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Constitutional Adjudication: Deciding When to Decide

Carl McGowan
United States Court of Appeals for the District of Columbia Circuit

CONSTITUTIONAL ADJUDICATION: DECIDING WHEN TO DECIDE

*Carl McGowan**

JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT. By *Jesse H. Choper*. Chicago: University of Chicago Press. 1980. Pp. xviii, 415. $28.50.

In a searching and acute lecture on American jurisprudence at the Law Session of the Salzburg Seminar last summer, Edward H. Levi — who has pursued this subject over many years both in an academic environment and in the sharply contrasting circumstances of his service as Attorney General of the United States — concluded that:

> The distinctive quality of American jurisprudence and of the American style of government is to be found in the role of the courts. There may be other distinctive qualities, but for an understanding of American jurisprudence and government, the role of the courts must be recognized and explored.

This has been peculiarly true of the role of the United States Supreme Court in constitutional interpretation. The nature and scope of that role has long been the central preoccupation of many of this country's leading legal scholars.[1] The literature generated by it continues to grow, and the year just ended has seen two major accessions to it. One was Harvard Professor John Hart Ely's book, *Democracy and Distrust*. Rejecting the approaches of both the broad and the strict constructionists of the Constitution, Ely asserted that the Court's proper function is to assure participation by all of the people in the shaping of public policy by readings of the Constitution that are "participation-oriented" and "representation-reinforc-

* Chief Judge, United States Court of Appeals for the District of Columbia Circuit.

1. A distinguished observer from abroad, Professor H.L.A. Hart, has remarked upon the virtually obsessional nature of this concentration by American legal scholars upon the judicial process:

> "In fact, the most famous decisions of the Supreme Court have at once been so important and so controversial in character and so unlike what ordinary courts ordinarily do in deciding cases that no serious jurisprudence or philosophy of law could avoid asking with what general conception of the nature of law were such judicial powers compatible."

Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969, 971 (1977).

ing."[2]

The second entry into this arena is the subject of this Review. Professor Jesse Choper, throughout a long and brilliant career as a teacher of constitutional law at Boalt Hall in Berkeley, has been one of the keenest and most assiduous of our Supreme Court watchers. The ultimate reflections emerging from that intense and prolonged experience are brought together in this book, which is based in major part on the Thomas M. Cooley Lectures given by Professor Choper at the University of Michigan Law School in 1977.

Unlike many of those who have ploughed the field of constitutional adjudication by the Supreme Court, Professor Choper's avowed concern is not with *how* the clauses of the Constitution should be interpreted, but rather with *whether* the Court should in certain classes of cases engage in adjudication at all. His objectives are to define the proper limits of the Court's review function and to formulate the principles which should guide it in determining whether to decide, or to withhold decision, in constitutional controversies tendered to it for review. The focus of this book is, in sum, on the justiciability of constitutional disputes, as distinct from the proper resolution of their merits.

I

Professor Choper's point of departure in this inquiry is that the Court's reviewing power is, in the large, at odds with the assumptions underlying a democratic system of governance. Unlike the members of Congress and the President, who accede to office only by popular vote and who are periodically accountable to the electorate for what they do while in power, the Justices need only nomination by the President and confirmation by the Senate to acquire a lifetime tenure which can end only with death, incapacitation, voluntary resignation, or impeachment. They are even immune, as we have recently been reminded, from the intimidating sanction of reduction in compensation.[3] According to Professor Choper, these characteristics give judges a strongly antimajoritarian cast that makes it anomalous, to say the least, for them to be the exclusive vessels of revealed truth as to the meaning and operation of the words of the Constitution.

Professor Choper is not content, it should quickly be added, merely to assert on faith that the judiciary is the least democratic of the three branches of the federal establishment in both its constitu-

2. J. ELY, DEMOCRACY AND DISTRUST 87 (1980).

3. United States v. Will, 101 S. Ct. 471 (1980).

tion and its functioning. In a lengthy first chapter, he indulges in a comparative examination of the legislative, executive, and judicial departments for the purpose of documenting his thesis that it is the last that comes off the worst in terms of its reflection of, and its responsiveness to, the will of the people.

Addressing the Congress first, he proceeds, in the manner of a skilled and knowledgeable political science instructor, to catalog the respects in which that body falls short of the democratic ideal. He discusses the inability of the electoral process, operating in geographical districts rather than at large, to guarantee that the successful candidate will represent the views of more than a small part of the total electorate. This is exacerbated by party selection of candidates, the occasional gerrymander, the premium on incumbency, and the endemic low voter turnout which plagues this country.

