2003

Constitutional Law: The Garvee Bonds Case and Executive Power: Breakthrough or Blip

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CONSTITUTIONAL LAW: THE GARVEE BONDS CASE AND EXECUTIVE POWER: BREAKTHROUGH OR BLIP?

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I. Introduction

On September 24, 2002, the Oklahoma Supreme Court appeared to cause a lot of important people a lot of trouble. On that day, it issued an opinion in the awkwardly titled case, *In the Matter of the Application of the Oklahoma Department of Transportation for Approval of Not to Exceed $100 Million; Oklahoma Department of Transportation Grant Anticipation Notes, Series 2002*[1] (Garvee Bonds). In Garvee Bonds, the court denied the Oklahoma Department of Transportation's application for approval of $100 million dollars in Grant Anticipation Notes. These instruments, commonly known as Garvee bonds, allow the state to borrow money for currently needed highway improvements, while permitting the bonds to be retired by applying future federal highway grants (hence the use of the term "anticipation" notes).[2] Three different entities of state government, the Contingency Review Board, the Legislative Bond Oversight Committee, and the Executive Bond Oversight Committee, whose members include the Governor, the President Pro Tempore of the Senate, and the Speaker of the House, approved the bonds, which were intended to finance highway improvements across the state.[3] Despite the political clout urging the issue's approval, the court's decision delayed the funding of the politically popular highway improvements.

The politicians were not overly concerned by the court's opinion, however. Governor Keating, for example, described the decision as a "technical opinion" and moved quickly to remedy its effects.[4] The politicians' lack of concern stemmed from the fact that the Oklahoma legislature provided itself with an escape hatch in the event the court struck down the statute in question. The court kindly permitted the use of the legislature's alternative bond approval process, requiring review of the application by a separately

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1. 2002 OK 74, 64 P.3d 546.
2. Chuck Ervin, *Ruling Stalls Road Bonds*, TULSA WORLD, Sept. 25, 2002, at A13.
3. *Id.*
4. *Id.*

constituted Council of Bond Oversight (CBO).[5] The Governor and legislative leaders immediately announced that they would fill the vacant positions on the CBO and move to have the applications approved.[6] They have, in fact, quickly made appointments to the CBO, and the bond-issue review process seemingly has gotten back on track.[7]

So, was the decision in Garvee Bonds much ado about nothing? It is not unreasonable to dismiss the effects of the decision as a temporary and insignificant inconvenience caused by the technical objections of an inveterate litigant.[8] Not unreasonable, but a mistake. For while one can assume that, as the state's politicians have repeatedly pledged, the state will complete the projects funded by the bonds, the court's rationale for voiding the bond-review process may profoundly affect Oklahoma government. In this article, I will demonstrate that the court's willingness to hold unconstitutional the legislature's assignment of normally executive functions to committees and boards — whose membership, in this instance, includes legislators and legislative appointees — provides hope that the court will more actively police the separation of powers in the future. In particular, it provides hope that the court will be more likely to prevent the legislature from either granting itself executive authority or interfering with the executive's legitimately exercised authority. Active enforcement of separation of powers principles will significantly compensate for the harm inflicted by one of the most serious structural flaws of the Oklahoma Constitution — the creation of an executive branch whose structure and powers make it unlikely that Oklahoma will ever enjoy effective governance.

In this Article, I will first explain the core problem in judicial enforcement of the separation of powers and the two most employed approaches to solving the difficult questions the court faces in this area. I will then turn to the Garvee Bonds case and explain the problem presented, the court's resolution, and the court's new approach to separation of powers problems. Finally, while I will argue that the court reached the correct result, I will critique the doctrinal foundation of the court's opinion and suggest how the court's approach can be improved.

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5. *In re Okla. Dep't of Transp.*, ¶ 38, 64 P.3d at 555.

6. Ervin, *supra* note 2, at A13.

7. Richard Williamson, *After Legal Delays, Oklahoma Sees 4Q Issuance 'Starting to Heat Up'*, BOND BUYER, Oct. 21, 2002, at 5. The attorney whose original objection led to the decision in Garvee Bonds, however, intends to fight the issuance of the bonds until the Oklahoma Supreme Court affirmatively rules they can be issued. *Id.*

8. *See* Richard Williamson, *He's at It Again*, BOND BUYER, Jan. 14, 2003, at 27. This perpetual plaintiff has also challenged the Garvee bonds in federal court. *Id.*

II. The Core of the Separation of Powers Problem

The theory of separating the legislative, executive, and judicial powers of government is one of the hallmarks of modern popular government in general, and American constitutionalism in particular.[9] The theory is based on the profound distrust of human nature and, consequently, human government.[10] In the words of Publius:[11]

> It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.[12]

Because human beings cannot be trusted, it is imprudent to allow any of them unlimited power over the lives of others. In order to render government safe, one must divide the authority of government in a way that ensures that no single part of the government accumulates enough power to threaten liberty. The ancient model of the mixed regime, as articulated by Aristotle and the British Constitution that inspired liberal political theory, based the division of political authority on the division of society into monarch, aristocracy, and common people.[13] Such a division was not suitable for republican America, so the necessary balance had to be based on the separation of the polity into different functions of government. As Publius,

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9. Harvey C. Mansfield, *Separation of Powers in the American Constitution, in* SEPARATION OF POWERS AND GOOD GOVERNMENT 5 (Bradford P. Wilson & Peter W. Schramm eds., 1994).

10. *See* Martin H. Redish & Elizabeth J. Cisar, *"If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 456 (1991).

