CHAPTER 1

Introduction

IN THIS INTRODUCTORY chapter, the substance of the examples used throughout the text is summarized, and the basic advantages of each branch or level of government illustrated through those examples are described. The American system of government separates power. It thereby achieves protection for its citizens against the potential of tyranny. The separation also can call forth advantages that each branch possesses for the efficient disposition of issues of public policy and private dispute and to enhance the public's confidence in the fairness of the process that led to those dispositions. In a government with no formal separation, a sacrifice is necessarily made of at least some of these advantages. A danger exists also, however, of too severe a separation. Where one branch fails to undertake a task for which it is the best suited, it willingly permits another branch to usurp that authority. The consequences often include a compromise in the efficiency of the branch assuming the power from the branch giving it up.

In these materials, I present several different issues in recent public policy. The analysis is not attempted to derive what the best outcome, substantively, on any one of them might be. Rather, I attempt to demonstrate how the resolution of these issues came about, highlighting the advantages of each of the federal branches and, in some cases, of the states as compared with the federal government in reaching those resolutions.

My hope is that students of American government, and especially those who serve in government, will see in this analysis a guide of when to abstain and when to seize upon an issue presented to them. At-

torneys representing private parties will, and should, look to all three branches of government as potential sources of redress. For their purposes, this analysis might assist such an appeal when it is demonstrable, along the lines I propose, that the branch to whom appeal is made is the best suited, institutionally, to handle the issue. Similarly, the private party seeking to prevent a particular result might raise the kind of objections outlined here to an adversary's seeking relief from a branch of government inappropriate for the particular request. Overall, my hope is to turn the direction of at least some discourse from how a policy advocate can obtain a particular outcome to what is the body of government most appropriate to be engaged in a question of the kind at hand.

The opening sections deal with the process of how Congress passes laws and how courts interpret them. Chapter 2 offers a brief outline of the structural advantages of each branch. Chapter 3 deals with the legislative process, presenting several examples of how the rules of the U.S. House of Representatives allow, and impede, the people's work to be done. The practical workings of today's Congress are essential to understand before forming a judgment as to the inherent advantage of Congress in deciding questions of competing policy.

In considering how individuals serving in government carry out their functions, to what extent should we demand that our legislators, and our president, independently assess the constitutionality of what they pass, sign, and do? If we absolve them of that responsibility, we are tolerating violations of the Constitution, since so little of what those branches do ever is submitted to the Supreme Court. If we are serious about standing up for the authority of each branch of government, then each branch of government should be responsible, in return, in what it does, to abide by the Constitution's strictures, even when there is no other review. This issue is discussed in the second part of Chapter 3, dealing with the constitutional obligation that all federal and state officers take an oath to uphold the federal Constitution.

Touching on examples to be developed in the following chapters, the text next focuses on how courts go about their traditional function of interpreting statutes written by Congress. The Court often slips, in carrying out this function, from interpreter to creator of public policy. The Court will often say that Congress has "acquiesced" to its interpretation of a statute. Chapter 4 analyzes the rules of statutory construction, including acquiescence, to try to separate what the Court should do and

does well from what the Court should not do: take power from Congress.

There is a constraint that the judicial branch imposes upon itself, a constraint not shared by the other branches. Presidents change policies between, often even during, administrations. So also does Congress, which changes every two years anyway. These are strengths of each institution. By contrast, the Court purports to avoid such frequent changes through the doctrine of stare decisis. In reality, it has very seldom actually so bound itself in recent years; and that is a good thing since stare decisis, when it has force, binds the Court to do what the Court believes to be wrong—a concept impossible to square with the Court's fundamental role to identify and uphold constitutional principle. These issues are addressed in Chapter 5.

I then turn to the following ten specific clashes between the branches.

Obnoxious Speech

In Chapter 6, I deal with the prosecution of an individual for publicly burning a U.S. flag at a political convention, the reversal of his conviction (and the statute in question) by the state appellate court, affirmance by the U.S. Supreme Court, the subsequent passage of a new statute by Congress, and the eventual overturning of that statute as well.

