have gone much further. They have relied on the due process clause to impose a precise staff-patient ratio in a mental health facility and to set the specific content necessary for an adequate individualized medical treatment plan.[238] In prohibiting cruel and unusual punishment, a lower court has established standards for the minimum number of square feet in a prisoner's cell (60), the number of minutes of daily outdoor exercise for prisoners in isolation (30), the number of urinals to be provided (one urinal or foot of urinal trough per every 15 inmates), and such miscellany as a requirement that each dietary supervisor have at least a bachelor's degree in dietetics.[239] The Supreme Court has approved orders mandating the specifics of state apportionment schemes[240] and local education programs;[241] state officials have been enjoined from "failing to implement"[242] these detailed orders. Other aspects of judicial decrees can involve great detail: Courts have considered and sometimes actually have exercised a supervisory function over executive appointments,[243] and have appointed judicial receivers to make specific executive decisions.[244]

Depth of the intrusion. Because courts deal only with specific cases or controversies, their remedies necessarily are specific and detailed to some extent. Judicial orders traditionally control specific

235. *See* Robbins & Buser, *supra* note 2, at 893-94.

236. Miranda v. Arizona, 384 U.S. 436, 467-74 (1966).

237. Roe v. Wade, 410 U.S. 113, 162-65 (1973).

238. Wyatt v. Stickney, 344 F. Supp. 373, 383-86 (M.D. Ala. 1972), *aff'd in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

239. Pugh v. Locke, 406 F. Supp. 318, 332, 334 (M.D. Ala. 1976), *aff'd in relevant part sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977); *see* Robbins & Buser, *supra* note 2.

240. *See* cases cited in note 8 *supra.*

241. *See* Dayton Bd. of Educ. v. Brinkman, 97 S. Ct. 2766 (1977); cases cited in note 256 *infra.*

242. *E.g.*, Pugh v. Locke, 406 F. Supp. 318, 331 (M.D. Ala. 1976), *aff'd in relevant part sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977).

243. *See* Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605 (1974); Carter v. Jury Comm'n, 396 U.S. 320 (1970); Lance v. Plummer, 384 U.S. 929 (1966) (Black, J., dissenting from denial of certiorari).

244. *See* Roberts, *supra* note 2.

conduct, including executive conduct. In constitutional cases, however, the court's function often is to enforce very general mandates such as "due process." Detail in decrees enforcing such broad mandates is relevant to measuring the depth of the judiciary's intrusion into the functions of other branches.

When the constitutional language is broad, the judicial function is to articulate the broad policies contained in the Constitution, and to determine whether existing conditions are in compliance. The classical function of the executive is to decide detailed questions about how to implement constitutional policies. Therefore, a judicial decree specifying in detail how policy should be implemented intrudes deeply into the executive function. Alternatively, although detail is not necessarily unrelated to the purposes of constitutional adjudication, the plausibility that the injunctive language is necessary to fulfill the courts' constitutional function decreases as the gap between the generality of the constitutional language and the specificity of the injunctive language increases. It must be acknowledged, for example, that the Constitution might be satisfied with something less than a bachelor's degree in dietetics in an institutional kitchen, and a decree that implements the due process clause by mandating the use of standards set by the Department of Health, Education and Welfare (HEW) plausibly adjudicates the constitutional issue only to the extent that HEW can be thought to have done so in issuing its regulations.[245] Indeed, some courts have framed their constitutional analysis so that it is nearly impossible to discern whether any particular part of the court order represents a *constitutional* requirement or precisely how the decree might bear on the underlying constitutional violation.[246] The point here is not to question current requirements inferred from some constitutional provisions; it is merely to note what courts themselves seem to acknowl-

245. The *Wyatt* decree, for example, mandated compliance with the regulations of HEW with regard to medical experimentation. Wyatt v. Stickney, 344 F. Supp. 373, 380 (M.D. Ala. 1972), *aff'd in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974). In *Pugh*, the court mandated compliance with standards set by the United States Public Health Service as well as by the Center for Correctional Psychology at the University of Alabama. Pugh v. Locke, 406 F. Supp. 318, 332-33 (M.D. Ala. 1976), *aff'd in relevant part sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977).

246. *See* Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971). The constitutional stature of specific racial quotas in school desegregation cases, quotas that are referred to as "starting points," is similarly ambiguous. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 25 (1971). For an analysis of how court-imposed prison standards have exceeded the nature of the court-defined violation, see Robbins & Buser, *supra* note 2.

edge, at least implicitly: Such explicit detail in the decree often is unnecessary to protect the constitutional right involved. The Supreme Court acknowledged this in *Bounds v. Smith*,[247] where broad discretion was left to state governments in deciding how best to assure prisoners adequate access to federal courts.[248] In short, some degree of deference to the state executive function with regard to specificity might interfere with the judicial function less than executive compliance with the detailed judicial decree might interfere with the executive function.

