prescribed rights are not justiciable, their equivalents in the EConvHR and the ICCPR, as well as in other treaties (such as the ICESCR and ESC) generally are enforceable. I consider this further in Chap. 3.

It should not be assumed, however, that this longstanding aspect of the separation of powers in the Netherlands has tempered or quelled academic and political interest. Curiosity and interest in broadening or in developing such a jurisdiction has remained equally active in academic and political circles, just as has the opposition to that constitutional change.[163] For the moment, the weight of constitutional history and tradition, as well as the practicable alternatives offered through the EConvHR, ICCPR and through the ECtHR (and more recently perhaps the ECJ as well), have carried the arguments against expanding the courts' jurisdiction in the direction of their US counterparts.

Thus framing the scope of the review jurisdiction of the courts is Article 120 of the Constitution (subject to Articles 93 and 94), together with seven leading Hoge Raad judgments. In effect, that general prohibition has not hampered the judiciary acting as a check and balance to executive action. The 1879 *Meerenberg* decision held the Crown's legislative power to be subject to the Constitution: its power to make law must derive either from an independent prescription in the Constitution or from specific statutory authorisation.[164] The Constitution did not limit or restrict free-standing powers of the Crown; rather, it conferred them. Thus "general rules of governance" had to have a constitutional or statutory foundation. This decision provides an early and general foundation for the jurisdiction of the courts to review secondary legislation for conformity with primary legislation.

Second, the 1986 *Landbouwvliegers* case expressly confirmed the jurisdiction of the courts to review secondary legislation (and including "general rules of governance" and "generally binding precepts") for compliance with general principles of law and justice, such as arbitrariness, equality, generality and certainty).[165] The Court found that no rule of law barred the courts from declaring invalid a law (other than primary legislation), based on the unreasonableness or irrationality (in its administrative law sense) of its tenor and operation. This remained a "marginal" control, in that the courts were nonetheless prohibited from deciding on the actual merits or necessity of the law by Article 11 of the General Provisions Act.

Third, the 1989 *Harmonisatiewet* decision provided added clarity and certainty to the limits of judicial review espoused in *Landbouwvliegers*. Relying on a perceived relaxation in the approach to jurisdiction, and comfort in assessing legislation according to treaty rights, the claimants launched a challenge to a statute altering the conditions and availability of student financial aid for higher

[163] Specifically Prakke 1992, Koopmans 1992, and Barendrecht 1992; Prakke 1972; Schutte 2004; Hirsch Ballin 2005; de Lange 2006, and Schutgens 2007.

[164] HR 13 Jan. 1879, W 1879 4330.

[165] HR 16 May 1986, NJ 1987 251. See also HR 24 Jan. 1969 (*Pocketbooks II*); HR 1 July 1983, NJ 1984 360 (*LSV*), and HR 1 Dec. 1993, AB 1994 35.

education, on the basis of an infringement of fundamental principles of law and justice. The Court rejected the challenge. Primary legislation remained outside the review jurisdiction of the courts by virtue of Article 120 and the constitutional traditions and separation of powers in the Netherlands. Although Article 120 mentioned only "constitutionality", Parliamentary and other commentary demonstrated that it was to be construed, in accordance with constitutional history, as barring all forms judicial review.

The 1994 *Valkenhorst* case articulated the law-making capacity, albeit limited, of the courts, so as to fill in certain gaps or omissions in the fabric of current legislation on the basis fundamental principles of law and justice. Specifically, the Court directed a private charity institution which assisted unwed mothers through the father. The institution had refused on confidentiality grounds. Moreover, the mother had refused consent; the consent of the father in the circumstances was not required. The right to know of one's parents flowed from the collection of fundamental rights and principles of justice. It was not absolute, requiring consideration of any competing and overriding rights of others (such as the biological father).

The 1999 *Arbeidskostenforfait* decision set out the limits to the remedial jurisdiction of the courts when applying directly applicable treaty provisions to statutory schemes.[166] I discuss this further in Chap. 3. But briefly, the Court outlined a test, based on the constitutional history and separation of powers in the Netherlands, for rectifying statutory infringements or omissions in the face of directly applicable treaty obligations. The central feature to the test was the necessary restraint or abstention from entering the realm of policy, from weighing political and social interests to arrive at a remedy. Unless the necessary relief was readily apparent from the legislative history and context, or from the scheme it established, the court should not be seen to usurp the legislative function and choose from a number of possible options and interests.