11. Some commentators, with perhaps some justice, complain that most analyses of constitutional questions rely upon sources interpreting the U.S. Constitution even when, as does this article, they deal with matters of state constitutional law. *See* John Devlin, *Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions*, 66 TEMPLE L. REV. 1205, 1211 (1993). Reliance on *The Federalist*, however, should not engender this criticism, as much of its deserved fame lies in the recognition through the centuries that its defense of the Constitution is rooted not simply in an authoritative understanding of that particular document, but, instead, reflects a deep understanding of the nature of popular government itself. *See* Mansfield, *supra* note 9, at 4.

12. THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

13. Mansfield, *supra* note 9, at 3-4.

once again, put succinctly: "No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty than that . . . [t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether or one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[14] In order to prevent the dangerous accumulation of power in one person or small group of people, one must first separate power into different departments and then give "those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."[15]

Separating the different powers of government supports two indispensable pillars of popular government. First, and most obviously, separation protects liberty by preventing any one branch from abusing its power; if the President or Congress are inclined to abuse the rights of citizens, at least one of the other two branches should possess the power to stop the offending branch.[16] The second, less recognized, structural benefit of separating power is that constructing the different branches to achieve an optimal balance of powers and limits enables each branch to accomplish more effectively its special duties.[17] In other words, a branch specially designed to exercise executive power, which requires decisive, expeditious action, is more likely to use that power effectively than a deliberative body such as a legislature.

As important as separating powers is to the constitutional scheme, however, effective government sometimes requires the creative blending of different powers into complex political structures designed to solve the most difficult political problems. Indeed, the Framers of the Constitution themselves chose not to rest their structural scheme on a simple-minded, strict separation. Rather, they concluded that unless the different branches are "connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained."[18] What we today call the "checks and balances" of the Constitution are really the use of blended powers.[19] For example, the President's veto is a legislative, not an executive power; conversely, it can be argued that Senate confirmation of principal executive officers is a transfer of executive power to the legislature. This blending of

14. THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

15. THE FEDERALIST NO. 51, *supra* note 12, at 321-22.

16. Mansfield, *supra* note 9, at 10.

17. *Id.*

18. THE FEDERALIST NO. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961).

19. *See* James W. Caeser, *Doctrines of Presidential-Congressional Relations*, *in* SEPARATION OF POWERS AND GOOD GOVERNMENT, *supra* note 9, at 95.

power provides each of the branches the means of defense against the others. Once possessed of the means, man's normal ambition will supply the motive to defend himself.[20]

This need to blend powers seems more necessary in the era of modern government. The advent of the administrative state, for example, has led to the extensive blending of powers. It is difficult to imagine how the government can effectively engage in the kind of close regulation of labor or environmental conditions so common today, without the executive — or, what we might call today, the administrative branch of government — issuing rules that look very much like statutes or making decisions regarding alleged violations of these rules that appear to all the world as judicial.[21] In addition, as government becomes more complicated and society becomes more polarized, difficult issues arise that the political system cannot solve because of entrenched partisan differences, structural flaws, or lack of political will. Examples of such problems include investigation of possible Presidential corruption,[22] systemic budget deficits,[23] and inconsistent sentencing practices by judges.[24] In these situations, Congress and the President designed complex structures employing blended powers to solve the knotty problems at issue. In each of these cases, a strict separation of powers doctrine would have led to the voiding of all these structures and the unraveling of the carefully negotiated political compromise underlying the proposed solution.

The hard and messy truth, then, is that the separation of powers doctrine must both enforce the boundaries between the different branches and allow for the necessary blending to make government effective. Clearly, these needs are in tension, and have led courts to develop seemingly inconsistent lines of doctrine.[25]

In some cases, for example, the U.S. Supreme Court, in interpreting the Federal Constitution, has adopted what is called a "formalist" approach. This approach seeks to define formal, bright-line rules delineating the different powers so that courts may identify and strike down the attempts of one branch to exercise or interfere with the powers of another branch.[26] For example, in

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20. THE FEDERALIST NO. 51, *supra* note 12, at 322 ("Ambition must be made to counteract ambition.").

21. *See* Devlin, *supra* note 11, at 1205.

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

23. *See* Bowsher v. Synar, 478 U.S. 714 (1986).

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

25. One commentator, for example, has stated that "the Supreme Court's treatment of the constitutional separation of powers is an incoherent muddle." Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1517 (1991).

26. Redish & Cisar, *supra* note 10, at 453.

INS v. Chadha,[27] the Court struck down Congress's use of the legislative veto, holding that Congress violated the requirement that laws must be made through the formal process of bicameralism and presentment.[28] The Court rejected arguments, made by Justice White in dissent, that the legislative veto is a creative and effective solution to the problems to democratic governance posed by the broad delegations of power to the executive branch necessitated by the modern administrative state.[29] Justice White urged the Court, instead of viewing the separation of powers as requiring the articulation and enforcement of what he saw as rigid, formal rules, to accept that "our Federal Government was intentionally chartered with the flexibility to respond to contemporary needs without losing sight of fundamental democratic principles."[30] The legislative veto, when understood in the context of the increased authority provided to the administrative branch by the delegation of power, "did not alter the division of *actual* authority between Congress and the Executive."[31] The Court, White urged, should therefore give its constitutional imprimatur to this new structure because it does not sufficiently impair the functioning of the respective branches.[32]

The majority rejected Justice White's plea to make its decision based on whether the mechanism actually made the Constitution work better; indeed, it opined that "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives — or the hallmarks — of democratic government . . . ."[33] The Court found that, despite the utility of the legislative veto, because "[e]xplicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process," the Court had no choice but to invalidate the provisions

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27. 462 U.S. 919 (1983).

28. *Id.* at 952 (defining making a law as taking action "that had the purpose and effect of altering the legal rights, duties, and relations of persons").

29. *Id.* at 968 (White, J., dissenting).

> Without the legislative veto, Congress is faced with a Hobson's choice: either to refrain from delegating the necessary authority, leaving itself with a hopeless task of writing laws with the requisite specificity to cover endless special circumstances across the entire policy landscape, or in the alternative, to abdicate its lawmaking function to the executive branch and independent agencies.

