SEPARATED POWERS AND ORDERED LIBERTY

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Imagine the United States Constitution without a bill of rights. Today, it is almost unthinkable. Our Constitution, however, originated as seven articles dealing almost exclusively with the structure of the federal government, and nothing more.[1] Those seven articles are all that the Framers wrote at Philadelphia, all that they signed, and all that the proponents—the "Federalists"—promoted. And those seven articles are all that the states ratified when the people voted to adopt the Constitution of the United States.

We know, of course, that a bill of rights soon followed. But the Framers, most of them ardent supporters of civil liberty, were willing to establish a nation under the real possibility that an enumeration of rights might not follow. "How could such an 'assembly of demigods,' as Jefferson called them, neglect the liberties of the people?"[2]

What if there had been no bill of rights? One might think the consequences for individual liberty would have been disastrous. But perhaps the authors of the Constitution trusted that a bill of rights was not essential to preserve the fundamental aspects of an ordered liberty. Perhaps they had already made provision for the requirements of ordered liberty through the structure of the government they had crafted in the original Constitution.

The principle of separated powers is a prominent feature of the body of the Constitution, dictating the form, function, and structure of a government of limited powers. "Ordered liberty," a phrase coined by Justice Cardozo,[3] has come to represent a counter-majoritarian protection of the rights of the individual against arbitrary or unfair treatment at the hands of the govern-

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[1] *See* J. ELY, DEMOCRACY AND DISTRUST 92 (1980) (pointing out that the original Constitution was "overwhelmingly dedicated to concerns of process and structure").

[2] Levy, *Bill of Rights*, in ESSAYS ON THE MAKING OF THE CONSTITUTION 258, 261 (L. Levy 2d ed. 1987).

[3] *See* Palko v. Connecticut, 302 U.S. 319, 325 (1937).

ment, rights now embodied in the due process clauses of the fifth and fourteenth amendments. In the last three decades, the meaning of "separated powers" and of "ordered liberty" has come under increasing scrutiny. It is curious, however, that the relationship between these two core concepts has yet to be explored.[4]

The Supreme Court has treated separation of powers as an isolated area of the law, governed by its own glacial dynamic and insulated from the social changes that stimulate development of other constitutional doctrines. I reject that approach and, repairing to the norms that inspired the embrace of the mechanism of separated powers at its inception, seek to demonstrate that the structure of the government is a vital part of a constitutional organism whose final cause is the protection of individual rights. From this perspective, it is unsurprising that the revolution in individual rights of the fifties and sixties was followed in the seventies and eighties by renewed interest and profound changes in the doctrine of separated powers.

A link between constitutional structure and liberty has been acknowledged by political philosophers for centuries; many of those who have favored a system of separated powers have done so, at least in part, to promote liberty.[5] The importance of the relationship between governmental structure and individual freedom is borne out by a comparison with authoritarian nations in which the people actually enjoy comparatively little freedom, despite very generous verbal constitutional commitments to individual liberties. Such constitutions contain liberal bills of rights, but they do not provide for separated powers,[6] so that those who execute the laws also interpret and enforce them. The value of enumerated rights is dramatically diminished as a consequence. The Framers of our own

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[4] One examination of separation of powers under a "rule of law" approach has explored the importance of avoiding conflicts of interest in government actions, necessarily touching upon some aspects of due-process jurisprudence. *See* Verkuil, *Separation of Powers, the Rule of Law, and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 303-07 (1989); *see also* Pierce, *Separation of Powers and the Limits of Independence*, 30 WM. & MARY L. REV. 365 (1989) (discussing role of conflict of interest in structural analysis). These discussions, however, do not focus on the individual-rights concerns which are the essence of due process. *See* Strauss, *Article III Courts and the Constitutional Structure*, 65 IND. L.J. 307, 310 (1990) (suggesting that courts should interpret structural provisions to maintain protection of rights).

[5] *See infra* notes 86-90 and accompanying text.

[6] *See* KONST. SSSR. ch. 1 (government structure), ch. 7 (rights); *see also* A. VANDERBILT, THE DOCTRINE OF THE SEPARATION OF POWERS AND ITS PRESENT-DAY SIGNIFICANCE 13-18 (1963) (discussing how lack of separated powers in the Weimar Republic led to loss of individual rights and rise of Hitler).

Constitution preferred to err in the opposite direction: once the body of the Constitution was essentially complete, some opposed the addition of a bill of rights on the ground that the structure of the government, with its own self-limiting principles, would make any express protection of individual liberties superfluous or even counterproductive.[7]

As if to confirm its central importance in protecting individual rights, the judges and academics who take up the subject of separated powers almost invariably invoke James Madison: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[8] The brief bow to Madison so often performed, however, is more a ritualistic gesture than an effort to supply a meaningful framework for the inquiry at hand. The quoted passage rarely, if ever, appears to influence the writer's analysis in any substantive way.

I argue that the Madisonian goal of avoiding tyranny through the preservation of separated powers should inform the Supreme Court's analysis in cases raising constitutional issues involving the

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[7] *See* THE FEDERALIST NO. 84, at 561 (A. Hamilton) (Modern Library ed. 1937) (contending that a bill of rights is not only unnecessary but dangerous); *see also* C. BOWEN, MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION MAY TO SEPTEMBER 1787, at 243-53 (1966) (describing the circumstances surrounding the rejection of a bill of rights at the 1787 Constitutional Convention); Elliott, *Why Our Separation of Powers Jurisprudence Is So Abysmal*, 57 GEO. WASH. L. REV. 506, 511 (1989) (arguing that separation-of-powers theory was considered the foundation of constitutional law by the Framers); *infra* notes 112-14 and accompanying text (discussing relationship between lack of a bill of rights and structural provisions).

[8] THE FEDERALIST NO. 47, at 313 (J. Madison) (Modern Library ed. 1937). The same thought was expressed by Thomas Jefferson: "[C]oncentrating these [legislative, executive, and judicial powers] in the same hands is precisely the definition of despotic government." *Notes on the State of Virginia*, Query XIII, No. 4, *reprinted in* T. JEFFERSON, WRITINGS 245 (M. Peterson ed. 1984). It was also voiced by Montesquieu: "There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates." THE FEDERALIST NO. 47, *supra*, at 314 (quoting Montesquieu).

The quotation from Madison, or language expressing the same idea, can be found in nearly every modern judicial opinion on the subject of separated powers. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 380-81 (1989); Bowsher v. Synar, 478 U.S. 714, 733-34 (1986); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 859-60 (1986) (Brennan, J., dissenting); Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 594 (1985) (Brennan, J., concurring in judgment); INS v. Chadha, 462 U.S. 919, 960 (1983) (Powell, J., concurring); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 57 (1982).

structure of government. Moreover, that goal should be understood as a concern for protecting individual rights against encroachment by a tyrannical majority. Madison's insight expresses a fundamental due-process concern that can supply the consistent interpretative philosophy heretofore missing from the Court's constitutional analysis of separation of powers. The protection of individual rights—specifically, evenhanded treatment by the government, or "ordered liberty"—should be an explicit factor in the analysis of structural issues and should provide an animating principle for the jurisprudence of separated powers.[9] Thus, as I explain in greater detail below, when government action is challenged on separation-of-powers grounds, the Court should consider the potential effect of the arrangement on individual due-process interests.

I will show that this "ordered-liberty" model has many virtues. First, it quite sensibly recognizes that separation of powers is not an end in itself. In addition, it is consistent with the original understanding of the Constitution and the traditions that gave rise to it. Thus consideration of individual rights in conjunction with separated powers, while not effecting any dramatic changes in the results of the Court's cases, will bring a welcome coherence to the law developing around the body of the Constitution, and, more importantly, will help to ensure the future balance of government powers in a changing nation. Finally, this theory provides a rational structure for articles I, II, and III that also elucidates other areas of the law, including standing, delegation, and administrative due process.

I first discuss the current themes in the law of separated powers and the need for a new approach. I then examine the historical relationship between the doctrine of separated powers and ordered liberty. I conclude that government action that jeopardizes government process poses a concomitant danger to individual rights and that the potential for such danger should therefore be a significant factor in separation-of-powers analysis. I show that concern for the principle of due process has appeared repeatedly in

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[9] This Article is limited in scope to those separation-of-powers conflicts that end up before the Judiciary. This class of conflicts is quite small relative to the large number of situations in which the branches of government routinely contend for, share, and allocate power without ever going to court. But it is principally the former class that raises significant issues of legal analysis and theory, the latter being driven by predominantly customary and political considerations. Whether the theory espoused here could aid in the resolution of extra-judicial conflicts of separated powers is a subject for another article.

the Court's separation-of-powers cases. The Court and individual justices have attached individual rights implications to structural analyses in ways that would make no sense were it not for some unspoken or perhaps even unconscious perception that they belong there. At the same time, however, the Court has not yet expressly recognized individual liberty as an important value in resolving structural issues. I argue that it is such a value, and also show the importance of the due-process theory to the law of standing, the nondelegation doctrine, and the separation of functions in administrative agencies.

Finally, I examine the major cases involving separated powers and discuss how my theory would change their constitutional analyses. Employing the "ordered-liberty" model of separated powers I set forth would secure for the body of the Constitution the dignity, intelligibility, and purpose that its historical traditions suggest.