The sixth case, *Waterpakt*, stands for two propositions.[167] First, the courts must interpret and apply legislation according to its terms, even if it expressly contradicts or omits full implementation of treaty terms not enforceable under Articles 93 and 94 of the Constitution. Certainly the courts do interpret and apply legislation in accordance with the international obligations of the Netherlands, where they are able to do so. But express language in the statute will override the treaty. Second, a judge does not have the jurisdiction to compel the state to enact legislation implementing treaty terms.[168] The jurisdiction under Articles 93 and 94 is "negative", in the sense of not enforcing enacted legislation, and not "positive" in the sense establishing law.

The last case, the 2004 decision in *Afghanistan*, articulates clearly the "act of state" or "Crown prerogative" doctrine, that foreign affairs policy is not justiciable.

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[166] HR 12 May 1999, NJ 2000 271.

[167] HR 21 March 2003, NJ 2003 691.

[168] In a complementary decision, HR 19 Nov. 1999, AB 2000 387, the Court held that it has no jurisdiction to forbid the passage of such legislation.

Nor is Article 90 of the Constitution, the duty to promote the international order, justiciable. Thus the decision to commit troops to the conflict in Afghanistan was intricately related to defence and foreign policy. These engaged considerations of political and social interest whose appreciation fell outside the legal forms and jurisdiction typifying the abilities of a judge.

Hence the power dynamic to the separation of powers in the Netherlands remains primarily between the legislative and the executive branches. Yet it is clear that the courts exercise a monitoring function which is grounded on a not so modest review jurisdiction. In particular, the strength of that position derives from the constitutional grant of power to hold directly applicable treaty terms paramount to ordinary legislation. And it bears emphasis in the general appreciation of the separation of powers, that it is an express constitutional grant of power, not one arising inherently or by imputation.

2.2.4 The US: The Judiciary as a Full Member of the Trias

Although the UK may have furnished the initial blueprint for the doctrine of the separation of powers, it was the US and France that first consciously and expressly built it into the foundations of their respective constitutional frameworks. Indeed, the US represents the most developed expression of the doctrine, arising from continuing debate and consideration in legal, political and academic circles.[169] The US version of the doctrine articulates a dynamic equilibrium, a continual balancing of powers—or perhaps better: a refining of the balance—among the three principal branches of government.[170] It very much takes to heart the Montesquieu aspiration of checks and balances, of moderation, for the well-being and liberty of the polity.

The dynamism owes much to circumstances peculiar to the US. First is the nature of the US Constitution, a modest document of some seven articles, drafted in 1787 and with the addition of some 27 amendments since then.[171] In brief, the US Constitution establishes a republican (presidential) federation, and is the supreme and paramount law (as stipulated in Article V) by which are constituted the three branches of government which are further attributed certain defined and

[169] To give just a small sampling from the academic camp: Goldwin and Kaufman 1986; Redish 1995, esp. Chap. 4; Gwyn 1989; Merrill 1991; Brown 1991; Nourse 1996 and Nourse 1999; Flaherty 1996 (the executive being the "most dangerous branch"); Magill 2000 (and the sizeable listing of separation of powers Articles at nn. 34 and 35, pp. 1136–1137) and Magill 2001; Ackerman 2000 and Colburn 2004.

[170] On the "balancing" nature to the US version, see, e.g., *CFTC v Schor* 478 US 833 (1986); *Morrison v Olson* 487 US 654 (1988); *US v Mistretta* 488 US 361 (1989) 381; see also *Bowsher v. Synar* 478 US 714 (1986).