Professor Choper is at pains to note the antimajoritarian elements of the functioning of Congress itself: the bicameral structure; the overrepresentation in the Senate; the vulnerability of its product to the executive veto; the filibuster and its resistance to cloture; the existence of powerful committees and, in many cases, of even more powerful committee chairmen; the strength of the party leaders; and the capacity of the conference committee to alter legislation into something significantly different from the initial enactments of either House. Hanging over all, of course, is the shadow of the special interest groups, particularly those with well-financed, highly informed, and professional lobbies. Viewing all these influences in the round, Professor Choper concludes that, at best, the voice of the people in the legislative process is "only one of a multitude of interacting forces — and a relatively minor one at that" (p. 25).

But, comparing the undemocratic aspects of Congress and the Supreme Court, Professor Choper points out that the negative elements in the former operate mainly to impede or "to *prevent* the translation of popular wishes into governing rules rather than to *produce* laws that are contrary to majority sentiment" (p. 26). He reminds us also that, even when bills finally do become law, the Supreme Court, by a holding of unconstitutionality, can set the whole at naught. And, using the traditional classroom technique, he proceeds to reexamine all the clogs he has just identified in the functioning of Congress, concluding that, in terms of their antidemocratic potential, they are not nearly as mischievous as he has first made them out to be.

It is surely not necessary for me to identify all the considerations which Professor Choper employs in reversing his field, since they

will have already occurred to most readers of this Review. They consist of such propositions as that (1) bicameralism, and even filibusters, advance democratic ends by compelling greater consideration of important policy issues and increasing awareness and understanding by the public of the values at stake, (2) thoroughgoing reforms have been recently made in the committee system, (3) leaders in actual practice tend to press their members to vote their constituents' preferences, and (4) there are a growing number of large and effective "citizens' lobbies" that are redressing the balance with the professionals and making known to Congress the interests and desires of a wider variety of people.

Turning to the executive branch, Professor Choper remarks on the strong influence that the President, the single federal official elected by a national constituency, can bring to bear upon the legislative process. Armed with the veto and the two-thirds override requirement, and possessed of many carrots and sticks with which to put pressure on individual members of Congress, the President himself "greatly enhances the democratic image of the political branches" (p. 46) of the federal system. The only major blemish on this image is the "smoke-filled-room" selection of presidential nominees. But this cloud has, in Professor Choper's view, been substantially dissipated by the increasing use of presidential primaries and recent reforms in nominating convention delegate selection.

Professor Choper apparently to the contrary, many shrewd and experienced observers of presidential nominations have come to believe that the caliber of the chosen nominees has visibly declined in recent years and look back wistfully to the products of the earlier methods. The primary system has tended to give the communications media perhaps the greatest power to affect the choices of the national parties; and the selection process itself has been prolonged interminably, thus distracting an incumbent president seeking a second term from more important matters of public business. This has led to much talk of a national primary if the primary system is to be used at all; and sentiment is palpably strengthening for a single six-year presidential term by constitutional amendment.

With these reservations, however, it remains true, as Professor Choper insists, that "the American presidency . . . comes closer to the majoritarian ideal than practically any other national office in the modern western democracies" (p. 47). Certainly its political accountability to the people at large far surpasses that of the Supreme Court, despite the political controls that can be exerted upon the Court through constitutional amendment, budgetary and term limi-

tations, Presidential nomination and Senate confirmation of appointees, and the power vested in Congress to regulate the Court's appellate jurisdiction.

Throughout our history as a nation, however, these controls have arguably been less than significantly effective, although they remain as ever-present dangers to the Court itself. Because of that vulnerability, and the Court's own lack of political power to resist them, Professor Choper formulates the central theme of his book — the necessity for the Court to avoid confrontations with the legislative and executive branches that might put its popular capital at risk. This is to be achieved by the Court's refusal to adjudicate issues which are likely to mobilize resistance and the deployment against it of the immensely greater political resources available to the Congress and the President — greater, indeed, because they derive from the very majoritarian foundations of those bodies that the Court lacks.

II

Professor Choper's plea that the Court protect itself by self-denying limitations on the use of the judicial power vested in it by article III is subject to being characterized as a craven counsel of weakness. It is, therefore, appropriate at this point to summarize his precise prescription for the Court's salvation.

