

5-1-1991

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ARTICLES

Congress and Taxes: A Separation of Powers Analysis

KARLA W. SIMON*

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I. INTRODUCTION

In the United States, principal control over the purse, both the taxing and the spending powers, is lodged in the Congress. Our system of separation of governmental powers, with its inherent checks and balances, is designed, however, to ensure that Congress does not usurp the powers of the executive and judicial branches. Thus, in the words of James Madison in *The Federalist*, the Constitution prevents Congress from becoming too “ambitious” and overstepping the bounds of the legitimate exercise of its fiscal, as well as its other,

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powers.¹

The primacy of the congressional role in making fiscal laws is rooted in the fact that Congress is the most accountable to the electorate of the three governmental branches. As Chief Justice Marshall noted in *McCulloch v. Maryland*, the people delegated fiscal lawmaking to the Congress and thus the people themselves have the ultimate power to determine the legitimacy of congressional acts: "The only security against the abuse of [the taxing] power, is found in the structure of government itself. In imposing a tax the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation."²

In the American system, therefore, the structure of the government is intended to prevent the government from oppressing the people. The three branches of government are set off against each other to prevent any one of them from accumulating too much power, and to limit their ability—in particular the ability of the political branches—to combine forces, imposing burdensome government on the people. As Justice Brandeis noted in *Myers v. United States*:

[T]he 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 governmental powers among three departments, to save the people from autocracy.³

Thus the issue becomes whether theoretical underpinnings of our constitutional system are borne out in the way the process currently makes internal taxation laws. There is constant criticism of the tax legislative process. Professors Doernberg and McChesney, drawing on the economic theory of regulation,⁴ have criticized the tax legislative process, suggesting that the current system will always produce laws that increase private benefits rather than public goods.⁵ Profes-

1. THE FEDERALIST NO. 51, at 26 (J. Madison) (G. Wills ed. 1982).

2. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). *But see* 3 F. HAYEK, LAW, LEGISLATION AND LIBERTY 127 (1979):

The theory and practice of public finance has been shaped almost entirely by the endeavor to disguise as far as possible the burden imposed, and to make those who bear it as little aware of it as possible. It is probable that the whole complexity of the tax structure we have built up is largely the result of efforts to persuade citizens to give up more than they willingly would consent to do.

3. 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

4. See Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335 (1974); Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971). For a general discussion of the theory, see Kalt & Zupan, *Capture and Ideology in the Economic Theory of Politics*, 74 AM. ECON. REV. 279 (1980).

5. See Doernberg & McChesney, *On the Accelerating Rate and Decreasing Durability of*

sors Brennan and Buchanan, leading public finance theorists, have proposed that the constitutional system needs more procedural constraints to prevent Congress from increasing spending and taxing in a manner that harms the people.⁶ Others have criticized the tax lawmaking process in less fundamental ways, but their voices have added to the chorus of dissatisfaction about the current system. Criticism of the process provides useful tools for analyzing the tax legislative process and making it more responsive to the general public interest.⁷ Most current criticism, however, fails to explore the impact of the tripartite structure of American government on tax lawmaking. This Article addresses that missing linkage by assessing the role of Congress in tax lawmaking using a traditional separation of powers analysis. The analysis considers Congress's role in tax lawmaking and how its actions fit within the strictures on government provided in the Constitution. The essential question is how taxing power should be distributed among the branches of the federal government.

Section II of this Article focuses on the criticisms of tax lawmaking procedures made by Professors Doernberg and McChesney and Professors Brennan and Buchanan. It demonstrates how their lack of a separation of powers analysis causes them to fall short of addressing more fundamental problems in the current system.

Section III presents a theory of separation of powers within the context of tax lawmaking. That theory suggests that if Congress were to write less complex tax laws it would exercise its legislative power

Tax Reform, 71 MINN. L. REV. 913 (1987) [hereinafter *Tax Reform*]; Doernberg & McChesney, *Doing Good or Doing Well?: Congress and the Tax Reform Act of 1986* (Book Review), 62 N.Y.U. L. REV. 891 (1987) [hereinafter Doernberg & McChesney, *Book Review*].

6. G. BRENNAN & J. BUCHANAN, *THE POWER TO TAX: ANALYTICAL FOUNDATIONS OF A FISCAL CONSTITUTION* (1980). See also *TAX AND EXPENDITURE LIMITATIONS* (H. Ladd & J. Tideman eds. 1981); *THE CONSTITUTION AND THE BUDGET* (W. Moore & R. Posner eds. 1980).

7. For general descriptions of the tax legislative process, see 4 B. BITTKER, *FEDERAL TAXATION OF INCOME, ESTATES & GIFTS* § 116.1 (1981); Gallagher, *The Tax Legislative Process*, 3 REV. TAX'N INDIVIDUALS 203 (1979); and Ferguson, Hickman & Lubick, *Reexamining the Nature and Role of Tax Legislative History in Light of the Changing Realities of the Process*, 67 TAXES 804, 808-12 (1989). For a political science perspective on the tax legislative process, see J. WITTE, *THE POLITICS AND DEVELOPMENT OF THE FEDERAL INCOME TAX* (1985). See also T. REESE, *THE POLITICS OF TAXATION* (1980); Evans, *The Condition of the Tax Legislative Process*, 39 TAX NOTES 151 (1988); Leonard, *Perspectives on the Tax Legislative Process*, 38 TAX NOTES 969 (1988); McDaniel, *Federal Income Tax Simplification: The Political Process*, 34 TAX L. REV. 27 (1977); Waris, *Practical and Philosophical Observations on the Tax Legislative Process*, 38 N.Y.U. INST. ON FED. TAX'N ch. 30 (1980). For an interesting account by two *Wall Street Journal* staffers of the process of "tax reform" leading up to the enactment of the Tax Reform Act of 1986, see J. BIRNBAUM & A. MURRAY, *SHOWDOWN AT GUCCI GULCH: LAWMAKERS, LOBBYISTS AND THE UNLIKELY TRIUMPH OF TAX REFORM* (1987).

more closely to the manner intended by the Constitution. This conclusion does not suggest greater procedural restraints on Congress but rather argues for its more faithful adherence to the structure of lawmaking as described in the Constitution. This analysis suggests that Congress would better serve the fundamental underpinnings of our democratic traditions by leaving more of the burden of administering tax laws to the executive branch.⁸

The analysis, however, does not include a prescription for convincing Congress that it should not become so involved in the details of tax legislation. Congress' behavior is schizophrenic. On the one hand, it frequently avoids addressing hard political choices. On the other hand, it retains control over many detailed technical areas that have a considerable impact on taxpayers. That problem, however, must be cured by political remedies, not legal analysis. The Supreme Court should not strike down an excessively detailed statute on the theory that Congress has delegated executive functions to its own agents. Nothing in the Constitution *prevents* Congress from legislating in as much detail as it wants—only prudence does that.

II. CRITIQUING THE CRITICS

A discussion of two criticisms of the federal tax legislative process—those of Professors Doernberg and McChesney, and of Professors Brennan and Buchanan—sets the stage for a separation of powers analysis. While both of these analyses critique congressional actions and provide instructive insights into the current system, neither grapples with fundamental questions about Congress's proper role in law making and the appropriate distribution of powers among the branches. The effectiveness of these criticisms diminishes as a result.

A. *The Contract Theory of Professors Doernberg and McChesney*

One of the principal public policy concerns in recent years has been the amount of tax legislation written in response to lobbying by private interests⁹ rather than to the general public need for fairer and

8. It should be noted that this position is inconsistent with one this writer has taken in the past. See Simon, *Base Broadening Proposals and Fringe Benefits*, 29 ST. LOUIS U.L.J. 1201, 1214-15 (1985) (stating that "in the absence of statutory specificity, regulatory specificity will be needed—a solution that is unappealing because of the need to rely on the IRS for policy determinations that are within the scope of congressional authority." (citation omitted)). In the process of the lengthy analysis of tax lawmaking as a whole that preceded this article and that is ongoing, the author has come to see a greater need for reliance on the executive branch to make law.

9. See J. BIRNBAUM & A. MURRAY, *supra* note 7; J. WITTE, *supra* note 7, ch. 16. See generally P. STERN, *THE BEST CONGRESS MONEY CAN BUY* 78 (1989) (noting that Bob Dole

more efficient tax laws. Professors Doernberg and McChesney, in two recent articles,¹⁰ have explained how and why this happens. In addition, they have offered a theory of bargaining between legislators and private interests for the provision of private goods and have applied it to the tax legislative process.¹¹ Additionally, they have detailed the way money is spent to influence the tax legislative process.¹²

Doernberg and McChesney's thesis is that legislators auction their services as providers of private goods by writing tax legislation, for a fee, to benefit special interests. They receive financial rewards in the form of political action committee ("PAC") contributions, speakers' fees, travel expenses, and other emoluments because they are willing to enter into contracts with the private sector that will be performed by the enactment or defeat of certain legislation. In the view of Doernberg and McChesney, this contractual relationship between legislators and special interests has contributed to the complexity and frequency of change in the federal tax laws.

Although the observations of Doernberg and McChesney may be accurate, the thesis they derive from those observations explains only a small part of why the federal tax lawmaking process works as it does. In fact, the process is far too complicated to have the bargaining they envision play a substantial part in general legislative outcomes.

In addition, the tension that exists between a legislator's role as trustee for the public interest and as the representative of particular constituencies causes compromises on points that have little or nothing to do with whether a PAC has made a contribution to the legislator's campaign fund. Because each member of Congress must respond to many interests, both public and private (with frequently conflicting views), it is quite probable that many political "bargains"

receives a large number of PAC contributions because, "as *the* senior Republican on the Finance Committee, he can offer crucial assistance to anyone desiring (or hoping to protect) a tax loophole worth hundreds of millions or even billions of dollars." With respect to special tax provisions, see Stern, *How Would You Like A Special Tax Law, All Your Own?* in *THE RAPE OF THE TAXPAYER* 34-59 (1974); Surrey, *Congress and the Tax Lobbyists—How Special Tax Provisions Get Enacted*, 70 *HARV. L. REV.* 1145 (1957); see also D. BARLETT & J. STEELE, *THE GREAT TAX GIVEAWAY* (1988) (originally published as a series of articles in the *Philadelphia Enquirer*, Apr. 10-16, 1988) (addressing special provisions contained in the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085).

10. See Doernberg & McChesney, *Book Review*, *supra* note 5; Doernberg & McChesney, *Tax Reform*, *supra* note 5.

11. The theory is derived from earlier work by various economists and lawyers. See Posner, *supra* note 4; Stigler, *supra* note 4. For criticism of Posner and others who use contract analysis to frame the issues about legislative actions, see Rose-Ackerman, *Progressive Law and Economics—and the New Administrative Law*, 98 *YALE L.J.* 341 (1988).

12. See Doernberg & McChesney, *Tax Reform*, *supra* note 5, at 934-45.

are never actually consummated. Analyses of congressional voting behavior support this observation.¹³ Indeed, Doernberg and McChesney themselves note that the contracts they refer to are merely executory, suggesting that they frequently will not produce the desired results.¹⁴

Legislators inevitably face difficult choices in determining which interests to serve in the course of enacting legislation.¹⁵ Special interests tend to be vocal minorities whose views are of little or no interest to apathetic majorities. Although the special interests may be well funded, money only talks, it does not vote, and apathetic majorities do. Although money helps legislators get their views across to the voters, reelection depends on more than money.¹⁶ Thus the legislators, intent on remaining in their elected positions, must appeal to a broader range of voters than the special interests who have contributed to their reelection campaigns. Most of their legislative activities reflect that need.¹⁷

Despite the validity of these observations, it is nonetheless true that Congress enacts special interest tax legislation every time it passes a tax bill. The easiest special interest provisions to identify are the "private bills" that benefit only a given project or taxpayer. It is hard to reconcile such special laws with the general public need for fairer and more efficient taxation.¹⁸ The existence of such private tax laws, particularly when buried in a lengthy technical tax bill, raises serious questions about the way Congress exercises its legislative powers. These questions, addressed in Section III, are not considered by Professors Doernberg and McChesney.

In addition to private legislation, both financial and political

13. See D. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 43-49 (1974).

14. See Doernberg & McChesney, *Book Review*, *supra* note 5, at 899; Doernberg & McChesney, *Tax Reform*, *supra* note 5, at 945-52.

15. See D. MAYHEW, *supra* note 13, at 67-73; M. FIORINA, CONGRESS, KEYSTONE OF THE WASHINGTON ESTABLISHMENT 81-93 (1977).

16. Constituent casework is also an important part of getting reelected. See M. FIORINA, *supra* note 15, at 93-97; D. MAYHEW, *supra* note 13, at 54-59; Aranson, Gellhorn & Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 30-33 (1982).

17. See M. FIORINA, *supra* note 15, at 83-101; D. MAYHEW, *supra* note 13, at 67-69; Aranson, Gellhorn & Robinson, *supra* note 16, at 37-41. See also D. ARNOLD, CONGRESS AND THE BUREAUCRACY 26-35 (1979); Fiorina & Noll, *Voters, Legislators and Bureaucracy: Institutional Design in the Public Sector*, 68 AM. ECON. REV. 256 (1978) (describing constituent casework and its effect on the functioning of administrative agencies); Peltzman, *Constituent Interest and Congressional Voting*, 27 J.L. & ECON. 181, 183 (1984) (stating "that when 'constituent interest' is given more appropriate empirical characterization than it has had up to now, it plays a far larger, even dominant, role in congressional voting, and party and ideology correspondingly smaller roles, than heretofore believed").

18. See *infra* Section III (discussing separation of powers).

powers influence legislators to obtain the outcomes desired by, and more helpful to, particular industries or groups. The most striking recent example was the intense lobbying and massive political gift-giving by the banking industry to obtain the repeal of the withholding tax on interest and, only incidentally, on dividends.¹⁹ Nevertheless, empirical evidence of this kind does not necessarily support the economic theory of regulation or the contract theory of Professors Doernberg and McChesney any more than it supports the traditional interest group theories of political action by legislatures.²⁰ Furthermore, this kind of interest accommodation is precisely what the Constitution contemplates. Majoritarian decisionmaking and political compromise inevitably will result in the enactment of legislation that satisfies the desires of powerful lobbies.

The problem Professors Doernberg and McChesney discuss is of great importance to our system of government. The amount of money spent by special interest groups in the pursuit of influencing legislative outcomes is staggering.²¹ However, Doernberg and McChesney plead for campaign spending reforms only, and better salaries and higher ethical standards for the members of Congress. They do not question whether Congress is overstepping the bounds placed upon it by the Constitution. Thus, they do not come to grips with the question of whether the fundamentals of the constitutional system suggest a more probing analysis of the problems they identify.