Breadth of the intrusion. Detail in the decree is also relevant to measuring the breadth of the intrusion into the operations of the other branches. The amount of detail in a decree is an index of the extent to which executive and legislative decisionmaking is limited with regard to matters not under litigation. For example, to the extent that a decree mandates the specific amounts of space or time that must be devoted to prison recreation, resources available for other prison programs, programs that might not be challenged in the lawsuit, are diminished.[249] A court that mandates specific personnel procedures obviously affects the way in which all executive functions are carried out.[250] In short, to the extent that a decree is so detailed as to approximate judicial operation of school or prison systems, the relative displacement of executive and legislative authority is extremely broad, extending even to matters not under adjudication.

2. *Range of the decree.*

Modern decrees often have long duration and wide impact. The length of time over which the decree controls executive or legislative behavior is clearly one index of both the depth and breadth of the invasion of their functions. It is the range of behavior that the decree seeks to control, however, that most clearly demonstrates the degree of judicial intrusion into the functions of other branches.

The power to make and implement policy governing the affairs

247. 430 U.S. 817 (1977).

248. *Id.* at 830-32. Although the Court upheld a lower court order requiring state prison officials to provide law libraries for inmates in order to assure "right to access" to federal courts, the Court left to state officials broad authority to devise other remedies that equally could assure access.

249. *See* Taft, *supra* note 2, at 347.

250. *Cf.* Rizzo v. Goode, 423 U.S. 362 (1976) (order of district court requiring submission of program to handle citizen complaints about police misconduct unwarrantedly interfered with state's internal affairs and disregarded principles of federalism).

of individuals who have committed no legal wrong is, of course, a classical description of the legislative and executive functions;[251] the power to coerce individuals who have committed a legal wrong in order to redress that wrong is a classical judicial role.[252] The functions overlap when the coercion of the wrongdoer has consequences for third parties who are strangers to the suit. A school busing decree entered against officials found to have participated in racial segregation obviously affects children and parents who have not participated in constitutional violations and who are not parties to the lawsuit at all. This result is not unique to modern extensions of judicial power; traditional remedies have some incidental or intended effect on those who deal with the defendant.[253] Although some third-party consequences of a judicial remedy are inevitable, the decree should not inevitably displace legislative and executive decisions—at least no more so than a general legislative policy that incidentally affects parties to a lawsuit and frustrates a judicial decree should inevitably predominate over that decree. In either case, one branch is claiming an inherent power to encroach upon the functions of the other branch as an incident to performing its acknowledged responsibilities. The clearest example, perhaps, of widespread third-party consequences is a decree that necessarily requires substantial expenditures; such an order leads either to increased general taxes or to fewer resources being available for alternative programs. When the welfare and behavior of virtually every resident of a state or city might be affected by a judicial remedy, both the depth and breadth of the intrusion into the functions of the executive and legislative branches are most obvious.[254]

The application of separation of powers principles to such

251. "The executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated." THE FEDERALIST No. 78, at 522-23 (A. Hamilton) (J. Cooke ed. 1961).

252. *See* United States v. Brown, 381 U.S. 437, 442 (1965) (the Bill of Attainder clause, U.S. CONST. art. I, § 9, cl. 3, is "an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature").

253. A limited and "traditional" finding of a constitutional violation might implicate wide third-party consequences if broad affirmative action is necessary to correct the violation. For example, protection against impairment of contracts of a limited number of municipal bondholders might be thought to require control over every aspect of city government if the city's financial problems were sufficiently pervasive. *See* Meriwether v. Garrett, 102 U.S. 472 (1880).

254. "The judiciary . . . has no influence over either the sword or the purse . . . . It . . . must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." THE FEDERALIST No. 78, at 523 (A. Hamilton) (J. Cooke ed. 1961).

conflicts requires that the branch least able to demonstrate a specific need for the scope of its intrusion into the classically defined functions of the other branch find a less intrusive means of carrying out its function. Specifically, the burden on the judiciary should be to demonstrate that it could not redress the adjudicated violation by involving fewer third-party consequences. The burden on the executive or legislative branch should be to demonstrate that its authority does not affect parties to the adjudication in ways that unnecessarily frustrate judicial redress.