In this flag-burning example, the executive branch shows its advantages, and disadvantages, in choosing whom to indict and under what statute. As the Texas Court of Criminal Appeals held, the police and prosecutor could have proceeded simply under breach of the peace if the goal were to prevent the immediate flag burning.[1] So another purpose was at work. The choice of statute gives us a clue that a hortatory purpose was involved: the prosecution wanted a conviction for flag burning, not for breach of the peace. This exercise of authority is undoubtedly within the discretion reserved to the executive branch, here, a state's executive branch. No branch other than the executive possesses this power, to initiate criminal prosecution.

The story actually begins much earlier, however, with the passage of the anti-flag-burning statute by the Texas legislature. The state was expressing a sentiment through its elected representatives in Austin. The message was broader than a desire to prevent danger of riot or setting fire to property. The legislature has an advantage in being the closest representative of the people's will. In choosing to pass a criminal stat-

ute, rather than a nonstatutory resolution regarding the flag, the Texas legislature made use of the discretion it alone possessed.

The U.S. Supreme Court and the Texas Court of Criminal Appeals both held the Texas statute unconstitutional. The inherent advantage of the courts—and especially the federal courts, which are insulated from popular sentiment by life tenure and nondiminution of salary—is to uphold fundamental rights. It was appropriate, therefore, for each court to measure the statute against the First Amendment's guarantee of freedom of speech. In performing this function, the courtlike method of analysis was to reason from previous cases interpreting the First Amendment, so as to convey the impression that the conclusion was to be expected from what had gone before.

This attribute has both advantages and disadvantages. The advantage is that the Court's claim to consistency vitally defends against its characterization as a mere policy-maker. If the Court becomes policy-maker, it is inferior to the legislature in both design (ability to gather the relevant facts and take testimony) and legitimacy (if preference, rather than principle, is to govern, then the people's preferences are more clearly expressed through their representatives whom they elect than the justices they do not). The disadvantages are two. The first is that the Court is hampered from moving away from earlier errors by the need to appear consistent with earlier opinions. Neither the legislature nor the executive has a similar disadvantage. Second, the Court, in crafting a ruling, has to rule by creating a broad category, then applying that category to the case before it. To rule only on the basis of the one case is not to announce constitutional principle. This becomes disadvantageous when the category for analysis sweeps more broadly than the Court might have intended, leaving dangerous precedent that later cases must distinguish.

The action of Congress in connection with this episode in recent American history shows how it can communicate rather directly to the U.S. Supreme Court. It created a statute and, in that same bill, obliged the Court to hear an appeal of any conviction under that statute on an expedited time schedule. Congress came close, in this instance, to obtaining an advisory opinion; it might have been better if it had been fully advisory, in that at least one individual had to go through indictment, trial, and conviction in order for Congress to obtain a response to the question it was asking the Supreme Court. The fundamental ability of Congress is to use words precisely fitted to the problem at hand. In this instance, we see Congress's attempt to use that ability so as to ap-

peal to one specific justice who held the swing vote on the U.S. Supreme Court. Congress has other powers not in evidence here and significant by omission. The fact-finding mechanisms available to Congress are superior to those available to a court, particularly for the ascertainment of sociological facts about America. These powers could have been used to determine what threats flag burning actually posed and, in so asking, to obtain guidance on what statute would work most effectively to allay them. The other congressional institutional advantage started but not completed in this case was an effort to amend the Constitution. A constitutional amendment offers a way to define and vindicate principle, much as a court does, but without having to rule by broader category than the immediate concern or having to show consistency with earlier holdings.

At the end of Chapter 6, I consider the American Nazis' march through Skokie, Illinois, a village heavily populated with Holocaust survivors. The federal court protected the demonstrators, with a discussion in a separate opinion about the possibility of private insurance solving a problem that the First Amendment prevented the village from solving on its own.

Exclusionary Rule

The Rehnquist Supreme Court is in the process of undoing what the Warren Court set in place regarding the exclusionary rule. This is a difficult process, since the premises for establishing exclusionary rules for evidence obtained in violation of the Fourth and Fifth Amendments were constitutional. Exposing the inherent disadvantages of the judicial branch, the Court is now attempting to allow for exception after exception to the exclusionary rules, without explicitly overruling the decisions that originally held the exclusionary rule to be required by the Constitution. It is a process that shows, as clearly as any of these materials, the weakness of the judicial branch. Once freed of its constitutional moorings, the exclusionary rule continues as a judge-made and judge-supervised process for deterring constitutional violations. The decision to deter a constitutional violation, however, should be a legislative one. It is not, itself, a constitutional decision. Whether society should spend resources making Fourth Amendment violations less common (by the cost of reversals and retrials) or highway accidents less common (by the cost of more frequent repaving) calls for the weighing of interests, at which the legislative branch, not the judicial branch, excels.