B. *Spending Limitations and Their Implications for the Tax Lawmaking Process*

Another fundamental criticism of the way the American system makes its fiscal policies is that Congress fails to control the spending side of the budget. Although such controls do not focus directly on taxation, the link between spending and taxing is clear: the two are inextricably intertwined parts of the fiscal policy process.²² Thus, any

19. See Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324 [hereinafter TEFRA] (outlining requirements for dividend and interest withholding); see also Anderson, *On the Unlikelihood of Sensible Tax Reform*, 4 AM. J. TAX POL'Y 81, 97-104 (1985) (discussing the enactment and repeal of dividend and interest holding requirements contained in TEFRA).

20. See M. FIORINA, *supra* note 15, at 61-77; D. MAYHEW, *supra* note 13, at 40-54.

21. See L. SABATO, PAC POWER: INSIDE THE WORLD OF POLITICAL ACTION COMMITTEES 12-13 (1984); Sabato, *The Political Parties and PACs: Novel Relationships in the New System of Campaign Finance*, 3 J.L. & POL. 423, 424-25 (1987); Sorauf, *Political Parties and Political Action Committees: Two Life Cycles*, 22 ARIZ. L. REV. 445 (1980). For an earlier discussion of the influence of private interests on the legislative process, see N. ORNSTEIN & S. ELDER, *INTEREST GROUPS, LOBBYING AND POLICYMAKING* (1978).

22. See Simon, *The Budget Process and the Tax Law*, 40 TAX NOTES 627 (1988), *reprinted*

change in constitutional procedures that affects the spending side of the budget *inevitably* affects the taxing side. It is important, therefore, to consider the wisdom of proposals for a balanced budget amendment, which, if followed to the letter, would inhibit congressional action on taxing and spending. Professors Brennan and Buchanan explain one such proposal in *The Power to Tax: Analytical Foundations of a Fiscal Constitution*.²³ With that work as a discussion piece, this Subsection critiques proposals for greater controls on congressional power, using a separation of powers analysis.

Brennan and Buchanan believe that the current structure of government does not adequately control the spending power of Congress. Their thesis is rooted in the public-choice view of how legislatures act, which is similar to the views of Doernberg and McChesney.²⁴ Recognizing that self-aggrandizement is only possible for a public official if she can be reelected, the public choice model assumes that legislators ordinarily will do whatever they can to stay in power. This means, of course, that legislators will cause the government to spend money for both public and private goods because the public desires them.

Having spent the money that way, it becomes inevitable, according to the theory of public choice, that legislators must raise taxes to pay for the increased spending they have authorized or to raise funds in some other way, such as by borrowing. If too much borrowing occurs, that too will lead to increased taxation because the public will not want public expenditures cut back. And so the process of more spending breeding more taxing perpetuates itself.²⁵ This admittedly pessimistic view of the world has at least some support in recent history.

There are, however, serious flaws in using the public-choice theory to justify a balanced-budget amendment as Brennan and Buchanan have done. Reducing taxing by reducing spending certainly seems to be an appropriate method for dealing with budget deficits, but whether Congress should retain its power to choose between a balanced budget and one that is not is a question that relates to the basic structure of our constitutional system. Many critics have suggested that spending limitations simply will not work because, in

in 17 CAP. U.L. REV. 455 (1989). For an examination of the impact of the budget process on the complexity of tax legislation, see McLure, *The Budget Process and Tax Simplification/Complication*, 45 TAX. L. REVIEW 25 (1989).

23. See G. BRENNAN & J. BUCHANAN, *supra* note 6.

24. Both Brennan and Buchanan and Doernberg and McChesney express cynicism about the ability of Congress to function in the public interest. This cynicism is shared by many. See *supra* note 10.

25. See G. BRENNAN & J. BUCHANAN, *supra* note 6, at 163-64.

terms of practical realities, legislators will resort to budgeting tricks to avoid the limits.²⁶

More important, the public also seems to tolerate a high level of spending and is just as likely to allow such tricks under a balanced-budget amendment. Admittedly, however, in our system, which holds that congressional power derives directly from the people, the people will not support tax laws that increase their burdens intolerably. Yet a balanced-budget amendment is no more than a bookkeeping leash from which a strong dog can escape easily. Despite cosmetic appeal, it would have no real impact on the actual deficit.

Assuming for purposes of discussion, however, that such an amendment would have some effect on the outcomes of the tax legislative process, a more fundamental criticism of the balanced-budget amendment can be made. For the amendment to be effective, it must necessarily reduce the power of Congress to make policy choices—the very role delegated to Congress under the Constitution. Thus, such an amendment would severely impede the operation of the political process as envisioned by the Constitution. In fact, the impact of the current budget reduction law, Gramm-Rudman-Hollings and the more recent “pay-go” amendments,²⁷ on the tax-policy process has been severe. In recent years, numerous examples of revenue concerns that have outweighed policy concerns, provide anecdotal evidence to support the notion that balanced budget rules—when they work—frequently result in bad policy choices.²⁸

Although a balanced-budget amendment can provide some con-

26. See A. WILDAVSKY, *THE POLITICS OF THE BUDGETARY PROCESS* (4th ed. 1979); Olson, *Is the Balanced Budget Amendment Another Form of Prohibition?* in *THE CONSTITUTION AND THE BUDGET 91-94* (W. Moore & R. Penner eds. 1980).

27. Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1038, amended by Pub. L. No. 100-119, 101 Stat. 574 (1987) (amended to reflect the Supreme Court decision in *Bowsher v. Synar*, 478 U.S. 714 (1986), which held unconstitutional certain portions of the prior law on separation of powers grounds). See *infra* text accompanying notes 101-09. Further amendments of the 1985 legislation (and of the underlying 1974 Congressional Budget Act) were made in 1990. See Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-239, 103 Stat. 2106. The amendments alter many of the technical aspects of the 1985 legislation but generally continue to prohibit new legislation from adding to the deficit in any way.

28. A proposal in the House Ways and Means Committee during the pendency of the 1989 tax and budget legislation would have paid for the extension of the effective date for the repeal of Section 133 (the popular interest exclusion for Employee Stock Option Plans (“ESOPs”)) for one month by repealing the remaining deduction for consumer interest. See *House Taxwriters Approve \$5.3 Billion Bill; Scheduled to Act on Major Proposals This Week*, 44 TAX NOTES 247, 250 (1989). The ESOP extension was designed principally to benefit the banks financing the acquisition of employer stock by an ESOP. The consumer interest phaseout repeal, while not having a great effect on a significant number of taxpayers (the amount of consumer interest deductible in 1990 was 10% and was available only to itemizers),

trol over Congress (unless, of course, Congress consistently evades its strictures), it is not the sort of control Congress needs. Congress's proper role in the tax lawmaking process is a very dynamic one. Congress should have considerable flexibility to balance needs and interests and to work out political compromises that create sound tax policy for the people of the country as a whole. A balanced-budget amendment cannot further that endeavor. It is more important, therefore, to focus on the issues presented by the way Congress interacts with the other branches in making tax law, and to assess whether the separation of powers doctrine suggests some changes in its actions.

III. EXERCISING LEGISLATIVE POWER

Congress's enactment of tax legislation generally follows the procedural requirements of the constitutional separation of powers doctrine as enunciated in recent Supreme Court jurisprudence. Congress enacts tax laws bicamerally and presents them to the President for signature or veto.²⁹ It also tends not to delegate to the executive branch the power to make tax policy, but retains the crucial authority to make such decisions.³⁰ There are, however, three aspects of Congress's tax lawmaking that call into question whether its legislative power in the tax area is "exercised in accord with a single, finely wrought and exhaustively considered, procedure," as required by the Constitution.³¹

nevertheless was a benefit for individual taxpayers, not banks. The Committee apparently saw the light and reinstated the consumer interest deduction one week later.

Another more important example is the failure of Congress to enact dividend relief in 1986 despite the widespread belief that the double taxation of dividends has detrimental effects on the economy. See Graetz, *The Tax Aspects of Leveraged Buyouts and Other Corporate Financial Restructuring Transactions*, 42 TAX NOTES 721 (1989); Warren, *Recent Corporate Restructuring and the Corporate Tax System*, 42 TAX NOTES 715 (1989); ALI Federal Income Tax Project Subchapter C (1982); ALI Federal Income Tax Project Subchapter C (Reporter's Study Draft June, 1989). In 1984 the Treasury proposed a form of dividend relief to achieve partial integration. See TREASURY DEP'T, 2 TAX REFORM FOR FAIRNESS, SIMPLICITY AND ECONOMIC GROWTH 152-72 (1984) [hereinafter TREASURY I]. For a discussion of the TREASURY I proposal and how it fared in Congress, see Simon, *Comments on the Dividends Paid Deduction of HR 3838*, 31 TAX NOTES 609 (1986); see also H. AARON, *THE IMPOSSIBLE DREAM COMES TRUE IN TAX REFORM AND THE U.S. ECONOMY* 53-55 (1987) (noting that the failure to enact Treasury's proposed dividend relief was one of the major failures of the Tax Reform Act of 1986).

29. The importance of both bicameralism and presentment for the enactment of legislation in accordance with our constitutional structure are made clear in *INS v. Chadha*, 462 U.S. 919 (1982). See *infra* accompanying text notes 116-129.

30. See *infra* accompanying text notes 140-164 (discussing the requirement that policymaking not be delegated by the Congress).

31. *Chadha*, 462 U.S. at 951.

First, Congress as a whole does not understand much of the detailed tax legislation it enacts, which tends to reduce its accountability to the public.³² Second, by keeping so much tax detail for itself, Congress deprives the executive branch of a more dynamic role in the tax-policy process, one that the Constitution entrusts to it.³³ Third, Congress' special tax laws that benefit only a selected few suggest that Congress does not always exercise its majoritarian and balancing role.³⁴ In a sense, such special legislation involves a redelegation by

32. Accountability requires responsiveness to the will of the people. See D. EPSTEIN, *POLITICAL THEORY OF THE FEDERALIST* 147-61 (1984). There can be no accountability where there is no understanding. For an analysis of the lack of responsiveness to the public of the government as a whole, see Aranson & Ordeshook, *Public Interest, Private Interest and the Democratic Polity*, in *THE DEMOCRATIC STATE* 87 (R. Benjamin & S. Elkin eds. 1985).

Commentary by two former Assistant Secretaries of the Treasury for Tax Policy suggests that there is no other possible way for the members to act:

In substance, if not in form, the elected members of Congress have delegated substantial authority to staff with respect to the technical details of tax legislation. There is no realistic alternative. Members are not equipped to play the role of senior law partner who might review the technical work of a junior partner or associate. . . . Like the expertise of tax counsel generally, staff expertise is relied upon to produce technical implementation of the general conceptual decisions of nonexperts.

Ferguson, Hickman & Lubick, *supra* note 7, at 810-11.

The role of the staffs and their "dominance" in the tax legislative process suffers frequent criticism. See, e.g., J. BIRNBAUM & A. MURRAY, *SHOWDOWN AT GUCCI GULCH*, *supra* note 7, at 217 (criticism from members of Congress of the staff); Chapoton, *Perspective From Tax Practitioners* in *TRANSCRIPT OF FEDERAL BAR ASSOCIATION TAX SECTION CONFERENCE ON THE TAX-WRITING PROCESS* 55 (1986) (criticism from a former Assistant Secretary of the Treasury for Tax Policy). For an example of the influence that a staff person working directly for a member can have on tax policy, see Gina Despres, Legislative Assistant to Senator Bill Bradley, in Efron, *Tax Titans: Three Lawyers' Key Roles in Reform*, *NAT'L L.J.*, July 7, 1986, at 1, col. 1. A discussion of the roles of the congressional tax-writing committees and their staffs that will be helpful to those who are less well-versed in the tax legislative process is in *The Joint Committee on Taxation*, 11 *TAX ADVISER* 181 (1980); see also Ferguson, Hickman & Lubick, *supra* note 7, at 810-12. For a general discussion of the growth and role of congressional staff and their effect on the legislative process as a whole, see Strauss, *Legislative Theory and the Rule of Law: Some Comments on Rubin*, 89 *COLUM. L. REV.* 427, 430-34 (1989).

33. U.S. CONST. art. II, § 3. The interaction between the legislative and executive branches in the tax lawmaking process is not the principal consideration of Article II. Thus, the analysis only touches tangentially on the way in which the judicial branch interacts with the legislative branch and the separation of powers concerns that may arise in that context. It is clear, however, that if Congress were to write simpler laws—as proposed herein—the courts would be called upon to play a greater role in the lawmaking process than they do currently. For general discussions of the judicial role versus that of agencies, see Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 *COLUM. L. REV.* 452 (1989); Rubin, *Law and Legislation in the Administrative State*, 89 *COLUM. L. REV.* 369 (1989). Rubin's article, which considers constitutional aspects of the fiscal lawmaking structure, compliments Professor Kenneth Dam's article, *The American Fiscal Constitution*, 44 *U. CHI. L. REV.* 271 (1977). Professor Dam focused this article on federalism, whereas this Article focuses on separation of powers. Both concern the sharing of power over raising and spending revenue.

34. The American system resolves the tension among the various interests in the various

Congress of its legislative power to the vocal interests themselves.³⁵ All of these issues have important implications for our constitutional system and the question of whether it functions effectively to permit the writing of tax laws that benefit the people as a whole.

A. *Congressional Accountability*

The first of the three reasons for suggesting that Congress is not writing tax laws in harmony with its constitutional role is based on the of congressional accountability when the laws reduction are overly complex. Because our constitutional system is premised on the idea that the most accountable branch of government should have the most responsibility in the lawmaking process, it is useful to examine whether or not congressional accountability is a reality in our current system for making tax laws.

Congressional accountability has two essential aspects to it. The first requires that the members be accountable to the public that elects them. If this form of accountability is present, the public, by understanding the legislation that the members have voted for or against, will be able to vote in an informed way in deciding whether to return incumbents to office. This aspect of accountability is difficult to achieve because of the complexity of tax legislation. Thus, the members of Congress can never be fully accountable to the people, for people who do not understand the tax laws are incapable of being informed voters complex tax issues. However, the public can achieve a degree of understanding of broad aspects of tax policy, and Congress should write broad legislation as one means of enhancing its accountability to the people.