I. THE JURISPRUDENCE OF SEPARATED POWERS

A. *The Supreme Court's Ad Hoc Approach.*

Unanimity among constitutional scholars is all but unheard of. Perhaps when achieved it should be celebrated. But one point on which the literature has spoken virtually in unison is no cause for celebration: the Supreme Court's treatment of the constitutional separation of powers is an incoherent muddle.[10]

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[10] *See, e.g.*, Carter, *From* Sick Chicken *to* Synar: *The Evolution and Subsequent De-Evolution of the Separation of Powers*, 1987 B.Y.U.L. REV. 719, 721 [hereinafter Carter, *Evolution*] (arguing that the Court's reasoning in separation-of-powers cases lacks analytical coherence); Carter, *The Independent Counsel Mess*, 102 HARV. L. REV. 105, 127-28 (1988) [hereinafter Carter, *Mess*] (noting that the Court, by upholding judicial appointment of independent counsel to investigate alleged wrongdoing in the executive branch in Morrison v. Olson, 487 U.S. 654 (1988), sounded a sudden retreat from traditional separation-of-powers jurisprudence); Chemerinsky, *A Paradox Without a Principle: A Comment on the Burger Court's Jurisprudence in Separation of Powers Cases*, 60 S. CAL. L. REV. 1083, 1085-86 (1987) (finding no justification for the Burger Court's inconsistencies); Elliott, *supra* note 7, at 507 (stating that the Court has failed to develop a law of separation of powers); Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions–A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 489-96 (1987) [hereinafter Strauss, *Approaches*] (asserting that the Court has adopted inconsistent reasoning styles); Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L.J. 789, 817-18 [hereinafter Strauss, *Veto Decision*] (contending that the Court's decision in INS v. Chadha, 462 U.S. 919 (1983), created confusion regarding constitutional process in regulatory setting); Verkuil, *supra* note 4, at 312 (insisting that the Court is searching for "sure

The criticism here is not the familiar lament that the Court has gotten it wrong. In the field of separated powers the Court has not really "gotten it" at all. It has adopted no theory, embraced no doctrine, endorsed no philosophy, that would provide even a starting-point for debate. The Court has appeared to decide each case as if it were the first of its kind, with each individual justice apparently weighing costs and benefits according to some idiosyncratic scale of values, often unarticulated, and which may vary from case to case. The decisions reached in this ad hoc manner have not necessarily been wrong, but neither have they required the Court to take a stand on what values the structural provisions of the Constitution should promote. Even if the results of these cases have not been particularly alarming, the absence of any intelligible foundation for those results certainly is.[11]

The judicial opinions addressing the separation of powers over the past decade tend to place primary emphasis not on the prevention of tyranny or protection of individual liberties, but on the advancement of the institutional interests of the branches themselves,[12] as if that goal were itself a good—a proposition with no historical support. When possible excesses by one branch

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guide" to separation-of-powers cases); Note, *Separation of Powers: A New Look at the Functionalist Approach*, 40 CASE W. RES. 331, 331 (1989-90) (maintaining that the Court has used two inconsistent modes of analysis in addressing recent separation-of-powers issues). *But see* Stern, *The Separation of Powers Cases: Not Really a Mess*, 31 ARIZ. L. REV. 461, 464 (1989) (defending Court's reasoning in its separation-of-powers jurisprudence).

[11] Also somewhat alarming is the cynical speculation that the Court's ad hoc approach masks a more troubling agenda of favoring the Executive over Congress. *See* Chemerinsky, *supra* note 10, at 1084. Such speculation seems less plausible as applied to the Rehnquist Court, which in deciding Morrison v. Olson, 487 U.S. 654 (1988), employed a functionalist analysis and rejected the Executive's position on the constitutional issues presented. *See infra* notes 130-37, 218-21 and accompanying text (discussing *Morrison*).

[12] *See* Strauss, *supra* note 4, at 309-10. The seeds of this trend can be seen as early as 1932 in Crowell v. Benson, 285 U.S. 22 (1932). The Court distinguished between the "simpl[e] . . . question of due process in relation to notice and hearing" and "the question whether the Congress may substitute for constitutional courts, in which the judicial power . . . is vested, an administrative agency." *Id.* at 56. The Court approached the issue from the perspective of the Judicial Branch, seeming to suggest that as long as its essential attributes were not jeopardized, delegation of judicial power to non-article III bodies would be constitutionally permissible. *See id.* at 54. Other early warning signs of the institutional analysis can be found in Myers v. United States, 272 U.S. 52 (1926) (stating that postmaster's duties are executive in nature; President must have unrestricted power of removal) and Humphrey's Ex'r v. United States, 295 U.S. 602 (1935) (noting that the Federal Trade Commission is neither "arm" nor "eye" of the Executive and must be free from executive control).

present issues that cannot be resolved easily by resort to the text of the Constitution, the Court simply asks whether the territorial boundaries of the "victim" branch have been violated. The Court's ultimate goal appears to be to protect the interests of each branch—its "turf"—against encroachment by the others. Hence, the Court has viewed the separation of powers as "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of another."[13]

A representative example is *Morrison v. Olson*,[14] in which both the majority and the dissent took this institutional-interests approach, disagreeing only on the extent of the turf at stake. *Morrison* presented a challenge to the independent counsel scheme established by Title VI of the Ethics in Government Act of 1978.[15] The Act provided for the appointment, under specified circumstances, of an independent counsel to investigate and prosecute crimes when certain high-ranking executive officials came under suspicion. The statute thus removed those limited prosecutorial functions from the exclusive control of the President. The appellee, Olson, argued, among other things, that in doing so the Act violated the principle of separation of powers.[16] A majority of the Court found no constitutional violation because the Act did not "pose a 'dange[r] of congressional usurpation of Executive Branch functions.'"[17] Justice Scalia, in a vituperative dissent, thought it obvious that the statute unlawfully deprived the Executive of exclusive power over the execution of the laws.[18] Both sides appeared to agree that the Court should be concerned principally with the degree of encroachment upon the "turf" of the Executive Branch. Other cases display the same distressing inclination.[19]

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[13] Buckley v. Valeo, 424 U.S. 1, 122 (1976).

[14] 487 U.S. 654 (1988).

[15] Pub. L. No. 95-521, 92 Stat. 1824, 1867-75 (amended by the Ethics in Government Act of 1982, Pub. L. No. 97-409, 96 Stat. 2039, and the Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, 101 Stat. 1293) (codified at 28 U.S.C. §§ 591-599 (1988)).

[16] *See Morrison*, 487 U.S. at 693.

[17] *Id.* at 694 (quoting Bowsher v. Synar, 478 U.S. 714, 727 (1986)).

[18] *See id.* at 708-12 (Scalia, J., dissenting).

[19] *See infra* notes 122-29, 138-62 and accompanying text (discussing institutional-interests approach taken by the Court in Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986), Mistretta v. United States, 488 U.S. 361 (1989), INS v. Chadha, 462 U.S. 919 (1983), and Bowsher v. Synar, 478 U.S. 714 (1986)).

This trend marks a disturbing departure from the original objectives underlying the separation of powers.[20] Rather than reinforcing a governmental design that furthers the public good,[21] the Court's institutional rhetoric suggests an aim of preserving the government for its own sake. On the whole, the Court's separation-of-powers decisions have protected the mechanics of government operations, and while this has often led to correct results, there is no look beyond any specific case to a higher objective that the separation of powers may serve. The operation has been a success thus far, but the patient may be dying.

What the Court has not even pretended to achieve for the body of the Constitution—fidelity to the document's animating principles—it has unapologetically sought in its interpretations of the Bill of Rights. Take the eighth amendment, for example. In determining whether government action constitutes such "cruel and unusual punishment" as is barred by that amendment, the Court from the beginning has turned to the goals those elusive words might have been intended to promote. Initially the Court articulated the philosophy that the words used in the eighth amendment should be given the same application they had originally. This "historical" mode led it to invalidate only those actions that would have been considered "cruel and unusual" in 1789.[22] Later, the Court looked to the Constitution and concluded that the purpose of the amendment was not only to bar procedures condemned in 1789, but also to prevent novel forms of cruelty.[23] This more expansive view of the eighth amendment's purpose became the standard informing the Court's resolution of cases arising under it. More recently, the Court has found that "the Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[24] This is but another interpretative standard, yet the Court still relies on a vision of the amendment's underlying goal and spirit in the process of deciding cases.

Thus while the Court's understanding of the eighth amendment has undergone a series of radical changes over time, and while the justices clearly make no pretense of agreeing among themselves

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[20] *See infra* notes 83-85 and accompanying text.

[21] *See* THE FEDERALIST NO. 51, at 337 (A. Hamilton or J. Madison) (Modern Library ed. 1937) ("the private interest of every individual may be a sentinel over the public rights").

[22] *See In re* Kemmler, 136 U.S. 436, 446-47 (1890).

[23] *See* Weems v. United States, 217 U.S. 349, 368-72 (1910).

[24] Trop v. Dulles, 356 U.S. 86, 101 (1958).

regarding the objectives to which the constitutional language points,[25] the Court has consistently striven to identify those objectives, referring to them for guidance as a matter of course. Yet neither the method of constitutional reasoning nor the profound historical analysis and eloquence of expression which have characterized the Court's eighth amendment decisions have been brought to bear in its separation-of-powers cases. The same may be said of the Court's treatment of other individual rights issues,[26] leaving those cases involving the structure of government—those arising under the body of the Constitution (articles I, II, and III)—as perhaps the only group of cases without an animating spirit.

Admittedly, the tasks are somewhat different. Interpretation of the Bill of Rights begins with very broad, grand, and often fluid textual provisions—"freedom of speech," "unreasonable searches and seizures," "due process of law," "cruel and unusual punishment"—that are more the embodiment of philosophical aspirations than specific rules of conduct. The Court must attempt to understand the nature and contours of such lofty norms before it can give them meaning in specific factual contexts. In the context of the Bill of Rights, the Court has taken that obligation quite seriously.

The process of interpreting the structural requirements of the Constitution works just the other way around. The Constitution articulates no general principle of separated powers.[27] Articles I, II, and III contain no broad normative phrases at all. Instead they articulate specific rules for allocating and exercising government power.[28] From those specifics, the Court must determine the validity of other specific acts not mentioned in the text—as if the eighth amendment did not prohibit cruel and unusual punishment generally, but specifically outlawed thumb screws, decapitation, and the rack, leaving the Court to decide whether the list should include

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[25] *See, e.g.*, Furman v. Georgia, 408 U.S. 238 (1972) (setting forth five different opinions on why the death penalty violates the eighth amendment and four on why it does not).

[26] *See* Elliott, *supra* note 7, at 509-10, 510 n.10 (describing the "splendid conceptual and rhetorical edifices that judges have constructed under the First Amendment").

[27] *See infra* notes 112-18 and accompanying text (explaining that such a provision was proposed and rejected).