B. *Recent Supreme Court Standards*

The Supreme Court has not adopted a separation of powers analysis to limit the lower federal courts' intrusions into state executive and legislative functions, perhaps on the assumption that it had essentially foreclosed this possibility as early as *Baker v. Carr*.[255] Instead, the Court has attempted to restrain excessive lower court intrusions by a halting, ad hoc process that has avoided directly threatening the lower courts' potentially limitless reserve of authority over state institutions. The Court has relied on a rather variable application of the vague equitable maxim that "the nature of the . . . remedy is to be determined by the nature and scope of the violation."[256] The cases and decisions suggest, however, that the Court's use of this rule can be understood better as a tentative, indirect application of the separation of powers analysis derived from *United States v. Nixon*[257] and its evolutionary precedents. By analyzing the Court's restraints in light of the separation principles already developed,[258] a coherent rationale emerges that can provide the necessary standards for the lower courts and properly can divide responsibilities among all the branches of the federal government.

255. 369 U.S. 186 (1962); *see* text accompanying notes 77-80 *supra*.

256. Milliken v. Bradley, 97 S. Ct. 2749, 2757 (1977). *Compare, e.g.*, Keyes v. School Dist. No. 1, 413 U.S. 189 (1973) (if purposeful discrimination exists in one part of a citywide school system, a presumption exists that the entire system must be desegregated), *and* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (upholding use of pairing and busing to remedy de jure segregation), *with* Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976) (court's responsibility ends after it implements a racially neutral attendance pattern), *and* Milliken v. Bradley, 418 U.S. 717 (1974) (interdistrict desegregation remedy inappropriate if no interdistrict violation exists). For more recent examples, compare Dayton Bd. of Educ. v. Brinkman, 97 S. Ct. 2766 (1977) (remanded for more specific findings because of disparity between evidence of constitutional violations and the remedy decreed), with Milliken v. Bradley, 97 S. Ct. 2749 (1977) (courts may impose remedial programs where necessary to correct ills of segregation).

257. 418 U.S. 683 (1974); *see* text accompanying notes 195-205 *supra*.

258. *See* text accompanying notes 195-232 *supra*.

When deference to the executive or legislative branches would not result in any diminution of the effectiveness of judicial relief, the Court has used the "scope of the violation" rule to assess the relative scope and necessity of competing intrusions. In *White v. Weiser*,[259] for example, the Court reversed a lower court's reapportionment order because it was designed to achieve compact, contiguous districts at the expense of a state policy favoring a minimum number of electoral contests between incumbents. Because this state policy would not limit judicial redress for violations of the one-person-one-vote standard,[260] the state policy did not intrude on the judicial function. The court had intruded unnecessarily upon the legislative function, however, because the judicial preference for compactness did not promote population equality among the districts and therefore was not essential to the judicial function. In holding that a court's remedies should not "intrude upon state policy any more than necessary,"[261] the Court reconciled the competing functions by the same separation of powers principle that applies at the federal level. It chose the least intrusive means to effectuate both branches' functions.

In *White*, proper regard for state policies did not reduce the effectiveness of judicial relief, but this is not always the case. When deference to other branches would make the judicial remedy marginally less effective, the degree of the intrusion into the judicial function necessitated by this deference should still be balanced against the degree of the judicial intrusion into state policy-formulation functions. No judicial remedy can be fully effective. The judgment of what is necessary to rectify the "condition that offends the Constitution"[262] requires an essentially imaginary determination of the state of affairs that would have existed but for the violation. The consequences of a violation are speculative and potentially unlimited. Full redress for harm done by school segregation, for example, could be thought to entail protection and compensation of millions of adults for whatever personal inadequacies are traceable to their segregated schooling as children. Indeed, the Court on occasion has approved rather massive changes in school curricula to redress the inadequacies of segregated schooling.[263] If educational deprivations

259. 412 U.S. 783 (1973).

260. *See* Reynolds v. Sims, 377 U.S. 533 (1964) (announcing the one-person-one-vote standard for state reapportionments).

261. 412 U.S. at 795 (quoting Whitcomb v. Chavis, 403 U.S. 124, 160 (1971)).

262. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971).

263. *See, e.g.*, Dayton Bd. of Educ. v. Brinkman, 97 S. Ct. 2766 (1977).

must be compensated, why not the countless other personal, social and economic deprivations that flow from educational disadvantages? Intoning traditional maxims to the effect that remedial powers are "not unlimited" and must be based on a "balancing of individual and collective interests" at most acknowledges the problem,[264] but does not resolve it.

The Supreme Court has masked the contradiction between the proposition that remedial power "must be adequate to the task" of correcting the constitutional violation and the proposition that remedial powers are "not unlimited" by rather unconvincing characterizations of the underlying violations.[265] In *Pasadena City Board of Education v. Spangler*,[266] for example, the Court held it erroneous to continue a school desegregation order after the target racial quotas had been achieved. The Court dealt with the case as if all aspects of the initial violation had been eliminated and full redress had been achieved; hence the time span of the judicial control exceeded the violation.[267] Full redress had not been achieved, however, if ever it could be. The educational success of the integration program had not been shown, and success in areas such as teacher hiring and promotion had not been achieved.[268] Implying that full redress is possible by narrowly characterizing the initial violation does not aid analysis.