The other, and equally important, aspect of accountability is that the members of Congress themselves should be able to understand the legislation they are voting on in order to ascertain whether it is in the interests of the national constituency or the more narrowly focused local constituencies each represents. Under this theory of accountability, the ability to represent either a narrow constituency or the

parts of the country through the legislative process. For a description of the kinds of compromises that were needed, to enact the first income tax see R. PAUL, *TAXATION FOR PROSPERITY* 11-14 (1947); Brownlee, *Taxation for a Strong and Virtuous Republic*, 45 *TAX NOTES* 1613 (1989). The 1986 Act, for example, required compromises for the timber interests in the Northwest (depreciation write-offs and capital gains), oil and gas interests in the Southwest (depletion allowances), farming interests in the Midwest (myriad special rules for farmers), and the interests of the high tax states of the Northeast (whose citizens stood to suffer the most from repeal of the deduction for state and local taxes). Obviously all such special rules could not survive in the general base-broadening effort of the 1986 Act. See Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 [hereinafter 1986 Act].

35. See *infra* Subsection II.C.

national interest is equated with the ability to understand the legislation. Many members of Congress are not accountable to their constituents under this definition of accountability because the technical and intricate tax laws they write are not comprehensible, even to the legislators themselves. The extent of their knowledge may be greater than that of the public as a whole, but it is probably not much greater.

Given the broad range of complex subjects over which Congress has jurisdiction, there is nothing constitutionally impermissible for the Congress as a whole to satisfy the second aspect of accountability by delegating the requirement of understanding to a few of its members so that they may act on its behalf. Thus, it is proper for the Congress to delegate the need to have refined expertise in a particular area of knowledge to substantive committees with jurisdiction over the subject matter. In fact, this is what Congress has done with respect to the tax laws by delegating to the members of the Ways and Means and Finance Committees and the Joint Committee on Taxation the responsibility for having a greater understanding and knowledge of tax issues than the membership at large.³⁶ Nevertheless, in light of Congress's tendency to write current tax laws with arcane terminology and specific effects on complicated financial arrangements, many of the committee members to whom the responsibility has been delegated may not understand the import of the legislation they vote to bring to the floor of the Congress.³⁷

This is problematic because it raises questions about the way Congress presently operates within our constitutional structure. Congress has permitted the further delegation of much of the writing of legislative details in the tax area to the expert staff of the tax-writing committees, thus permitting the creation of complex legislation for which there is no actual congressional accountability.³⁸ Tax legislation should be written in such a way that the members of the two tax-writing committees can comprehend the proposals on which they vote; otherwise their votes are not informed and they are not accountable to the larger body from which they received their delegation and,

36. The Joint Committee on Taxation arose from the Revenue Act of 1926, Pub. L. No. 20, 44 Stat. 9. Its authority and functions are described in sections 8021 to 8023 of the Internal Revenue Code of 1986. See I.R.C. §§ 8021-8023 (1986), see also Ferguson, Hickman & Lubick, *supra* note 7, at 810-12.

37. The Ferguson, Hickman and Lubick article considers the legislators' lack of understanding to be appropriate because of the technical nature of tax legislation. See Ferguson, Hickman & Lubick, *supra* note 7, at 809, 811. That is, of course, entirely contrary to the view expressed here.

38. The use of staff for drafting insulates the members from legislation and in the process reduces their accountability. Even if such a result may be "inevitable" if tax legislation is complicated, it is not right. *But see* Ferguson, Hickman & Lubick, *supra* note 32.

via their representatives, to the people. Where the proposals are largely incomprehensible, the committee members, as the appropriate delegates of the larger body, do not exercise the responsibility they should. The further delegation to the staff means that Congress is not being accountable to the public and thus is sidestepping the reason that the Framers vested in the legislative branch the principal obligation to formulate the broad fiscal policy society.

Consider, for example, the original issue discount rules, substantially amended in 1984 to take into account a greater understanding of the time value of money.³⁹ Notwithstanding the complexity of this area, which requires a relatively complex set of solutions, it seems likely that few members of the tax-writing committees, and even fewer members of Congress not on those committees, had any real grasp of the solutions they adopted. Yet the principles of the economic accrual of interest are not particularly difficult to describe, suggesting that the basic legislative goals might have been accomplished more simply so that they could have been better understood by the members.

Other examples come readily to mind. The branch profits tax of section 884 of the Internal Revenue Code,⁴⁰ for instance, deals with the former disparity in treatment between United States corporations owned by foreign persons and doing business in the United States directly, and foreign corporations owned by foreign persons doing business in the United States through subsidiaries.⁴¹ Again, it is difficult to imagine that many members of Congress understood the implications of this tax beyond its barest concept.⁴² Consider also the passive activity loss rules of section 469⁴³ and the deemed asset sale rules of section 338,⁴⁴ which are excessively wordy, contain needless

39. I.R.C. §§ 1271-88 (1988) *see also* Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 41(a), 98 Stat. 678.

40. I.R.C. § 884 (1990).

41. I.R.C. § 884, enacted by section 1241(a) of the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085.

42. Section 884 contains completely new terminology. For instance, "dividend equivalent amount," I.R.C. § 884(a)-(b) uses instead of familiar terms "effectively connected earnings and profits, adjusted as provided in subsection (b)" would have done just as well. In addition, it is needlessly specific with respect to the required adjustments for investment by a foreign branch in the United States. There is little reason to believe that non-lawyers understand what this is all about, when the eyes of noted tax experts glaze when reading it.

43. I.R.C. § 469 (1990) (enacted as the Tax Reform Act of 1986, Pub. L. No. 99-514, § 501, 100 Stat. 2085). For discussion of these provisions, see Bankman, *The Case Against Passive Investment: A Critical Appraisal of the Passive Loss Restrictions*, 42 STANFORD L. REV. 15 (1989); Peroni, *A Policy Critique of the Section 469 Passive Loss Rules*, 62 S. CAL. L. REV. 1 (1988); and Zelenak, *When Good Preferences Go Bad: A Critical Analysis of the Anti-Tax Shelter Provisions of the Tax Reform Act of 1986*, 67 TEX. L. REV. 499 (1988).

44. I.R.C. § 338 (1990) (enacted as the Tax Equity and Fiscal Responsibility Act of 1982

new language, and attempt to refine concepts that can easily be understood only if they are left unrefined. Although these are random examples, they are by no means isolated, and others may think of different targets of criticism.

Contrast these complicated provisions with subsections (b) and (c) of section 704.⁴⁵ In each case the statutory concept is a simple one, leaving it to regulatory interpretation to flesh out the details.⁴⁶ However, the brief statutory language was thought adequate to give the desired specificity to the statutory scheme without Congress

(TEFRA), Pub. L. No. 97-248, § 22(e)(4), 96 Stat. 324 (1982). For a discussion of section 338 and citation to some of the many articles that have been written concerning its effect, see B. BITTKER & J. EUSTICE, *FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS* § 11.47-11.48 (5th ed. 1987).

45. I.R.C. § 704(b) (1990). Section 704(b) reads as follows:

A partner's distributive share of income, gain, loss, deduction, or credit (or item thereof) shall be determined in accordance with the partner's interest in the partnership (determined by taking into account all the facts and circumstances), if—

- (1) the partnership agreement does not provide as to the partner's distributive share of income, gain, loss, deduction, or credit (or item thereof), or
- (2) the allocation to a partner under the agreement of income, gain, loss, deduction, or credit (or item thereof) does not have substantial economic effect.

Section 704(c), prior to the complications made by section 7642 of the Omnibus Budget Reconciliation Act of 1989, read as follows:

Under regulations prescribed by the Secretary, income, gain, loss, and deduction with respect to property contributed to the partnership by a partner shall be shared among the partners so as to take account of the variation between the basis of the property to the partnership and its fair market value at the time of contribution. Under regulations prescribed by the Secretary, rules similar to the rules of the preceding sentence shall apply to contributions by a partner (using the cash receipts and disbursements method of accounting) of accounts payable and other accrued but unpaid items.

Rubin and Strauss refer to this sort of legislation as "intransitive." See Rubin, *supra* note 33; Strauss, *Legislative Theory*, *supra* note 32, at 428.

Many administrative law scholars are not particularly disturbed by the overwhelming complexity of the Internal Revenue Code. See, e.g., Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183, 1188 (1973); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1695 n.127 (1975). Perhaps they view this issue with more equanimity because they don't practice tax law.

46. The regulations under section 704(b) have gone through a couple of metamorphoses and are extraordinarily long. See Treas. Reg. § 1.704-1 (1991); Temp. Treas. Reg. § 1.704-1T (1991); see also W. MCKEE, W. NELSON & R. WHITMIRE, *FEDERAL TAXATION OF PARTNERSHIPS AND PARTNERS* § 10.01A (1977 & Cum. Supp. 1989); A. WILLIS, J. PENNELL & P. POSTLEWAITE, *PARTNERSHIP TAXATION* chs. 101-107 (4th ed. 1989). The section 704(c) regulations are briefer and less controversial. For a discussion of section 704(c) and the major change made in the statute in 1984, see W. MCKEE, W. NELSON & R. WHITMIRE, *supra*, at § 10.08; and A. WILLIS, J. PENNELL & P. POSTLEWAITE, *supra*, at ch. 108.

Section 704(c) was further amended in 1989. Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 7642, 103 Stat. 2106. The amendment was designed to correct certain "abuses," and it has complicated a very simple provision of the Code.

becoming involved with the administrative details. Other examples of situations in which Congress has provided simple statutory rules include section 1502, in which it delegated regulation-writing authority with respect to affiliated groups of corporations filing consolidated returns,⁴⁷ and section 385, setting out principles to distinguish between corporate debt and equity.⁴⁸ These two instances are of particular interest because each represents a situation in which Congress specifically recognized that it should not try to deal with the subject matter in any detail primarily because of its complexity.⁴⁹

It is apparently possible, therefore, for Congress to avoid writing tax statutes that the members cannot understand. Both aspects of

47. Section 1502 reads in pertinent part as follows: "The Secretary shall issue such regulations as he may deem necessary taxation note, the regulations promulgated pursuant to the grant of authority in Section 1502 "for practical purposes constitute the 'law' of consolidated returns." See B. BITTKER & J. EUSTICE, *supra* note 42, at § 15.20. For a discussion of the delegation in Section 1502, see Salem, *Judicial Deference, Consolidated Returns, and Loss Disallowance: Could LDR Survive a Court Challenge?*, 43 TAX EXECUTIVE 167, 176 (1991).

48. I.R.C. § 385(a) authorizes the Secretary "to prescribe such regulations as may be necessary or appropriate to determine whether an interest in a corporation is to be treated . . . as stock or indebtedness." Subsection (b) describes the factors that are to be taken into account in making that distinction. See B. BITTKER & J. EUSTICE, *supra* note 42, at § 4.02 (discussing Treasury's failed attempts to write adequate rules under this delegation of authority); see also Manning, *Hyperlexis and the Law of Conservation of Ambiguity: Thoughts on Section 385*, 36 TAX L. 9 (1982) (criticizing the infeasible attempts by the Treasury to make the regulations confront every possible problem).

In section 7208(a) of the 1989 legislation, Congress gave the Treasury additional regulatory authority under section 385 (to treat interests in part as debt and in part as stock), noting as well that "it is important that the Treasury Department provide guidance to taxpayers on debt-equity issues in an expeditious manner." See H.R. REP. NO. 257, 93d Cong., 2d Sess., 1235 (1974). Clearly Treasury would be better able to do so if it were to write simpler rules under section 385 than those it proposed during the 1980's.

49. With respect to section 385, see S. REP. NO. 552, 91st Cong., 1st Sess. 137 (1969), reprinted in 1969-3 C.B. 510-12. Commenting on the distinction between debt and equity, the committee report noted that "[t]he differing circumstances which characterize these situations . . . would make it difficult for the committee to provide comprehensive and specific statutory rules of universal and equal applicability." *Id.* at 138.

With respect to section 1502, see S. REP. NO. 1622, 83d Cong., 2d Sess. 120 (1954), which stated as follows:

Under the House bill, the consolidated return regulations were inserted in the statute. While your committee recognizes that those regulations have been generally accepted, your committee believes that it is more appropriate to have these detailed rules in the form of regulations rather than in the statute. In this form they may be readily amended without necessary congressional action. This is particularly desirable in view of the many revisions of the income tax laws in this bill which must be reflected in those regulations.

It should be noted that the delegation in section 1502 was generally successful until recent years, when the slowness of the regulatory process caused Congress to enact various specific rules to deal with consolidated returns. See, e.g., I.R.C. § 1503(e) (1990) (enacted as the Tax and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-203, § 10222, 101 Stat. 1330) (providing a special rule for determining investment basis adjustments).

accountability, described above, would be increased if Congress were to do so more often. The members of Congress would be able to understand what they were voting on, and their constituents would be able to determine whether they liked the members' votes. The importance of increased accountability in the American system of government should not be ignored: it is the basis for vesting fiscal powers in Congress. That means that Congress should strive harder to fulfill the obligations of the role it has as representative of the people by enacting legislation that is more readily understood. This would reduce the massive complexity we have seen in tax statutes in the recent past.

The ramifications of this suggestion are clear—legislating in less detail will result in the delegation of more authority to the Treasury to write rules and regulations that flesh out the simple laws written by Congress. It is therefore extremely important for Congress to ensure that it maintains policymaking functions, delegating only the execution of its policies to the executive branch. The question of whether such delegation seems consistent with the general principles embodied in the separation of powers is explored later in this section.⁵⁰

The point made here is a fairly simple one, but it is by no means trivial. If accountability is the principal reason for lodging the taxing power in Congress, then Congress should be accountable to the public for the tax legislation it writes. Presently, such accountability does not exist because the tax laws written by Congress are too detailed and complex for the members of Congress or their constituents to understand.

B. *Limiting the Role of the Executive Branch*

A second way in which Congress may have violated a fundamental aspect of the separation of powers is that by writing excessively detailed legislation it may have deprived the executive branch of its proper role in the lawmaking process. In analyzing why this might be, it is useful to examine separation of powers decisions and scholarly discussions for their impact on the question of delegating greater legislative power to the Treasury.