[171] The first 10 amendments were adopted by states' ratification between 1789 and 1791, and include the "Bill of Rights". The last amendment, the 27th, was first proposed in 1789, and only received the last necessary state's ratification (that of Michigan) in 1992.

limited powers. All three branches may only exercise such power to the extent prescribed by the Constitution. Of course it does not explicitly stipulate a separation of powers, nor mandate a system of checks and balances among the branches of government it identifies, nor even require strict observance of those institutional boundaries.[172] What it does do, however, is allocate certain powers to the legislature, the President (the executive) and the courts, in its first three articles. Thus Article I, section 1, provides that all legislative powers listed therein shall be vested in Congress (the Senate and the House of Representatives). Sections 7 to 9 itemise the powers. Article II, section 1, vests the executive power in the President and specifies in sections 2 and 3 the powers and duties of the office. Those include, of relevance hereto, the making of treaties and international agreements, the conduct of foreign relations, and being the chief law-enforcement officer. Indeed, the Constitution gives the President a more or less unfettered right to conduct foreign relations and conclude treaties and international agreements.[173] All aspects regarding foreign relations are strictly speaking federal jurisdiction. Treaties can create private rights and duties providing the constitutionally prescribed formalities have been satisfied, and by extension and implication, international executive agreements as well. These all bind every branch of government, including at the states level even though the subject matter apart from the international aspect strictly falls under states' legislative jurisdiction.[174] And Article 3 vests in section 1 the judicial power of the US in "one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." That jurisdiction is particularised further in section 2, the "case or controversy" clause. And in the penultimate Article VIII, the second paragraph reads,

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the united States, shall be the supreme Law of the Land; and the Judges of every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

The rest, it leaves to the ingenuity and fidelity of its citizens and officials, to adapt and interpret its broad lines so as to fit evolving circumstances and demands into the eighteenth century text.

As a mere sketch of government, yet having a perfection of practicable conciseness and of creating a stable, enduring constitutional order, the US Constitution places a heavy burden on later generations of working out the details. Hence the vibrant tradition of US constitutional interpretation, with its historical investigations, the continual rehearsal of the arguments in *The Federalist Papers*,

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[172] On the history of the separation of powers in the US, see esp. Vile 1998, esp. Chaps. 6, 10, and 11; and Gwyn 1966.

[173] *Curtiss Wright v US* 299 US 304 (1936) 318–320 (per Sutherland J).

[174] See e.g., *Missouri v Holland* 252 US 416 (1920); *American Insurance Assoc. v Garamendi* 539 US 396 (2003) and *Dames Moore v Regan* 453 US 654 (1981) (executive agreements), and see *Curtiss Wright v US* 299 US, at 316ff.

and the theories of "originalism" and "textualism" and so on. This phrasing may perhaps belie its seemingly bottomless disputational character, and transient nature of the consensus on most major points (until the next Supreme Court decision), just because of the burden of interpretation which the US Constitution imposes.

> Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other.[175]

Moreover, that burden of interpretation—and as reflected in the various schools it has created—also appears to assume or invoke a backdrop of shared understandings or presumptions. For example, the US Constitution does not expressly create the federation of states and national government, nor does it mention "federation" or "federal government" or such like anywhere. It tacitly assumes this central and determinative characteristic of the US constitutional settlement in its allocation of powers, references to "states", and prescribing the supremacy of US laws. Even in the 10th Amendment, as a 1789 afterthought, the assertion that residual powers not allocated or denied to the Congress remain in the states is but a roundabout way of confirming a basic federalism principle. "The Tenth Amendment was intended to confirm the understanding of the people at the time the Constitution was adopted, that powers not granted to the United States were reserved to the States or to the people. It added nothing to the instrument as originally ratified."[176]

All this has, nonetheless, not exempted the US from major constitutional crises and upheavals.[177] But the innate flexibility and power of accommodation (together with burdensome amending procedures) of the US Constitution may have preserved its text, and the framework it establishes, from the kinds of wholesale revision undergone in, for example, France, the Netherlands, and Belgium. In many ways, in is not so much interpreting the US Constitution to address current situations, but rather the obverse: an interpretation of those modern conditions in terms of the Constitution. Instead of changing the text to address comprehensively new political circumstances, the debates and controversies have sought rather to fit into, or draw out of, the text the desired adaptations and extensions, or conversely prevent same.

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[175] *Youngstown Sheet & Tube v Sawyer* 343 US 579 (1952) 634–635, per Jackson J.