Nor is it helpful to rely on defining the scope of the violation in

264. *See* Whitcomb v. Chavis, 403 U.S. 124, 161 (1971); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

265. An early example of this phenomenon is found in Meriwether v. Garrett, 102 U.S. 472 (1880), in which the plurality opinion supplemented vigorous separation of powers language with a rather strained insistence that there had been no impairment of contract in any event. *Id.* at 511, 514 (Field, Miller and Bradley, J J., concurring in the judgment). There was little doubt that the challenged legislation had been designed to reduce the amount of required repayment on the debt for which the city had contracted. *Id.* at 532 (Strong, Swayne and Harlan, JJ., dissenting); *see* Amy v. Shelby County Taxing Dist., 114 U.S. 387 (1885). To argue in 1880 that legislated reductions in any substantial aspect of a contract, especially in its value, were not impairments was contrary to common understanding. *See* 102 U.S. at 532-33 (Strong, Swayne and Harlan, JJ., dissenting); Von Hoffman v. City of Quincy, 71 U.S. (4 Wall.) 535, 553 (1867). In other cases in which the Court was willing to find an impairment of contract, the necessary judicial involvement in executive and legislative functions was far more limited because the taxes could be raised by use of existing governmental apparatus rather than by the broad receivership required in *Meriwether*. *See, e.g.*, Mobile v. Watson, 116 U.S. 289 (1886); Louisiana v. Pilsbury, 105 U.S. 278 (1881). Thus the Court, then as now, preferred strained interpretations of the underlying constitutional right to unambiguous admissions that full correction of some violations might require action that the judiciary was not empowered to take.

266. 427 U.S. 424 (1976).

267. *Id.* at 434-35.

268. *Id.* at 436.

order to limit the remedy necessary to correct the consequences of the violation. In reversing an interdistrict desegregation order in *Milliken v. Bradley*,[269] the Court insisted that an interdistrict remedy would not have been barred had it been necessary to restore the victims to the positions they would have occupied but for the initial segregative acts.[270] The Court explained, however, that in this instance full redress did not require an interdistrict remedy because the illegal acts had not caused segregation in the suburban districts.[271] The weakness of this explanation is that, whether or not segregation had resulted in the suburban districts, the lower court had found that a failure by defendants to merge districts would frustrate a remedy in Detroit, where violations certainly had occurred.[272] The Court's explanation assumes that because there had been no interdistrict violations, the decree should not reach across district lines even though this insulation prevented full redress for the violations. Prior school desegregation decisions make undeniably clear the power of the court to order defendants to influence the decisions and lives of individuals who are entirely innocent of any segregative conduct but whose lives must be affected if defendants are to provide full redress.[273] The rule that the "scope of the remedy should not exceed the scope of the violation" inadequately explains the *Milliken* result because the rule is indeterminate to the extent that it confuses the "scope of the violation" with the scope of what is necessary to correct the *consequences* of the violation.

In addition, and most important, the reliance on characterizations of the underlying violations to limit the extent of judicial relief tends to constrain the definition of constitutional rights. In *Rizzo v. Goode*,[274] plaintiffs sought relief from an extensive pattern of police violations of constitutional rights; the federal district court mandated procedures for review of citizen complaints.[275] The Supreme Court reversed on the ground that the defendant police officials had not participated in the proven instances of abuse. Moreover, the Court expressed doubt that a mere failure to act in the face of a statistical pattern could ever be a constitutional violation,[276] and that

269. 418 U.S. 717 (1974).
270. *Id.* at 744.
271. *Id.* at 745.
272. *Id.* at 735, 738-39.
273. Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Green v. County School Bd., 391 U.S. 430 (1968).
274. 423 U.S. 362 (1976).
275. *Id.* at 365; Council of Organizations v. Rizzo, 357 F. Supp. 1289, 1321 (1973).
276. 423 U.S. at 371-72.

the plaintiffs even had presented a "case or controversy."[277] Although this characterization prevented rather disproportionate judicial supervision of the police department, it contains the potential for a very narrow definition of the citizen's right to be free of police abuse that is tolerated or even encouraged by the inaction of police officials.[278]

Unpersuasive or limited characterizations of the underlying violations and the steps necessary to correct them would not have been necessary to these decisions, if the Court had acknowledged the relevance of separation of powers principles to the federal-state relationships involved. Each result can be viewed as a finding that the judiciary had been unable to demonstrate the relative narrowness and necessity of its intrusion into legislative and executive responsibilities in order to carry out its own function. In *Pasadena*, the judge apparently realized that full redress would require a lifetime of judicial control over complex, far-reaching educational decisions.[279] In contrast, subordinating the court's function to those of the other branches did not directly threaten the major aspects of the corrective order.[280] The maintenance of specific racial quotas, after all, is not necessarily related very directly to the underlying constitutional right.[281]

Similarly, in *Milliken*, the lack of an interdistrict remedy would have affected the achievement of certain racial quotas, but the range of *intra*district remedies remained wide, and the longrun probability of achieving the quotas was somewhat dubious in any event.[282] The third-party consequences of an interdistrict order, however, would be broad indeed.[283] The Court's discussion indicates a real

277. *Id.* at 372.