[28] *See* Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 YALE L.J. 821, 854 (1985) (explaining the specificity of the structural provisions). *See generally* C. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 3-32 (1969) (advocating a method of interpretation that takes into account the structure and relationships created by the Constitution).

electrocution. Unable to reason from specific to specific, the Court has approached questions arising under articles I, II, and III either by forcing the issue of the case, often artificially, into terms that bring it within the express language of one of the specific provisions,[29] or by supplying some ad hoc general principle of its own.[30] Under these circumstances, it is easy to lose sight of the big picture.

B. *Critical Approaches: Formalism and Functionalism*

The lack of analytic consistency has exasperated the critics. Most writers in the field have proceeded by selecting the interpretative theory they consider superior, then evaluating each of the Court's separation-of-powers decisions against the template of that theory. Because the Court has failed to adopt its own theory, invariably some of its opinions pass muster and others do not, depending upon the perspective of the scholar. Even those decisions that do correspond in result to the author's recommendations generally do so for the wrong reasons—again because of the absence of theoretical foundation.[31]

The most prominent theories of constitutional interpretation to be superimposed upon the separation-of-powers cases by and large track the traditional "formalist" and "functionalist" approaches to constitutional interpretation.[32] Other terminology has been offered by various scholars, who have staked claims for a "de-evolutionary" versus an "evolutionary" approach;[33] a "neoclassical"

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[29] *See, e.g., Morrison*, 487 U.S. at 675-77 (using narrow language of the appointments clause); Bowsher v. Synar, 478 U.S. 714, 732-33 (1986) (emphasizing the Constitution's use of the term "executive").

[30] *Compare* Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935) (describing "fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others") *with* Mistretta v. United States, 488 U.S. 361, 381 (1989) ("the greatest security against tyranny . . . lies not in a hermetic division between the Branches, but in a carefully crafted system of checked and balanced power within each Branch").

[31] *See* Elliott, INS v. Chadha: *The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125, 127, 149 (arguing that *Chadha* reached right result for wrong reasons).

[32] Some advocate a formalist approach to structural issues and a functionalist approach to interpreting the Bill of Rights. *See* M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 37-60, 91-145 (1982); Carter, *supra* note 28, at 863-64.

[33] *See* Carter, *Evolution*, *supra* note 10, at 719-20. Professor Carter develops two strands of interpretative theory in separation-of-powers cases. The evolutionary tradition recognizes the need to defer to Congress in its efforts to adapt the powers

versus a "pragmatic" approach;[34] an "originalist" versus a "non-originalist" interpretation,[35] or judicial "literalism" versus judicial "interpretation."[36] On closer inspection these theories appear to present pretty much the same dichotomy, and fit reasonably well within the general descriptions of the formalist and functionalist schools.[37]

Those who espouse the formalist view of separated powers seek judicial legitimacy by insisting upon a firm textual basis in the Constitution for any governmental act.[38] They posit that the structural provisions of the Constitution should be understood solely by their literal language and the drafters' original intent regarding their application, giving little or no weight to the influence of changed circumstances or broad objectives such as good or efficient government.[39] The formalist approach is com-

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of the federal government to changing needs. The de-evolutionary tradition rejects these evolutionary tendencies and urges a return to the Framers' original design. *See id.*

[34] *See* Miller, *Independent Agencies,* 1986 SUP. CT. REV. 41, 52. Professor Miller describes the pragmatic view, dominant on the Court between the 1930s and the 1970s, as endorsing a practical, flexible approach, "such that the division of powers between the branches, and the system of checks and balances by which those powers are related to one another, can . . . stretch[] . . . to accommodate the changing needs of modern society." *Id.* In contrast, the neoclassical view "de-emphasizes the importance of convenience and efficiency," and "emphasizes instead the 'constitutional design for the separation of powers' and the 'structure of the articles delegating and separating powers.'" *Id.* at 53-54 (quoting INS v. Chadha, 462 U.S. 919, 946 (1983)).

[35] *See generally* Brest, *The Misconceived Quest for the Original Understanding,* 60 B.U.L. REV. 204, 205-24 (1980) (cataloguing the meanings of originalism).

[36] *See* Elliott, *supra* note 10, at 509. Professor Elliott describes literalism as a "negative," "simplistic," "even slavish obeisance to the Framers' intentions on the specifics of governmental organization and structure." *Id.* at 511. Interpretation, in contrast, "asks not only *what* the Framers did, but also *why*." *Id.* at 532. *See also* Grey, *Do We Have an Unwritten Constitution?,* 27 STAN. L. REV. 703, 703 (1975) (noting that former Justice Black's literalist approach to constitutional adjudication may be returning to favor).

[37] *See* Carter, *Mess, supra* note 10, at 109 n.11 (arguing that differences are principally in emphasis). My description of the two schools will necessarily be inadequate because of its generality and brevity. With apologies to those whose views I have given short shrift, I emphasize that this discussion is primarily for illustration and contrast, and does not play a substantive role in the theory I am setting forth in this Article.

[38] *See* Carter, *supra* note 28, at 855; Carter, *Mess, supra* note 10, at 106.

[39] *See Chadha,* 462 U.S. at 958-59 ("it is crystal clear . . . that the Framers ranked other values higher than efficiency"); Bowsher v. Synar, 478 U.S. 714, 736 (1986) ("'[T]he 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.'" (quoting *Chadha,* 462 U.S. at 944)).

mitted to strong substantive separations between the branches of government,[40] finding support in the traditional expositions of the theme of "pure" separated powers, such as the maxim that "the legislature makes, the executive executes, and the judiciary construes the law."[41] Thus the formalists attempt to ensure that exercise of governmental power comports strictly with the original blueprint laid down in articles I, II, and III of the Constitution.[42] Under formalist thinking, the creation of independent administrative agencies, for example, is considered a violation of the Constitution because such agencies require the exercise of governmental power in ways that involve an overlap of expressly assigned functions, subject to the control of none of the three branches.[43]

The implications and consequences of formalism are significant. First, it depends upon a belief that legislative, executive, and judicial powers are inherently distinguishable as well as separable from one another—a highly questionable premise.[44] Moreover, formalism

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[40] *See Bowsher*, 478 U.S. at 725 ("'The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question'" (quoting Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935))).

[41] Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 46 (1825).

[42] *See, e.g., Morrison*, 487 U.S. at 697 (Scalia, J., dissenting) ("The Framers of the Federal Constitution similarly viewed the principle of separation of powers as the absolutely central guarantee of a just government"); Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253, 1261-72 (1988) (discussing how constitutional restraints on each branch of government act as self-executing mechanisms for minimizing interbranch conflict).

[43] *See* Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451, 498-99 (1979); Miller, *supra* note 34, at 54-55.

[44] In his dissent in *Morrison*, for example, Justice Scalia admitted of "no possible doubt" that "prosecution of crimes is a quintessentially executive function." 487 U.S. at 706. Yet several historically-based analyses of that question have reached a different conclusion. *See, e.g.*, Carter, *Mess*, *supra* note 10, at 126 (discussing dual system of public and private prosecution in colonial America); Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474, 489 (1989) (arguing that Justice Scalia is unaware of historical evidence); Krent, *Executive Control Over Criminal Law Enforcement: Some Lessons From History*, 38 AM. U.L. REV. 275, 281 (1989) (disputing Justice Scalia's conclusion that criminal law enforcement is a core executive function). Even for Madison, rigid categorization of functions as executive, legislative, or judicial was impossible and unreliable. *See* THE FEDERALIST NO. 37, at 228 (J. Madison) (Modern Library ed. 1937) ("Experience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces—the legislative, executive and judiciary"). *See also* Springer v. Philippine Islands, 277 U.S. 189, 211 (1928) (Holmes and Brandeis, JJ., dissenting) ("we do not and cannot carry out the distinction between legislative and executive action with mathematical precision and divide the branches into watertight compartments"); Sargentich, *The Contemporary Debate About*

tends to produce excessively mechanical results. Two of the Court's most clearly formalist opinions—*INS v. Chadha*,[45] which struck down the legislative veto, and *Bowsher v. Synar*,[46] which invalidated provisions of the Gramm-Rudman-Hollings Act that vested budget-cutting authority in the Comptroller General[47]—have been criticized on that ground.[48] This is not to say that the formalists are unconcerned with the results of their analysis. Indeed, they often justify their approach by insisting that rigid adherence to the strict constitutional design is the only, or at least the best, way to ensure that liberty survives.[49] But the means has become too important and the end not important enough to the formalist school, so that the "forest" of individual liberty is often lost in the "trees" of absolute fealty to the Framers' words. "To insist upon the maintenance of an absolute separation merely for the sake of doctrinal purity could severely hinder the quest for 'a workable government' with no appreciable gain for the cause of liberty or efficiency."[50]

Moreover, formalism, at least as promoted by Justice Scalia, appears to be concerned primarily with forcing the Court to adhere to bright-line rules to foster predictability and restraint in judging.[51] Thus, the particular choice of rules—and the attendant goals of each chosen rule—are secondary, and the liberty that separation

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Legislative-Executive Separation of Powers, 72 CORNELL L. REV. 430, 437-38 (1987) (noting that distinctions among various branches have been called into question).

[45] 462 U.S. 919 (1983).

[46] 478 U.S. 714 (1986).

[47] Both *Chadha* and *Bowsher* are discussed in greater detail below. *See infra* notes 148-62 and accompanying text.

[48] *See* L. FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 179-81 (1985); Elliot, *supra* note 31, at 144-45; Gewirtz, *Realism in Separation of Powers Thinking*, 30 WM. & MARY L. REV. 343, 343-44 (1989); Kurland, *The Rise and Fall of the "Doctrine" of Separation of Powers*, 85 MICH. L. REV. 592, 592-93, 605-13 (1986); Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 633-36 (1984); Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 494 (1987); Tribe, *The Legislative Veto Decision: A Law By Any Other Name?*, 21 HARV. J. ON LEGIS. 1, 8-18 (1984).

[49] *See* Morrison v. Olson, 487 U.S. at 710-11 (Scalia, J., dissenting) (arguing that separation of powers operates to "ensure that we do not lose liberty"); *Chadha*, 462 U.S. at 959 ("we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution").