[176] *US v Sprague* 282 US 716 (1931) 733; and *US v Darby* 312 US 100 (1941) 124, "The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers." And see *Fry v US* 421 US 542 (1975) 547.

[177] On which, see Ackerman 1991 and Ackerman 1998.

2.2.4.1 Presidential Power: Waxing and Waning

Such an interpretative exercise and evolution to constitutional roles and meaning appears so very clearly along the legislative–executive axis, in delimiting presidential power to create, extinguish or otherwise compromise legal rights and duties. Although Article I of the Constitution vests particular legislative powers in the Congress, and other powers as well as the residue in the various states of the Union, successive US Presidents have sought to broaden and strengthen the independence of executive decision and rulemaking. This claim to power includes not only the direct creation of rules, but also the indirect, by diverging from applying legislation or treaties in ways or situations preemptively declared inconsistent with constitutionally attributed powers.[178]

> This [federal] government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it… is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.[179]

As a general observation, while the courts have applied more careful scrutiny to the exercise of presidential power in domestic situations, they have been more generous and reluctant to interfere in situations with a significant foreign, international component. Of course, more careful scrutiny does not necessarily translate into a more restrictive interpretation of presidential, executive power.[180] An indicator than black letter law is, perhaps, the political mood and situation of the country itself.

While the basic principle is clear, the devil is in the details. Presidential power must be rooted either in the Constitution or in a statute. The acknowledged touchstone for that separation of powers analysis is the opinion of Jackson J in *Youngstown Sheet and Tube v Sawyer*.[181] Although only one opinion among six other concurring Justices (with three dissenters), history and constitutional litigation has preferred the tripartite test for justifying presidential action.[182] The case turned upon justifying President Truman's 1952 executive order during the Korean War and the Cold War ordering the seizure of steel factories to avoid the paralysing effects of a general strike by steel workers, as an exercise of the President's emergency powers albeit inconsistent with Congressional legislation on the matter. The majority were not persuaded of the existence of such emergency

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[178] See e.g., Cooper 2002; Strauss 1997; Fleischman and Afuses 1976; Cash 1963. Consider also the (debated) legal implications of the presidential use of signing statements (comments issued with legislation at the time of presidential signing) to declare how aspects of particular legislation will or will not be enforced, consistent with the President's views on its constitutionality and constitutional application: see e.g., Lee 2008; Thompson 2007; Skrodzki 2007, and Bradley 2003; and see generally Cleary 2007.

[179] *McCulloch v Maryland* 17 US 316 (1819) 405.

[180] See, e.g., Monaghan 1970; Sunstein 2005; Hansen 2009; Devins 2009 and Blomquist 2010.

[181] *Youngstown Sheet & Tube v Sawyer*, 343 US 579 (1952) 637–660.

[182] Black, Burton, Jackson, Clark, Frankfurter, and Douglas JJ concurring; Vinson CJ, Reed and Minton JJ dissenting. See Swaine 2010 (and commentaries cited therein).

powers (of expropriation) inherent in and innate to the office of the President, and yet unexpressed in the Constitution. Indeed, such powers independent of Congressional scrutiny and control carried with them the great risk of abuse. The test for justifying presidential authority is as follows: [footnotes omitted]

1. When the President acts pursuant to an express or implied authorisation of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth), to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power….
2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility….
3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only be disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinised with caution, for what is at stake is the equilibrium established by our constitutional system.[183]

The four principal sources of independent—constitutional—presidential power are (1) as commander-in-chief; (2) in the control and direction of foreign affairs; (3) an unenumerated, general and implied power to issue orders in times of national emergency (whether or not requiring *ex ante* or *ex post* Congressional approval) and (4) to take care that the laws be faithfully executed. Statutory authorisation may be explicit or implied, and the scope and breadth of the authorisation depends upon the particular statutory language.[184]

Presidential rule and decision making powers take the form of "presidential orders"—to follow Stack[185]—an umbrella term covering a wide and diverse range of nominate instruments from executive orders, executive agreements, through signing statements, to declarations, proclamations, directives, and so on. The Constitution does not mention presidential orders anywhere, but Presidents have nevertheless made use of them since the Founding.[186] They have tracked important constitutional and political events across US history, such as *Marbury v Madison* (order interfering with Marbury's judicial commission); the Civil War (Lincoln's

[183] *Youngstown Sheet & Tube v Sawyer*, 343 US 579 (1952) 637–638.