Much of the scholarly literature and many of the recent Supreme Court decisions about the impact of the separation of powers on modern government have focused on the independent commissions and other government agencies operating within executive branch departments or as wholly separate entities.⁵¹ The Treasury, in contrast, is

50. See *infra* Subsection III.D.

51. For instance, the Federal Energy Regulatory Commission is part of the Department of Energy, see 42 U.S.C. § 7171 (1988), and the Food and Drug Administration is part of the the

an executive branch department with a cabinet secretary at its head. Although created by Congress,⁵² it is subject to the direct control of the President. In the context of the appointment and removal power, it is only subject to the control of Congress for the advice and consent of the Senate for high-level appointments.⁵³ Recent Supreme Court doctrine with respect to the exercise of legislative and judicial powers by independent agencies is therefore only partially relevant in assessing the appropriateness of the vesting of such powers in the Treasury under the laws written by Congress.⁵⁴

The essential issue presented by this Section of the Article, that Congress should delegate what is essentially non-policy detail to the Treasury, is one of deciding how modern government should be organized to cope most effectively with modern society while ensuring that the rights of the people vis-à-vis the government are protected. The distribution of governmental power among the three separate branches in our system was not designed to achieve maximum efficiency. The Framers thought that efficient governments could more easily become tyrannical and oppressive than inefficient ones.⁵⁵ Nevertheless, the Framers did value a system that could get things done, and they distributed the governmental powers accordingly. Furthermore, as history demonstrates, Congress devised a variety of innovative solutions to respond to perceived needs for greater flexibility in government. These solutions have withstood the test of time and, often, constitutional challenge.⁵⁶

In addition to requiring structural responses that enable government to function more smoothly, the complexity of everyday life in the modern age (particularly in financial and other business transactions) has demanded complex laws to regulate those activities. The tax laws are complex because of the nature of the transactions to

Department of Health and Human Services, *see* 21 U.S.C. 393 (1988). In comparison, the Securities and Exchange Commission and the Federal Trade Commission are independent agencies. *See* 15 U.S.C. § 78(d) (1988) (SEC); 15 U.S.C. § 41 (1988) (FTC).

52. *See* Act of Sept. 2, 1789, ch. XII, § 1, 1 Stat. 65-6 (1789).

53. U.S. CONST. art. II, § 2.

54. For an overview of recent law and scholarship regarding the role of agencies in the administrative state, *see* Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

55. *See* THE FEDERALIST NO. 51, at 261 (J. Madison) (G. Wills ed. 1982); D. EPSTEIN, *supra* note 32; L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 2-2, at 19-20 (2d ed. 1988).

56. *See, e.g.*, *Mistretta v. United States*, 488 U.S. 361, 384-412 (1989) (upholding creation of the sentencing commission); *Humphrey's Executor v. United States*, 295 U.S. 602, 608-11 (1935) (upholding restrictions on the President's right to fire members of the FTC). *But see* *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 111 S. Ct. 2298 (1991) (striking down an elaborate mechanism for the transfer and retention of control over Washington, D.C. area airports).

which they pertain. Perhaps those laws do not need to be as complicated as they currently are, but a certain amount of complexity is inevitable.⁵⁷ Given that reality, the question becomes who should have primary responsibility for providing the details: should Congress retain that responsibility, delegating, as it must, the actual development of the rules to its own staff, or should Congress delegate that responsibility to the staff of the Treasury?⁵⁸

The answer suggested here is that Congress should strive to write

57. There is, however, a general consensus that the Internal Revenue Code today has more than a little too much. Criticism of the complexity of the Code and the regulations promulgated it focuses to some degree on the perceived need to address all possible contingencies and to draft in order to prevent avenues for abuse. Carv Ferguson, a former Assistant Attorney General of the Tax Division expressed his views on this issue: "The Internal Revenue Code has become so highly articulated in frequent response to perceived needs that copious and interpretative regulations have become essential to its administration." See Ferguson, *Development and Implementation of Tax Policy in the United States and the United Kingdom: A Seminar of the American College of Tax Counsel*, 4 AM. J. TAX POL'Y 107, 151 (1985).

Where statutes are not complex, regulations frequently are, a situation which the Code seems to invite. Section 7805(a) of the Code grants general authority to the Secretary of the Treasury to "prescribe all needful rules and regulations" for the enforcement of the internal revenue laws. I.R.C. § 7805(a) (1990). In addition, there are numerous specific grants of authority found in the Code itself and in its various amendments. See, e.g., I.R.C. §§ 338, 382, 704(c), 502 (1990)). Frederic Hickman, a former Assistant Secretary of the Treasury for Tax Policy has compared the overly specific regulations promulgated by Treasury to the work of inexperienced attorneys attempting to draft documents to cover every contingency "except the one that actually occurs." Invitational Conference on the Reduction of Income Tax Complexity, (Jan. 11, 1990). For a report of this conference, see Sheppard, *Simplification Means Tough Choices, AICPA/ABA Conferees Agree*, 46 TAX NOTES 381 (1990). Many perceive, and the Internal Revenue Service and the Treasury Department have recently recognized, that the way out of the current morass may well be to develop bright line tests and safe harbors in order to avoid some of the greatest burdens of complexity. This will allay some of the excessive concern about tax avoidance that has animated much of the regulatory process in the recent past. See *id.* at 382-83. For a general discussion of the burdens of complexity in the tax law as viewed by a prominent practitioner, see Henderson, *Controlling Hyperlexis—The Most Important "Law And . . ."*, Tax Forum Paper #452 (1989) (on file with the author).

58. In the Office of the Assistant Secretary of the Treasury for Tax Policy, two branches are specifically concerned with taxation: the Office of Tax Legislative Counsel (TLC), composed principally of lawyers; and the Office of Tax Analysis (OTA), composed principally of economists. As the name implies, the duties of the lawyers are related principally to the legislative effort. See McDaniel, *Political Process*, *supra* note 7, at 32-36. Nevertheless, the staff of TLC have specific regulations projects as well and work on them together with their counterparts at the IRS Chief Counsel's Office. The Assistant Secretary of the Treasury and the Commissioner of Internal Revenue must sign all Treasury Regulations promulgated in the Federal Register.

The duties and functions of the IRS are described in detail in B. BITTKER, *supra* note 7, at § 110.1. The IRS makes clear in its Statement of Principles that its job is to "administer" the Code. See Rev. Proc. 64-22, 1964-1 C.B. 689; *Statement of Organization and Functions*, 1974-1 C. B. 440. See generally M. SALTZMAN, *IRS PRACTICE AND PROCEDURE* (1981) (describing the duties of the IRS and how it carries them out). The Saltzman treatise discusses the interrelationship of the Treasury and the IRS and how they administer the Internal Revenue Code. *Id.* at § 1.02[1].

simpler tax laws and should delegate the management of administrative detail to the Treasury. This view is based not only on the belief that such a system would be more accountable and more efficient,⁵⁹ but also on the Constitution's suggestions about the appropriate interaction of the three branches in our tri-partite system. The fundamental principles of the separation of powers give the executive branch an important and dynamic role in the tax lawmaking process. Congress unduly limits this role when it writes extremely detailed laws. Constitutional history as well as the Framers' conception of the basic structure of the government support the theory that Congress should delegate the management of detail to the executive branch. Recent Supreme Court decisions about the separation of powers, particularly *INS v. Chadha*,⁶⁰ *Bowsher v. Synar*,⁶¹ and *Morrison v. Olson*, also support this theory.⁶²

1. CONSTITUTIONAL HISTORY AND THE STRUCTURE OF AMERICAN GOVERNMENT

When the Framers considered how to organize the structure of American government, they were careful to discard the models that were otherwise acceptable but might inadequately guard against tyranny. They gave the President the power to propose legislation,⁶³ but they gave the legislative power to Congress.⁶⁴ They assigned to the President the task "to take Care that the Laws be faithfully executed."⁶⁵ They did not, however, specify exactly how that was to be done, or the relationship between legislation and execution.

The few references to executive departments found in Article II⁶⁶ indicate that the Framers contemplated that the President would have executive officers to carry out the day-to-day business of executing

59. *But see* Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1277, 1318-34 (1984) (criticizing the American tendency to rely on agencies to develop law under the erroneous assumption that they are more efficient than Congress).

60. 462 U.S. 919 (1983).

61. 478 U.S. 714 (1986).

62. 487 U.S. 645 (1988). The Court's latest separation-of-powers decision suggests that the failure to delegate executive functions to the executive branch may render a statute unconstitutional. *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 111 S. Ct. 2298 (1991) (holding that a scheme, granting state agencies certain powers subject to examination by a Board of Review comprised of members of Congress, was unconstitutional under the separation of powers principle).

63. U.S. CONST. art. II, § 3.

64. *Id.* art. I, § 1. *Cf.* *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 587 (1952) ("The Constitution limits [the President's] functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad.").

65. U.S. CONST. art. II, § 3.

66. *Id.* art. II, §§ 2, 4.

laws written by Congress.⁶⁷ Indeed, the Constitution specifically provides for congressional control over the appointments process for the heads of the executive departments by requiring Senate confirmation of the President's appointees.⁶⁸ But the Constitution does not detail how the actual governance is to be carried out once Congress has written those laws that the President is required to execute faithfully.

Various inferences can be drawn from this failure to more carefully delineate the exact relationships between the Congress and the executive branch officers below the President. The most plausible of these is that the Framers did not know exactly what would happen, but they were confident that they had set up a system in which none of the three branches of government would be so powerful as to control the others. Having experienced the British parliamentary system⁶⁹ and having read the democratic theories of Locke⁷⁰ and Montesquieu,⁷¹ they clearly expected that there would be a number of governmental departments that would carry out the day-to-day functions of government. Presumably the Framers concluded that establishing precise details was best left to the future so they did not name the departments⁷² or describe their exact relationship to Congress.

The Framers did want to ensure that the President, with a limited role in the actual legislative process but an important role as the head of the branch that would carry out the legislative dictates, would not be able to arrogate greater than appropriate power as a result of his executive duties.⁷³ Thus, the Framers' failure to describe the various departments meant that they wanted Congress to create them as it saw fit, under the authority granted to it by the "necessary and proper" clause.⁷⁴ In addition, the Framers lodged in Congress the appropriations power, so that no money could be spent for governance without congressional legislation.⁷⁵ As a result, the Framers

67. See Strauss, *supra* note 54, at 605-08.

68. U.S. CONST. art. II, § 2.

69. See generally THE FEDERALIST NOS. 67 & 69 (A. Hamilton) (G. Wills ed. 1982) (discussing the despotic power of the King of England).

70. See generally J. LOCKE, TWO TREATISES ON GOVERNMENT (Cambridge Univ. Press 1960).

71. See C. MONTESQUIEU, THE SPIRIT OF LAWS (M. Nugent trans. 1873). For a discussion of Montesquieu's theories, see H. MERRY, MONTESQUIEU'S SYSTEM OF NATURAL GOVERNMENT (1970).

72. Proposals, such as that by Gouverneur Morris, to name the departments in the Constitution were rejected by the Constitutional Convention. See Strauss, *supra* note 54, at 600-01.

73. See THE FEDERALIST NOS. 67 & 69 (A. Hamilton).

74. U.S. CONST. art. I, § 8.

75. For a discussion of the appropriations power, see L. TRIBE, *supra* note 53, at 256-57, 321; Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343 (1988).

gave Congress considerable ability to curtail potential executive despotism, and they vested the Supreme Court with responsibility to mediate the disputes that inevitably would arise between the political branches over who was permitted to exercise which powers.⁷⁶ This distribution of authority among the branches was certainly designed to keep the executive branch in check.

On the other hand, it is clear from the framework of the Constitution that the Framers were also suspicious of a governmental structure in which the legislature was too dominant. They feared legislative control of the executive as much as they feared executive control of legislation.⁷⁷ In addition, they assumed from experience under the Articles of Confederation that the Congress could not govern well on its own because of the nature of legislation and its incremental and ad hoc response to problems.⁷⁸ Thus, the Constitution only provided Congress a limited role in the actual operations of government. The legislative occupation of a member of Congress was, in the early days of the nation, quite limited. Congress was to be in session only one month of every year,⁷⁹ thereby permitting the members to engage in their regular occupations (farmer, shopkeeper, lawyer, for example) throughout the remainder of the year. This preserved for Congress a lawmaking power severely circumscribed by time, with no role whatsoever in the administration of the few laws it might enact during the short legislative sessions. Only the President and his subordinate officers were to occupy full-time positions in the business of government.

As it turned out, Congress wasted no time creating departments within the executive branch, and, from the standpoint of the inquiry addressed here, it is interesting to note that one of the first departments it established during its first session was the Treasury Department. Administration of the nascent government's funds was regarded as an extremely important executive function. It is also important, from the standpoint of the distributed powers, that Congress took pains to ensure that the Secretary of the Treasury would be answerable to it as well as to the Chief Executive:

[I]t shall be the duty of the Secretary of the Treasury . . . to make report and give information to either branch of the legislature, in person or in writing (as he may be required), respecting all matters

76. U.S. CONST. art. III. For a general discussion of the judicial power, see L. TRIBE, *supra* note 53, at 96-107.

77. See THE FEDERALIST NO. 48 (J. Madison); D. EPSTEIN, *supra* note 31, at 128.

78. See D. EPSTEIN, *supra* note 32, at 131-33; Strauss, *Separation of Powers*, *supra* note 52, at 603.

79. U.S. CONST. art. I, § 4, cl. 2.

referred to him by the Senate or House of Representatives, or which shall pertain to his office.⁸⁰

Congress wanted to make clear to the subordinate officers of the executive branch from the very start that its power extended beyond that of consent to appointment into the realm of overseeing the ways these officers carried out their duties of governance.⁸¹

The governmental structure established by the Constitution is quite rational, given the overwhelming belief of the Framers that distributing power among the branches would best guard against tyranny. The system permits Congress to enact legislation and to delegate broad authority to the executive branch to carry out the leg-

80. Act of Sept. 2, 1789, ch. 12, § 2, 1 Stat. 65-66.

81. It was not until the middle of the twentieth century that Congress adopted a set of rules about oversight. The Legislative Reorganization Act of 1946 formalized the oversight function of Congress, which had previously been carried on in a piecemeal fashion. See Act of Aug. 2, 1946, ch. 753, 60 Stat. 812. Various types of congressional investigations prior to that time included those involved with wars (the Indian wars and the Civil War) and financial and political scandals (Credit Mobilier and Teapot Dome). See W. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 202 (1978). The ratifying conventions for the Constitution recognized the general investigative powers of Congress, referring to their general historical antecedents in the English Grand Inquest of the Nation. See Berger, *Congressional Subpoenas to Executive Officials*, 75 COLUM. L. REV. 865 (1975). Oversight activities were one subject of the Legislative Reorganization Act of 1970, which called them "review" functions and which provided more rules regarding the surveillance power of the legislative branch over the executive. See Legislative Reorganization Act of 1970, Pub. L. No. 91-510, 84 Stat. 1140.

Five years later, when Congress made several rules changes that resulted in a more open legislative process, it also formally adopted rules for the creation of oversight subcommittees for the various committees of Congress. See H.R. Res. 998, 93d Cong., 2d Sess. (1974); S. Res. 55, 94th Cong., 1st Sess. (1975). For a contemporaneous view of the oversight responsibility, see M. OGUL, CONGRESS OVERSEES THE BUREAUCRACY (1976). Prior to 1974, the subcommittees of the Ways and Means Committee did not include a subcommittee with specific oversight responsibilities. Oversight occurred only rarely, and not through the formal hearing process. During the past fifteen years, however, the oversight function of the Ways and Means Committee has become increasingly important. For a general discussion of the uses and abuses of the oversight power, see Parnell, *Congressional Interference in Agency Enforcement: The IRS Experience*, 89 YALE L.J. 1360 (1980). Parnell found that the Senate Finance Oversight Subcommittee rarely met and seldom conducted hearings. *Id.* at 1367. The merger of the Oversight Subcommittee with the Subcommittee on Private Retirement Plans in the reorganization of the Finance Committee that took place in the 100th Congress indicates that the tendency for it to do little continues.