[50] Alfange, *The Supreme Court and the Separation of Powers: A Welcome Return to Normalcy?*, 58 GEO. WASH. L. REV. 668, 670 (1990).

[51] *See, e.g.*, Zeppos, *Justice Scalia's Textualism: The New "New Legal Process"*, 14 CARDOZO L. REV. (forthcoming); Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1354-55 (1990).

of powers theoretically protects may be sacrificed in a given case to the principal objective of determinacy in judicial decisionmaking.

An additional consequence of formalism is that it tends to straitjacket the government's ability to respond to new needs in creative ways, even if those ways pose no threat to whatever might be posited as the basic purposes of the constitutional structure.[52] And ironically, in light of the usual textualist support for judicial restraint, the Court is forced to engage in a relatively high degree of judicial activism. Formalism, although conceiving a narrow role for the Court, forces it to strike down any action for which it cannot find express textual justification in the Constitution, even when two branches of the federal government may have agreed or acquiesced in the use of certain powers.

Finally, formalism supports majoritarianism. It is no accident that many of those who advocate the formalist view of constitutional interpretation for separation-of-powers issues also strongly favor greater strength for the Executive Branch—a majoritarian institution—through a "unitary" theory of executive power.[53] Formalism restricts innovation in sharing power and encourages independence of the branches; in the modern era it has most often been Congress, as the instigator of political change through legislation, that has initiated new modes of allocating or sharing power, at least in the domestic sphere. Thus, the formalist view as understood by the Burger and Rehnquist Courts has tended to work to restrict Congress to the advantage of the Executive.[54] In the area of

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[52] *See, e.g.*, Gwyn, *supra* note 44, at 474-75 (contrasting the flexibility of the functionalist orientation with the rigidity of the formalist approach); Strauss, *supra* note 48, at 625-26 (criticizing preference of formalists for bright-line rules).

[53] The unitary executive contemplates a centralized and coordinated Executive Branch in which the President has unfettered control over any officer who can be said to exercise executive power. This scheme is the focus of much formalist writing. *See, e.g., Morrison*, 487 U.S. at 698-99 (Scalia, J., dissenting) (noting that the Framers consciously declined to weaken the Executive by dividing it); Carter, *Mess, supra* note 10, at 112 (noting that once a function is viewed as "executive," formalist approach would give President complete control over it); Miller, *supra* note 34, at 54-56 (advocating formalist approach in part on the ground that it promotes the unitary executive). *See generally* Cross, *The Surviving Significance of the Unitary Executive*, 27 HOUSTON L. REV. 599, 618-57 (1990) (arguing that the unitary executive is an important but not absolute constitutional principle); Pierce, *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1251-54 (1989) (offering a functional defense of the unitary executive).

[54] *Compare* Bowsher v. Synar, 478 U.S. 714, 734 (1986) (striking down Balanced Budget and Emergency Deficit Control Act on formalist theory) *and Chadha*, 462 U.S. at 958-59 (striking down legislative veto on formalist theory) *with* Mistretta v. United States, 488 U.S. 361, 412 (1989) (upholding Sentencing Act by rejecting formalist

foreign affairs, where the Executive traditionally has enjoyed more freedom to initiate policy, formalism would tend to work against the Executive Branch and in favor of Congress, also a majoritarian institution, in the same fashion.[55] Either way, however, formalism resists efforts to blend the areas of turf between Congress and the Executive; it promotes the passage of legislation and the execution of the laws strictly in the manner set forth in the Constitution. It thus ensures that the majoritarian political outcomes contemplated by the procedures outlined in articles I and II will not be compromised.[56]

In contrast, advocates of the "functionalist" approach urge the Court to ask a different question: whether an action of one branch interferes with one of the core functions of another.[57] The sharing of powers, in itself, is not repugnant to the functionalists, nor is the formation of alliances among the branches repugnant, as long as the basic principles of separated powers are not impaired.[58] The functionalist view follows a different strand of

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argument) *and Morrison*, 487 U.S. at 670-96 (upholding Ethics in Government Act by rejecting formalist argument).

[55] *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). When President Truman attempted to seize the steel mills under his powers as Commander-in-Chief, to secure the steel supply for use in the Korean conflict, the Court employed a formalist analysis in finding his action unconstitutional. It found that none of the President's express article II powers, read narrowly, permitted such an action in the absence of legislative authorization. *See id.* at 588-89. Similarly, a formalist approach in the case of Dames & Moore v. Regan, 453 U.S. 654 (1981), would have produced a decision against the President. There, the Court—using functionalist and not formalist analysis—upheld President Carter's executive agreement with Iran against a challenge that the Constitution does not authorize such executive agreements, but only treaties, which require ratification by the Senate. *See id.* at 686. A formalist treatment of the issue almost certainly would have produced the opposite result.

[56] *Chadha* is an example of the Court's insisting that action be taken by a majoritarian procedure—bicameral passage and presentment to the President—rather than by the less accountable committee or one-house action. Similarly, *Bowsher* prevented an attempt to allow action by a single person, the Comptroller General, who possessed the accountability of neither the entire Congress nor the President. By requiring that Congress as a whole perform the duties that the statute vested in the Comptroller General, the Court ensured that the powers so assigned would be exercised in ways acceptable to the majority. *See infra* notes 148-62 and accompanying text (discussing *Chadha* and *Bowsher*).

[57] *See Bowsher*, 478 U.S. at 776 (White, J., dissenting) ("[T]he role of this Court should be limited to determining whether the [act in issue] so alters the balance of authority among the branches of government as to pose a genuine threat to the basic division between the lawmaking power and the power to execute the law."); *see also* Nixon v. GSA, 433 U.S. 425, 443 (1977) (holding that separation-of-powers analysis must focus on the potential disruption of the balance of power among the coordinate branches of government).

[58] *See, e.g.*, Sargentich, *supra* note 44, at 433 (noting the functionalists' recognition

separation-of-powers tradition from that of the formalists: the American variant that stresses not the independence, but the interdependence of the branches. "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."[59]

Functionalism appears to bestow on judges a much greater discretion than does formalism. In order for the functionalist system to work, someone must determine what values or functions are central to the constitutional structure, and must define the extent to which changed circumstances should be permitted to influence that determination.[60] Functionalist analysis is criticized, therefore, for its indeterminacy and the inevitability of ad hoc decisionmaking under its influence.[61] In reality, however, the deference contemplated by functionalism has resulted in a less activist role for the Judiciary than has formalism—or at least it fosters activism of a different kind. While formalism nearly always results in striking down the challenged measure,[62] functionalism nearly always upholds it.[63] The activism of functionalism resides in the unguided discretion that it necessarily bestows on judges.

The functionalist approach, like the formalist, is majoritarian in outcome. Because it encourages cooperation among branches, it

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of the complex interaction among the various institutions of government).

[59] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

[60] *See* Sunstein, *supra* note 48, at 494-96. It is not clear what principles the Court is expected to employ in making these delicate determinations. "[T]he judge is left . . . to work out in every case whether the power that one branch has appropriated is too great, or whether the checks now available over another are too small, . . . a slender reed indeed to support a jurisprudence of separation of powers." Carter, *Evolution*, *supra* note 10, at 787.

[61] *See* Carter, *Constitutional Improprieties: Reflections on* Mistretta, Morrison, *and Administrative Government*, 57 U. CHI. L. REV. 357, 375-76 (1990).

[62] *See, e.g., Bowsher*, 478 U.S. 714 (rejecting as unconstitutional provisions of the Gramm-Rudman-Hollings Act); *Chadha*, 462 U.S. 919 (striking down the legislative veto); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (rejecting as unconstitutional provisions of the Bankruptcy Act of 1978); *Youngstown Sheet*, 343 U.S. 579 (blocking executive order directing Secretary of Commerce to seize steel mills); Myers v. United States, 272 U.S. 52 (1926) (holding that Senate cannot block President's removing an executive officer).

[63] *See, e.g.*, Mistretta v. United States, 488 U.S. 361 (1989) (upholding power of U.S. Sentencing Commission); Morrison v. Olson, 487 U.S. 654 (1988) (upholding appointment of independent counsel); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986) (upholding provisions of Commodities Exchange Act).

would likely permit schemes to which Congress and the Executive, the two majoritarian branches, give their assent. Thus it is a theory that employs the principle of judicial restraint,[64] and relies largely upon the departments of government themselves to work out what is best for them politically. This approach pays little attention to the effects of such inter-institutional alliances on those outside the government, namely private individuals. Within certain limits (and it is not clear exactly where those limits lie) the structure of government for the functionalists becomes a matter of politics, because the Court's deferential approach leaves the bulk of the responsibility for structural design to the elected departments of government.

An alternative to these two mechanisms for resolving separation-of-powers issues would leave all disputes between the Executive and Congress to the political process and rule them non-justiciable political questions.[65] The justification for this approach is that the branches are capable of protecting themselves, through the weapons provided them in the Constitution in the form of "checks and balances," against encroachments by the others. It is not at all clear, however, that such protection is possible.[66] Moreover, even if true balance could be achieved through judicial deference to the political branches, this would be insufficient to justify such deference: the Constitution envisages that the Judiciary will protect not the branches of government, but individuals.[67] Shielding the actions of the political branches from review invites them, through partisan allegiances or other institutional imbalance, to seek their own ends, to the ultimate detriment of individual rights.[68]

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[64] *See* Carter, *Evolution, supra* note 10, at 725.

[65] *See* J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 263 (1980). This idea was earlier expressed by Justice Holmes in Myers v. United States, 272 U.S. 52, 177 (1926) (dissenting opinion). It appears also to be the Court's current approach to issues of power-sharing between Congress and the states. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 551-52 (1985) (leaving protection of state sovereignty to political process because structure of federal government was designed to prevent congressional overreaching).

[66] *See* THE FEDERALIST NO. 51, *supra* note 21, at 338 ("But it is not possible to give to each department an equal power of self-defence.").

[67] *See infra* notes 83-86 and accompanying text.