[184] See e.g., *Chevron v NRDC* 467 US 837 (1984) and *US v Mead* 533 US 218 (2001) (test for judicial deference to regulatory policies).

[185] Stack 2005, p. 546 (arguing for a broader coverage for judicial review of presidential orders, and narrower grounds for constitutional exemption from that review).

[186] Following Stack 2005; Strauss 1997, and Cash 1963.

use under cover of the emergency powers); internment of Japanese–Americans during WWII, through to the Iran Hostage Crisis, and beyond to the presidencies of George W. Bush and Barack Obama.

Presidential orders serve primarily to declare and initiate policy positions and to structure the administrative arm and implement administrative policies. They represent presidential declarations as the head of the Executive Branch, and as Head of State. Presidential orders are not by definition intended to determine (private) legal rights, and may contain declarations to that effect. This may render them unenforceable as law, and thus nonjusticiable. However, by design and effect, they may well interfere with private rights, such as imposing criminal penalties or even having retroactive effect,[187] and thus become justiciable. To that end, they also benefit from the Supremacy Clause and may preempt state laws.[188] It is worthy of emphasis, however, that most presidential orders having legal effects would claim in addition some Congressional, statutory authorisation, and do not necessarily rely on independent powers alone. The lessons learned in *Youngstown Sheet and Tube* remain fresh. There are no fixed procedural requirements for issuing presidential orders—including any Congressional scrutiny—except perhaps the publication requirements in the *Federal Register* for those entitled "executive orders".[189] Moreover, the courts have been more generous and observed greater deference to presidential orders executed within the President's independent constitutional authority, in particular in the conduct of foreign affairs, and those exercising a statutorily granted discretion.[190]

The significance of this may be highlighted in contrast to the more strictly controlled process of issuing secondary legislation by agencies (as delegates of the presidential power to take care that the laws be faithfully executed under Article 2 (3)). By Chap. 5 of Title V to the US Code, proposed rules are subject to various degrees of public and bureaucratic scrutiny, through public consultations, legal review and cost–benefit analyses.[191] Proposed agency rules are also subject, at least in principle, to Congressional review pursuant to V US Code §8 ("*Congressional Review Act*"). This is a default procedure in which a rule will take effect within the prescribed time absent a joint resolution of disapproval (subject to a presidential veto thereof). Copies of the rule, together with explanatory notes and other

[187] As in *Youngstown v Sawyer* 343 US 579 (1952); *Curtiss Wright v US* 299 US 304 (1936); *Dames & Moore v Regan* 453 US 654 (1981), and *Sealand Serv. Inv. v ICC* 738 F (2nd) 1311 (DC Cir.) (1984) (retroactive effect permissible).

[188] See e.g., *American Ins. v Garamendi* 539 US 396 (2003) (executive agreement) and *Old Dominion Branch 496 Nat. Assoc. Letter Carriers v Austin* 418 US 264 (1974) (executive labour relations order pre-empts state libel laws).

[189] *Franklin v Massachusetts* 505 US 788 (1992) (*Administrative Procedure Act*—V US Code §5—not applying to executive orders).

[190] *Dalton v Spector* 511 US 482 (1994) (review for abuse of discretion not available). Also *Curtiss Wright v US* (export restrictions); *Dames & Moore v Regan* (staying civil claims).

[191] Note also V US Code §6 which echoes the rule and burden reducing objectives of the UK *Legislative and Regulatory Reform Act.*

comments, are provided to the leaders of each House, and to the Committees for whose legislative work domain they are relevant. And less deference is shown by the courts in determining their validity and constitutionality.[192]

2.2.4.2 The Job of Interpretation

In working out the details to the institutional separation of powers, the interpretative exercise alternates its favour for the two dominant US analytic paths of "functionalism" and "formalism".[193] The formalist school assesses the horizontal structure of government with a set of fixed rules gleaned from the face of the US Constitution and without reference to any larger purposes served by those rules. It sees the separation of powers doctrine as an institutional separation with clear and discernible rules to characterise organs and their functions. The functionalist school, as its name would suggest, approaches separation of powers questions as characterising the function according to the flexible standards modulated by the larger framework of maintaining a balance of power and other associated objectives. Neither is clearly required or discouraged by the text of the Constitution and the accent of the Supreme Court in its judgments shifts over time from the one to the other.