The exclusionary rule was first applied to the states under a rule of principle; namely, that the use of illegally obtained evidence constituted a denial of due process. A general rule of exclusion would apply; exceptions could then be considered along the lines of whether the judicial process was unconstitutionally tainted by admission of the evidence, given the circumstances of the particular case. Completely defensible ignorance of a new constitutional rule, for example, might be sufficient—as when the Court adopts a new constitutional interpretation or strikes down a facially valid statute that authorized the search in question. Also possibly allowable as an exception would be evidence so far removed from the original constitutional violation as to satisfy a rule of attenuation.

That approach would permit the judicial branch to show its own inherent advantages, including the U.S. Supreme Court's supervisory role over federal courts. The essential starting off point, however, had to be that the Constitution compels exclusion as a general principle.

As that principle has eroded, however, the Court has assumed a nonjudicial role for the exclusionary rule: one of estimating what kinds of exceptions to the rule will induce more police misconduct. The Court has arbitrarily assumed that only misconduct by police is to be deterred, not misconduct by prosecutor, magistrate, court employee, or judge. The Court has engaged in relatively poor social science inference in a sham effort at "balancing" likelihood of future violations against society's law enforcement needs.

By contrast, Congress and state legislatures have much the better institutional advantage here. To the extent each wants to devote public resources to the goal of deterring constitutional violations, the legislative branch can hold hearings on what kinds of steps (for example, *Bivens* actions, personal fines, disciplinary actions, or exclusionary rule) are most likely to deter governmental misconduct.[2] The cost of each alternative in terms of legitimate prosecutions forgone could then be estimated, and a weighing of interests, the function the legislative branch performs best, could ensue.

The role of the executive is the most underplayed in this area. No use of illegally seized evidence could go forth, of course, without the prosecutor, an agent of the executive branch, desiring it. If we are not speaking of a constitutional requirement, then any governor (or district attorney or attorney general, depending on who holds the executive power to prosecute under the state's constitution) or president could instruct whether to go ahead with the use of specific evidence. It might be

that the interests of law enforcement almost always trump, but there would be the occasional egregious case where the executive branch official, reflecting community standards, might opt not to use evidence in a prosecution.

Finally, this subject introduces an interesting interplay between Congress and the Court regarding the *Miranda* rules. The attempt by Congress to undo *Miranda* statutorily was rejected by the U.S. Supreme Court, in an opinion written by Chief Justice Rehnquist.[3] In dissent, Justice Scalia accused the majority of creating a new category of binding precedent: a constitutional rule. Such a rule was not to be found in the Constitution itself, but it could not be reversed by Congress. If Justice Scalia's criticism were warranted, it would be a devastating indictment of the intellectual integrity of what the Court does. The Court binds Congress only because it purports to announce what the U.S. Constitution requires, not because it has the right to make up useful rules short of constitutional compulsion.[4]

Affirmative Action: The Use of Race by Government

The inherent advantage of the judicial branch is in defining the contours of constitutional rights. In *Regents of the University of California v. Bakke*, *Grutter v. Bollinger*, and *Gratz v. Bollinger*, the right of state universities to make use of race in their admissions policies was considered.[5] In so doing, the Court showed an institutional disadvantage: ambiguity in its ruling. There were three major different positions announced by the Court in *Bakke*: four justices held that any use of race by the state required the highest kind of justification, four justices held that most uses of race with a remedial purpose were permissible, and one justice (Powell) allowed race for purposes of diversity in education only, and then only as a plus factor, not as a determinative factor. In *Gratz* and *Grutter*, almost the same kind of split resulted, with only two justices (O'Connor and Breyer, and only the former explicitly) embracing the middle ground. A statute by Congress or a decision by the executive to terminate federal aid would not have such potential ambiguity.