[68] *See generally,* Alexander, *Separation of Powers After the Independent Counsel Decision,* 29 SANTA CLARA L. REV. 1, 1 (1989) ("[T]he Supreme Court should decline to hear cases presenting separation-of-powers issues in favor of allowing one of the other two branches of government to resolve them."); Sunstein, *supra* note 48, at 495 ("There is good reason to suppose that without adequate controls one branch will sometimes exercise too much power over the others.").

Thus the scholarly debate about separated powers has been polarized, for the most part, between the formalists and the functionalists—a battle between those who would pay the price of rigidity in order to achieve an elusive determinacy on the one hand,[69] and those who would pay the price of indeterminacy in order to achieve unguided flexibility on the other.[70] This debate goes wrong because it hangs in midair, moored to no grander objective than the abstract merits of the two relatively mechanical theories themselves—in the end no more than a question of where the proper point lies on the flexibility/determinacy matrix.

Missing from the analysis of both camps is an appropriate external value. By "appropriate," I mean a norm that is consistent with the reasons for separating powers in the first place. Few seem to be asking which (or what) approach to constitutional analysis—formalist, functionalist, or some other—will serve more reliably the underlying purposes of the constitutional provisions being interpreted. The formalists appear to assume that textualism brings legitimacy. And although the functionalists fairly lay claim to a concern for the Constitution's basic structural principles of "unitary execution of the laws, avoidance of factionalism, protection against self-interested or unaccountable representation, and promotion of deliberation in government,"[71] those goals address making government work, not toward what ends a government should work. By fostering a majoritarian approach to the achievement of these goals, the functionalists, too, overlook a fundamental element of the Constitution's plan for liberty: the need to place limits on what a majority may do to the individual.[72] Although the Bill of Rights

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[69] *See* Carter, *supra* note 61, at 357.

[70] *See, e.g.*, Bowsher v. Synar, 478 U.S. 714, 759 (White, J., dissenting) (deploring "the Court's willingness to interpose its distressingly formalistic view of separation of powers as a bar to the attainment of governmental objectives").

[71] Sunstein, *supra* note 48, at 495-96.

[72] *See, e.g.*, Letter from James Madison to Thomas Jefferson (October 17, 1788), *reprinted in* 1 L. POLLAK, THE CONSTITUTION AND THE SUPREME COURT 122 (1966):

> Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents.

A similar expression of this concern can be found in *The Federalist*:

> It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. . . . If a majority be united by a common

expressly serves that function in its own way, a comprehensive approach to overseeing the separated powers must also include the consideration of individual rights or sacrifice fidelity to the Framers' plan.[73]

A counter-majoritarian approach better addresses the underlying purposes of separated powers. Unlike both the formalist and functionalist schools, an "ordered-liberty" analysis would have the Court examine governmental acts in light of the degree to which they may tend to detract from fairness and accountability in the process of government. If process is impaired in this way, then the action poses a threat to individual liberty. The degree to which one branch may invade the institutional turf of another is irrelevant, as is the presence or absence of interbranch agreement to share turf. In either case, the Court should evaluate the potential effect of the action on the procedural rights of individuals. Interpreting the original body of the Constitution itself as containing such an inherent check on majority action effectuates a major tenet of the Framers.

II. THE HISTORICAL RELATIONSHIP BETWEEN ORDERED LIBERTY AND SEPARATED POWERS

The American Constitution does not mention a "doctrine" of separation of powers. There is no constitutional rule to be interpreted, no fixed or pure principle to employ that dictates the segregation of government functions. To the extent that such an explicit doctrine of absolute separation ever existed, the Framers rejected it.[74] The best evidence that the Framers intended to reject a strict separation of powers is that they created a system of checks and balances requiring participation by each branch in some functions that may be considered part of the power of the others—

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interest, the rights of the minority will be insecure.

THE FEDERALIST NO. 51, *supra* note 21, at 339 (A. Hamilton or J. Madison).

[73] *See* A. DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 246 & n.1 (J.P. Mayer ed. 1969) (noting that the Framers sought to limit "absolute sovereignty of the will of the majority"); Carter, *supra* note 61, at 385 (arguing that "putting the brakes on majority rule is precisely what a written Constitution is for" (citing A. BICKEL, THE LEAST DANGEROUS BRANCH 16-21 (1986))); Morrison, *A Non-Power Looks at Separation of Powers*, 79 GEO. L.J. 281, 282 (1990) (suggesting that "the Framers included separation of powers in the Constitution to protect all of the people").

[74] *See infra* notes 115-18 and accompanying text (discussing rejection of Madison's amendment, which would have incorporated the separation-of-powers principle into the text of the Constitution).

itself a violation of a pure theory of separated powers.[75] "Checks and balances do not arise from separation theory, but are at odds with it. Checks and balances have to do with corrective *invasion* of the separated powers."[76] It is worth remembering that the federalist defense of the Constitution's treatment of governmental structure focused not on the use of the separation device, but on the Constitution's numerous deviations from the pure separation model.[77]

We do know that the idea of identifying the functions of government as separable concepts, familiar to philosophers as early as Aristotle,[78] and that of reposing those functions in separate hands did not spring full-blown from the collective mind gathered at Philadelphia in 1787. Since the middle of the seventeenth century, the separation of executive, legislative, and, to a lesser extent, judicial[79] powers had been an increasingly popular focus

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[75] For example, the Executive participates in legislation through the veto power. U.S. CONST. art. I, § 7, cl. 3. The Congress participates in the making of treaties and the appointment of executive officers through Senate advice and consent. *See id.*, art. II, § 2, cl. 2. And both the Executive and the Congress participate in the exercise of judicial power through their power to enact legislation regarding the jurisdiction of the federal courts. *See id.*, art. III, § 1 & § 2, cl. 2.

[76] G. WILLS, EXPLAINING AMERICA: THE FEDERALIST 119 (1981).

[77] *See* THE FEDERALIST NO. 47, *supra* note 8, at 312 (responding to the "principal objection[]" that the Constitution violated the maxim that "the legislative, executive, and judiciary departments ought to be separate and distinct" by showing that in practice this maxim was nowhere regarded as requiring absolute separation); THE FEDERALIST NO. 48, at 321 (J. Madison) (Modern Library ed. 1937) (undertaking "to show that unless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation . . . essential to a free government can never in practice be duly maintained"); THE FEDERALIST NO. 51, *supra* note 21, at 336 (arguing that "some deviations" from principle of pure separation "must be admitted").

[78] Aristotle described the three elements of a constitution as, first, that "which deliberates about public affairs"; second, that element "concerned with the magistracies—the questions being, what they should be, over what they should exercise authority, and what should be the mode of electing to them"; and third, "that which has judicial power." ARISTOTLE, POLITICS, bk. IV, ch. 14, *reprinted in* BASIC WORKS OF ARISTOTLE 1225 (R. McKeon ed. 1970). Although this division roughly corresponds to modern notions of legislative, executive, and judicial powers, it is clear that Aristotle did not go so far as to advocate that the performance of those functions be kept separate. *See, e.g., id.* at bk. IV, ch. 15, *reprinted in* BASIC WORKS OF ARISTOTLE at 1229 ("There is no reason why the care of many offices should not be imposed on the same person, for they will not interfere with each other. When the population is small, offices should be like the spits which also serve to hold a lamp.").

[79] For the early separation-of-powers theorists, the power to judge was considered part of the executive power. *See* J. LOCKE, SECOND TREATISE OF GOVERNMENT 73 (J. Gough ed. 1976); T. PAINE, RIGHTS OF MAN, 207-31 (H. Collins ed. 1976). Indeed, even Montesquieu, who made the great innovative contribution of treating the

of attention among political theorists.[80] Over time, these theorists developed many variations on the basic separation-of-powers doctrine,[81] yet no single approach had succeeded in commanding universal accord.[82] One common thread, however, appeared: "From their inception most versions of the separation of powers maintained that the arrangement was a prerequisite for civil liberty, a condition of life for which England had long been famous."[83]

On the American side of the Atlantic the primary impetus for separated powers was the establishment and maintenance of political liberty. There was perhaps a secondary concern for greater efficiency in government,[84] but clearly "[t]he doctrine of the

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Judiciary as an independent force in government, seemed to treat it somewhat differently from the other two, using the term *"la puissance de juger"* (the ability to judge) consistently in his writings, rather than *"le pouvoir judiciaire"* (judicial power), in contrast to *"le pouvoir executif ou legislatif"* (executive or legislative power). *See* M. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 87 n.1 (1967).

[80] These include Buchanan, Nedham, Lilburne, Sir Henry Vane, John Hall, Pennington, Locke, Hay, Bolingbroke, Pitt, Montesquieu, John Adams, Rousseau, and de Lolme. *See generally* W. GWYN, THE MEANING OF THE SEPARATION OF POWERS (1965) (describing development of the doctrine in political theory up through adoption of the Constitution); *see also* J.S. MILL, ON LIBERTY 60 (G. Himmelfarb ed. 1978) (arguing that constitutional checks on government power are a necessary condition to liberty); M. VILE, *supra* note 79, at 86-87 (discussing the classification of government functions in Montesquieu and Locke).

[81] For example, the separation of powers in 17th- and 18th-century Europe had five possible objectives:

> (1) to create greater governmental efficiency; (2) to assure that statutory law is made in the common interest; (3) to assure that the law is impartially administered and that all administrators are under the law; (4) to allow the people's representatives to call executive officials to account for the abuse of their power; and (5) to establish a balance of governmental powers.

W. GWYN, *supra* note 80, at 127-28. It is clear that "[a]ll but the efficiency version are directly concerned with the maintenance of civil liberty and the avoidance of tyranny." *Id.* at 128.

[82] Many combined the notion of mixed government, which focused on ensuring that different classes of people were duly represented (as exemplified by the British House of Commons and House of Lords), with that of separation of powers, which involved a more functional examination of government that was not concerned with who performed various functions as long as they were not combined in the same person. The American idea of dissolving classes and allowing the "people" collectively to wield all power—combined with deteriorating relations with England—theoretically eliminated the need for any accommodation of the mixed government ideals in the Constitution. *See* M. VILE, *supra* note 79, at 124-26.

[83] W. GWYN, *supra* note 80, at 11.