Whichever analytic technique may currently find favour with the justices, the objective of each remains ostensibly the same. The central tenet to the US doctrine is a preventing of one branch improperly encroaching upon the constitutionally prescribed powers of the others, and aggrandising itself at their expense.[194] In effect the Constitution is read to establish and preserve a tension and competition among the branches, thus promising a doctrine perpetually in flux and debate.[195] In holding the various branches to their attributed powers, the underlying premise is obviously the primacy and supremacy of the US Constitution. Any and all powers which an organ of government seeks to exercise must originate in the Constitution or be conferred through it. No explicit provision is required there for all possible types and sorts of state power: certain powers may be derived by necessary implication from those conferred by the Constitution.[196]

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[192] *Chevron v NRDC* 467 US 837 (1984) and *US v Mead* 533 US 218 (2001) (review whether EPA legislation allows agency to fill definitional gaps, but no review of the wisdom of regulations if they are not otherwise unreasonable).

[193] Overview based on Magill 2000.

[194] See e.g., *Reid v Covert* 354 US 1 (1957); *Bowsher v Synar* 478 US 714 (1986) (legislation limiting federal budget intrudes into executive function), and *CFTC v Schor* 478 US 833 (1986) (primacy of federal agency regulating commodities trader over state adjudicative powers).

[195] See e.g., *Myers v US* 272 US 52 (1926) 293 ("… by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy" per Brandeis J dissenting).

[196] *McCulloch v Maryland* 17 US 316 (1819) (federal vs state power); *Missouri v Holland* 252 US 416 (1920) and *Youngstown Sheet & Tube v Sawyer* 343 US 579 (1952) (foreign affairs powers, executive orders, and treaties).

The constitutional origin of powers and the prohibition on "encroachment and aggrandisement" can translate into very narrow, finely detailed—if not highly institutionalised and formalist—understandings of the separation of powers. For example, the directness and immediacy of the President's executive power over the appointment, control and removal of officials is a decisive aspect in determining whether Congress imposed standards for officials and agencies encroaches on presidential power by retaining undue supervisory control over the conduct of government.[197] Nor can Congress create a right of action to compel the federal government to execute Congress imposed duties in the absence of specific injury, being an improper encroachment on presidential powers and transfer of those powers to the judiciary.[198] A House of Representatives veto of the Attorney General's suspension of a deportation represented an impermissible intrusion into the executive branch,[199] and presidential "line item" budget veto powers—although conferred by statute—in effect gave the President powers to amend active legislation outside the constitutionally prescribed legislative process.[200] And whilst Congress can create new tribunals and courts having specialised jurisdiction and closely integrated in a publicly regulated scheme which are not necessarily bound by the constraints and restraints applying to the constitutionally established courts of original jurisdiction (Article III courts), it may not encroach upon the ability of citizens to have private rights and duties determined by the Article III courts.[201]

These reflections point us to the next aspect of the US constitutional situation. Constitutional debates and controversies are fuelled in no small measure by the second feature, being the jurisdiction of the courts of general jurisdiction to review legislation and executive acts for constitutional compliance. The constitutional jurisdiction of the courts has transformed them into the foremost constitutional forum and testing grounds. In many respects the articulation and application of a separation of powers doctrine in the US is the product of, and is driven by, the courts. Of course, we must be mindful of the caution that—and to quote Jackson J. again from *Youngstown v Sawyer*—"The actual art of governing under our Constitution does not

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[197] *Buckley Valeo* 424 US 1 (1976); *CFTC v Schor* 478 US 833 (1986); *Bowsher v Synar* 478 US 714 (1986) (if retains legislative character, must still comply with legislative functions per Art 1); *INS v Chadha* 462 US 919 (1983); *Morrison v Olson* 487 US 654 (1988); *Metro Washington Airport Auth v Citizens for Abatement of Aircraft Noise* 501 US 252 (1991), and see also *Free Enterprise Fund v CFAO* 551 US _ (2010).