The inherent advantages of the judicial branch include an ability to monitor an enforcement decree. If the use of race is appropriate in a remedial context, judges can and have kept jurisdiction over cases for years, watching the outcomes and, in some cases, eventually terminat-

ing the litigation when the discrimination complained of has been eradicated. In going beyond the purely remedial context, the majority opinion in *Grutter* and the Powell position in *Bakke* present serious challenges to the capacity of the judiciary. When is the attainment of racial diversity in education so slight a state interest as to be no longer compelling (*Grutter* contains language suggesting racial diversity might be compelling only for law schools, because of their role in training government and civic leaders), when has sufficient racial diversity been achieved so that the use of race must be phased out (*Grutter* seems to create, in a judicial opinion, a legislative-like twenty-five-year duration for the practice of using race), and how much of a plus factor becomes a determinative factor (twenty points out of one hundred are too many)—all are questions to which the opinions give no answer. A legislative solution would certainly offer more predictability, if the legislature cared to address each question in turn.

The inherent advantage of the legislative branch, to set rules clearly, responsive to the present need, is nevertheless taxed in this context. Appeals to race occur in politics; and dangers of an appeal to race lurk even in statutes with a benign purpose on their surface.

A possible solution would allow a policy-making political body to make clear rules of general applicability, so long as the political body had a First Amendment kind of protection in doing so and was insulated from the worst of racial politics. Alternatively, the entire enterprise of using race could be restricted to specific instances of remediation under a court's supervision.

The Fiesta Bowl: Cutting Off Federal Aid to a Recipient That Discriminates

Poor drafting by Congress created uncertainty as to what kind of discrimination by a recipient of federal funds was enough to trigger a cutoff of those funds. Overstepping its inherent advantages, the U.S. Supreme Court attempted a Solomonic compromise: extending the reach of the federal oversight but moderating the effect of its sanction. Congress, in turn, missed the opportunity to make use of its own inherent advantages by simply rewriting the law. Instead, engaged in an effort to chastise the Court, Congress literally reversed the Supreme Court's opinion, construing the ambiguous words of the original statute rather than rewriting them. The result was a Draconian statute,

with a quick trigger and cataclysmic consequences, which became evident when the executive branch entered the dispute when the organizers of the 1991 Fiesta Bowl announced a scholarship for minority-race students at the competing schools.

It is an undoubted executive prerogative to choose whom to prosecute, or against whom to proceed civilly, but not every prerogative is wisely used. In threatening to terminate all federal funds to two colleges whose only failing was to accept students who in turn had accepted scholarships awarded to African Americans only, the federal Department of Education was applying the law, as newly amended by Congress, quite literally, but in a way virtually no one in Congress would have wished. Showing the advantage the executive has to move more quickly than either of the other branches, the Department of Education changed this policy in a matter of days. Further, in announcing guidelines for how it would prosecute such cases in the future, the executive branch effectively reversed both the U.S. Supreme Court and Congress. In the absence of a private right of action, prosecutorial discretion becomes the effective equivalent of suspending a statute, at least for the duration of a president's term.

Roe v. Wade

Perhaps the most contentious issue in modern American domestic discourse, the issue of abortion has also tested the boundaries of the inherent advantages of the several branches. The states begin our inquiry: they are the repository of all legitimate governmental powers not specifically given to the federal government. In exercise of those powers, some states had prohibited abortions, some had permitted them up until a particular point of a pregnancy. We can cast the issue as determining when human life begins. The Constitution does not state which branch of government makes such a decision; following the Tenth Amendment's language, therefore, it might seem it should be left to the states.

It is, however, the advantage and obligation of the federal judiciary to apply the U.S. Constitution even to laws of the states. In the abortion context, this role had two important ramifications. First, it fell to the Court to decide who gets to enjoy constitutional rights. In *Roe v. Wade*, the U.S. Supreme Court ruled that an unborn child or fetus was not a person for purposes of the U.S. Constitution. Second, the Court's role

includes defining the contours of the constitutional right of privacy; the Court did so, so as to include a woman's right to terminate her pregnancy at least in the first trimester. Combining the two holdings, a state could not prevent a woman from exercising her constitutional right of privacy without a compelling reason, and saving the life of that which was not a person did not qualify.