Oversight of the executive branch occurs not only through the formal committee hearing process but also through the investigation and reporting functions of the General Accounting Office ("GAO"). See 31 U.S.C. § 3526 (1983). Specifically with reference to taxation, the GAO makes recommendations as to how the IRS could better perform some of its functions. See, e.g., U.S. COMPTROLLER GENERAL, REPORT TO CONGRESS, IRS CAN IMPROVE ITS PROCESS FOR DECIDING WHICH CORPORATE RETURNS TO AUDIT (Aug. 3, 1979), cited in B. BITTKER, *supra* note 7, at § 116.9 n.15. Some GAO reports are made specifically at the behest of one of the oversight subcommittees of Congress. See, e.g., U.S. COMPTROLLER GENERAL, REPORT TO CONGRESS, TAX ADMINISTRATION: IRS' AUTOMATED COLLECTION SYSTEM (July 1986).

islative purposes.⁸² But in preserving certain powers for Congress, it permits Congress to oversee the executive branch activities so that it can prevent unwarranted interpretations by executive branch officers of the laws Congress enacts. It also permits the Congress to control the actions of the executive branch departments by controlling their appropriations. Yet the Constitution does not appear to give Congress an actual say in the detailed administration of the laws it writes. That function is given to the President and the employees of the executive branch, who must carry out their duties under the constitutional admonition of faithful execution.⁸³ Without the executive department's active role in the process of governing, the erratic and incremental legislative pattern would have led to chaos.

Looking at the recent past and the legislative morass that has developed in the tax area, it seems that we are in the precise state the Framers sought to avoid. Congress has in many situations seized control of the detail of the tax laws. This tendency has made the laws themselves hypertechnical and hence susceptible to frequent change, rendering them almost unadministrable.⁸⁴ If Congress wrote simpler laws, the proper role of Treasury in the governmental process would be better preserved. The management of detail would be entrusted to the executive branch, where it properly belongs. In that way, the structure adopted by the Framers would be respected and its purpose of guarding against tyranny would be effectuated.

2. SUPREME COURT DECISIONS WITH RESPECT TO THE SEPARATION OF POWERS

Against the historical background described, it is hardly surprising that the Supreme Court has been called upon from time to time to resolve disputes over the exercise of the distributed powers by one of the two political branches. The inevitability of such disputes is attrib-

82. See *infra* Subsection III.D for a discussion of the propriety of legislative delegations.

83. The constitutional admonition of "faithful execution" applies directly to the President. See U.S. CONST. art. II, § 3. But it is implicit in that charge that the inferior officers whom he or she hires must also follow the dictates of the Constitution. See, e.g., *Myers v. United States*, 272 U.S. 52, 122 (1926). For a discussion of various presidential controls over agency actions, see Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 535 (1989).

84. The frequency with which Congress has enacted complex tax legislation in the period since the Tax Reform Act of 1976 has led to a considerable regulations backlog. Contributing to that backlog is the complexity of some of the statutory provisions that were enacted in recent years. The difficulty of issuing regulations under complex statutory schemes is exemplified by the recent experience with section 469, where the Treasury used 100 pages to define one statutory term—the word "activity." The ABA Tax Section sharply criticized this effort. See ABA Tax Section, Task Force on Passive Losses, *Preamble to the Comments on Activity Regs*, 44 TAX NOTES 1277 (1989).

unable to the Constitution's failure to spell out exactly the relationships that the two branches should have. In addition, interbranch jealousy and desire for control of outcomes has frequently led to attempts by Congress to impose controls on the executive branch. Such extra-legislative mechanisms for control as limitations on the presidential removal power and the legislative veto have been the subject of considerable dispute among scholars⁸⁵ and in the courts.⁸⁶ These mechanisms have also led to a meaning of the separation of powers doctrine in a government that is different from the one envisioned by the Framers of the Constitution, who could scarcely have foreseen the numerous agencies and commissions that make up the modern administrative state.⁸⁷

A review of the removal power cases, including both those that concern independent agencies and those that concern executive departments, leads to the conclusion that the cases are not important for their largely unsuccessful formalistic attempts to define legislative, executive, or judicial powers or actions. They are important rather for their recognition of the primacy in the American form of government of the diffusion of power among the branches and the operation of the checks and balances thereby created.⁸⁸ The decision in *INS v. Chadha*,⁸⁹ the legislative veto case, reveals the significance of the separation of powers doctrine at the present time. Both the removal cases and *Chadha* support the theory that Congress should write fairly simple tax statutes and delegate the function of filling in the detail to the Treasury where necessary.

85. See, e.g., Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369 (1977); Cooper & Cooper, *The Legislative Veto and the Constitution*, 30 GEO. WASH. L. REV. 467 (1962); Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569 (1953); Javits & Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N.Y.U. L. REV. 455 (1977). Post-*Chadha* articles include Breyer, *The Legislative Veto after Chadha*, 72 GEO. L.J. 785 (1984); Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L.J. 789; see also J. SUNDQUIST, *CONSTITUTIONAL REFORM AND EFFECTIVE GOVERNMENT* 116-32 (1986).

86. With respect to the legislative veto, see *INS v. Chadha*, 462 U.S. 919 (1983); with respect to the removal power, see *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), and *Myers v. United States*, 272 U.S. 52 (1926).

87. Strauss, *supra* note 52, at 605-08.

88. *Id.* at 609-16. Strauss makes the point quite well: "[T]heir conclusions can also be understood in light of the checks-and-balances approach, and so understood the opinions are both readily reconciled and consistent with the constitutional scheme." *Id.* at 609.

89. 462 U.S. 919 (1983). *Chadha* clearly relied on the same idea: the Constitution established a scheme dividing powers among the branches in order to make the government less susceptible to accompanying tyrannical impulses. See *infra* text notes 116-29 (discussing *Chadha*).

a. The Removal Cases

At the heart of the removal power cases is the question of control over the actions of the person who may be removed. Accordingly, the issue of what functions the person performs is relevant to the outcome.⁹⁰ If the person, as an employee of an agency, may exercise legislative or judicial powers (as the heads of independent commissions are permitted to do), the person is more properly subject to control by Congress, or less properly subject to unfettered control by the President, because the right to exercise such legislative or judicial functions necessarily derives from Congress and is delegated by it to the agency in the agency's enabling legislation.⁹¹

In *Myers v. United States*,⁹² the first of the modern removal cases, the Supreme Court considered whether the President could remove a postmaster before the completion of his statutory four-year term without the consent of the Senate.⁹³ A divided Court said that presidential removal was proper, holding that the reservation of the requirement of Senate consent to the removal improperly invaded the power of the President as Chief Executive.⁹⁴ *Myers* thus accepted the inherent and unfettered power of the President over the officers employed in the executive branch. As a result the President has authority to direct the actions of those officers, free from intervention by the legislative branch.⁹⁵

Less than ten years later, the Court confronted the legislative control question with respect to an employee of an independent agency. In *Humphrey's Executor v. United States*,⁹⁶ the Court found that Congress properly required dismissal of a member of the Federal Trade Commission by the President be for cause.⁹⁷ It thus retreated somewhat from its earlier holding in *Myers*, but only in the context of

90. In *Myers v. United States*, 272 U.S. 52 (1926), the Court considered the powers of a postmaster to be executive in nature. In *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), the Court regarded the powers of an F.T.C. Commissioner as legislative and judicial in nature. In both *Bowsher v. Synar*, 478 U.S. 714, 726 (1986) (Comptroller General), and *Morrison v. Olson*, 108 S. Ct. 2597, 2616-18 (1988) (special prosecutor), the powers were regarded as executive.

91. The fact that Congress itself exercises the legislative power gives it the authority to delegate that power to executive branch and fourth branch agencies. See Strauss, *supra* note 52, at 605. Congress also presumably has the power to delegate judicial authority under its general power to establish lower federal courts. See *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986); *Crowell v. Benson*, 285 U.S. 22 (1932); U.S. CONST. art. III.

92. 272 U.S. 52 (1926).

93. Act of July 12, 1876, 19 Stat. 80, c. 179.

94. *Myers*, 272 U.S. at 121-23.

95. *Id.* at 122.

96. 295 U.S. 602 (1935).

97. The Federal Trade Commission Act of 1914, ch. 311, 38 Stat. 717.

a "fourth branch" administrative agency which could exercise only "quasi-legislative" and "quasi-judicial" powers.⁹⁸ Taken by themselves, these two cases suggest a fundamental difference between executive branch employees and employees of independent agencies, with Congress having more power over the latter because it can restrict the circumstances in which the President may remove them.

The distinction drawn in *Humphrey's Executor* between executive employees and employees of independent agencies has been largely discounted in recent years by the recognition that executive branch officers do in fact exercise functions that are essentially legislative and judicial.⁹⁹ This has not resulted in their being viewed as any less "executive" than they were originally. The distinction in *Humphrey's Executor* arises from the recognition that the checks and balances imposed by the Constitution require rigorous attention when Congress tries to exert undue power over actions by subordinate officers in the executive branch.

There is also a rational basis for distinguishing between executive branch agencies on the one hand and independent agencies on the other. The functions of the independent agencies derive entirely from Congress, which on its own initiative created them and assigned their functions, not as departments within the executive branch, but as something separate. Thus, Congress arguably should be able to maintain more control over independent agencies than it has over the executive departments. The functions of the executive branch departments, unlike those of the independent agencies, do not derive solely from Congress but jointly from Congress and the Constitution itself. Although Congress created them, the Constitution recognized that such departments must exist to allow the President to carry out the mandated execution of the laws.

Implicit in *Myers* is the belief that employees of the executive branch always perform executive functions¹⁰⁰ and thus are subject to control with respect to job tenure only by their superiors in that branch.¹⁰¹ Both *Myers* and *Humphrey's Executor* suggest that execu-

98. *Humphrey's Executor*, 295 U.S. at 629; see also Strauss, *supra* note 52, at 612.

99. See Strauss, *supra* note 52, at 611-12.

100. The ability of executive branch officers has become readily accepted to legislate as well as to adjudicate. The Administrative Procedure Act applies to both executive branch agencies and to those that are independent. See Administrative Procedure Act (APA), 5 U.S.C. §§ 551-706 (1989). The Act sets out standards rules for promulgating and adjudicating disputes. The IRS, for example, participates in the rulemaking process along with the Treasury, see B. BITTKER, *supra* note 7, at § 110.4, and also adjudicates disputes between it and taxpayers, see *id.* at § 112.1.

101. Not permitting the Senate to impose a consent condition on the firing of executive branch officers makes those officers subject to the control only of the President and those below

tive departments are intended by the Constitution to be fully independent in the exercise of their executive functions and are subject to legislative control only through proper legislative activities: oversight and the appropriations power. Although the *Humphrey's Executor* court felt that distinctions should be drawn between executive departments and independent agencies in these respects, that is not especially relevant to the inquiry here, and the formalistic distinctions it makes are outmoded.¹⁰²

The stress in the early cases on what constitutes an executive power, as opposed to a legislative or a judicial power, has been largely rejected in the more recent removal cases. These cases support the view that the importance of removal power lies in the emphasis on the constitutional scheme of diffused powers and checks and balances. In *Bowsher v. Synar*,¹⁰³ the Supreme Court considered whether the Comptroller General, who was appointed by the President but could be removed only by joint resolution of Congress or by impeachment, could exercise certain powers under the Balanced Budget Emergency Deficit Control Act of 1985.¹⁰⁴ Under that law as originally enacted, the Comptroller General had to determine the amounts of reductions in the federal budget deficit that were to be applied in the event that Congress did not need the deficit reduction targets of the legislation in the budget it adopted.¹⁰⁵ The President was then to issue a sequestration order containing the budget reductions specified by the Comptroller General's report.¹⁰⁶

Accepting the opinion of the lower court that such actions by the Comptroller General constituted an exercise of executive power,¹⁰⁷ the Supreme Court held that the Congress is not entitled "to reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment."¹⁰⁸ In other words, Congress cannot give a person who is at least in part its employee¹⁰⁹ the power

him to whom he or she has delegated that power. Congress may, of course, have considerable influence over whether an executive branch employee is retained in office, as the experience of Ann Gorsuch and the Environmental Protection Agency demonstrates. See Note, *The Conflict Between Executive Privilege and Congressional Oversight: The Gorsuch Controversy*, 1983 DUKE L.J. 1333.

102. See Strauss, *supra* note 52, at 611-12.

103. 478 U.S. 714 (1986).

104. The Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, Tit. II, 99 Stat. 1037.

105. *Id.* at § 251(b).

106. *Id.* at § 252.

107. *Synar v. United States*, 626 F. Supp. 1374, 1403 (D.D.C. 1986).

108. *Bowsher*, 478 U.S. at 726.

109. The conclusion that the Comptroller General is an employee of the Congress was made after review of congressional testimony and of various statutes. See *id.* at 726-32.

to exercise the functions that the Constitution mandates the executive branch to perform. Although the opinion to some extent relies on differentiating between executive and legislative functions,¹¹⁰ that formalist distinction is not necessary to the decision in the case. The real importance of *Bowsher* lies in the determination that the proper functioning of the government requires that any legislative scheme established by Congress must respect the division of power among the branches. Thus, the principal holding of *Bowsher* is that the Constitution requires Congress to delegate the execution of the laws rather than retaining execution for itself.¹¹¹

The most recent removal case, *Morrison v. Olson*,¹¹² also demonstrates the movement away from formalism. It involved restrictions on the Attorney General's power to remove an independent prosecutor from office after being appointed in accordance with the scheme Congress established for such executive branch employees. In *Morrison*, the Court retreated somewhat from the rationale in *Humphrey's Executor*.¹¹³ This permitted the Court to analyze the restriction that removal of a special prosecutor be for "good cause" in a more flexible manner that accords with current scholarly views about the separation of powers.¹¹⁴

In its decision in *Morrison*, the Court noted that "the real question is whether the removal restrictions are of such nature that they impede the President's ability to perform his constitutional duty" ¹¹⁵ It concluded that the statutory scheme for appointment and removal of special prosecutors withstood constitutional scrutiny, which suggests that the Court currently views the removal cases as bearing on the way government as a whole functions, with the powers properly distributed among its branches. In moving away from for-

110. *Id.* at 732-34.