Id.

30. *Id.* at 978 (White., J., dissenting).

31. *Id.* at 994 (White, J., dissenting) (emphasis added).

32. *Id.* at 995 (White, J. dissenting).

33. *Id.* at 944.

at issue.[34] Thus, in order to employ the formalist approach, the Court must possess confidence that it can define and apply formal categories of power to decide cases.

In other cases, the Court has applied an entirely different approach, one founded more on Justice White's approach in *Chadha* than on that of the majority. In *Morrison v. Olson*,[35] the Court considered the constitutionality of the independent counsel established to investigate the President and other executive officers. It appeared clear that the independent counsel established by Congress must violate any formalist understanding of the Constitution; the independent counsel exercised the most traditional and obvious of executive powers, the power of prosecution, and this prosecutor was neither appointed nor truly supervised by the executive, and could only be removed by the Attorney General for cause.[36]

The Court rejected the arguments that the case could be settled by the application of a formalist test, holding, for example, on the challenge to the limitations on the removal power, that the "analysis contained in our removal cases is designed not to define rigid categories."[37] Instead, the Court ruled that in the separation of powers case, two questions must be asked: first, does the structure or law at issue impermissibly impede the ability of another branch to carry out its constitutional functions?;[38] and second, does the challenged practice involve the attempt of one branch to increase its powers at the expense of another branch?[39]

In asking these questions, the Court rejected the formalist notion that separation of powers cases can be decided by defining and applying formal categories; rather, it adopted a functionalist approach to these problems that requires a close analysis of the particular facts of the case and examines whether the challenged practice overly interferes with the workings of another branch or gives too much power to another branch.[40] Under a functionalist approach, these questions are of degree, not kind. This approach, therefore, provides courts with far more flexibility in analyzing separation of powers questions; it can approve new structures that blend and rearrange the powers of different branches, as long as the new practice does not interfere *too much* with one of the branches or give *too much* power to another. A formalist

34. *Id.* at 945.

35. 487 U.S. 654 (1988).

36. *See id.* at 706 (Scalia, J., dissenting).

37. *Id.* at 689.

38. *Id.* at 691 ("[T]he real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty . . . .").

39. *See id.* at 692-93.

40. *See* Devlin, *supra* note 11, at 1213-14.

approach, in contrast, is not concerned with matters of degree; once one branch invades the province of another, the practice must be struck down.

The Court has not exclusively adopted either approach, using one in some cases and the other in different cases.[41] The state supreme courts have also used both approaches, albeit formulated in various ways, in interpreting the separation of powers provisions in their constitutions.[42] It seems obvious that the decision of whether to adopt one approach or the other — or to continue to waver between both — is one of the most difficult, and important, questions of constitutional interpretation. The question of which approach to adopt was at the heart of the Garvee Bonds case.

III. The Garvee Bonds Case: Analysis and Critique

A. The Question

The Garvee Bonds case presented a classic separation of powers problem. In 1987, the Oklahoma Legislature decided to reform the process of the issuance of bonds by state government entities by establishing a process for "significant systematic oversight."[43] However, rather than delegating the power to issue bonds to purely executive officers or entities, or writing detailed rules governing the issuance of bonds, the legislature constructed a creative mechanism to ensure both legislative and executive review of the bond issuance process.

The legislature established two separate committees to carry out the desired oversight. First, it established the Legislative Bond Oversight Committee (LBOC), comprising six members, three appointed by the Speaker of the House of Representatives and three by the President Pro Tempore of the Senate.[44] Second, it established the Executive Bond Oversight Board (EBOC), consisting of the Governor, the Lieutenant Governor, the Director of the Oklahoma Department of Commerce, and two other members appointed by

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41. Redish & Cisar, *supra* note 10, at 450.

> In the separation of powers area, however, the modern Court has evinced something of a split personality, seemingly wavering from resort to judicial enforcement with a formalistic vengeance to use of a so-called "functional" approach that appears to be designed to do little more than rationalize incursions by one branch of the federal government into the domain of another.

Id.

42. *See* Devlin, *supra* note 11, at 1246-47.

43. 62 OKLA. STAT. § 695.2 (Supp. 2003); *In re* the Application of the Okla. Dep't of Transp., 2002 OK 74, ¶ 14, 64 P.3d 546, 551.

44. 62 OKLA. STAT. § 695.4 (Supp. 2003). While the statute does not require that the Speaker or the President Pro Tempore appoint legislators, all the members at the time of the case were legislators. *In re Okla. Dep't of Transp.*, ¶ 15, 64 P.3d at 551.

the Governor.[45] The statutory scheme provides that all bond obligations issued by any state government entity must be approved by a majority of both the LBOC and the EBOC.[46]

The legislature added an additional wrinkle to this scheme when, in 2000, it passed a bill authorizing the Oklahoma Department of Transportation (ODOT) to issue Garvee bonds. The bill amended a statute establishing a $700 million road improvement program; the amendment provided that ODOT "may issue Grant Anticipation Notes" if the issue was unanimously approved by the Contingency Review Board (CRB).[47] The CRB consists of three voting members: the Governor, the Speaker of the House, and the President Pro Tempore of the Senate.[48] It functions primarily to review requests for additional state government personnel or funds in case of an emergency that could not be foreseen during the preceding legislative session.[49]

In early 2002, proceeding according to this statutory scheme, ODOT, after receiving authorization from the Oklahoma Transportation Commission, sought approval for the issuance of Garvee bonds in an amount not to exceed $100 million.[50] On February 1, 2002, the CRB gave the requisite unanimous approval, followed by the approval of both the EBOC and LBOC on February 28, 2002.[51] Having secured the necessary approvals, ODOT filed an application with the Oklahoma Supreme Court seeking a determination that the bonds were authorized in accordance with law and, if issued, were valid. At that point, a protest was filed to the application, requesting that the court deny the application because the statutory scheme authorizing the issue was constitutionally flawed.[52]