278. *Id.* at 382, 387 (Blackmun, J., dissenting).

279. Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 433 (1976).

280. *Id.* at 437-39.

281. The Court itself has insisted that "desegregation . . . does not require any particular racial balance in each 'school, grade, or classroom.'" Milliken v. Bradley, 418 U.S. 717, 740-41 (1974). *See also* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 24 (1971). To the extent that particular quotas are aimed at achieving the racial balance that would have existed but for the segregative acts, the remedy is based on judicial speculation regarding extremely complex, multi-causal social events, not necessarily constitutional requirements.

282. Of course, the extent to which busing contributes to "white flight," which had helped to create nearly uniracial schools in Detroit, is widely debated. At the least, the lower court was proposing as constitutionally required a remedy with an uncertain ultimate effect. *See* Clotfelter, *The Detroit Decision and White Flight*, 5 J. LEGAL STUD. 99 (1976); Comment, *Community Resistance to School Desegregation: Enjoining the Undefinable Class*, 44 U. CHI. L. REV. 111, 113 (1976). *See also* Milliken v. Bradley, 418 U.S. 717, 802 (1974) (Marshall, J., dissenting).

283. "Entirely apart from the logistical and other serious problems attending large-scale

sensitivity to the depth and breadth of the intrusion into executive and legislative functions. The rationale would be significantly more definite and principled if the Court merely had applied the separation of powers analysis as developed at the federal level.

Finally, the Court in *Rizzo* emphasized the limited number of proven violations and the speculative nature of the threat of future violations, suggesting that abuses could be cured through individual cases.[284] Thus the claims of the nonjudicial branches for control over the details of personnel and complaint procedures for the city's police department were, on the record, only a limited intrusion into the court's corrective powers when compared to the scope of the court's intrusion into the normal executive decisionmaking process.

In summary, then, the Court's decisions have been sensitive to separation of powers considerations, although its explanations have not referred to that doctrine. If the Court explicitly were to adopt a separation of powers rationale, several advantages would accrue. First, there would be a simplification of analysis. There is a ready-made doctrine at the federal level that could be adapted to the federal-state relationship. Second, a coherent doctrine would provide greater guidance to lower federal courts, who are now subject to rather ad hoc second-guessing by the Supreme Court. Third, explicit acknowledgment of inherent limits on the permissible degree of federal judicial intrusion would bolster the legitimacy of the court's role when it does intrude, and might increase popular confidence and respect for the federal judiciary. Even a coherent explanation from the Supreme Court of *why* the function of the federal courts necessarily is limited might be significant in this respect. Finally, recognition of the separation of powers principle would indicate to other branches of the state and federal governments where their constitutional responsibilities lie. It is entirely plausible that the apparently unlimited authority of the federal courts to

transportation of students, the consolidation would give rise to an array of other problems in financing and operating this new school system. Some of the more obvious questions would be: What would be the status and authority of the present popularly elected school boards? . . . What board or boards would levy taxes . . . ? Would the children of Detroit be within the jurisdiction and operating control of a school board elected by the parents and residents of other districts? What board or boards would levy taxes for school operations . . . ? . . . What body would determine that portion of the curricula now left to the discretion of local school boards? Who would establish attendance zones, purchase school equipment, locate and construct new schools, and indeed attend to all the myriad day-to-day decisions that are necessary to school operations affecting potentially more than three-quarters of a million pupils?" Milliken v. Bradley, 418 U.S. 717, 743 (1974).

284. Rizzo v. Goode, 423 U.S. 362, 372 (1976).

resolve constitutional problems, and the readiness of some courts to assert that authority, inhibits other branches of both the state and federal governments from considering, determining and effectuating their own proper roles in vindicating constitutional rights.

If a separation of powers analysis were applied, the Court would have to acknowledge that, on occasion, the scope of the only permissible judicial remedies might not be adequate fully to redress a constitutional violation, at least not without the cooperation of the other branches of the federal or state governments. This should not be shocking. Limitations on the power of the judiciary to rectify constitutional violations already exist; they merely go by other names. Some limitations long have been acknowledged to inhere in the "political question" and "case or controversy" requirements.[285] Other limitations have included the vague equitable maxim that the scope of the remedy should not exceed the scope of the violation. That formulation not only limits the judicial authority as much as would the separation of powers analysis, but it also has a dangerous tendency to induce narrow definitions of constitutional rights and unconvincing characterizations of both the underlying violation and the steps necessary to achieve redress.