111. This view is supported by dicta in *Buckley v. Valeo*, 424 U.S. 1, 119 (1976) (*per curiam*) ("[T]he Legislative Branch may not exercise executive authority by retaining the power to appoint those who will execute its laws."), and *Springer v. Philippine Islands*, 277 U.S. 189, 202 (1928) ("[T]he legislature cannot engraft executive duties upon a legislative office, since that would be to usurp the power of appointment by indirection. . . ."); *see also* Rubin, *supra* note 9, at 390.

Another view, expressed by Justice Stevens in his concurrence in *Bowsher*, considers the power in question as legislative and holds that Congress may not delegate legislative power to one of its agents, even if it may delegate that power to independent and executive branch agencies. *See Bowsher*, 478 U.S. at 753-59 (Stevens, J., concurring). Although this view was not adopted by the majority in *Bowsher*, it has resurfaced, in somewhat altered form, in *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 111 S. Ct. 2298 (1991). *See infra* Part III.B.2.c.

112. 487 U.S. 654 (1988).

113. *Id.* at 685-91.

114. *Id.* at 691-93.

115. *Id.* at 691.

malism toward a recognition that powers overlap within our system, the Court has moved the separation of powers doctrine in the direction this Article suggests. The removal power cases, particularly the most recent ones, are essentially about limiting the power of Congress in order to permit the executive to exercise an important and independent role in the government. Rather than finding formal labels for actions that may be performed by either branch, the primary concern is to accord respect to a system of coordinated independent branches.

Without addressing the question of which acts are inherently executive in nature and which are not—a difficult enterprise at best and one that is not terribly useful¹¹⁶—it is clear that the removal power cases support the theory that some functions must be preserved for the executive branch, subject only to oversight and other proper legislative controls. The basis for this division of powers in our Constitution comes from the Framers' acceptance of Montesquieu's belief that permitting legislatures the power of execution would magnify the possibility of government tyranny.¹¹⁷ Thus, the Framers of the Constitution preserved for the executive an important role in the government, allowing the employees of that branch to interpret the laws written by Congress and apply them to individual facts and circumstances. In enacting detailed tax laws that contain their own interpretation and specific application and that are obviously written by its staff, Congress tends to deprive the Treasury of its constitutional role in government.

116. Courts that have tried to draw the distinction have not heeded the words of caution from Mr. Justice Holmes, dissenting in *Springer v. Philippine Islands*, 277 U.S. 189, 211 (1928):

It does not seem to need argument to show that however we may disguise it by veiling words we do not and cannot carry out the distinction between legislative and executive action with mathematical precision and divide the branches into watertight compartments, were it ever so desirable to do so, which I am far from believing that it is, or that the Constitution requires.

Cf. *Bowsher v. Synar*, 478 U.S. 714, 747 (1986) (Stevens, J., concurring) ("One reason that the exercise of legislative, executive, and judicial powers cannot be categorically distributed among three mutually exclusive branches of Government is that governmental power cannot always be readily characterized with only one of those three labels."); *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 111 S. Ct. 2298, 2312 (1991) (noting that the Court need not consider Congress's delegation to its Board of Review to be "quintessentially executive" in order to find it unconstitutional).

117. "When the legislative and the executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner." C. MONTESQUIEU, *supra* note 69, at 174; *see also* H. MERRY, *supra* note 71, at 300.

b. *INS v. Chadha*

The Supreme Court's decision in *INS v. Chadha*¹¹⁸ supports the conclusions just drawn from the removal power cases.¹¹⁹ *Chadha*, like the removal cases, involved an attempt by the Congress to exert power over the executive branch. Like many other statutes¹²⁰ in which Congress had delegated specific powers to independent agencies and executive departments, a provision of the Immigration and Nationality Act had allowed either house of Congress, by resolution, to invalidate a decision by the Attorney General to allow a particular deportable alien to remain in the United States.¹²¹ In this case, the Attorney General granted Chadha's application for suspension of deportation and transmitted its recommendation to Congress. The House then passed a resolution declaring that Chadha and five other aliens would not be entitled to become permanent residents of the United States.¹²² Chadha sued to prevent his deportation, and ultimately the Supreme Court invalidated the legislative veto altogether.

A legislative veto like the one struck down in *Chadha* had been the subject of scholarly concern for many years. Views favoring¹²³ and opposing¹²⁴ the use by Congress of such extra-legislative controls over the executive had been recorded from the time Congress first enacted such a provision in 1932.¹²⁵ The decision in *Chadha* is significant because it lays to rest many of the arguments, based on expediency, in favor of permitting the legislative branch to exert greater control over the executive branch by avoiding bicameral consideration of a law then subject to veto by the President.

In deciding *Chadha*, the Supreme Court emphasized the importance in our constitutional system of the way the branches are intended to work together in the legislative process. Stressing the need for bicameralism, the Court noted that the Framers wanted to ensure that legislation would be enacted only after it had been "care-

118. 462 U.S. 919 (1983).

119. See *supra* text accompanying notes 90-115.

120. Justice White noted in dissent that the Court's decision in *Chadha* essentially struck down legislative veto provisions in "nearly 200" other statutes. *Id.* at 967 (White, J., dissenting).

121. Immigration and Nationality Act, § 244(c), Pub. L. No. 414, 66 Stat. 163, 216 (amended 1986).

122. See *Chadha*, 462 U.S. at 926. It was not clear to the Supreme Court that the House really understood what it was doing. See *id.* at 927 n.3.

123. See, e.g., Cooper & Cooper, *supra* note 83.

124. See, e.g., Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369 (1977).

125. Congress in that year permitted the reorganization of the executive branch, but it made such reorganization subject to its review. See Act of June 30, 1932, § 497, 47 Stat. 414.

fully and fully considered by the Nation's elected officials."¹²⁶ No less important to this scheme is the requirement of presentment, which ensures that the President will have the opportunity to judge the soundness of the legislation.¹²⁷ In stressing the importance of the Constitution's structure of the legislative function, the decision in *Chadha* recognizes the need for the distribution of powers exercised only as the Constitution specifically prescribes.

In that sense, *Chadha* does not depart from the removal cases, a fact recognized by both the district court¹²⁸ and Supreme Court¹²⁹ decisions. The issue is a basic one: whether Congress or the President may control the actions of the employees of the executive branch. The removal cases hold that Congress may not control those employees by removing them if it does not like what they do. *Chadha* says that Congress may control the actions of executive branch employees by telling them what to do, but only by enacting legislation in the way the Constitution says that legislation must be enacted.

Chadha recognizes that Congress may try to control the executive branch in ways that are outside the contemplation of the constitutional system. One of these ways, though not as obvious as a legislative veto, is by writing extremely detailed laws. By writing such laws, Congress indicates its distrust of and desire to limit administrative decisionmaking.¹³⁰ As with the legislative veto exercised in *Chadha*, Congress thereby seeks to limit what the executive branch employees may do, substituting its judgment—or, more accurately, that of its staff—for that of executive branch employees and not allowing them the freedom that the Constitution confers on them to interpret the laws. *Chadha* subtly suggests that congressional assertion of such control over the executive is suspect because it does not follow the structure the Framers intended.¹³¹ Respecting that structure is fundamental. Thus detailed legislation, whatever its merits,

126. *Chadha*, 462 U.S. at 949.

127. *Id.* at 947-48.

128. *Synar v. United States*, 626 F. Supp. 1374, 1402-03 (D.D.C. 1986).

129. *Bowsher v. Synar*, 478 U.S. 714, 726 (1986).

130. Cf. Comment, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CALIF. L. REV. 983, 1055 (1975) ("Generally, the more broadly a statute is drawn, the more power the President will have relative to Congress. Thus interbranch jealousy typically prompts Congress to prepare specific and narrowly drawn legislation to limit the powers it creates.").

131. It is true that if *Chadha* is read more narrowly to stand only for the proposition that legislation must be enacted bicamerally and presented to the President, the sorts of statutes that Congress enacts in the tax area clearly conform to those requirements. But the import of *Chadha* is not so simple. In stressing the need for bicameralism and presentment in order for legislation to be constitutionally valid, the Court also emphasized the reasons for those constitutional requirements. Those reasons support the view that Congress must not retain for

may inappropriately encroach on the roles the Constitution preserves for the executive branch.

C. *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise*

*Metropolitan Washington Airports*¹³² uniquely illustrates some of the separation of powers issues presented in the earlier cases. The case represents a retreat to formalism after the Court's more functionalist decisions in *Morrison*¹³³ and *Mistretta*.¹³⁴ Nevertheless, *Metropolitan Washington Airports* does tend to support this Article's theory that Congress should not delegate to its own agents the authority to make essentially executive decisions. In fact, like *Bowsher* and *Chadha*, *Metropolitan Washington Airports* focuses on the question of how government should operate under the Constitution.

The *Metropolitan Washington Airports* case arose because Congress attempted an innovative solution to the problem of administering the two Washington, D.C. area airports. The airports had previously been administered by the Federal Aviation Administration, until the need to raise funds for capital improvements, particularly at Washington National airport,¹³⁵ prompted many to suggest that control over the airports should be given to a regional authority.¹³⁶ This new regional authority would have the ability to raise funds through the issuance of bonds. Congress, however, opposed the complete transfer of control to the regional authority, and subsequently it imposed a condition to the lease of the land on which the airports were located and established a Board of Review to oversee the decisions of the regional authority.¹³⁷

itself the power to interpret the laws—it must delegate that to the co-equal branch charged with that power. See generally Strauss, *supra* note 85.

132. *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 111 S. Ct. 2298 (1991).

133. *Morrison v. Olson*, 487 U.S. 654 (1988).

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

135. The intense controversy surrounding the intended improvements to Washington National Airport brought this case to court. National's location "at the center of the Metropolitan area is a great convenience for air travelers." *Metropolitan Washington Airports*, 111 S. Ct. at 2302. But citizens of the areas have objected long and strenuously to the noise, the pollution, and the dangers associated with flight paths over such densely populated areas. *Id.*

136. The members clearly believed that if the local citizenry had sole say in the matter, there would be a significant decrease in the use of National and a shift of many flights to Dulles. See *id.* at 2302.

137. The Board of Review was to be comprised of nine members of Congress, none of whom were to be representatives of Maryland, Virginia, or the District of Columbia. See 49 U.S.C. App. § 2456(f) (1988). These members were to serve in their individual capacities as representatives of airport users. *Id.*

Citizens for the Abatement of Aircraft Noise, Inc. ("CAAN"), a local citizen's group, challenged the constitutionality of the Board, in part because of a plan for the renovation and development of National Airport adopted by the regional authority and accepted by the Board.¹³⁸ The District Court for the District of Columbia granted the defendants' motion for summary judgment, holding that there was no violation of the separation of powers doctrine because the members of the Board of Review were to act in their individual capacities.¹³⁹ The Court of Appeals for the District of Columbia Circuit reversed, because it considered the Board of Review a violation of "the constitutional prohibition, articulated in *Bowsher*, against legislative agents performing executive functions."¹⁴⁰ On certiorari, the Supreme Court held that the retention of the review power in the Board of Review, to which Congress delegated legislative power to deal with the airports, was inappropriate under the separation of powers doctrine.¹⁴¹

In reaching its decision, the Court declined to decide whether the power exercised by the Review Board was legislative or executive, as the Court of Appeals had done. Instead, it decided that if the power was executive, Congress could not, according to *Bowsher*, authorize its agents to perform the acts required.¹⁴² Alternatively, if the power was legislative, the Court held that Congress, pursuant to *Chadha*, must exercise that power "in conformity with the bicameralism and presentment requirements of Art. I, § 7."¹⁴³ The Court thus construed the Constitution and its own separation of powers decisions, applied them to the facts of *Metropolitan Washington Airports* in a formal manner, and determined that Congress must not go outside the constitutionally prescribed separation of powers limits.

Metropolitan Washington Airports has clear parallels to the theory advanced by this Article. The Court would not have prevented Congress from retaining more legislative power over the airports if it did so by enacting laws in the normal fashion. Similarly, Congress may legislate tax laws with detail. The only question is whether it is actually doing so. If Congress does not, and it simply passes more general laws and delegates administrative detail to its own staff rather

138. *Metropolitan Washington Airports*, 111 S. Ct. at 2304-05.

139. *Citizens for the Abatement of Aircraft Noise v. Metropolitan Washington Airports Auth.*, 718 F. Supp. 974, 985 (D.D.C. 1989), *rev'd*, 917 F.2d 48 (D.C. Cir. 1990), *aff'd*, 111 S. Ct. 2298 (1991).

140. *Citizens for the Abatement of Aircraft Noise v. Metropolitan Washington Airports Auth.*, 917 F.2d 48, 57 (D.C. Cir. 1990), *aff'd*, 111 S. Ct. 2298 (1991).

141. *Metropolitan Washington Airports*, 111 S. Ct. at 2301.

142. *Id.* at 2311.

143. *Id.* at 2312.

than that of the Treasury, then the *Metropolitan Washington Airports* case suggests serious questions about the propriety of such action.

C. *Special Legislation*

The previous two Subsections discussed indications in constitutional history and Supreme Court decisions that support the conclusion that the separation of powers favors the writing of simpler tax laws by Congress. This Subsection considers the role of special interests in the tax legislative process. The focus, unlike that of Professors Doernberg and McChesney, is on whether the influence of special interests on the legislative process constitutes a problem under the separation of powers doctrine.

In addressing this issue, it is important at the outset to distinguish between true special-interest legislation and legislation that reflects a balancing of constituent interests and has a broad impact on the allocation of the tax burden. For example, there is a distinction between an affirmative congressional response to lobbying to prevent the reduction in the section 162 deduction for travel and entertainment expenses and an affirmative response to lobbying for special relief from the repeal of the investment tax credit.¹⁴⁴ Some congressional responses fall between these two poles, and it is sometimes difficult to define their treatment. The difference between them is in the number of taxpayers affected by the legislation. The essential point is that Congress may enact a law that benefits some more than others, but in a fashion that permits the legislative balancing process to work as it should within the separation of powers. Problems arise where Congress prevents the legislative balancing process from working.

By focusing on the actual distribution of power among the branches, a careful examination of the enactment of tax legislation reveals the tendency for special-interest tax provisions to prevent the executive branch from exercising its constitutionally prescribed role. Special legislation, hidden within a long, intricate tax bill, may deprive the presentment clause of its meaning. As *INS v. Chadha* makes clear, the presentment of legislation to the President for signature or veto remains a meaningful part of the legislative process.¹⁴⁵ It

144. Because a reduction in the deduction for travel and entertainment expenses may well result in a decrease in jobs as well as profits, a member of Congress from a state with an economy that is highly dependent on the convention trade may well feel under some obligation to heed the pleas of hotel and restaurant industry and union lobbyists and resist cutting the deduction. This, however, is a far cry from trying to satisfy a single, well-heeled and well-connected constituent who wants special help. See generally BARLETT & STEELE, *supra* note 9 (discussing provisions enacted to provide such special help).