The protestor alleged, not surprisingly, that the statutory scheme violated the separation of powers principles of the Oklahoma Constitution. In particular, the protestor contended that the role of both the LBOC and the CRB in the bond review process violated the state constitution because, with regard to both entities, members of the legislature unconstitutionally exercised

45. 62 OKLA. STAT. § 695.5 (2001).
46. *Id.* § 695.9(A).
47. 69 OKLA. STAT. § 2001(E)(2) (2001).
48. *Id.* § 3605. The Director of State Finance is an ex officio non-voting member.
49. 74 OKLA. STAT. § 3603 (2001).
50. *In re* the Application of the Okla. Dep't of Transp., 2002 OK 74, ¶ 1, 64 P.3d 546, 548.
51. *Id.* ¶ 3, 64 P.3d at 548.
52. *Id.* ¶¶ 6-7, 64 P.3d at 549.

executive powers.[53] The case, then, squarely required the court to decide and articulate its doctrinal approach to separation of powers questions.

B. The Solution

In resolving this important question, the court received minimal guidance from the text of the constitution and its precedent. Article 4, Section 1 of the Oklahoma Constitution states that:

> The powers of the government of the State of Oklahoma shall be divided into three separate departments: The Legislative, Executive, and Judicial; and except as provided in this Constitution, the Legislative, Executive, and Judicial departments of government shall be separate and distinct, and neither shall exercise the powers properly belonging to either of the others.[54]

This language does not resolve the question of whether a branch in a particular case is exercising a power that properly belongs to it or to another branch.

Precedent was only marginally more helpful to the court. As might be expected, given the judicial struggle with interpretation of the Federal Constitution, the court, in interpreting the state's constitution, has wavered to some degree between a formalist and functionalist approach to understanding the separation of powers. For example, in a 1981 case, the court employed formalist rhetoric, stating that "[l]egislative, as distinguished from executive, power is the authority to make law, but not to execute it or to appoint agents charged with the duty of enforcement. The latter is purely an executive function."[55] This reasoning suggests that the court is comfortable with defining and enforcing categories of power.

Three years later, however, the court made functionalist noises, opining that:

> The true import of the doctrine of separation of powers is that the whole power of one department shall not be exercised by the same hands which possess the whole power of either of the other

53. *Id.* The protestor also contended that the legislators, by serving on the LBOC and the CRB, were holding both legislative and executive offices in violation of the constitution. The court, because it struck down the scheme on separation of powers grounds, did not consider the dual office argument. *Id.* ¶ 7 n.10, 64 P.3d at 549 n.10.

54. OKLA. CONST. art. 4, § 1.

55. Tweedy v. Okla. Bar Ass'n, 1981 OK 12, ¶ 9, 624 P.2d 1049, 1054 (holding that a court could not order a re-investigation of a disciplinary grievance filed against an attorney because this order was inconsistent with the courts' role as the sole and final tribunal for the adjudication of these grievances).

> departments; and that no one department ought to possess *directly* or *indirectly* an overruling influence over the others.[56]

This language suggests, as a functionalist would argue, that the question of whether separation of powers principles have been violated is one of degree, not kind. One branch may legitimately exercise some of the power that normally belongs to another branch, but not so much that it exercises either the whole power of another branch, or enough of the power that the losing branch is excessively impeded in carrying out its mandated functions. This approach certainly does not rely on the definition and firm policing of hard and fast boundaries between the branches. In sum, given the importance of the doctrinal question and the failure to articulate a clear approach to that point, the issue of the preferred approach to separation of powers problems under the Oklahoma Constitution was ripe for decision in Garvee Bonds.

The court came down strongly and clearly on the side of the functionalist approach. The court stated that "there can be blending of the three powers of government" and that "it is not always possible to contain the three branches of government."[57] The problems of modern government, particularly the administrative state, "make it more difficult to neatly classify the function and make the application of the formalistic approach to separation of powers issues more problematic."[58]

In articulating its functionalist approach, however, the court did not rely upon the general pronouncements in its previous opinions. It instead turned to a test articulated by the Kansas Supreme Court in *Schneider v. Bennett*,[59] in which the Kansas court, in terms quite similar to those used in the functionalist opinions of the U.S. Supreme Court,[60] concluded that "to have a usurpation of powers there must be a significant interference by one department with the operations of another."[61] While acknowledging that others may be considered in future cases, *Bennett* set out four factors it considered particularly important in the analysis of these questions:

> First is the essential nature of the power being exercised. Is the power exclusively executive or legislative or is it a blend of the

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56. York v. Turpen, 1984 OK 26, ¶ 9, 681 P.2d 763, 767 (citation omitted). The court, quite early on, it should be noted, had evinced functionalist leanings, stating in *Bailey v. State Board of Public Affairs*, 1944 OK 301, ¶ 13, 153 P.2d 235, 239, "[t]hat there may be a certain degree of blending of the three powers of government is well recognized."

57. *In re Okla. Dep't of Transp.* ¶ 10, 64 P.3d at 550.

58. *Id.*

59. 547 P.2d 786 (Kan. 1976).

60. *See* Devlin, *supra* note 11, at 1213 n.27 (citing several cases, including Morrison v. Olson, 487 U.S. 654 (1988) and Mistretta v. United States, 488 U.S. 361 (1989)).

61. *Bennett*, 547 P.2d at 792.