C. *Implications for Judicial Practices*

Adoption of separation of powers as a relevant structural principle in determining the permissible scope of equitable relief would have a number of implications for current practices among the federal courts. Some of these implications merely would confirm and give constitutional significance to present practices; others would be inconsistent with certain practices of some courts.

1. *Postponement of the remedy.*

It is generally acknowledged that judicial relief on complicated matters of broad impact, such as apportionment, should be withheld until the relevant state institutions have had an opportunity to act.[286] A similar deference to the executive branch is achieved by providing it an opportunity to shape the court's decree. Although unobjectionable in themselves, these judicial practices are inconsistent with separation of powers unless they include an adequate degree of deference to the decisions of the other branches. It is not enough to

285. *See* texts accompanying notes 30-31 & 90-94 *supra*.

286. *E.g.*, White v. Weiser, 412 U.S. 783 (1973); Minnesota State Senate v. Beens, 406 U.S. 187 (1972); Reynolds v. Sims, 377 U.S. 533 (1964).

postpone the judicial decree in order to see if the state legislature will make the same decision that the court would have made.[287] It might as well have been said in *Ex parte Milligan*[288] that military tribunals would have been unnecessary if the civilian courts had given proper assurances that they would adjudicate in the same manner as the military; or in the *Steel Seizure Case*[289] that the President could seize the steel mills only if Congress failed to take them. Authority without choice is illusory. A state legislature does not exercise authority when it appropriates money only because a federal court would do so if the legislature does not,[290] nor does a state executive when a court merely considers its proposals as to the specific mechanics of how best to achieve certain constitutional objectives along with the proposals of private litigants in the case.[291] In addition to providing simply a prior opportunity for other branches of government to speak on an issue, federal courts should be required to demonstrate an adequate consideration of the appropriate degree of deference to those branches.

2. *Consideration of the proper degree of deference.*

The point at which the judiciary's deference will interfere less with its function than the decision not to defer will interfere with the functions of the other branches is a matter that must be decided on the facts of particular cases. The lower courts should be required, however, to show a proper consideration of this issue. This burden should increase as the decree is more detailed or broader in its impact. At the least, lower courts should be required to specify how deference to general legislative policies or to the specifics of executive decisionmaking would impede their efforts to redress the

287. *Cf.* Wyatt v. Stickney, 344 F. Supp. 373, 377-78 (M.D. Ala. 1972), *aff'd in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) (court would take affirmative steps to ensure proper funding if state legislature did not promptly implement court's order to provide such funding). An extreme example is Judge Garrity's order to the Boston School Committee requiring the appointment of a certain individual as headmaster of South Boston High School. *See* note 302 *infra*.

288. 71 U.S. (4 Wall.) 2 (1867); *see* text accompanying notes 115-20 *supra*.

289. Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure Case), 343 U.S. 579 (1952); *see* text accompanying notes 188-94 *supra*.

290. *See* Wyatt v. Stickney, 344 F. Supp. 373, 394 (M.D. Ala. 1972), *aff'd in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

291. *See, e.g.*, Morris v. Travisono, 310 F. Supp. 857 (D.R.I. 1970) (entire new set of regulations drafted after arm's-length bargaining by counsel conducted under the auspices of the court); Holt v. Sarver, 309 F. Supp. 362, 383-85 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971) (court required state to devise plan for upgrading prisons); SaMarion v. McGinnis, 253 F. Supp. 738, 741 (W.D.N.Y. 1966) (court ordered Commissioner of Corrections to formulate a plan which would allow Black Muslim prisoners to practice their religion).

constitutional violation. This would require federal courts to state explicitly the less intrusive alternatives considered and the reasons for their rejection. Since less intrusive remedies could not be rejected without reason, express consideration of the proper degree of deference would amount to a rule that decisions of the other branches that are appropriate to their functions but incidentally affect the judicial function would be treated as presumptively valid. This is, of course, the same kind of discipline that the judiciary has imposed on itself with regard to presidential decisions regarding executive privilege.[292] Such self-discipline, at the district court level, is an essential prerequisite to assuring adequate review of the limits of the lower courts' functions.