Preliminarily, Professor Choper acknowledges that the Constitution itself is not without its undemocratic features. No part can be changed by simple majority will; although its purpose was mainly to create a framework of government in which democracy could broadly prevail, the powers granted by it to achieve this purpose are carefully limited; and the protection and preservation of individual rights and liberties was one of its essential goals. It exists, as James Madison said, to protect the individual from majority rule, since "the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents."[4]

Putting to one side the parts of the Constitution which address housekeeping details, the provisions of that document fall, in Professor Choper's submission, into three categories: the separation of powers within the federal government, the division of powers between that government and the states, and the designation of those

4. 5 THE WRITINGS OF JAMES MADISON 272 (G. Hunt ed. 1904).

individual rights and liberties to be protected from invasion or nullification by either the federal or state governments. It is for the last of these constitutional purposes that Professor Choper conceives judicial review to be absolutely essential, and to be exercised by the Supreme Court without equivocation or concern for its own public image. Indeed, it is by way of assuring the Court's power to decide controversies in this area — and to live to fight another day — that restraint is suggested in the other two categories.

Thus, Professor Choper stands foursquare on the central proposition that the Supreme Court should bring its full adjudicatory powers to bear with respect to claims of governmental transgression upon individual rights and liberties guaranteed by the Constitution. Beyond that Individual Rights Proposal, and in furtherance of it, he makes three additional Proposals.

The Federalism Proposal is that the federal judiciary should refrain from deciding constitutional issues relating to the reach of national power *vis-à-vis* the states. Any claim of improper federal intrusion into the powers of the states should be deemed nonjusticiable; its resolution should be left to the political interplay between the Congress and the President.

It is important to note, however, that the Federalism Proposal does not extend to federal court review of state laws or actions which impinge upon federal powers and rights.[5] This is principally because the federal government is not represented in state and local legislative bodies (in contrast with the representation which the states have in the Congress); and, accordingly, effective protection of federal concerns requires review by the federal courts. In addition, federal court rulings in this area tend not to deal with significant constitutional issues; such decisions may usually be revised by the political branches of the national government through ordinary federal statutes. The Supreme Court's work in this field more frequently involves statutory, rather than constitutional, interpretation, and thus the tension between constitutional adjudication and majoritarian democracy is not customarily present.

Professor Choper's Separation Proposal, as he terms the second of his suggestions for judicial restraint, is limited to controversies involving the Constitution's allocation of authority between the legis-

5. This echoes Justice Holmes's familiar pronouncement:

> I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States.

O. HOLMES, COLLECTED LEGAL PAPERS 295-96 (1920).

lative and executive branches of the national government. Choper proposes that the federal courts should treat all constitutional issues involving the respective powers of Congress and the President as nonjusticiable, leaving their resolution to the workings of the national political process. This is to be so whether the constitutional claims derive from executive action (or failure to act) affecting the prerogatives of Congress, or from congressional action (or omission) touching the powers of the President. Although the Supreme Court has in the more remote past not been faced with too many of these executive-legislative conflicts, they have increased in number in recent years, and bid fair to keep on doing so. In no such case are the merits of such issues to be explored and decided by the courts.

In his enunciation of the third principle in this series defining the appropriate exercise of judicial review, Professor Choper returns to the strongly affirmative approach of his Individual Rights Proposal. Indeed, it is primarily for the purpose of safeguarding the Supreme Court's power to function effectively in that area that he formulates what he calls his Judicial Proposal. It declares that the Supreme Court should be alert to detect and nullify efforts by either the Congress or the President to restrict or expand improperly the scope and reach of the judicial power created in article III of the Constitution.

Threats to the federal judiciary of this nature may take a variety of forms. Questions may be raised as to whether the Congress has provided for judicial resolution of matters that are not "Cases" or "Controversies" as envisaged by article III, or whether Congress has directed the exercise by the Supreme Court of original or appellate jurisdiction exceeding that allocated to the Court by that article. Similarly, efforts by the Congress to prescribe the manner of the Court's functioning (*e.g.*, final decision-making by panels of the Supreme Court, or delegation of its authority to lesser bodies) may conflict with the constitutional commitment of the federal judicial power to the "one supreme Court" contemplated by article III. Further, legislative regulation of the assignment, suspension, or removal of federal judges, or dictation as to how the judges shall go about performing their tasks, could contradict constitutional assurances of judicial independence.