[84] Experience with the ineffectual Continental Congress contributed to a concern among the Framers for a more effective government. *See, e.g.*, J. ADAMS, 4 WORKS OF JOHN ADAMS 488, 582 (C.F. Adams ed. 1851) (arguing that checks and balances are needed to temper the Executive Branch); Letter from Thomas Jefferson to Edward

separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power."[85] In general, then, separation of powers aimed at the interconnected goals of preventing tyranny and protecting liberty.[86] Of course, different writers have defended different notions of what those terms meant, but it is not inaccurate to define tyranny as fear of "arbitrary government."[87] A short definition of political liberty is a bit more difficult to come by. Montesquieu, generally regarded as a principal philosophical progenitor of the American system of separated powers,[88] defined "[t]he political liberty of the subject" as "a tranquillity of mind arising from the opinion each person has of his safety. In order to have this liberty," he asserted, "it is requisite the government be so constituted as one man need not be afraid of another."[89] Thus, whatever else we might say, liberty depends on some notion of predictability, or perhaps rationality, in government as a basic prerequisite to fair decision-making.

Carrington (Aug. 4, 1787) *reprinted in* T. JEFFERSON, MEMOIR, CORRESPONDENCE, AND MISCELLANIES 202-03 (T.J. Randolph ed. 1829) (suggesting that executive and legislative functions should be separated for more efficient government). Yet that concern is more an argument for creating an executive capable of acting quickly and efficiently than for maintaining strict separation among the branches. Both Adams and Jefferson recognized that the prevention of tyranny was the chief argument in favor of the separated powers. *See* Sharp, *The Classical American Doctrine of "The Separation of Powers,"* 2 U. CHI. L. REV. 385, 396-97, 400 (1935) (noting that protection from tyranny was Adams' primary argument for separation of powers and that Jefferson was concerned that private property be protected from legislative overreaching); *see also* J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 197 (1987) (stating that separation of powers is "indispensable to public liberty").

[85] Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

[86] *See* W. BONDY, THE SEPARATION OF GOVERNMENTAL POWERS IN HISTORY, IN THEORY, AND IN THE CONSTITUTIONS 13-14 (1967) (noting that Montesquieu was the first to assert that separation of powers is crucial to civil liberty, a proposition with which Blackstone agreed); P. CONKIN, SELF-EVIDENT TRUTHS: BEING A DISCOURSE ON THE ORIGINS AND DEVELOPMENT OF THE FIRST PRINCIPLES OF AMERICAN GOVERNMENT—POPULAR SOVEREIGNTY, NATURAL RIGHTS, AND BALANCE AND SEPARATION OF POWERS (1974) (noting that the notion that government balance protected liberty was an ancient tenet); SEPARATION OF POWERS IN THE AMERICAN POLITICAL SYSTEM 15 (B. Knight ed. 1989) (arguing that it is the distinctly American separation of powers permitting each branch to have "'self-interest rightly understood' that prevents majority tyranny and enhances liberty").

[87] W. GWYN, *supra* note 80, at 57.

[88] *See* THE FEDERALIST NO. 47, *supra* note 8, at 313-314; P. SPURLIN, MONTESQUIEU IN AMERICA, 1760-1801, at 255 (1969); Bowsher v. Synar, 478 U.S. 714, 721-22 (1986).

[89] C. MONTESQUIEU, THE SPIRIT OF THE LAWS 151 (T. Nugent trans. 1949); *see also id.* at 149.

Montesquieu elaborated elsewhere upon what would be lost if the separation of powers was not observed:

> When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty . . . .
>
> Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the *life and liberty of the subject would be exposed to arbitrary control*; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.
>
> There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.[90]

From a modern perspective, what Montesquieu described as a structural problem translates easily into the concept of due process. For example, twentieth-century due process prevents a court from retroactively expanding the reach of certain laws,[91] which ensures separation of legislative and judicial functions—a concern Montesquieu identifies. Due process also guarantees trial by independent tribunal,[92] which ensures the separation of executive and judicial functions—another of Montesquieu's stated goals. Thus, it is fair to say that, for Montesquieu, the unification or combination of the institutional powers would mean the loss of the values that now underlie the protections of due process.

Montesquieu was by no means alone in this perception:

> If a Parliament should execute the Law they might doe palpable injustice, and male administer it, and so the people would be rob'd of their intended and extraordinary benefit of appeales; for in such cases they must appeale to Parliament either against it self, or part of it self; and can it ever be imagined they will ever condemme themselves, or punish themselves?[93]

Again, the author's description of the evils of consolidated power presages a basic due-process tenet: the importance of an opportunity for independent review.[94] John Locke is credited with the same

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[90] *Id.* at 151-52 (emphasis added).

[91] *See* Bouie v. Columbia, 378 U.S. 347, 353-54 (1964).

[92] *See* Wong Yang Sung v. McGrath, 339 U.S. 33, 50-51 (1950).

[93] Lilburne, *The Picture of the Councel of State*, in LEVELLER TRACTS 197 (W. Haller & G. Davies eds. 1944), *quoted in* W. GWYN, *supra* note 80, at 42.

[94] *See* Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287, 289 (1920).

insight, criticizing "absolute monarchies, which, by violating the separation of powers, frustrate the possibility of achieving an impartial administration of the laws"[95]—another danger coextensive with the breakdown of due process of law.[96]

Montesquieu articulated other potential hazards that separation of powers was thought to forestall. He saw the exercise of judicial power as posing the greatest threat to the liberty of the people. He recognized that the legislature and executive are concerned with general rules, which might be good or bad for the masses. A genuine loss of liberty, however, could come only from a judicial decision, which determines how the laws affect individuals under specific circumstances.[97] Consequently, Montesquieu emphasized the importance of judicial procedures, even when costly or cumbersome, as a protection for the individual from this type of harm—as a guarantor of "liberty."[98] "This insistence upon 'due process', a phrase Montesquieu does not use but which . . . was current in seventeenth-century England, is of the essence of the doctrine of constitutionalism, in the development of which his thought forms such an important step."[99] Thus Montesquieu, for whom separated powers was essential to liberty, contended that fair process was similarly essential, suggesting a syllogistic link between the structure of government and the protection of individual rights—specifically, the right to fair treatment by the government, or ordered liberty.

The Constitution adheres to this principle of structural protection for individuals even more rigorously, in some ways, than Montesquieu would have done. Montesquieu tolerated one exception to the ordinary separation between legislative and judicial powers. He viewed the British Parliament's ability to pass bills of attainder (legislative declarations of guilt and punishment of individuals) as a necessary, single instance in which a branch other than the Judiciary should be permitted to make a decision affecting

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[95] W. GWYN, *supra* note 80, at 71.

[96] *See* Tumey v. Ohio, 273 U.S. 510, 523 (1927) (stating that due process is violated when a defendant's "liberty or property [is subjected] to the judgment of a court the judge of which has a direct personal, substantial, pecuniary interest in reaching a decision against him").

[97] *See* W. GWYN, *supra* note 80, at 103; M. VILE, *supra* note 79, at 88. *See also* A. BICKEL, *supra* note 73, at 16-23 (arguing that judicial review involves construing the Constitution against the wishes of the majority).

[98] *See* M. VILE, *supra* note 79, at 89-90.

[99] *Id.* at 90.

the liberty of an individual. "In countries where liberty is most esteemed, there are laws by which a single person is deprived of it, in order to preserve it for the whole community."[100] The United States Constitution, on the other hand, expressly prohibits this particular departure from the principle of separated powers,[101] which has significant, direct consequences for individual rights, even though it permits, through checks and balances, other ways of blending powers that do not so clearly affect individuals. Thus the constitutional structure is consistent with a philosophy of permitting deviations from separated powers only when they do not jeopardize civil liberty.[102]

The Declaration of Independence confirms that the Framers perceived a correlation between structure and rights. That document purported to contain a list of ways in which the King of England had transgressed the colonists' understanding of appropriate rule, and also documented some of the consequences that had flowed from the monarch's usurpations of the Americans' liberty. Among these were the following:

> - He [the King] has refused his assent to laws the most wholesome & necessary for the public good. . . .
>
> - He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public records, for the sole purpose of fatiguing them into compliance with his measures. . . .
>
> - He has obstructed the administration of justice by refusing his assent to laws for establishing judiciary powers.
>
> - He has made . . . judges dependent on his will alone . . . .[103]

Thus, the King had interfered in and commingled the legislative, executive, and judicial powers of the government—exercising unbridled discretion—and consequently had caused massive "invasions on the rights of the people."[104] "A prince whose character is thus marked by every act which may define a tyrant is

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[100] C. MONTESQUIEU, *supra* note 89, at 199.

[101] *See* U.S. CONST. art. I, § 9, cl. 3 (Bill of Attainder Clause).

[102] It is noteworthy that the Executive's only constitutionally sanctioned power to act in individual cases—the pardon power—can serve only to benefit, not to punish individuals. *See* U.S. CONST. art. II, § 2, cl. 1.

[103] The Declaration of Independence para. 2 (U.S. 1776), *reprinted in* T. JEFFERSON, *supra* note 8, at 20.

[104] *Id.*

unfit to be the ruler of a free people . . . ."[105] The Framers' recent experience taught them that abandonment of separated powers led directly to the loss of accountable, impartial government, which, in turn, led inevitably to the loss of due process and individual rights. The Constitution they wrote responded to this experience.

At the time the Framers met in 1787, the original states already had constitutions of their own. With regard to the establishment of the three departments of government in particular, the Framers were clearly influenced by the experiences of the various states.[106] The Constitutions of the states of Maryland,[107] Massachusetts,[108] New Hampshire,[109] North Carolina,[110] and Virginia[111] all contained statements explicitly addressing a "separation of powers." Indeed, that principle actually appears in the bill of rights sections of those five state constitutions. Thus the idea that the separation of powers is inextricably linked to the protection of guaranteed rights finds support in the historical practice most immediately familiar to those who drafted the federal Constitution.