> two? A second factor is the degree of control by the legislative department in the exercise of the power. Is there a coercive influence or a mere cooperative venture? A third consideration of importance is the nature of the objective sought to be obtained by the legislature. Is the intent of the legislature to cooperate with the executive by furnishing some special expertise of one or more of its members or is the objective of the legislature obviously one of establishing its superiority over the executive department in an area essentially executive in nature? A fourth consideration could be the practical result of the blending of powers as shown by actual experience over a period of time where such evidence is available.[62]

The court in Garvee Bonds adopted and applied the *Bennett* test as its own.[63] It first applied the test to the challenge to the constitutionality of the LBOC. The court asked whether the power to approve or disapprove the issuance of bonds was a purely legislative or executive power.[64] The court found that "the LBOC exercised a power that cannot be classified as purely legislative, because it is beyond the Legislature's fundamental role to make the law."[65] It concluded that the power to issue bonds is essentially one of carrying out legislative policy, not making it, and therefore the LBOC — a body of legislators — exercised primarily executive or administrative powers.[66] It is worth noting that if the court applied a formalist test, this finding alone would void the law; the court, however, pressed on.

The court then considered the second factor, the degree of control exercised by the legislative body over the executive branch.[67] The court, noting that the LBOC is an exclusively legislative body and that it holds a veto over an essentially executive function, concluded that "the LBOC is a vehicle by which the executive department is being subjected to the coercive influence of the legislative department."[68]

Finally, the court considered the third factor, asking whether, in establishing the LBOC, the legislature intended to cooperate with the executive by furnishing, for example, special expertise, or, instead, if it intended to establish legislative superiority over an essentially executive

62. *Id.*
63. *In re Okla. Dep't of Transp.*, ¶¶ 16-21, 64 P.3d at 551-52.
64. *Id.* ¶ 16, 64 P.3d at 551.
65. *Id.*
66. *Id.*
67. *Id.* ¶ 17, 64 P.3d at 551.
68. *Id.*

function.[69] The court found that the legislation establishing the LBOC did not require its members to possess any special expertise regarding the issuance of bonds; its only role was to control the bond approval process.[70] The combination of this lack of expertise with the fact that, while not required, the LBOC was made up entirely of legislators, "evince[d] a motive to retain legislative control over the note-approval process."[71]

Examining the three factors together, the court concluded that the power "wielded by . . . the LBOC is potentially coercive and may constitute a significant interference with the executive branch in the note-approval process."[72] Because the LBOC, in effect, operated as "a mini-legislature," controlling the note-approval process, it constituted "a usurpation by the Legislature of the powers of the executive branch and violates Oklahoma's constitutional separation of powers provision."[73]

Two facts complicated the court's analysis of the challenge to the CRB. First, the Governor served as one of the three voting members of the body. Second, decisions of the CRB regarding the issuance of Garvee bonds require unanimity.[74] Therefore, on the surface, it appears the Governor possesses equal authority as the two other members of the CRB, the Speaker of the House and the President Pro Tempore of the Senate. The problem with this analysis is that, as the court noted regarding the LBOC, the decision to approve the bonds is essentially an executive matter. The fact that the state's two highest legislators possess a veto over the bond issuance process provides the legislature "a significant degree of control over an executive function."[75]

The motive for the legislative injection of the CRB into the bond issuance process is as suspicious as its devising and staffing of the LBOC. The CRB's main function is to approve emergency funding requests; nothing about the purpose of its existence, its design, or its membership suggests any special expertise regarding the issuance of bonds.[76] Certainly, the CRB was not involved in the review of bond issues to give the Governor more authority over these decisions; he already serves on, and theoretically controls the EBOC through his appointments. The only explanation for including the CRB

69. *Id.* ¶ 18, 64 P.3d at 551. The court did not consider the fourth factor, the practical effect shown by experience over time, because there was no relevant historical experience to analyze in this case. *Id.* ¶ 20, 64 P.3d at 552.

70. *Id.* ¶ 18, 64 P.3d at 551.

71. *Id.* ¶ 19, 64 P.3d at 552.

72. *Id.* ¶ 21, 64 P.3d at 552.

73. *Id.*

74. *Id.* ¶ 23, 64 P.3d at 552.

75. *Id.*

76. *Id.* ¶ 24, 64 P.3d at 552.

in this process is to provide the Speaker of the House and the President Pro Tempore a veto regarding the issuance of Garvee bonds.[77] The court concluded that the power wielded by the two legislators in the bond review process "is potentially coercive and may constitute a significant interference with the executive branch;" this statutory scheme therefore "constitutes a usurpation by the Legislature of the powers of the executive branch and violates Oklahoma's constitutional separation of powers provision."[78]

What, then, is the significance of the Court's opinion in Garvee Bonds? First, and most obviously, the Court made clear, in adopting the *Bennett* test, that it will use a functionalist approach when analyzing separation of powers problems. Theoretically, this choice should provide the other two branches of government, particularly the legislature, more freedom to create structures that blend different powers. At the very least, a functionalist approach commits the court to scrutinize closely the practical effects of such blending, rather than simply rejecting these attempts because the legislature has crossed some abstract line.

While this first implication of Garvee Bonds may encourage the legislature to take greater liberties with the separation of powers, it should also take heed of the second important lesson of Garvee Bonds; the court is willing, in applying its new test, to strike down the actions of the other branches when they exceed their authority. Indeed, advocates of judicially enforced, rigorous separation of power limits on the political branches, who generally support the formalist approach, should find hope not only in the result of Garvee Bonds,