All such questions, says Professor Choper, are not only to be entertained, but also decided, by the federal judges, even if in particular instances they do not significantly affect the rights and liberties of individual persons but present only relatively pure separation of powers issues. Where the judiciary's rights and prerogatives under the Constitution are threatened with impairment, any individual

should be accorded standing to assert those rights on behalf of the federal courts. Nothing less will suffice to maintain the ability of the federal courts to interpose the shield of the Constitution between all individuals and their governments.

The rationale behind the Judiciary Proposal mainly consists of two elements. One is that, with no independent political base and with both tradition and ethical canons barring it from any participation in politics, the federal judiciary has neither representation in Congress nor influence within the executive branch. It is thus poorly equipped to turn back threats from those quarters at their very inception. Second, the judges are peculiarly expert, by education and tradition, in identifying the nature of judicial power and prescribing for its preservation. They are the natural guardians of that power, and it is wholly appropriate that they should marshal and exert their full resources to protect the "judicial Power of the United States" committed to them by the Constitution.

III

Of Professor Choper's four Proposals — which together constitute the core of his book — surely his Individual Rights Proposal will command the greatest measure of assent and acceptance. That is evident from the range of powerful and respected voices that have spoken to the same theme.

In commending the Bill of Rights to the First Congress as a vital addition to the Constitution, James Madison prophetically stated that "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive."[6] More than a century later, Justice Holmes reported the view of his colleague Justice Brandeis to be that "the best defense . . . 'for leaving fundamental responsibilities to this Court' was that constitutional restrictions enabled minorities to get an untroubled night's sleep."[7] It was Earl Warren's eventual view that "[t]he essential function of the Supreme Court in our democracy is to act as the final arbiter of minority rights . . . ."[8] And the always eloquent Justice Robert Jackson, speaking for the Court in *West Virginia State Board of Education v. Barnette*[9] said:

6. 1 ANNALS OF CONGRESS 439 (1834).

7. A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 37 (1970).

8. Warren, *Fourteenth Amendment: Retrospect and Prospect*, in THE FOURTEENTH AMENDMENT 212, 228 (B. Schwartz ed. 1970).

9. 319 U.S. 624, 638 (1943).

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.

Professor Choper rightly concludes that "at diverse but continual periods of American history, individuals and minority groups of all ideological shades have looked to the Court as the supreme guarantor of personal liberty against majority will . . ." (p. 67).

The justification for assigning this role to the Court resides in its very remoteness from the ebbs and flows of the political tides, and its consequent immunity from the vagaries of the ballot box. There is, moreover, a rational quality inherent in judicial reflection and decision which makes for an objectivity that is difficult to achieve in the legislative chambers or the Oval Office. This is documented by Professor Choper's lengthy and learned review of the Court's decisions in the individual rights area since 1935. The Hughes, Stone, and Vinson Courts made significant advances in the protection of individual rights, providing a sturdy foundation upon which the Warren Court could — and did — build to a truly remarkable degree, especially in the context of racial equality, the rights of the criminally accused, freedom of expression, and legislative reapportionment.

As for the Burger Court, Professor Choper does not share the views of those who were quick to declaim that it was a disaster for civil rights. Looking to the record of its actual performance over what is now more than a decade, he concludes that, although it "has often upheld the claims of those alleging popular disregard of their constitutionally secured individual rights," it has not exhibited "the extraordinarily sensitive stance of the Warren Court" (p. 107). But, says Professor Choper, it has already exceeded any of its predecessors in its invalidation of statutes on first amendment and equal protection grounds, "and, indeed, on several issues, has moved well beyond the lines established in 1969" (p. 107). These advances have included a notable expansion of the right to privacy, especially with respect to abortions; extension of the right to counsel to indigent misdemeanants; a sweeping improvement in the procedures for revoking probation and parole; severe restrictions of the availability of the death penalty; and delineation of a substantive constitutional right to liberty for involuntarily detained mental patients.

These steps alone would appear to ensure that, in any final reckoning, the contemporary Court cannot fairly be cast into the outer darkness of unrelieved obscurantism for its attitude toward the constitutional rights and liberties of the individual. Although partisans of particular Courts seem to find it emotionally satisfying to compare

their favorites to the disadvantage of the others, the important thing is that progress toward the ideal be steady and continuous, albeit arguably uneven. Professor Choper's review of the civil rights sensitivities of the changing Courts of the middle years of the twentieth century will convince most of his readers that this progression has occurred to a remarkable degree. At the least, his review provides a powerful and altogether persuasive demonstration that his Individual Rights Proposal articulates a sound standard of judicial review for constitutional adjudication.