[198] *Lujan v Dept Wildlife* 504 US 555 (1992).

[199] *INS v Chadha*.

[200] *Clinton v City of New York* 524 US 417 (1998).

[201] *American Ins. v Canter* 26 US (1 Pet.) 511 (1828); *Gordon v US* 69 US (2 Wall.) 561 (1864); *Northern Pipeline v Marathon* 458 US 50 (1982) (bankruptcy courts); *Thomas v Union Carbide Agri. Prods* 473 US 568 (1985); *CFTC v Schor* (orders of commodities trading commission enforceable in federal courts, not contra Art III guarantees), *Mistretta v US* 488 US 361 (1989) (sentencing commission issuing guidelines binding on federal judges); *Granfinanciera SA v Nordberg* 492 US 33 (1989) (id., jurisdiction of bankruptcy courts).

and cannot conform to judicial definitions of power of any of its branches based on isolated clauses over even single Articles torn from context."[202]

In the US version, institutional insulation does not translate into functional isolation, as perhaps may characterise largely the French and Dutch systems, even the UK. That the separation of powers means more than a mere institutional separation of government powers has been decried as an archaism from the very beginnings of US constitutionalism.[203] The precedents and legal history of constitutional review in the US, from *Marbury v Madison* onwards, is well-known and has been amply rehearsed in great detail elsewhere. The very essence of the judicial duty being to determine what legal rules govern a case, it follows that the courts must include consideration of the Constitution, treating it superior to any ordinary act of legislation, and disregarding same insofar as the latter is contrary or in conflict with the Constitution. It is the responsibility of the courts, in particular the Supreme Court as having the final legal say on what the Constitution means, to ensure that the three branches (including itself) neither encroach upon the others nor aggrandise their powers at the expense of the others.[204] Hence by the powers of judicial review, the Supreme Court—and lower courts of ordinary jurisdiction—plays an active and integral role in checking the balance underpinning the US version of the separation of powers.

The judicial branch stands as a coequal, coordinate branch of active government. With the courts not participating as a voice in the social and political debates of the time, they are compelled by litigants to account for those debates in their interpretation and application of the law, especially through constitutional review. The separation of powers in the US articulation reinforces the element of checks and balances as a critical aspect to the doctrine, in addition to the mere institutional separation and insulation from interference from the other branches. Thus, this second factor allows the Constitution to evolve not as a doctrine but as the political and legal framework of an evolving polity.

But the involvement of the courts on political and social controversies through judicial review is not unbounded or unrestricted.[205] The US separation doctrine limits the courts' jurisdiction to "cases and controversies" by virtue of Article V of the Constitution. Hence Article III courts do not render advisory opinions on questions of law or interpretation, nor do they review orders of tribunals where the hallmarks of judicial process and order, namely the administrative nature of the proceedings and the lack of finality to the decision, are absent.[206] The Article III

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[202] *Youngstown Sheet & Tube v Sawyer,* 343 US 579 (1952) 635, and see Elliott 1989, pp. 506–507.

[203] *Marbury v Madison* 5 US 179 (1801–1803); *Mistretta v US* 488 US 361 (1989) 360 citing *US v Nixon* 418 US 683 (1974).

[204] Recited in, e.g., *Marbury v Madison* and *Mistretta v US* 488 US, 380ff. *Nixon v Admin Gen Services* 433 US 425 (1977) 443 (three branches of government not hermetically sealed).

[205] *US v. Lopez* 514 US 568 (1995) 577–578; *US v Morrison* 529 US 598 (2000), and see *US v. Harris* 106 US 629 (1883) 635.

[206] *Mistretta v US* 488 US, 385ff; *Northern Pipeline v Marathon Pipe* 458 US 50 (1982); *DC Crt of Appeals v Feldhaver* 460 US 462 (1983), and *Glidden v Zdansk* 370 US 530 (1962).