145. *INS v. Chadha*, 462 U.S. 919, 946-48 (1983).

is designed to check the Congress by giving the President the opportunity to assert the national interest in the legislative process. This is significant because the President, unlike the members of Congress, was elected by a majority of the entire voting public to represent all of the people.¹⁴⁶ If the legislation presented to the President is riddled with special-interest provisions, it is hard to believe that the underlying constitutional reason for presentment is served. If the President agrees with the general content of the bill, he or she will not veto it simply because of the special provisions.¹⁴⁷ Thus, the way the tax legislative process currently works, the President has no opportunity to curb legislative excesses that are detrimental to the national interest because they only benefit private interests. In that sense the constitutional rationale for presentment is essentially ignored.

The second way in which the enactment of special legislation undermines the executive role is more subtle. In a sense, the grant of a special tax break is analogous to a grant of money or a "tax expenditure" by the Treasury.¹⁴⁸ In general, however, the authority to make

146. See *Myers v. United States*, 272 U.S. 52, 123 (1926) ("The President is a representative of the people just as the members of the Senate and of the House are, and it may be, at some times, on some subjects, that the President elected by all the people is rather more representative of them all than are the members of either body of the Legislature whose constituencies are local and not countrywide . . .").

147. Tax legislation is almost never vetoed, mainly because the executive branch has had ample opportunity to have its views considered while tax legislation is pending in Congress. See B. BITTKER, *supra* note 7, at § 116.2. This is so despite the fact that the President may not always agree with all the provisions in the legislation. For example, President Carter did not veto the Crude Oil Windfall Profits Tax Act of 1980, even though it contained a provision repealing section 1023, the provision for carryover basis at death, which his Administration had lobbied hard to retain. See Crude Oil Windfall Profits Tax Act of 1980, Pub. L. No. 96-223, § 401, 94 Stat. 229 (1980).

Professor Bittker makes note of President Franklin Roosevelt's veto of the Revenue Act of 1943, Pub. L. No. 235, 58 Stat. 21 (1944). See B. BITTKER, *supra* note 7, at § 54.3.1; see also R. PAUL, *supra* note 34, at 143-62 (tracking the development of the 1943 legislation, the reasons for the veto and the politics of its override by Congress).

It is worthy of note, however, that the general notion that the Treasury's views are given ample weight during the course of the tax legislative process has diminished recently. See, e.g., Cohen, *The Role of the Treasury Department in the Federal Tax Legislative Process*, 32 NAT'L TAX J. 256 (1979); Reese, *The Politics of Tax Reform*, 32 NAT'L TAX J. 248, 249 (1979); Waris, *supra* note 7, at 30. If these observations are accurate, it is all the more important that the veto be a meaningful part of the legislative process.

Of course, problems with presentment are just as apparent in lengthy legislation about any subject. President Bush's message about the Omnibus Budget Reconciliation Act of 1989, which he signed despite constitutional concerns about the separation of powers, provides one cogent example. See President's Statement on Signing the Omnibus Budget Reconciliation Act of 1989, 25 WEEKLY COMP. PRES. DOC. 1969 (Dec. 19, 1989).

148. For many years there was considerable debate about the concept of tax expenditures, but now Congress and the commentators seem to have accepted the idea. See Alt, *The Evolution of Tax Structures*, 41 PUB. CHOICE 181 (1983); Simon, *Budget Process*, *supra* note 22, at 630-34; Thuronyi, *Tax Expenditures: A Reassessment*, 1988 DUKE L.J. 1155. One of

grants of money is an inherently executive one,¹⁴⁹ normally exercised under guidelines set out by Congress in general legislation. Thus, for example, Congress does not decide which scientific researchers will receive funding for which projects; an administrative agency does, having been directed to do so by Congress. By writing special tax laws that allow only a select few to receive monetary benefits in the form of reduced taxes, Congress exercises an executive power that it properly should delegate to an agency with the requisite expertise to make finely tuned determinations of merit. Congress should not unilaterally decide which taxpayers are entitled to relief from general laws because it is poorly suited to perform the detailed administrative analysis that should precede such selections.

Special tax laws undercut congressional accountability as well. When Congress writes laws that benefit specific taxpayers and make exceptions to general rules worked out in the legislative process, it is not acting as a representative of the people as a whole. Justice Powell, concurring in *INS v. Chadha*, summed up this idea by noting that “[t]he only effective constraint on Congress’ power is political, but Congress is most accountable politically when it prescribes rules of general applicability”¹⁵⁰ Special laws are enacted outside of the normal legislative process that balances the pluralist interests represented by the legislators from various regions and localities.¹⁵¹

Stanley Surrey’s principal objections to tax expenditures is that they promote complexity, which, in turn, undercuts fairness. See Surrey, *Complexity and the Internal Revenue Code: The Problem of the Management of Tax Detail*, 34 *LAW & CONTEMP. PROBS.* 673, 683-85 (1970).

149. See *Buckley v. Valeo*, 424 U.S. 1, 140 (1976) (per curiam) (listing among the powers considered to be administrative, as opposed to legislative or judicial in nature, those having to do with “determinations of eligibility for funds”). Congress ordinarily does not concern itself with which specific entities are funded under programs administered by executive branch and independent agencies. Where there is political benefit in such intrusion into the executive realm, however, Congress may attempt to reap it. Such was the case with the recent controversy regarding the National Endowment for the Arts. See Kastor, *Senate Votes to Expand NEA Grant Ban*, Wash. Post, July 27, 1989, at C1, col. 1.

150. *INS v. Chadha*, 462 U.S. 919, 966 (1983) (Powell, J., concurring). Powell views the power retained by Congress in the review of deportation proceedings as judicial rather than executive. However categorized, it seems clear that particularized decisionmaking of the sort involved in grants of money to specific individuals is far too detailed a task to be entrusted to the legislature.

151. In *Chadha*, the Court which suggested that one of the rationales for the requirements of bicameralism and presentment was that the Framers were concerned that otherwise the “special interests could be favored at the expense of public needs” *INS v. Chadha*, 462 U.S. at 950.

Unfavorable press about special tax laws has resulted in a willingness to be more resistant to private interest lobbying. In the Senate version of the 1986 Act, the Senate itself recognized the importance of special interest provisions by calling for the publication in the conference report of the names of the concerns and individuals receiving special or unique treatment. See

These are the ways in which Congress exercises its power to write special tax laws and in doing so tends to overstep the boundaries of legislative power as we understand it. Although lobbying per se is appropriate in a pluralistic and representative democracy, the special laws that sometimes stem from such lobbying may be viewed as undermining the principles embodied in the separation of powers doctrine. Special interest legislation comes about largely because of the enormous influence of money in the congressional election process.¹⁵² But the complexity of the tax laws that Congress enacts also enhances the influence of special interests in the tax legislative process. It is easier to hide a special law in a complex statute than in a simple one, concealing it from public scrutiny with arcane language.¹⁵³ This suggests that if Congress wrote simpler laws, the influence of special interests in the tax legislative process would be reduced considerably.

D. *The Nondelegation Doctrine*

The remaining constitutional issue is the impact of the nondelegation doctrine on this separation of powers thesis. Although many scholars view the nondelegation doctrine as outmoded in the current administrative state,¹⁵⁴ its underlying theory is basic to our constitu-

H.R. 3838, 99th Cong., 2d Sess. § 1711, as passed by the Senate. Unfortunately the provision was not adopted by the Conference. See H.R. CONF. REP. NO. 841, 99th Cong., 2nd Sess. II-840 (1986).

Congressional Quarterly estimated that the 1986 Act spent \$10.6 billion on special provisions in the law that paid back "political favors granted to gain votes for the bill." See *Congress Enacts Sweeping Overhaul of Tax Law*, 50 CONG. ALMANAC 491, 524 (1986). The story reported Senator Metzenbaum's role in publicizing the estimated 682 special transition rules public, something entirely unprecedented. For a more detailed report of some of the special rules, see BARLETT & STEELE, *supra* note 9.

In addition to unfavorable publicity, the revenue concerns generated by the budget deficit and the importance of revenue neutrality have made the enactment of special rules increasingly difficult. See Jones & Rosenthal, *Rostenkowski Sets Ground Rules for Members' Amendments to Tax Bill; Markup to Resume Next Week*, 44 TAX NOTES 1063 (1989). But there is little reason to believe that it will not be business as usual once the budget concerns subside.

152. See, e.g., P. STERN, *THE BEST CONGRESS MONEY CAN BUY* (1989); Doernberg & McChesney, *Book Review*, *supra* note 5, at 896-99; Sabato, *The Political Parties and PACs: Novel Relationships in the New System of Campaign Finance*, 3 J.L. & POL. 423 (1987). For a discussion of the net gains and losses experienced when targeted transition rules are enacted, see Ramseyer & Nakazato, *Tax Transitions and the Protection Racket: A Reply to Professors Graetz and Kaplow*, 75 VA. L. REV. 1155 (1989).

153. For marvelous anecdotal evidence of this from the 1986 Act, see BARTLETT & STEELE, *supra* note 9. For an earlier bit of muckraking in this area, see P. STERN, *THE RAPE OF THE TAXPAYER* 34-59 (1973).

154. See, e.g., S. BARBER, *THE CONSTITUTION AND THE DELEGATION OF CONGRESSIONAL POWER* 11-41 (1975); K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 2.02 (1958); Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J. L. ECON. & ORGANIZATION 81 (1985).

tional scheme. Nonetheless, recent cases that have considered the issue of inappropriate congressional delegation to agencies have not invalidated those legislative schemes.¹⁵⁵ Indeed, the only important cases to suggest the viability of the doctrine were ones in which the Court exhibited its general hostility to the New Deal.¹⁵⁶ But the idea of nondelegation is not devoid of substance even at the present, and there are those who urge its resurrection in a more impressive form.¹⁵⁷

In the tax area, considering whether nondelegation is even an issue may seem incongruous with the broad general delegation of rulemaking authority to the Secretary of the Treasury found in Section 7805(a) of the Internal Revenue Code.¹⁵⁸ In addition, the delegations of specific regulatory power in many instances¹⁵⁹ suggest that

155. See *Skinner v. Mid-America Pipeline Co.*, 109 S. Ct. 1726 (1989) (upholding delegation to the Secretary of Transportation to establish a schedule of pipeline safety user fees); *Mistretta v. United States*, 488 U.S. 361, 660 (1989) (upholding constitutionality of the Sentencing Commission); *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) (approving broad delegation to the Environmental Protection Agency with respect to environmental matters); *Amalgamated Meat Cutters & Butcher Workmen v. Connally*, 337 F. Supp. 737 (D.D.C. 1971) (holding that wage and price controls may be delegated to the President).

156. See, e.g., *Carter v. Carter Coal Co.* 298 U.S. 238 (1936) (invalidating parts of the Bituminous Coal Conservation Act of 1935, ch. 824, 49 Stat. 991, on the theory that its delegation to private parties violated due process); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (invalidating section 3 of the National Industrial Recovery Act of 1933 (NIRA), ch. 90, 48 Stat. 195, as not supplying adequate standards); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (invalidating section 9(c) of NIRA as not fixing policy or standards).

157. See Aranson, Gellhorn & Robinson, *supra* note 16, at 36-37, 63-67.

158. I.R.C. § 7805(a) (1990). For a general discussion of the scope of the delegation and the legal effect of regulations promulgated under the general authority contained in Section 7805(a) and the specific regulatory authority contained in an ever-increasing number of statutes, see B. BITTKER, *supra* note 7, at § 110.4.

159. For example, section 338(e)(5) of the Internal Revenue Code authorizes the Secretary to issue certain regulations "[w]henver necessary to carry out the purpose of this subsection and subsection (f)" I.R.C. § 338(e)(5) (1990). Section 338(i) authorizes the Secretary to "prescribe such regulations as may be necessary or appropriate to carry out the purposes of this section," and it specifies with that the regulations should prevent the circumvention of consistent treatment between stock and asset purchases "through the use of any provision of law or regulations." In addition, the section requires the coordination of section 338 provisions relating to foreign corporations and their shareholders. *Id.*; see also I.R.C. § 337(d) (1990) (authorizing regulations to "carry out the purposes" of the provisions repealing the *General Utilities* doctrine, including regulations that will "ensure that such purposes may not be circumvented through the use of any provision of law or regulations").

In the legislative history of the 1989 legislation there is a sweeping delegation to change the law as enacted by Congress. Thus, with reference to the amendments to section 163 contained in section 7210 of the Act (the new "earnings stripping" rules), Congress permitted Treasury wide latitude in the way it should write its regulations to define statutory provisions and to *amend* the statutory definitions of certain terms:

The conferees are aware of the complexity of the legal issues involved in this matter and the possible evolution of the international standards for identifying

nondelegation may be irrelevant in the tax field. That is not necessarily the case. The requirement of the nondelegation cases that the grant of authority to the executive branch contain an "intelligible purpose" of the congressional intent is designed to ensure that Congress has in fact retained the policy-making power inherent in legislating.¹⁶⁰ That requirement applies to the tax area as well as other areas of governance.

The nondelegation doctrine requires Congress to make broad tax policy choices in accordance with its role under the separation of powers. However, that does not suggest that Congress may not direct the Treasury Department to write rules and make more specific tax policy choices in the process.¹⁶¹ Under this theory, Congress could not, for example, delegate the authority to set tax rates to the Treasury, even though the Supreme Court has upheld a statutory grant of rate-setting authority to the President in the customs area.¹⁶² Congress could decide, however, that a zero rate of tax will apply to the exempt function income of charitable groups, leaving it to the Treasury to define both "exempt function income" and "charitable purposes."¹⁶³

Writing simpler tax laws is appropriate under the nondelegation doctrine for two reasons. First, were Congress not to legislate with as much specificity as it currently does, the Treasury might not "leap into the gap" and write complicated regulations. If it did not, there

thin capitalization. The conferees have therefore granted authority to Treasury to make appropriate adjustments, by regulation, to the definitions applicable to debt equity (sic), net interest expense, and adjusted taxable income so that the application of the statute will be consistent with the concept of thin capitalization as described above.