As indicated above, Professor Choper regards his Judicial Proposal as serving a supportive role for his Individual Rights Proposal. It deals, as he points out, with what is in reality a subclassification of the Separation Proposal in that it addresses a tension that can arise between the political and the judicial branches.

Thus it is that those who look with favor on the Individual Rights Proposal will also readily embrace the Judicial Proposal, and rightly so. In so doing, they can be comforted by the fact that, historically, even those who took the narrowest view of the proper scope of judicial review of constitutional controversies never doubted the Framers' purpose to enable the judicial branch to protect itself from the crippling of its functioning by the political branches. James Madison himself said that the Supreme Court's article III jurisdiction to decide cases arising under the Constitution ought to be "limited to cases of a Judiciary Nature."[10] The first Act of Congress found unconstitutional by the federal courts fell because it tried to saddle article III courts with nonjudicial functions.[11] *Marbury* itself, in its actual holding, involved a similar defect, thereby exposing most of Chief Justice Marshall's sweeping delineation of the reach of judicial review to the charge of being *dicta*. It was not until *Dred Scott* was decided in 1857 that the Supreme Court struck down a federal statute for reasons other than improper trespass upon the judicial power defined in article III.

Many questions remain unresolved, of course, with respect to the powers of Congress to divest, restrict, or expand the jurisdiction of

10. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430 (M. Farrand ed. 1911).

11. *See* Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792). Congress had vested the power to rule on pension applications in the circuit courts, but had given the Secretary of War and finally the Congress the power to review those determinations. *See* 2 U.S. at 410 n.1. The Circuit Court for the District of New York, as well as those of several other districts, held that the provisions for review by nonjudicial officers transformed pension decisions into nonjudicial business beyond the power delegated to the federal courts by article III. Confronted with this thorny constitutional question, the Supreme Court held the Government's appeal over for a term on the issue of whether the Government could represent pension applicants, and was rescued by the passage of fresh pension legislation. *See* 2 U.S. at 409-10.

the Supreme Court — some of which could pose serious threats to the functioning of the Court in the area of individual rights. Professor Choper identifies these questions in a singularly interesting passage in his book. But, in accordance with the general theme of his inquiry, he does not undertake to assert how they ought to be decided, but only that the Court should invariably perceive the making of such decisions as part of its duty.

IV

The Federalism Proposal and the Separation Proposal, contemplating as they do the staying of the Court's hand, are the most dramatic and challenging aspects of Professor Choper's book. As such, they are the least likely to evoke agreement, particularly among those enthusiastic partisans of the Court who consider its function to be that of deciding all controversies within its jurisdiction, however the chips may fall.

In Professor Choper's conception, the justification for his counsels of restraint lies in his concern that the Court's decisions in these fields will diminish its popular acceptance and thereby endanger its effectiveness in the all-important area of individual rights. It may be questioned, however, whether he is unduly apprehensive about the danger of popular rejection and political retaliation. There have, of course, been periods in our national history when public opposition to the Court's decisions has led Congress to attempt to limit its jurisdiction or the Executive to refuse to enforce its edicts. But, from the second quarter of the nineteenth century (when Daniel Webster, as chairman successively of the House and Senate Judiciary Committees, fended off efforts to cut the Court down to size) to the 1950s (when the Conference of State Chief Justices urged legislation to curb the Warren Court) the Court emerged unscathed, thanks to the opposition rallied in large part by the leaders of the organized Bar.

Franklin Roosevelt, at the pinnacle of his political power after his overwhelming reelection to a second term in 1936, thought that he could shape the Court more nearly to his liking, and pressed upon Congress his notorious court-packing plan. But even those who shared his dismay with some of the Court's decisions in the first flush of the New Deal put their loyalty to the Court as an institution first, and the President suffered the most resounding political defeat of his entire career.

More recently, of course, the country has seen the emergence of interest groups who march to the sound of a single drum, and to whom the concept of a broader national interest appears to be utterly

alien. They have mounted attacks upon some of the decisions of both the Warren and the Burger Courts, particularly in the field of privacy and religion, but so far at least they have been unavailing, and they appear likely to suffer the frustrations of their predecessors who have tried to clip the wings of the Court.

This is not to say that Professor Choper's fears are wholly without foundation, or that he does not perform a useful service in suggesting ways in which the Court can, without jettisoning its critically important functions, secure its position by voluntary abstinence from decision in less vital areas. But the relevant criterion for appraising his two proposals for suspension of judicial decision making is the relative importance of his suggested subjects for such restraint. Few would say that the subject matter of either the Federalism or the Separation Proposal is as important as that of the Individual Rights Proposal. But it may be that, between the two Proposals themselves, there are differences of significance to the value of judicial resolution.