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77. *Id.*

78. *Id.* ¶ 26, 64 P.3d at 553. The court then considered whether the unconstitutional provisions regarding the LBOC and CRB were severable from the remainder of the bond review process. *Id.* ¶¶ 27-31, 64 P.3d at 553-54. The court concluded that "the Legislature would have, in the event that the LBOC was found unconstitutional, enacted the remainder of the Bond Oversight and Reform Act without the LBOC and clearly intended the remaining, non-offending language of the [Act] to stand alone." *Id.* ¶ 28, 64 P.3d at 553. The court further found that the CRB provision was subject to a statutory presumption that it too was severable and that the presumption was not overcome in this case. *Id.* ¶ 31, 64 P.3d at 554; *see* 75 OKLA. STAT. § 11a (2001). The legislature buttressed the court's conclusions by including an alternate review process in the event the court struck down its existing provisions. The legislature provided that "[i]n the event either the Executive or Legislative Bond Oversight Commission is found unconstitutional . . . all of the powers, duties and responsibilities of the Commissions shall devolve upon the Council of Bond Oversight." 62 OKLA. STAT. § 695.11A(A) (2001). This Council consists of five non-legislative members, one appointed by the Speaker of the House, one by the President Pro Tempore, two by the Governor with advice and consent of the Senate, and one shall be the Director of State Finance. *Id.* § 695.11A(B). The court finally concluded that, for the notes presented in the application to be issued, approval must be secured from the Council of Bond Oversight; once that approval is secured, the application may be presented to the courts for approval. *In re Okla. Dep't of Transp.*, ¶ 34, 64 P.3d at 554-55.

but in some of the court's reasoning. While the court clearly adopted the functionalist approach, the court relied on formalist reasoning in applying that test and invalidating the legislature's bond review scheme. If used in future cases, such reasoning could result in a quite robust separation of powers doctrine.

The court turned to formalist arguments when it asked, in applying the first factor of the *Bennett* test, whether the powers exercised by the challenged entity were primarily legislative or executive.[79] The court answered this question by supplying a definition — a formal category — of executive power, stating that executive power "involves carrying out legislative policy and applying it to varying conditions."[80] Once the court determined that the legislature had involved itself in an essentially executive function, it placed a heavy burden on the legislature to demonstrate that it had some special reason for injecting itself into this function. The legislature failed to meet this burden and, as it is difficult to envision what special expertise legislators possess regarding executive functions, seldom could it. The court, in effect, has infused formalist steel into its flexible, functionalist doctrine. This increased rigor may result in a legislature more cautious about grasping the power of other branches.

C. A Critique

From the perspective of someone who supports more rigorous enforcement of separation of powers principles in Oklahoma, Garvee Bonds certainly represents a move in the right direction. While the court made some progress, however, it squandered an opportunity to do much more. The court provided some hope that it would curb future legislative abuses in applying its newly adopted functionalist doctrine, but it would have better served the cause of effective separation of powers if it had articulated clear-cut, formal rules curbing legislative violations of the separation of powers, particularly the legislative proclivity for directly usurping executive authority.

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79. *Id.* ¶ 16, 64 P.3d at 551.

80. *Id.* In making this distinction, one more consistent with formalist than functionalist thinking, the court hearkened back to earlier cases where it was more confident about drawing these kinds of formal lines. *See* City of Sand Springs v. Dep't of Pub. Welfare, 1980 OK 36, ¶ 12, 608 P.2d 1139, 1146.

> This Court has committed itself to the proposition that the essence of the legislative function is the determination of policy; indeed, the dichotomy between administrative acts and legislative acts hinges upon the declaration of policy, which is a legislative function, and the implementation of that policy, which is traditionally an administrative function.

Id.

In order to appreciate the importance of reining in legislative usurpation, one must first understand the importance of a strong executive to a well-functioning popular government. *The Federalist* offers the best explanation of this political truth. In the words of Hamilton, "A feeble executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government."[81] Good government requires a strong executive because the executive supplies energy to government.[82] Energy is the virtue that enables a person or organization to accomplish tasks great and small; we all know the difference between working with someone who is energetic and productive and someone who is lethargic.[83]

Hamilton called the defining characteristic of an energetic executive "unity."[84] Put simply, the executive branch possesses energy only when power is lodged in one person, as with the presidency. The decisive, swift, and energetic action necessary to good government is far more likely to be taken when power is granted to one individual, rather than several.[85] Unity, and the practical advantages it supplies, ensures that the executive can effectively defend himself and his branch from the attempted usurpations of the other branches.[86] In addition, because the President alone is responsible for the actions of the executive branch, the people can hold him accountable for any failures in administration.[87] This unity — and, consequently, the effectiveness of government — is destroyed when more than one person possesses executive power or when others control the executive's authority.

The Framers of the Oklahoma Constitution, and the political leaders that have succeeded them unfortunately have ignored Publius's counsel. Rather than creating a strong, effective unitary executive branch, the state constitution establishes a plural executive with eleven separately elected executive officers, all of whom may pursue different policies if they wish.[88]

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81. THE FEDERALIST NO. 70, at 423 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

82. *Id.* ("Energy in the executive is a leading character in the definition of good government.").

83. Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 37 (1995) ("The Framers of the Constitution of 1787 believed adamantly that some degree of energy was absolutely vital both to good government generally and to good execution of the laws in particular.").

84. THE FEDERALIST NO. 70, *supra* note 81, at 424.

85. *Id.* ("Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number . . . .").

86. Calabresi, *supra* note 83, at 37.

87. *Id.*

88. GOVERNOR'S COMM'N ON GOV'T PERFORMANCE, STATE OF OKLA., A GOVERNMENT AS

To make matters worse, the legislature has placed much of the executive power that remains not in the hands of an already weak Governor and his chosen cabinet, but instead in the hands of more than 300 boards, commissions, agencies, and other state entities, many of which are not directly responsible to the Governor. This executive structure makes it difficult both for the Governor to manage the state effectively and for the people to hold him accountable for poor performance by government.[89] It is no coincidence that three separate studies on reform of the Oklahoma Constitution and Oklahoma government conducted since 1990 have recommended executive branch reform in general and strengthening of the authority of the Governor in particular.[90]

If the Oklahoma Constitution is going to function as well as possible in its current form, it is vital that the court, in interpreting the separation of powers provisions of the document, do all that it can to preserve the little executive authority that remains in the system. How might it go about accomplishing this task? It can take guidance from what some commentators might consider an unlikely source — the U.S. Supreme Court. For all the loose academic talk about the incoherence of the Court's separation of powers doctrine,[91] the pattern of the Court's decisions reveals a distinct and sensible logic — one that the Oklahoma Supreme Court should follow in interpreting the state constitution.