It is not clear why the Constitution did not provide an express guarantee of separated powers.[112] The structural provisions contained in articles I, II and III, in addition to the few expressly declared rights that appear in the Constitution proper,[113] together would have provided the protection of individual rights that all agreed was imperative. As Alexander Hamilton protested in defense of the original Constitution without a bill of rights, it "is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS."[114]

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[105] *Id.* at 22.

[106] *See* THE FEDERALIST NO. 47, *supra* note 8, at 316-20.

[107] *See* 3 AMERICAN CHARTERS, CONSTITUTIONS, AND ORGANIC LAWS 1492-1908, at 1687 (K.N. Thorpe ed. 1906) (MD. CONST., Declaration of Rights, & C., art. VI (1776)).

[108] *See id.* at 1893 (MASS. CONST., A Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts, art. XXX (1780)).

[109] *See* 4 *id.* at 2457 (N.H. CONST., The Bill of Rights, art. XXXVII (1784)).

[110] *See* 5 *id.* at 2787 (N.C. CONST., A Declaration of Rights, & C., art. IV (1776)).

[111] *See* 7 *id.* at 3813 (VA. CONST., Bill of Rights, § 5 (1776)).

[112] *See* Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 222 (1989).

[113] These include the provision governing impeachment, U.S. CONST. art. I, § 3, cl. 7; suspension of habeas corpus, art. I, § 9, cl. 2; bills of attainder and *ex post facto* laws, art. I, § 9, cl. 3; titles of nobility, art. I, § 9, cl. 8; trial by jury in criminal cases, art. III, § 2, cl. 3; and treason, art. III, § 3.

[114] THE FEDERALIST NO. 84, *supra* note 7, at 561.

James Madison actually proposed in 1789 that a new article be added to the original Constitution, articulating the American version of the separation-of-powers principle:

> The powers delegated by this constitution, are appropriated to the departments to which they are respectively distributed: so that the legislative department shall never exercise the powers vested in the executive or judicial; nor the executive exercise the powers vested in the legislative or judicial; nor the judicial exercise the powers vested in the legislative or executive departments.[115]

The amendment was adopted by the House,[116] but defeated by the Senate.[117] Later, in the ratifying conventions, a similar amendment that would have joined the Bill of Rights as part of the tenth amendment was also rejected.[118]

The Framers' French contemporaries also regarded separation of powers as an indispensable correlative of fundamental rights. The French Declaration of the Rights of Man of 1789 eloquently affirmed that "[a] society in which the guarantee of rights is not assured, nor the separation of powers provided for, has no constitution."[119]

These circumstances provide powerful historical instruction to those interpreting the Constitution to consider the protection of individual rights as a guiding principle in issues involving separated powers. Thus as a general goal of constitutional interpretation, the Court should set for itself the object of applying the structural provisions found in articles I, II and III so as to ensure that, whatever experiments the branches make with the allocation of governmental power, flexibility or inflexibility will be tolerated only to the extent that it is consistent with the protection of individual liberty—due process of law.

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[115] 12 THE PAPERS OF JAMES MADISON 202 (C. Hobson & R. Rutland eds. 1979). *See* E. DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 36-39 (1957) (discussing Madison's proposed amendments).

[116] *See* E. DUMBAULD, *supra* note 115, at 216.

[117] *See* 2 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1123, 1146, 1150 (1971). It is not clear why the Senate rejected the amendment. According to Provost Casper, "[o]ne can only surmise that the Senate was not eager to adopt separation of powers as an independent doctrine or even as a mere principle of construction for the many and subtle 'mixing' decisions of the framers, some of which benefitted the Senate." Casper, *supra* note 112, at 222.

[118] *See* Fisher, *The Efficiency Side of Separated Powers*, 5 J. AM. STUD. 113, 129-31 (1971).

[119] J. GODECHOT, LES CONSTITUTIONS DE LA FRANCE DEPUIS 1789, at 35 (1970).

The question in a given case, then, is not whether a particular action by one branch has impaired "[t]he fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others,"[120] as the formalists would have it. Nor is it whether the challenged act "so alters the balance of authority among the branches of government as to pose a genuine threat to the basic division between the lawmaking power and the power to execute the law,"[121] as the functionalists would ask the question. Rather, the Court should ask whether the governmental action at issue poses a threat to the impartial, non-arbitrary administration of the law that principles of due process require. This inquiry is not limited to opportunities to enforce actual rights of litigants with standing to seek judicial redress; it encompasses a much broader arena, including government actions that do not directly injure any specific individual, but alter the processes of government so as to make such injuries likely.

III. THE EMERGENCE OF DUE PROCESS IN STRUCTURAL CASES

The Supreme Court has never said, or even hinted, that due-process considerations have any place in resolving disputes between two branches of government. Yet in numerous cases involving the distribution of national power, the Court has appeared to grope for some help from the concept of ordered liberty, in some way recognizing that help is to be had there. The ordered-liberty model imposes a rationality that does not otherwise exist in the case law.

A. *Cases Involving an Independent Judiciary*

In the effort to discover and explore the role of due process in what appear to be structural cases, it makes sense to begin with those cases involving the Judiciary itself—the branch that, through adjudication, acts most directly upon the due-process rights of

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[120] Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935). *See also* Mistretta v. United States, 488 U.S. 361, 382 (1989) (stating that concern for "encroachment and aggrandizement" has animated the Court's separation-of-powers jurisprudence); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 856 (1986) (discussing "magnitude of any intrusion on the Judicial Branch"); Buckley v. Valeo, 424 U.S. 1, 129 (1976) (noting dangers of aggrandizement of one branch at the expense of the others).

[121] Bowsher v. Synar, 478 U.S. 714, 776 (1986) (White, J., dissenting).

individuals. In these cases the Court has been most inclined to consider the implications of structure for individual rights.

Commodity Futures Trading Commission v. Schor[122] provides a good illustration. The issue was whether the Commodity Futures Trading Commission (CFTC)—a non-article III tribunal—could constitutionally exercise jurisdiction over a counterclaim filed against a claimant, Schor, who had initially invoked the jurisdiction of the CFTC for adjudication of his claim. Recognizing that "the constitutionality of a given congressional delegation of adjudicative functions to a non-article III body must be assessed by reference to the purposes underlying the requirements of article III,"[123] Justice O'Connor for the Court acknowledged that the judicial independence contemplated by article III serves to protect "primarily personal, rather than structural, interests."[124] Having recognized that important bridge, the Court concluded that Schor had waived his "personal" right to article III protections by choosing to file his claim with the CFTC.[125]

If concluded there, the *Schor* opinion would stand as a unique confirmation of the principle that this Article seeks to establish: the resolution of structural issues should be informed by consideration of the potential threat to individual rights. In this case, according to the Court, there was no threat to due process because the affected individual had voluntarily subjected himself to the jurisdiction of the CFTC.

But the Court saw the personal, waivable interest as functionally and analytically distinct from the structural issue under article III. Thus, having addressed the former issue, it set about to resolve the latter: whether the scheme "impermissibly intrude[s] on the province of the Judiciary."[126] This approach to the commands of article III set up the institutional interest in protecting judicial turf as the focus of the constitutional inquiry. The Court found that the power given to the CFTC "is limited to that which is necessary to make the reparations procedure workable," and concluded, therefore, that "the magnitude of any *intrusion on the Judicial Branch*

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[122] 478 U.S. 833 (1986).

[123] *Id.* at 847. The cases involving article III are unique among separation-of-powers cases in at least trying to invoke this interpretative guide, which is traditional in other areas of constitutional law. *See supra* notes 22-26 and accompanying text.

[124] *Id.* at 848.

[125] *See id.* at 849.

[126] *Id.* at 851-52.

can only be termed *de minimis.*"[127] Consequently, the scheme "does not contravene separation of powers principles or article III."[128]

The case illustrates how principles of due process can work their way into opinions addressing the constraints of article III. It also demonstrates, however, the almost reluctant manner in which the Court acknowledges such influences, and then quickly returns to its more familiar and apparently more comfortable frame of reference, the protection of institutions.[129]

Morrison v. Olson[130] also forced the Court to consider the contours of article III as it relates to individual rights. The Court addressed the question whether the special court division established by the Ethics in Government Act of 1978[131] violated article III's constraints on judicial power. The special division was a three-judge panel of the United States Court of Appeals for the District of Columbia Circuit, assigned the power to appoint an independent counsel and to supervise both the Attorney General's preliminary investigation of criminal acts allegedly committed by a high-ranking executive official, and some aspects of the independent counsel's functions, including her termination.

The Court framed the issue as whether "the Special Division's exercise of the various powers specifically granted to it under the Act poses any threat to the 'impartial and independent federal adjudication of claims within the judicial power of the United States.'"[132] This inquiry reflected the broader goal of "ensur[ing] the independence of the Judicial Branch and . . . prevent[ing] the Judiciary from encroaching into areas reserved for the other

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[127] *Id.* at 856 (emphasis added).

[128] *Id.*

[129] The dissent took a more integrated view of structure and purpose: "The Court erroneously suggests that there is a clear division between the separation of powers and the impartial adjudication functions of Article III. . . . In my view, the structural and individual interests served by Article III are inseparable." *Id.* at 866-67 (Brennan, J., dissenting). While that approach shares with the ordered-liberty analysis the recognition of individual interests in the analysis of structural issues, the dissenters employed it in an extremely formalistic manner, ultimately finding the statute unconstitutional not because it threatens those individual interests, but because it fails to satisfy the strict terms of article III. *See id.* at 864.

[130] 487 U.S. 654 (1988).

[131] Pub. L. No. 95-521, 92 Stat. 1824, 1867-75 (amended by the Ethics in Government Act of 1982, Pub. L. No. 97-409, 96 Stat. 2039, and the Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, 101 Stat. 1293) (codified at 28 U.S.C. §§ 591-599 (1988)).

[132] *Morrison*, 487 U.S. at 683 (quoting *Schor*, 478 U.S. at 850).

branches."[133] So stated, the issue became just another battle over turf; the Court articulated an institutional approach to the issue before it, focusing on the territorial prerogative of the Judiciary. That approach was in keeping with the general trend of separation-of-powers analysis, and offered no surprises.