In unveiling his Federalism Proposal, Professor Choper is at some pains to point out that, when the constitutional issue is whether the state or the national government has the power to regulate the subject in question, there is not a vacuum in which no government may act. The question is which government, and the presumption is that, if the problem calling for government action is truly serious, constitutional power to address it exists in one place or the other. This contrasts strongly with a constitutional claim of an individual right or liberty, where redress assumes a void which no government may fill.

Thus, the withholding of decision by the Court under the Federalism Proposal leaves the question of which government shall act for the political branches of government to resolve; and the interplay (primarily in Congress, where the states have a voice) will determine what is to be done, and who is to do it. Professor Choper also asserts that the Court's holdings against national authority in the federal-state context have not survived for long, and that, saving the Court's most recent venture into this field in *National League of Cities v. Usery*,[12] there is almost no state's rights decision of any consequence that has endured.

The lessons drawn from all this by Professor Choper are that participation by the Supreme Court is not essential to the working of the federal system, that the political processes of the nation have over

12. 426 U.S. 833 (1976).

time provided resolutions of these problems, and that the Court can justifiably spare itself the flak which inevitably descends upon those who get in the middle of a contest over the reach of national power as against the states. And when one is reminded of the *Child Labor Cases*[13] and *United States v. Butler*,[14] one is hard put to believe that disposition by the Supreme Court of these cases was either necessary or meaningful in view of the long-run shift of social and economic opinion. And there are other cases, reaching various results, that now seem like empty battles of a by-gone era, and have had little or no impact on the shape of things to come. Certainly any individual rights implicated were not protected from regulation by *a* government, the only question being *which* government.

The rationalization Professor Choper employs to support his Federalism Proposal is not apt, as he explicitly recognizes, for the Separation Proposal. Individual rights and liberties can be mightily affected by controversies between Congress and President, as was recognized by such disparate political philosophers as Justices Frankfurter and Douglas in the *Steel Seizure Case*, where both harked back to Justice Brandeis's statement in *Myers*:

> The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the government powers among three departments, to save the people from autocracy.[15]

In the face of this principle, Professor Choper can only assert that it is by no means clear that the Framers "intended the Court to enforce the separation of powers or that judicial review is necessary to resolve constitutional clashes between Congress and the President" (p. 265). He appeals to Montesquieu as authority that the constitutional theory of separation of powers envisaged no judicial role but relied instead on internal checks within a bicameral legislature, with both houses being "checked by executive power, as the executive is by the legislative."[16] Thus, says Professor Choper, the Supreme

13. Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922) (child labor tax not a valid exercise of taxing power); Hammer v. Dagenhart, 247 U.S. 251 (1918) (prohibition of interstate shipment of products of child labor not within the ambit of commerce power).

14. 297 U.S. 1 (1936). The *Butler* majority, over the dissent of Justices Stone, Brandeis, and Cardozo, held that the taxing and spending power did not provide a basis for federal payments to farmers who reduced their crop acreage or the tax on the processing of that crop that financed the payments.

15. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 613-14 (1952) (Frankfurter, J., concurring); 343 U.S. at 629-30 (Douglas, J., concurring) (quoting Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting)).

16. C. MONTESQUIEU, L'ESPRIT DES LOIS (1748), *reprinted in* J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 266 (1980).

Court may safely leave conflicts in this regard to the inevitable accommodations reached by the shifting fortunes of political power. In so doing, the Court stays above the political fray, preserving its political capital from the erosions of partisan strife, and assuring that it will have the authority and acceptability necessary to protect individual rights against impairment by either of the political branches.

The Separation Proposal is not quixotic in either its logic or its theoretical foundations. But since it represents an exercise of judgment as to what is best for the nation when President and Congress collide, and since the cases to which it applies vary so widely in their nature and consequences, one cannot but wonder why it must be cast in such absolute terms. This abstract formulation of an essentially political judgment leaves no room for taking into account particular circumstances in which a sound political instinct would point in the direction of adjudication rather than abstention. Unresolved, or long delayed, accommodations of serious impasses between the two political branches are not to be lightly contemplated. The people at large may prefer, and the national interest may urgently require, speedier and more definitive answers; and dangerous tensions can be dissolved by an authoritative and expert voice from a neutral quarter.