3. *Deference in wording the decree.*

When intrusion into the functions of the nonjudicial branches is found to be disproportionate, the court need not necessarily forsake any decree with detail or broad third-party consequences. In such circumstances, separation of powers principles require only that the judicial function be subordinated to the minimum extent necessary to avoid disproportionate intrusion into the functions of the other branch. This requirement often can be met by preserving the opportunity for a final decision by the more appropriate branch by explicitly acknowledging, for example, that the detail in the decree is only representative of a level of change that would be constitutionally acceptable. Thus the decree should be worded so that legislative or executive decisions that later lead to minor variances, such as in the numerical ratios of the races in integrated schools, would not be technical violations of the decree. To the extent that certain details, like the specifics of racial quotas or the qualifications of institutional cooks,[293] are really only constitutional "starting points,"[294] they should be so treated in wording the decree and subordinated to legitimate responses from the legislative or executive branches.[295]

With regard to the breadth of the decree's impact, finality often can be preserved for the appropriate branch by ordering only the less intrusive remedy while allowing the appropriate branch an opportunity to avoid this remedy by its own decision to implement

292. *See* United States v. Nixon, 418 U.S. 683 (1974); text accompanying notes 195-205 *supra*.

293. *See* Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd in relevant part sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977); text accompanying notes 235-50 *supra*.

294. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 25 (1971).

295. *See* notes 246-48 *supra* and accompanying text.

the broader remedy. The clearest example of this method is the traditional hesitancy of the courts directly to order states to raise money for mandated changes.[296] In many circumstances, some remedy short of direct judicial mandating of programs or involvement in taxation is available: Prisoners can be released, damages can be awarded, programs can be enjoined, less costly modifications in programs can be ordered. Therefore, frequently courts simply announce the kinds of changes that will have to be made in order to avoid imposition of the less intrusive, but perhaps more drastic, remedy.[297]

Although this practice often indirectly requires the state to appropriate money, it does preserve final judgment in the appropriate branch with regard to whether and how the money should be raised and allocated. This concession is not a mere formality in light of the balancing of competing intrusions required by separation of powers principles. It is evidence that the judiciary has intruded into nonjudicial functions no more than necessary to perform its own function. The choice left to the competing branch is real, though difficult. A society might well prefer the more limited judicial remedy to the costs of complying with the broader remedy. For example, a state might prefer to have some patients or prisoners released rather than pay the costs of constitutionally adequate institutional conditions. In contrast, the tendency of some courts to threaten not the less drastic remedy, but a judicial effort to raise the funds necessary for the more intrusive mandate, simply displaces the legislative function in the broadest possible manner.[298]

4. *Judicial appointment of executive officers.*

The reluctance of the Supreme Court to permit direct judicial influence over executive appointments is well-founded in principles of separation of powers.[299] The identity of the person who holds an executive position is a detail that is most indirectly related to the judicial function. To justify the appointment of an executive officer as an appropriate function, the judiciary would have to claim that only a particular person is capable of implementing the remedy. The impact on the general executive function is as broad as possible

296. For a criticism of this reluctance, see Comment, *Enforcement of Judicial Financing Orders: Constitutional Rights in Search of a Remedy*, *supra* note 2.

297. *See, e.g.*, *id.* at 417 n.110.

298. *E.g.*, Wyatt v. Stickney, 344 F. Supp. 373, 394 (M.D. Ala. 1972), *aff'd in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

299. *See* cases cited in note 243 *supra*.

because the identity of the officeholder affects every decision entrusted by law to that office, not just those affecting the adjudicated remedy.

The use of receivers, and of masters and monitors, to the extent that their effect is to influence specific executive decisions,[300] also represents extremely broad, though more temporary, intrusions into the executive function. Such orders should be reviewed carefully to ensure that the duties entrusted to the judicial officer are narrowly limited to correcting the violation, an effort not always made by the lower courts.[301] Moreover, receivers should not be installed to replace executive officers.[302] Such appointments amount to judicial displacement of the executive removal power, a power recognized in the Constitution and the case law as essential to effective executive functioning.[303] The power to remove implies the power to demand loyalty, and no broader intrusion into the executive function is imaginable than judicial power to inject itself into executive lines of accountability. Judicial agents should be required to work with, not replace, their executive counterparts and should be required to give presumptive validity to executive proposals on issues normally entrusted to the executive. Power to override this presumption should be granted to the judicial agent only with respect to specific duties.

5. *Cooperation with other federal branches.*

Finally, if these limitations on federal judicial remedies make fully adequate enforcement of a constitutional guarantee impossible because of obstinate state institutions, the court should seek cooperation from the appropriate branches of the federal government. The most obvious means of doing so would be for the court expli-

300. The informal roles taken on by masters and monitors can approximate the formal duties of a receiver. *See, e.g.*, Note, *The* Wyatt *Case: Implementation of a Judicial Decree Ordering Institutional Change*, *supra* note 2.