The heart of the academic critique of federal separation of powers jurisprudence is the criticism of the Court's wavering between the formalist and the functionalist approaches.[92] The Court, however, may appear more inconsistent than it is. While it is true that the Court uses both approaches, there is a discernable pattern to the cases involving the formalist approach. The Court employs this approach when the legislature seeks to *directly* exercise purely executive powers. In other words, when the legislature itself exercises executive functions, as opposed to assigning executive functions to

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GOOD AS OUR PEOPLE 11 (1995).

89. *Id.* at 9. For a critique of the structure of the executive branch in Oklahoma, see Andrew C. Spiropoulos, *It All Starts At the Top: Reforming Oklahoma's Executive Branch, in* OKLAHOMA POLICY BLUEPRINT 111-25 (2003).

90. GOVERNOR'S COMM'N ON GOV'T PERFORMANCE, *supra* note 88, at 9-16; OKLA. ACADEMY FOR STATE GOALS, BACK TO THE FUTURE: TRANSFORMING OKLAHOMA'S ANTIQUATED STATE CONSTITUTION 9-12 (2002); *see also* Danney Goble, *The Constitution of the State of Oklahoma: Recommendations for Revision*, 16 OKLA. CITY U. L. REV. 515, 562-70 (1991). The Supreme Court of Oklahoma scuttled the 1990 attempt at reform by its decision in *In re Initiative Petition No. 344, State Question No. 630*, 1990 OK 75, 797 P.2d 326.

91. *See* Devlin, *supra* note 11, at 1214 ("The Court's reasoning and results have been variously described as 'an incoherent muddle,' 'abysmal,' and a 'mess.'").

92. *See supra* text accompanying notes 26-42.

another branch or to an independent entity, the Court categorically denies the legislature the authority to exercise that power.

Three illustrations prove the point. First, in *Buckley v. Valeo*,[93] the Court held, by a formalist interpretation of the Appointments Clause of Article II,[94] that the legislature could not, under any circumstances, appoint officers of the United States, finding that

> *all* officers of the United States are to be appointed in accordance with the [Appointments] Clause. Principal officers are selected by the President with the advice and consent of the Senate. Inferior officers Congress may allow to be appointed by the President alone, by the heads of departments, or by the Judiciary. No class or type of officer is excluded because of its special functions.[95]

Second, the Court, in *Bowsher v. Synar*,[96] held that Congress may never give itself the power to remove an officer performing executive functions; the Court stated its conclusion quite categorically:

> [W]e conclude that Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment. To permit the execution of the laws to be vested in an officer answerable only to Congress would, in practical terms, reserve in Congress control over the execution of the laws. . . . The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess.[97]

Lastly, in *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*,[98] in which a Board of Review composed of nine members of Congress was vested with veto power over the board of directors of the authority that manages the capital's two airports, the Court held that members of Congress were flatly prohibited from exercising executive power.[99] The Court concluded that, to prevent legislative encroachment upon the executive branch, Congress must obey the "basic"

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93. 424 U.S. 1 (1976).

94. U.S. CONST. art II, § 2, cl. 2.

95. *Buckley*, 424 U.S. at 132. The Court remarked that nothing in its opinion should be held to deny Congress the power to appoint its own officers. *Id.* at 128.

96. 478 U.S. 714 (1986).

97. *Id.* at 726.

98. 501 U.S. 252 (1991).

99. *Id.* at 255, 274.

restraint that "[i]t may not 'invest itself or its Members with either executive power or judicial power.'"[100]

It is clear, then, that the Court has constructed a set of high, formal barriers around the exercise of purely executive powers. The Court has decided that under no circumstances will legislators be allowed to: (1) appoint officers who exercise executive functions; (2) remove these officers; or (3) exercise executive functions themselves. The authors of *The Federalist* would applaud the Court's strict, formal approach to these questions because they made clear that the legislature should be the branch weighed down with the most restrictions because it was the one most to be feared. The Framers urged that in a representative democracy, because the "legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex,"[101] it is "against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions."[102] Because in a popular government the legislature "necessarily predominates," one must remember that "the weakness of the executive may require . . . that it should be fortified."[103] Courts can fortify the executive by enforcing strict rules against the legislature directly exercising executive functions.[104]

In Garvee Bonds, the Oklahoma Supreme Court should have followed its federal brethren in enacting formal barriers against legislative usurpation. While the Court reached the same result as the federal cases, its purely functionalist approach fails to provide the strong protection for the executive branch afforded by the federal doctrine. The surest way for the Oklahoma court to fulfill its professed intention to prevent the legislative usurpation of powers is to establish firm and clear rules forbidding the legislature from

100. *Id.* at 274 (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928)). Certainly, the application of such a rule would have made Garvee Bonds a much simpler decision.