At the time of political crisis caused by Watergate, the communications media were full of the volunteered and varying views of self-appointed constitutional prophets as to what the law was or should be. In the midst of this confusion, it always seemed to me that the country in the large was hungering for a final and authoritative answer from the courts. For them to have refused to rule would not only have aggravated the crisis, but would have assured its prolongation. When the answers came through expedited consideration and action by the courts involved, almost everyone experienced a deep sense of relief and satisfaction that our system had the machinery in place to provide them.

The major source of this relief, *United States v. Nixon*,[17] is a case which Professor Choper regards as not a true conflict between the executive and the legislative branches, and he therefore concludes that the Court's decision is not incompatible with the Separation Proposal. *Senate Select Committee on Presidential Campaign Activities v. Nixon*[18] was such a case, however, and it was decided. Supreme Court review was never sought, but it seemed to me then,

17. 418 U.S. 683 (1974).

18. 498 F.2d 725 (D.C. Cir. 1974).

as now, that the wiser course under all the circumstances was to resolve the constitutional issue presented.

Two recent cases involving treaties of the United States would, as Professor Choper states, clearly have been covered by the Separation Proposal. In one, a number of members of the House of Representatives claimed that they were entitled to vote on the question of transferring the Panama Canal to the Republic of Panama — an action which the President was proceeding to accomplish by means of a treaty subject only to approval by the Senate.[19] The plaintiff House members pointed, with some plausibility, to the provision in article IV, § 3, cl. 2 of the Constitution that "Congress shall have power to dispose of the Territory or other Property belonging to the United States." They stressed the obvious fact that the Congress includes the lower as well as the upper chamber.

The case reached the court of appeals only a short time before the final vote was to be taken in the Senate on the Treaty. Promptly after the vote, if it was favorable, the President proposed to deposit the instruments of ratification, which would affect the immediate and irrevocable transfer of United States sovereignty over, and ownership of, the Canal. If the losing party at the court of appeals level was to have a chance of Supreme Court review before the Senate acted, it was necessary for the court of appeals to act fast.

It did, addressing itself to the merits on a motion by the Government for summary affirmance, rather than ruling for the Government on standing grounds as had the district court.[20] The court found that the legislative history of the Constitutional Convention clearly revealed that the Framers, in writing the language in question, were concerned with the ultimate transfer of the vast western lands then held by only some of the existing colonies — a transfer in which they wished the Congress as a whole to have a voice. When the treaty clause was taken up by the Convention a few days later, there was no suggestion that property could not be transferred to foreign nations by treaty, as was traditional.

The day before the Senate voted its consent to the Treaty, the Supreme Court denied an injunction against ratification pending dis-

19. Edwards v. Carter, 580 F.2d 1055 (D.C. Cir.), *cert. denied*, 436 U.S. 907 (1978).

20. The court of appeals, noting the need for final resolution of the merits of the issue, which could be delayed by any ruling on standing or other preliminary issue such as justiciability, pretermitted the standing claim, and thereafter decided the merits in the President's favor. 580 F.2d at 1056-57. *Cf.* Edwards v. Carter, 445 F. Supp. 1279 (D.D.C.), *affd. on other grounds*, 580 F.2d 1055 (D.C. Cir.), *cert. denied*, 436 U.S. 907 (1978) (merits of congressional plaintiffs' claim need not be reached as plaintiffs lacked standing to sue President).

position of the House members' petition for certiorari.[21] It eventually denied the certiorari petition itself.[22] The Panama Canal Treaty, it will be remembered, was not popular within this country, although it was thought to be of great importance to our good relations with Latin American nations. There were many people who simply could not understand why we should give the Canal away. It surely was not desirable that that feeling be exacerbated by any lingering assumption that the gift had been effectuated in an unconstitutional manner.

The legal question was a pure matter of constitutional interpretation. Those for and against the Treaty could argue endlessly about that issue, although that would not have been good for the country. Both sides were arguably entitled to have the matter authoritatively resolved by the courts. This, therefore, was one of those occasions when the absolutist character of the Separation Proposal might well not have accorded with the public interest. It was, at the least, a situation in which the judges, as the accepted and empowered final arbiters of what the Constitution means, needed some flexibility in determining whether to bring those powers to bear.

Although the second treaty case, *Goldwater v. Carter*,[23] had not reached the litigation stage when Professor Choper's book went to press, he anticipated it by saying that an issue "as to whether the President or Congress is authorized to terminate a treaty" (as did President Carter himself with respect to Taiwan) is fully within his Separation Proposal, and that "no matter how persuasive the substance of the argument may seem, the ultimate constitutional question should be held to be nonjusticiable" (p. 357).