Whether popular or not, the Court's unique role is to be the ultimate voice on constitutional rights. One can imagine the Court fulfilling that role in another way, however, in the *Roe v. Wade* context. The Court could have held that the Constitution's protections extend to unborn children or fetuses from the moment of conception. Hence, if a state wanted to prohibit abortion, it could do so. Further, a state hospital probably could not perform abortions, except to save the woman's life, since the state would be depriving the child of her or his life without due process of law. Either outcome appears consistent with the Court fulfilling its role.

In imposing trimesters, the *Roe* Court was roundly criticized for acting like a legislature.[6] Nineteen years later, the Court reformulated the trimester approach into an inquiry whether a woman's constitutionally protected right was being unduly burdened.[7] This approach demonstrates a much more judicial function, whereas *Roe* demonstrated more of a legislative one. Courts traditionally have had to assess whether neutral statutory schemes nevertheless unduly burdened constitutionally protected rights.[8]

The movement from *Roe* to *Planned Parenthood v. Casey*, however, was a difficult one for the Court to make and still claim consistency. In upholding the essential part of *Roe*, *Planned Parenthood* nevertheless reversed several cases decided in between, cases that had been decided more in keeping with *Roe*'s language of an almost absolute right in the first two trimesters. The Court was, quite obviously, experimenting with different phrases for the privacy right in question; and doing so did little to support its claim that all it was doing was finding and announcing constitutionally protected principle.

Could the other branches have done better? This is not an area where Congress or the executive appear to have institutional advantages, as compared with the Court. The whole issue arises because of the assertion of a federal constitutional claim, and that is for the Court to decide. Were that federal constitutional issue taken away, there is no doubt that both of the political branches would reflect a point of view on this issue and thus that they could adopt whatever was common between the

president's and Congress's view. However, if there were no constitutional issue, it might be institutionally preferable to see the question revert to different states' solutions, rather than one answer for all, which Congress or the executive would give. If that happened, we would very likely see several different rules for abortion across the several states, just as we see different states' laws on marriage, divorce, and child custody. Our system of government allows, even encourages, that degree of difference between the several states.

But that degree of allowable difference does not permit a state to say freed slaves, or their descendants, are not citizens. Would we be content to say women have the right to end a pregnancy in some states but not in others? Would we be content to say an unborn child or fetus is a person in some states but not in others? Pro-life or pro-choice, there seems to be little room for the middle. The Court chose one side. The Court's critics, I believe, wish the Court had chosen the other side, not that the Court had never made a choice.[9]

The Burden of Proof in Civil Rights Cases

The crafting of the 1964 Civil Rights Act demonstrates advantages of the legislative branch. The 1964 Congress anticipated and provided, through compromise, for particular concerns that had been expressed about taking civil rights enforcement into the individual private employer context. The Court, however, six years later, adopted a broader application than the 1964 compromise. When the Court attempted to cut back on that ruling nineteen years later, Congress responded with a new law. The way in which the Court attempted to cut back purported to make use of judicial virtues: specifically, by setting burdens of proof rather than by trying to reinterpret phrases in the law.

Chapter 11 introduces the question of whether the setting of burdens of proof is a courtlike or legislative-like function. There is no doubt that it is an outcome-determining function.

In reaching this conclusion, Congress and the Supreme Court engaged in a dialogue. Had the Court never expanded the 1964 statute to allow proof in the absence of intent to discriminate, it's highly doubtful Congress would have enacted that rule on its own. Indeed, Congress chose not to do so in 1964. Once this kind of suit was permitted by the Court, however, it became impossible for a subsequent Court credibly to undo what the earlier Court had done. The response by Congress

was to cut through the pretense that all that was being decided was the allocation of the burden of proof. Using its inherent advantage of writing a law specific to the problem at hand, Congress proceeded to codify how to make out a case of discrimination in employment in the absence of proof of intent. Congress had shied away from this attempt in 1964 but was emboldened to do so in 1991 because of the Court's intervening rulings.

Two Statutes—A Hundred Years Apart

In the immediate wake of the American Civil War, Congress dealt with the lingering effects of slavery. Many years later, Congress acted again, responding to the civil rights movement of the 1950s and 1960s. In between, the U.S. Supreme Court interpreted what Congress had done in such a way as to limit private enforcement of the rights guaranteed immediately after the end of slavery. Both Congress and the U.S. Supreme Court revived their interest in the area, but the Court was presented with its earlier decisions as obstacles. The Court attempted to interpret the words of the older statute in a more expansive way, hampered by its institutional need to appear to be consistent with the earlier interpretation and then, a few years later, tried to move back to the original, narrower view. The Court's approach showed it at a disadvantage. In attempting to reconcile new and old opinions, it inadvertently created a result that was not well suited to the modern era in which it was announced. Race and sex discrimination ended up being treated differently. The Court's efforts exposed its implausibility in asserting it was only interpreting congressional words and congressional intent.