101. THE FEDERALIST NO. 48, *supra* note 18, at 309.

102. *Id.*

103. THE FEDERALIST NO. 51, *supra* note 12, at 322-23.

104. John Devlin argues that state constitutions differ from the Federal Constitution in important respects and, therefore, with regard to separation of powers questions, should be interpreted differently. Devlin, *supra* note 11, at 1226-27. State constitutions, for example, are based on the fundamental principle that the legislature, in contrast to the enumerated powers of Congress, possesses plenary power, so that it may exercise a power unless affirmatively limited by the constitution. *Id.* at 1226. Many state constitutions, like Oklahoma's, also establish a plural, rather than unitary, executive. *Id.* at 1226-27. These structural differences, however, make it more imperative that courts aggressively police separation of powers violations. If Madison is correct that the danger of legislative abuse is inherent in the *nature* of popular government, then the fact that state legislators are comparatively more powerful than Congress should lead courts to supervise them even more closely.

exercising core executive powers. If it is serious about invigorating the separation of powers in Oklahoma, the court should modify its doctrine to prevent the legislature from appointing executive officials, removing them, or giving its own members direct executive powers.[105]

Some may argue that the court, as it did in Garvee Bonds, may provide the same protection using a functionalist approach. This argument presents two problems. First, if the court continues to apply a flexible, functionalist rule in evaluating legislative encroachments on core executive powers, no guarantee exists that future courts will not mistakenly use this flexibility to allow the legislature to gut the powers of the executive. Certainly the history and practice of Oklahoma government to date fails to instill a great deal of confidence that an appreciation of the importance of a strong executive permeates the legal and political culture of the state.

Second, articulating strong formal rules against the usurpation of the powers of another branch has a great value, aside from facilitating the judicial invalidation of legislative overreaching. The fact of the matter is that, given the protean nature of political power, members of one branch can accumulate dangerous powers over time without the other branches noticing it. Worse yet, when the other branches notice the danger, they may not be able to either remedy the harm already caused or effectively stop the now all-powerful branch from abusing its powers.[106] To prevent one branch, particularly the dangerous legislature, from accumulating these powers over time, the court must articulate and enforce prophylactic rules against the first encroachment upon the powers of another branch, even if that encroachment seems small or especially useful under the circumstances.[107] These rules prevent the problem from even arising, creating what two commentators call a "buffer zone" between the legitimate interaction and competition between the branches and the dangerous accumulation of powers in one branch.[108]

What then of the legitimate need for experimentation and innovation in government? Will these formal rules prevent government from finding ways

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105. The problem of legislators directly exercising executive powers could be addressed by a robust interpretation of the state constitution's ineligibility clauses. For example, article 5, section 18 of the Oklahoma Constitution provides, in pertinent part: "No person shall serve as a member of the Legislature who is, at the time of such service, an officer of the United States or State government . . . ." *See* OKLA. CONST. art. 5, § 18; *see also id.* art. 5, § 23.

106. Redish & Cisar, *supra* note 10, at 464 ("[S]hort of an overt coup, such accretion [of power] need not be — indeed, is unlikely to be — of a dramatic form. Rather, it may be almost microscopic, so that the naked eye will be unable to perceive its occurrence.").

107. *Id.* at 463 ("[T]he separation of powers must operate in a prophylactic manner — in other words, as a means of preventing a situation in which one branch has acquired a level of power sufficient to allow it to subvert popular sovereignty and individual liberty.").

108. *Id.* at 476.

to solve new and difficult problems using the blending of powers? Not at all. I simply suggest that the court adopt formal rules regarding a limited number of legislative encroachments on the executive branch. The court's application of its functionalist doctrine to the myriad of separation of powers problems will provide it enough flexibility to approve those structures and innovations it believes do not practically threaten the balance between the branches.

Finally, the legislature will not lose the power it needs to do its job. In any representative democracy, the power to make the laws — the power to establish the policy of the government — is the most powerful tool available and is generally sufficient to protect the legislature from any threat from either of the two branches. For example, if the legislature disapproves of how the executive administers the bond issuance or any other program, it may add detailed rules instructing the executive or the judiciary precisely how the program should be run. If worse comes to worse, it can always abolish the program.

Aside from possessing the power to make laws, the legislature greatly influences the other branches.[109] For example, it exercises an oversight function over the administrative branch, allowing it to hold executive officials publicly accountable. Finally, the legislature can always use its second biggest club — the power over appropriations. If a recalcitrant executive branch fails to heed the legislature's directions or scolding, it can be deprived of the funds necessary to operate. In sum, the legislature can always protect itself. It is the other branches that need protection.

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109. John Devlin makes the interesting argument that the normal tools employed by legislatures to check the executive, such as the oversight power, are less effective in state governments because state legislatures often do not possess the same resources as Congress. Devlin, *supra* note 11, at 1228. For example, state legislators often must do their work in short sessions, serve only part-time, and lack adequate staff and budgets. *Id.* at 1228-29. While much of this is true, none of it justifies legislatures making short shrift of the separation of powers in order to effectively do their jobs. As the Court stated when it struck down the scheme placing members of Congress on the Washington area airports' authority Board of Review, Congress may not exercise real power in structures outside the normal legislative process because, "[i]f the power is executive, the Constitution does not permit an agent of Congress to exercise it. If the power is legislative, Congress must exercise it in conformity with the bicameralism and presentment requirements of [the Constitution]." Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 276 (1991). Indeed, much of the legislative usurpations of executive power, such as the establishing of permanent legislative oversight committees with veto power over executive decisions are merely ways of avoiding the difficult work of modernizing and reforming state governments so they work more effectively. This work must be done if the public is to gain a confidence it does not now possess in the institutional capacity of state governments. *See* G. Alan Tarr, *The State of State Constitutions*, 62 LA. L. REV. 3, 5 (2001).

IV. Conclusion

Those who hope for improved governance in Oklahoma should see Garvee Bonds as an opportunity lost and found. It was an opportunity lost because the Oklahoma Supreme Court could have taken the legislature's obvious usurpation of power as the occasion for the pronouncement of a strong and clear set of rules that could prevent such abuses in the future. The court instead chose to provide itself the most flexibility, at the cost of a lack of direction for the branches. The opportunity found, though, was in the court's willingness to use its authority to stop legislative usurpation of executive power. Whatever approach the court applies to these questions in the future, it should continue to take seriously both its role as the guardian of the Oklahoma Constitution and as the catalyst for positive change in Oklahoma governance.