301. Indeed, the *Wyatt* court enforced the monitors' demands even when they went beyond the broad contours of their duties. *Id.* at 1351, 1353, 1362-64. On the appeal of *Pugh v. Locke*, the Fifth Circuit ordered that the district court's 39-member Human Rights Committee be replaced by a single monitor for each prison, who would have "full authority to *observe*, and to report his *observations* to the Court, with no authority to intervene in daily prison operations." Newman v. Alabama, 559 F.2d 283, 290 (5th Cir. 1977).

302. In the Boston school desegregation litigation, Judge Garrity temporarily replaced the Boston School Committee, which by statute had administrative responsibility for operating the school, with a receiver. Roberts, *supra* note 2, at 55 n.1. Judge Garrity also ordered the transfer of South Boston High's administrative staff. Later he simply ordered the Committee to hire a particular individual as headmaster. *Id.* at 61 n.33.

303. U.S. CONST. art. II, § 2; *see* text accompanying notes 223-26 *supra*.

citly to acknowledge the separation of powers limitations on its remedies, and issue a declarative judgment that the existing situation is unconstitutional. The Supreme Court has specifically recognized the availability of this means of affording judicial redress while avoiding overly intrusive remedies.[304] Acknowledgment of separation of powers limits, combined with a declaratory judgment, constitutes a clear message to the other federal branches that their cooperation is necessary if the constitutional guarantee is to be effective. Once the declaratory judgment is issued, section 5 of the 14th amendment explicitly grants Congress the power to respond.[305]

Allowing courts to adjudicate constitutional issues and to issue declaratory judgments without being required to fashion a "complete" remedy appears to involve some risks. Without the constraints inherent in fashioning immediately effective remedies, the use of the power of judicial review might become too undisciplined, creating the same problems as advisory opinions. Irresponsible use of the declaratory judgment is unlikely, however, because it is unlikely that separation of powers principles would ever foreclose all relief against the state government except the declaratory judgment. Thus the declaratory judgment normally would be entered in combination with other forms of relief that would act to discipline the use of the power of judicial review as they do now. Furthermore, the declaratory judgment would have the advantage of emphasizing the responsibilities of all branches of government to guarantee compliance with constitutional norms.

IV. CONCLUSION

In applying separation of powers in *Ex parte Milligan*,[306] the Supreme Court commented that the framers had foreseen "that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to

304. Powell v. McCormack, 395 U.S. 486, 517 (1969) ("We need express no opinion about the appropriateness of coercive relief [against the House of Representatives], for petitioners sought a declaratory judgment, a form of relief the District Court could have issued.").

305. The power of Congress to implement the 14th amendment has been interpreted extremely broadly. *See, e.g.*, Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); Katzenbach v. Morgan, 384 U.S. 641 (1966). *See also* National League of Cities v. Usery, 426 U.S. 833, 852 n.17 (1976) (reserving the question whether Congress could "affect integral operations of state government" through its § 5 authority).

306. 71 U.S. (4 Wall.) 2 (1867).

accomplish ends deemed just and proper."[307] Although the modern pressures for sharp and decisive measures arise from justified impatience at a lack of social reform rather than from a military insurrection, and although the pressures are directed at the federal courts rather than at the executive, constitutional structure is threatened nevertheless. The Court's conclusion in *Milligan* is as relevant to the judiciary today as it was to President Lincoln: "The Constitution of the United States is a law for rulers and people . . . at all times, and under all circumstances."[308]

Application of the constitutional principle of separation of powers to the federal judiciary's relations with the states does not necessarily imply rejection of either reform-minded constitutional interpretations or innovative decrees. If separation principles are applied to limiting judicial *remedies*, it requires no assumption of judicial deference to the other branches' judgments regarding the *meaning* of the Constitution. Adoption of separation principles does not involve rigid, mechanistic judicial rules. But it might make the judicial enforcement of some constitutional remedies more difficult, and it would, in some cases, force open acknowledgment that there are limits to the level of redress that courts alone can provide.

To the extent that the courts would explain limitations on the scope of equitable relief by comparing the relative degree of intrusiveness of the claims of the competing branches, they would be defining the limits of their own function in the same way that they traditionally define the limits of the functions of the other branches of the federal government. This would demonstrate the degree of consistent regard for constitutional structure and process that the public has a right to expect of courts of law. The legitimacy of judicial decrees would be enhanced, and appropriate responsibility for constitutional redress would be placed on all the branches and levels of government.

The redress that courts do accomplish should be achieved by an institution with flexible but ascertainable limits to its power, even when rulers and people are impatient to achieve ends deemed "just and proper." The relevant principle for reestablishing some sense of functional appropriateness for the federal courts is separation of powers. Legal commentators and courts should begin the potentially constructive business of deciding how separation of powers applies to the scope of equitable relief in particular cases.

307. *Id.* at 120.
308. *Id.* at 120-21.