The litigation took the form of a claim by individual Senators that termination had to be approved by a two-thirds vote of the Senate, and a claim by several House members that termination required a majority vote of both Houses. Four members of the Supreme Court voted that these contentions were nonjusticiable as presenting political questions inappropriate for judicial resolution.[24] One said that the merits should not be reached for lack of ripeness

21. Edwards v. Carter, 435 U.S. 965 (April 17, 1978) (application for injunction denied); Edwards v. Carter, 435 U.S. 1005 (May 1, 1978) (motion to expedite consideration of petition for writ of certiorari and application for injunction both denied).

22. Edwards v. Carter, 436 U.S. 907 (May 15, 1978).

23. 617 F.2d 697 (D.C. Cir.) (*en banc*), *vacated mem.*, 444 U.S. 996 (1979) (plaintiff Senators had standing to challenge Presidential termination of mutual defense treaty with Taiwan, but Constitution did not require Senate concurrence in treaty termination).

24. Goldwater v. Carter, 444 U.S. 996, 1002 (1979) (Rehnquist, J., Burger, C.J., Stewart & Stevens, JJ., concurring).

since there was no apparent controversy between the Congress and the President; the dispute was between the congressional plaintiffs and their fellow members from whom they had failed to secure collective condemnation of the President's action.[25]

Professor Choper presumably would regard this result as gratifyingly responsive to the general spirit of his Separation Proposal, although he would not have thought it necessary to pursue the particular rationales advanced for withholding judgment. He might well believe that Justice Powell's reason for finding a lack of ripeness indicates a lack of the conflict between President and Congress requisite to trigger the Separation Proposal. He would, however, undoubtedly lament Justice Powell's insistence that, if Congress had as an institution objected to the termination, the constitutional issue presented should be decided:

> If the President and the Congress had reached irreconcilable positions, final disposition of the question presented by this case would eliminate, rather than create, multiple constitutional interpretations. The spectre of the Federal Government brought to a halt because of the mutual intransigence of the President and the Congress would require this Court to provide a resolution pursuant " 'to our duty to say what the law is. . .' "[26]

The spectre conjured up by Justice Powell stalks Professor Choper's Separation Proposal. It is the same nightmare that has troubled the repose of millions of Americans — lawyers and laymen alike — since Americans began their great adventure in constitutional government. The cloud of anxiety and unease during the days of Watergate was formed by fears that the bad dream might become reality. When the processes of the law did not bend or break, but steadily resolved the legal issues raised, the pall was lifted, and the Republic gained new confidence in its capacity for constitutional survival.

It must be true, then, that there are occasions when the statesmanlike course is for the Court to say what the Constitution means in relation to clashes between the political branches of the federal government which threaten the chaos and confusion of stalemate. It is an attribute of greatness among judges to perceive those occasions, and to act accordingly. Such occasions may be rare, and forbearance from decision may more frequently mark the path of wisdom. But it would seem as unwise as it is unnecessary to cast the alternatives in the form of absolutes.

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25. 444 U.S. at 997 (Powell, J., concurring).

26. 444 U.S. at 1001.

Major constitutional cases in this area customarily involve not demands for damages, but rather for the equitable remedies of injunction and declaratory judgment. From the earliest chancellors down to the present, the tradition persists of discretion to grant or to withhold these modes of relief. This choice is available in constitutional adjudication as elsewhere, and its judicious exercise in the federal separation of powers area can serve many, if indeed not most, of the values underlying Professor Choper's Proposal.[27]

V

Qualification of agreement with one aspect of Professor Choper's work is not, however, to lessen an admiring respect for the formidable scholarship and penetrating analysis which are the hallmarks of his highly useful inquiry into the principles that should guide constitutional adjudication by the Supreme Court. The appearance of this careful formulation of the conclusions Professor Choper has distilled from many years of teaching and reflecting upon the paradox of judicial review in a ballot-box democracy is an event of surpassing importance in the legal firmament.

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27. In a recent article, I have explored, in greater detail, the value of traditional notions of equitable restraint in withholding injunctive remedies and its statutory analogue, judicial discretion over declaratory relief, in resolving the difficult separation of powers concerns raised by congressional suits against the executive branch, such as the Panama Canal and Taiwan treaty termination cases. *See* McGowan, *Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241 (1981).