160. See Aranson, Gellhorn & Robinson, *supra* note 16, at 7-17; Farina, *supra* note 33, at 478-79, 497-98.

161. For a similar analysis, see Mashaw, *supra* note 152.

162. See *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928) (upholding delegation of power to the President to increase a congressionally established tariff schedule to equalize differences in the costs of production between the United States and competing countries). The power was granted pursuant to the Tariff Act of 1922, ch. 356, § 315(a), 42 Stat. 858. The Court relied on an earlier case, *Field v. Clark*, 143 U.S. 649 (1892) (upholding a delegation with respect to the tariff power to determine when an increase in tariffs was appropriate; the rate in that instance had been set by Congress). See also *Amalgamated Meat Cutters & Butcher Workmen v. Connally*, 337 F. Supp. 737 (D.D.C. 1971) (sustaining the delegation of wage and price control power to the President).

163. See *Bob Jones University v. United States*, 461 U.S. 574 (1983) (requiring the IRS to determine whether a school violates public policy with respect to racial discrimination in order to decide whether it should be given tax exempt status under section 501(c)(3)). The Court applied the public policy requirement to religious schools on the theory that they are required to be "charitable" within the generally accepted meaning of the term even though they are religious as well. *Id.* at 585-96. See generally Simon, *The Tax-Exempt Status of Racially Discriminatory Religious Schools*, 36 TAX L. REV. 477 (1981).

would be two effects. One would be that the vague statutory rules written by Congress might inhibit certain undesirable taxpayer behavior. There is considerable anecdotal evidence to suggest that taxpayers and their advisors believe clear rules provide planning opportunities but vague proscriptions (such as section 269) unduly limit their choices.¹⁶⁴ The other effect would be that the judicial process would begin to once again play a significant part in the development of tax laws. Neither outcome is altogether inappropriate. In fact, the revitalization of the judiciary's role may be more desirable than most commentators from tax practice believe.¹⁶⁵

Second, the development of the nondelegation doctrine in the setting of the administrative state suggests that delegation to administrative bodies is appropriate where there are adequate external controls and where the internal policymaking mechanisms provide for adequate due process of law. Voluminous literature supports this theory.¹⁶⁶

1. EXTERNAL CONTROLS

In the context of internal revenue statutes, Congress has not been shy to exercise its power to oversee the Treasury and the IRS.¹⁶⁷

164. I.R.C. § 269(a) (1990). Section 269(a) permits the Secretary to disallow certain tax benefits that occur as a result of an acquisition if the acquisition was made for the principal purpose of evading or avoiding federal taxes. *Id.*

165. See, e.g., L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 556-64 (1965); Farina, *supra* note 33, at 500-02. With respect to the role that courts may play in the interpretation of the tax laws (in particular, Section 385 of the Code), Charles Lyon commented:

One might say that this is one of those areas of tax law where the virtues of vagueness exceed its vices; that courts must look to all the facts and circumstances of each case to see what is really 'intended' or what has 'substantial economic reality'; and that it is salutary to tell taxpayers only that there is a danger zone which they enter at their peril.

Lyon, *Federal Income Taxation*, ANN. SURV. AM. L. 123, 142 (1957); see also Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1 (1985) (discussing the appropriate separation of powers theory to be applied to federal courts' interpretation of statutes). On the other hand, tax practitioners view with horror the intervention of more courts in the interpretation of tax statutes. See, e.g., Ferguson, Hickman & Lubick, *supra* note 7, at 806 ("It is not acceptable—at least not usually—to paint with extrabroad brush strokes and expect the courts to fill in all the details. The judiciary, to be candid, is not competent to flesh out such a vast and "technically integrated system.""). *But see* Salem, *supra* note 47, at 170 (noting that almost 80% of Tax Court judges are former government lawyers and questioning whether it makes "any sense to assume that they are not capable of sorting out a complex issue").

166. See, e.g., L. JAFFE, *supra* note 163, at 57-72; Bruff, *Legislative Formality, Administrative Rationality*, 63 TEX. L. REV. 207 (1984); Farina, *supra* note 32, at 502-11; Strauss, *supra* note 52, at 625.

167. See *supra* note 81, (describing the oversight powers of Congress, in general, and of the Ways and Means and Finance Committees, in particular).

Recent history divulges a number of instances in which congressional oversight has been effective,¹⁶⁸ and some instances in which it has been used to pass political blame onto administrators for decisions that were, in fact, the fault of Congress.¹⁶⁹ In addition, Congress has used its appropriations power to exercise control over the regulatory processes without actually passing laws to give greater guidance to the Treasury as to congressional intent. For instance, Congress has attached "riders" to some legislation, specifying the purposes for which appropriated funds could be spent, or prohibiting any expenditure for certain types of programs.¹⁷⁰ Other means of control, such as

168. One example of such congressional oversight occurred in July 1986, when the administration expressed concerns about the avoidance of the federal tax on gasoline, and the Ways and Means Oversight Subcommittee held a hearing to consider proposals for enforcement under the then-existing law and proposals for revamping the enforcement scheme. See *Daily Tax Rep. (BNA) No. 129*, at 135 (1986); Hanlon, *Oversight Subcommittee Investigates Gasoline Tax Evasion*, 32 *TAX NOTES* 201 (1986). Another example arose in the context of a decision by the IRS to grant tax-exempt status to Prince Edward Academy, which resulted in the publication of new guidelines for the awarding of tax-exempt status when racial discrimination is an issue. See *Egger Clarifies Guidelines for Private School Exemption*, 64 *J. TAX'N* 295 (1986).

169. Congress can be astonishingly inept and lacking in understanding of the statutes it writes. One example is the amendment of section 274(d) by the Tax Reform Act of 1984, Pub. L. No. 98-369, 98 Stat. 494. Pursuant to the general section 7805(a) authority, the Treasury issued *Treas. Reg. § 1.274-5T* (1984), to give guidance as to the meaning of the change in section 274. The statute as amended required taxpayers to keep "adequate contemporaneous records" of their use of personal vehicles for business purposes in order to be entitled to the deduction under section 162. The IRS interpretation, which required that a "log, journal, diary or other similar record" be kept, evoked a firestorm, of controversy. Members of Congress blamed the IRS rather than themselves, even though there is no question that the IRS interpretation was a reasonable one in light of the way the statute was drafted. See *Timberlake, Congressional Panels Hear Pros and Cons of Repealing Auto Log Requirements*, 26 *TAX NOTES* 960 (1985).

170. The constitutionality of such riders has been questioned. See Parnell, *supra* note 79, at 1377-80; Strauss, *Separation of Powers*, *supra* note 52, at 446 n.63. Others assert that such riders constitute a valid use of the appropriations power. See J. SUNDQUIST, *supra* note 83, at 221. What little authority there is on this point suggests that the latter view is correct. See, e.g., *Harris v. McRae*, 448 U.S. 297 (1980) (sustaining the Hyde Amendment, which forbid the use of federal funds for abortions, against various constitutional challenges without raising the question of whether the amendment violated the separation of powers). As the Eleventh Circuit noted in a subsequent case, "When the Supreme Court reversed [the] injunction [in *McRae v. Califano*, 491 F. Supp. 630 (E.D.N.Y., 1980)], it gave no indication that the district court's order was invalid because of limits imposed on HHS by the Constitution's appropriations clause" *Georgia Dep't of Medical Assistance v. Hekier*, 767 F.2d 1293, 1296 (11th Cir. 1985); see also *National Treasury Employees Union v. Devine*, 733 F.2d 114 (D.C. Cir. 1984) (holding that a direction that "no funds be spent" for implementation of a specified rule made the rule "null and void" during the period covered by the appropriations legislation).

Whether or not they are constitutional, appropriations act riders may, in certain instances, render the administration of the tax laws totally impossible for extended periods of time. With respect to the fringe benefits area, discussed by Parnell, *supra*, at 1380, the use of such riders brought attempts to provide guidance for consistent nationwide enforcement

the requirement that the Treasury issue nonregulatory or informal guidance,¹⁷¹ or that it write reports on certain topics to be submitted to the Congress at a specific time,¹⁷² give Congress the opportunity to keep a close eye on the process of executing the laws it writes.

The judiciary provides the other external control over the administrative process. Although there is a tradition of deference in the tax area for those Treasury decisions that have been in existence for some time¹⁷³ or are issued contemporaneously with the passage of a statute,¹⁷⁴ the courts occasionally have struck down a regulation for not being in accord with congressional intent.¹⁷⁵ There are indications outside the tax area that suggest problems with judicial deference to agency rulemaking,¹⁷⁶ but at least at this point, judicial deference is

standards to a standstill for nearly ten years. See Simon, *Fringe Benefits and Tax Reform: Historical Blunders and a Proposal for Structural Change*, 36 U. FLA. L. REV. 871, 879 n.14 (1984). Thus, whatever virtue they may have, appropriations act riders should be used sparingly and not for extended periods of time. If Congress is concerned about how the Treasury has exercised its delegated power, it should promptly give the executive branch guidance as to how it could do better rather than simply telling it not to do what it has attempted to do. For a general discussion of appropriations controls over agencies, see Macmahon, *Congressional Oversight of Administration: The Power of the Purse II*, 58 POL. SCI. REV. 911 (1960).

171. The Ways and Means Committee Report accompanying the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (the S&L bailout bill) specifically addresses the issuance of such guidance in addition to regulations, rulings, revenue procedures and other administrative pronouncements. The Report notes that "the committee expects that the Internal Revenue Service will, in appropriate cases, provide private letter rulings on specific transactions prior to any such published authority being issued." H.R. REP. NO. 54, 101st Cong., 1st Sess., Pt. 2, 25 (1989).

172. *Tax Notes* has compiled a listing of Treasury tax studies that have been completed or that are mandated but have not been completed. See 46 TAX NOTES 13, 13-15 (1990). At the date of the compilation of the list, some 26 mandated studies were still outstanding, but the Treasury hoped to reduce that number, and the fact that the Budget Reconciliation Act of 1990 mandated only one such study was viewed as a hopeful sign. See Hubbard, *Treasury Looks to Shrink Backlog of Mandated Tax Studies*, 46 TAX NOTES 12 (1990).

173. See, e.g., *Helvering v. Winmill*, 305 U.S. 79, 83 (1938) ("Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law.").

174. See, e.g., *Commissioner v. South Texas Lumber Co.*, 333 U.S. 496, 501 (1948) ("This Court has many times declared that Treasury regulations must be sustained unless unreasonable and plainly inconsistent with the revenue statutes and that they constitute contemporaneous constructions by those charged with the administration of the statutes which should not be overruled except for weighty reasons.").

175. See, e.g., *Big Mama Rag v. United States*, 631 F.2d 1030 (D.C. Cir. 1980) (invalidating longstanding regulations promulgated under section 501(c)(3) to define "educational" on the ground that its "full and fair exposition" standard was unconstitutionally vague); *Tilford v. Commissioner*, 75 T.C. 134 (1980), *rev'd*, 705 F.2d 828 (6th Cir., 1983) (holding Treas. Reg. § 1.83-6(d) (1978) invalid as not being an appropriate interpretation of legislative intent).

176. See, e.g., Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549 (1985); Farina, *supra* note 33, at 464-68; Gerwin, *The Deference Dilemma: Judicial*

still relevant to taxation statutes.

2. DUE PROCESS

Delegation may be proper when certain constraints on the agency exist to ensure procedural due process for individual citizens affected by agency behavior. The Administrative Procedure Act ("APA"), which applies to executive departments as well as independent agencies, provides for certain procedures that must be followed both with respect to agency adjudication and to agency rulemaking.¹⁷⁷ Of course, the IRS and the Treasury meet both these APA requirements. Thus, it seems clear that the due process safeguard applies to delegations in the tax area.

More fundamentally, however, the Treasury Department's process of promulgating new regulations may allow affected citizens a greater opportunity for participation in executive-branch lawmaking than the congressional rules permit for its legislation. The reason for this is fairly simple: tax bills are generally long and complicated and contain many provisions. Few of these will have been considered by the committees in hearings. Even fewer will have been thought through by the members of Congress themselves unless their particular constituents have an interest in them and have brought them to the members' attention.¹⁷⁸

Treasury regulations, on the other hand, no matter how long and complicated, are directed to a single subject: the interpretation of one statute. Thus, it is easier to target taxpayer response. In addition, it can be targeted by a person who understands precisely what the issues and concerns are and can rationally balance the concerns of accuracy and fairness. Although it does not ensure that a person who is electorally accountable has actual control over the outcome, delegation of administrative detail to the Treasury staff is designed to ensure a measure of fairness that delegation to the congressional staff does not. The application of the APA and other procedural safeguards to the rulemaking process within the Treasury Department satisfies the due process requirement and permits delegation so long as Congress

Responses to the Great Legislative Power Giveaway, 14 HASTINGS CONST. L.Q. 289 (1987); Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1 (1983); Rubin, *supra* note 33, at 407. For a general discussion about judicial deference in the tax area, in the context of an article arguing for striking down loss allowance regulations, see Salem, *supra* note 47, at 168-76.

177. See Administrative Procedure Act of 1946, 5 U.S.C. § 553 (with respect to rulemaking); *id.* §§ 554-558 (with respect to adjudications).

178. See Hoffman, *The Role of the Bar in the Tax Legislative Process*, 37 TAX L. REV. 411 (1982).

has set out the broad legislative policy that the rules are written to effectuate.¹⁷⁹

IV. CONCLUSION

This Article presents a separation of powers analysis of the federal tax legislative process and the Congress's control over the federal taxing power. The analysis suggests that, were it to write simpler tax laws, Congress would exercise its control of taxation in a way that more closely accords with the doctrine embodied in the separation of powers among the three branches and the checks and balances within the system.

The critique of other critics of the tax legislative process points out problems associated with that process are more fundamental than those commentators have realized. Nonetheless, the problem of Congress's failure to exercise its legislative power appropriately can be corrected by simpler modes of legislative expression rather than greater controls on its activities. The major concern that Congress is "out of control" in the tax area can be addressed by questioning its proper role under the separation of powers. The way the government works to extract taxes from the citizens is naturally a matter of great import. The analysis suggests that fairness would be enhanced if Congress writes simpler tax laws, thereby giving the executive branch greater opportunity to participate in the lawmaking process by fleshing out the administrative details that Congress currently delegates to its own staff.

179. There is one additional reason to believe that broad delegations to administrators might improve responsiveness. . . . Administrators at least operate within a set of legal rules (administrative law) that keep them within their jurisdiction, require them to operate with a modicum of explanation and participation of the affected interests, police them for consistency, and protect them from the importuning of congressmen and others who would like to carry logrolling into the administrative process. In short, if we are uncertain about the responsiveness of majority rule voting procedures to citizens' or even legislators' desires, perhaps vague delegations to administrators can be a technique for avoiding the more disheartening aspects of the alternatives.

Mashaw, *supra* note 152, at 99.