Congress, by contrast, had no such impediment. It accepted the earlier decisions and proceeded to set up new statutory rights. The ensuing conflict was one that Congress, rather than the Court, had institutional advantages in resolving. Congress relied on its inherent advantage to address the specific problem at hand: the damages that victims of state deprivation of civil rights should receive. In separate statutes, Congress dealt with housing and employment discrimination by private actors.

Once again, there was a dialogue between Congress and the Court. The Court's reversal of its older, narrower reading of the statute provoked no change from Congress; the later Court's narrowing of interpretation, however, provoked a strong response. It is doubtful whether Congress, without the Court's recanting opinion, could have engen-

dered the support to move from the status quo. In a manner that repeats itself often in these materials, we observe Congress reacting to the Court, a testimony to the active nature of the Court's modern role.

The executive figured in this example only in a small way. Through vetoing a first version of the bill and eventually signing a version only slightly different, the executive showed its inherent advantage to respond to changing circumstances of popular will.

The Second Amendment

The inherent advantage of the U.S. Supreme Court, to discern and define constitutional rights that must be upheld even against popular will, carries with it an obligation, too: that the Court actually take and decide cases presented to it that raise the issue of such constitutional rights. For the right to keep and bear arms, however, the Court has been content to remain silent for almost seventy years. Our constitutional scheme appears to have this as a flaw: barring an original jurisdiction case that presents an issue of personal constitutional privilege (and it is hard to see how such a case could be constructed), there is no way to force a ruling from the Supreme Court to uphold or to narrow a perceived personal constitutional right. One inference is that the Court is simply pleased with the lower courts' decisions. This assumption may have been valid while there was no split in the circuits; the widely varying bases on which the circuits have based their opinions, however, make it hard to infer what view it is in which the Court has acquiesced by silence.

The Court's understandable desire to avoid being taken into a highly controversial issue dividing the nation is a luxury it cannot forever indulge. While the Court does resist definitively ruling on the meaning of the Second Amendment, however, what is the role of the states and federal government? All officers of both state and federal government are obliged to take an oath to uphold the federal Constitution. It is an institutional disadvantage of the legislatures, state and federal, that adherence to that oath can lead to unpopular votes on bills, from time to time, with a resultant temptation to disregard the oath, or at least to say that it amounts to nothing more than an obligation to abide by the eventual, ultimate determination of a right by the branch with political insulation, the federal courts. How acceptable is that approach when the Court will not rule?

If Congress or the state legislatures were to undertake a serious con-

sideration of their constitutional duty in this context, what guides should they take for the Second Amendment's meaning? Congress could take evidence on present-day needs for private ownership of firearms and on the present-day meaning of the word "militia." It could engage in a historical analysis, with an ability, much broader than that enjoyed by the courts, to summon experts and take live testimony on the question.

The role of the executive, in choosing to prosecute, is demonstrated in this context as well. The dismissal of a prosecution commenced by a previous administration was on appeal at the time the executive changed in 2001. Should the new executive have pursued that case for the purpose of creating a circuit split, possibly forcing the U.S. Supreme Court to take the case? Or is the inherent advantage of the executive branch also an obligation: that it choose whom to prosecute on the fundamental fairness of the facts of that case and not for some broader jurisprudential reasons? In *INS v. Chadha*, to be discussed below, the attorney general essentially created a case to challenge the constitutionality of the legislative veto. Is that an appropriate illustration of executive branch inherent advantage or a cruel jeopardizing of an individual's security in this country to win a point of institutional importance for the executive branch?

The inherent advantages of the states are also of importance in this topic. In that states are given the right to train militias and appoint their officers, and to "well regulate" those militias, the federal government should defer to the states' determination of whether and how their citizenry should be armed should service in the militia be required.[10] If a state explicitly chooses to have its militia drawn from among its citizens upon need, rather than create a National Guard, the state's choice should be honored, if there is any meaning at all to the Second Amendment. This might lead to a state preferring its citizens to possess their own weapons. Alternatively, another state may "well regulate" its militia by forming a National Guard and taking guns away from all others, unless the Second Amendment is read to grant an individual constitutional right. The trade-off thus entailed between safety from crime and accident and security against threat to person or state is one that the state governments can each develop more effectively than if there were one federal rule.

Methods of Solving Separation of Powers Issues

One approach to easing institutional friction between the executive and legislative branches is the legislative veto. Though held to be unconstitutional, it offered significant opportunity for both executive and legislative branches to utilize their inherent advantages.[11] Congress would set broad policy and allow the executive to tailor that policy to individual circumstances. Any particular instance could be called back by the same body capable of having prevented the grant of authority going to the executive in the first place. No one disputes that Congress can, constitutionally, pass statutes that deal with minutiae; it's just more efficient if Congress doesn't have to do so. The alternative of simply surrendering an entire area to executive discretion exists in theory, but what has happened since the demise of the legislative veto is an informal system of congressional oversight much less visible to the public and much less inclusive of all the members of Congress.

Another way to approach the fitting of general laws to difficult circumstances is to encourage in the courts a broader use of their powers of equity. This possibility also was cut back by Supreme Court opinion; and, I believe, the opportunity to benefit from an inherent judicial advantage was thereby lost. A fundamental reason we have judges with broad discretion, rather than ministerial magistrates applying legislatively set rules unwaveringly, is because we recognize broad rules don't always fit specific circumstances. One large but well-defined category for the exercise of this kind of discretion is the case where a new statutory regime impacts projects undertaken before the statute's effective date. Congress could establish an absolute rule of no retrospective application or an absolute rule of retrospective application; but an absolute rule loses the advantage of individual accommodation. I suggest the Court erred in denying this role to federal courts in the snail darter case; however, the Court's abnegation of this authority for itself led to a new statute creating an interagency, and intergovernmental, process for resolving such special cases.

Litigation by Legislators

Legislators will sometimes take matters of disagreement with the executive branch to the courts for resolution. I explore those cases and advocate that a broader willingness to entertain such challenges be

adopted by the courts. At the very least, a case that otherwise fits the "case or controversy" requirement, is not moot, is ripe, and is not a political question should not be barred from adjudication simply because the plaintiff is a legislator. There should be greater, not lesser, use of the courts to resolve legitimate areas of disagreement between the two political branches, where the disagreements are not of a policy nature (should we go to war) but of a constitutional rights nature (what action by Congress is required before we go to war). The role of the Court to resolve such disputes is consistent with the Court's institutional advantages and is infinitely better than the alternative: stored-up resentment between the political branches or the escalation of disagreements that could have been resolved with no loss of face into "must-win" battles for supremacy going far beyond the constitutional issue of allocating power.

NOTES

1. *People v. Johnson*, 755 S.W.2d 92 (Tex. Crim. App., 1988).
2. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).
3. *Dickerson v. United States*, 530 U.S. 428 (2000).
4. However, it is fairer to see what the Court did in *Dickerson* as reaffirming a constitutional holding, that some prior warnings were needed to make custodial confessions admissible. Congress tried to say no warnings at all were needed. The post-*Miranda* Supreme Court decisions cited by Justice Scalia should be construed as saying *Miranda* warnings, per se, were not needed, but some warnings were.
5. *University of California Regents v. Bakke*, 438 U.S. 265 (1978); *Grutter v. Bollinger*, 2003 U.S. Lexis 4800; *Gratz v. Bollinger*, 2003 U.S. Lexis 4801.
6. J. Ely, "The Wages of Crying Wolf: A Comment on *Roe v. Wade*," 82 *Yale L.J.* 920 (1973).
7. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).
8. In free speech cases, for instance, a neutral regulatory regime that nevertheless impinges on expressive conduct can be upheld. See, e.g., *United States v. O'Brien*, 391 U.S. 367 (1968).
9. I believe most, not all, of the *Roe* Court's critics were not so much unhappy that the Court chose to take abortion to the constitutional level as they were that the Court failed to uphold the personhood of the unborn child or fetus.
10. U.S. Const., art. I, § 8.
11. *INS v. Chadha*, 462 U.S. 919 (1983).