The surprise came in the manner in which the Court chose to resolve the issue. Keeping in mind that its goal was to discover whether the statutory scheme had compromised the Judiciary's turf, consider the Court's two unexpected bases for its negative conclusion:

> First, the Act as it currently stands gives the Special Division itself no power to review any of the actions of the independent counsel or any of the actions of the Attorney General with regard to the counsel. Accordingly, there is no *risk of partisan or biased adjudication* of claims regarding the independent counsel by that court. Second, the Act prevents members of the Special Division from participating in "any judicial proceeding concerning a matter which involves such independent counsel while such independent counsel is serving in that office . . . ."[134]

Thus, the Court satisfied itself that *article III* was not violated—because the members of the Judicial Branch who participated in the prosecutorial process of the independent counsel scheme were not permitted to participate in such a way as to create the potential for bias or conflict of interest. Far from the usual expressions about the "core" of article III,[135] or the danger to the Judicial Branch itself—the concerns the Court ostensibly faces in such cases—these two justifications for upholding the Act against an article III challenge present a classic due-process concern: the assurance of an impartial decisionmaker for the persons directly affected by the statutory scheme.[136] It is odd that a challenge brought under article III, which simply vests judicial power in the courts and describes some of the content of that power, should be rejected on the ground that the challenged scheme provides its own means of ensuring impartial decisionmaking.[137]

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[133] *Id.* at 678.

[134] *Id.* at 683 (quoting statute) (emphasis added).

[135] *See, e.g.*, Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 77 (1982) (framing relevant question as "whether the Act has retained 'the essential attributes of the judicial power'").

[136] *See* Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980).

[137] This was just one of many issues the Court considered in *Morrison*; on the rest it took the more traditional approach. Perhaps the principal constitutional question

Mistretta v. United States,[138] involving a challenge to the constitutionality of the United States Sentencing Commission, contains similar isolated examples of individual-rights concerns in a separation-of-powers analysis that also appear to be either accidental or at least not expressly recognized for what they are. The challenged statutory provisions[139] created a commission, described as "an independent commission in the Judicial Branch," whose seven voting members, appointed by the President and confirmed by the Senate, included three federal judges.[140] The President retained the power to remove all members from the Commission, "for cause."[141] The Commission would promulgate mandatory sentencing guidelines for federal judges to follow in criminal cases.[142]

The case raised several constitutional issues, including whether the statute unconstitutionally vested in the President the power to remove from the Commission judges who had been appointed to it—article III judges sitting on an independent, nonadjudicatory commission within the Judiciary.[143] The Court responded as follows: "[W]e see no risk that the President's limited removal power will compromise the *impartiality* of Article III judges serving on the Commission and, consequently, no risk that the Act's removal provision will prevent the Judicial Branch from performing its constitutionally assigned function of *fairly* adjudicating cases and

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in the case was whether the establishment of an independent counsel having prosecutorial powers and duties free of Executive Branch control (except for the President's power to remove for good cause) violated principles of separated powers. *See Morrison*, 487 U.S. at 683. The Court resolved the issue by stating that the Act did not disrupt the proper balance between the branches by interfering with the Executive's ability to perform its constitutionally assigned functions. *See id.* at 695. In this and the other issues discussed in the opinion, the Court adhered to an institutional approach.

[138] 488 U.S. 361 (1989).

[139] The Commission was created to achieve the goals of the Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1988 (codified as amended at 18 U.S.C. §§ 3551-59 (1988)).

[140] *See* 28 U.S.C. § 991(a) (1988).

[141] *Id.*

[142] *See id.* § 991(b).

[143] Other issues presented in the case included: whether by allowing the Commission to promulgate sentencing guidelines, Congress improperly delegated legislative power; whether a body residing in the Judicial Branch and comprised, in part, of active federal judges, could constitutionally exercise the rulemaking and policymaking functions inherent in the promulgation of sentencing guidelines; and whether judges could be assigned the extrajudicial duties provided in the Act.

controversies."[144] It is curious that the Court viewed article III as containing a mandate that the Judiciary decide its cases and controversies *fairly*. Article III, of course, contains no such express provision; that notion resides only implicitly in article III and is considered primarily to be a creature of the due process clause. Thus, while professing an intention to enforce the terms of article III, ostensibly out of concern for the interests of the Judicial Branch itself,[145] the Court actually relied on doctrine associated with due-process protections.[146]

The examples given above might suggest that the Court had adopted the very principle that this Article proposes; that it had, in fact, resorted to considerations of individual rights in its treatment of structural issues. But these few references to due process in the article III cases are almost *de minimis* aberrations in the vast body of structural jurisprudence, unexplained by the Court and even unacknowledged as anything different from the institutional rhetoric that characterizes the bulk of the Court's separation-of-powers decisions. Perhaps the explanation is that article III is the sole structural provision that has direct impact on individual rights, both empirically and as a matter of historical development.[147] The Judicial Branch can be understood, therefore, as the branch where institutional and individual interests coalesce. The Court's occasional consideration of individual interests in article III cases may, in fact, be an incidental part of, rather than a real aberration from, its more typical focus on the concerns of the branches themselves.

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[144] *Mistretta*, 488 U.S. at 411 (emphasis added).

[145] Historically, the common law system presumed the impartiality of the courts. Thus article III's investiture of "judicial power" in the federal courts probably represents an implicit requirement of fairness in adjudication.

[146] The Court resolved the bulk of the issues in the case from the usual turf-based perspective. For example, to the objection that a judicial entity was improperly given rulemaking authority, the Court responded, "Congress may delegate to the Judicial Branch nonadjudicatory functions that do not trench upon the prerogatives of another Branch and that are appropriate to the central mission of the Judiciary." *Mistretta*, 488 U.S. at 388. Similarly, "Congress cannot be said to have aggrandized the authority of th[e Judicial] Branch or to have deprived the Executive Branch of a power it once possessed." *Id.* at 395.

[147] The common law courts originally developed as a response to the often oppressive rules of the various feudal lords in England. *See* F. POLLOCK & F. MAITLAND, *supra* note 145, at 145-48. The very reasons for which they arose, therefore, demonstrate their historically close connection to the protection of individual rights.

B. *Cases Involving Tension Between Articles I and II*

Other separation-of-powers cases also raise issues involving individual rights. *INS v. Chadha*[148] is one case in which institutional propriety clearly affected individual rights. Chadha applied to the Immigration and Naturalization Service (INS) and received a determination of "extreme hardship," which would have permitted him to remain in this country despite the expiration of his student visa.[149] Following a procedure authorized by the Immigration and Nationality Act,[150] however, the House of Representatives, without debate or recorded vote, passed a resolution to reverse the INS decision and deport Chadha.[151] Chadha challenged the House action on constitutional grounds.

In addressing Chadha's constitutional claim, the Court took the institutional point of view: it first sought to determine whether the one-house veto was an exercise of "legislative power." Having determined that the House action was legislative, with the aid of an initial presumption to that effect,[152] the Court concluded that the procedural requirements of article I—bicameral passage and presentment to the President for veto or signature—should apply to the measure, but had not been followed in this case: a neat exercise in absolutely mechanical application of the terms of the Constitution. The Court did mention a possible reason for its mechanical formalism at the very end of the opinion when it added, "we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution."[153] The Court did not, however, indicate how, if at all, that principle might assist in the disposition of this case.

Justice Powell, on the other hand, put that maxim to work. In his view, the case presented "the danger of subjecting the determination of the rights of one person to the 'tyranny of shifting majorities.'"[154] Indeed, Justice Powell expressly rejected an argument aimed at the purely structural, "turf"-oriented view of

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[148] 462 U.S. 919 (1983).

[149] *See id.* at 924.

[150] 8 U.S.C. § 1254(c)(2) (amended 1986).

[151] *See Chadha*, 462 U.S. at 926-27.

[152] *See id.* at 951-52.

[153] *Id.* at 959.

[154] *Id.* at 961 (Powell, J., concurring) (quoting Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 369, 375 (1976)).

separated powers in favor of a more substantive approach to the issue:

> The House and the Senate argue that the legislative veto does not prevent the executive from exercising its constitutionally assigned function. Even assuming this argument is correct, it does not address the concern that the Congress is exercising unchecked judicial power at the expense of individual liberties. It was precisely to prevent such arbitrary action that the Framers adopted the doctrine of separation of powers.[155]

Thus, in the view of one member of the Court, the larger objectives of separated powers, rather than the institutional interests of the branches themselves, resolve the case.[156]

In *Bowsher v. Synar*,[157] the majority took an institutional perspective again. That case presented a challenge to the "Gramm-Rudman-Hollings Act"[158] by which Congress, in an effort to reduce the federal deficit, gave the Comptroller General the power to review reports from both the Executive's Office of Management and Budget and the Legislature's Congressional Budget Office, and to "recommend" to the President specific spending cuts that should be made to meet deficit-reduction targets. The President was required to comply with the Comptroller General's conclusions. A member of Congress and a union of certain federal employees challenged this scheme on separation-of-powers grounds.

The Court found that the Comptroller General was an agent of Congress and that the Act authorized him to exercise executive powers, an unacceptable combination. "The structure of the Constitution does not permit Congress to execute the laws; it

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[155] *Id.* at 963 n.4.

[156] The thrust of Justice Powell's concurrence—that the one-house veto constituted an exercise of judicial power—is not relevant to the argument put forward here. I do not mean to endorse any attempt to pigeonhole government action into one of the three departments. But I do applaud Justice Powell's effort to look beyond that categorization to the real problem with the case: Chadha appeared to have been deprived of liberty without due process of law. In that respect, the analysis in *Chadha* should have differed from that of subsequent cases raising the constitutionality of the legislative veto, but in a context not so clearly affecting individual rights. *Cf.* Process Gas Consumers Group v. Consumer Energy Council of America, 463 U.S. 1216 (1983) (affirming summarily decision invalidating legislative veto as applied to Federal Energy Regulatory Commission regulations of national gas pricing); United States Senate v. FTC, 463 U.S. 1216 (1983) (affirming summarily decision invalidating two-house veto of FTC rulemaking).

[157] 478 U.S. 714 (1986).

[158] Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1038 (codified at 2 U.S.C. §§ 901-22 (1988)).

follows that Congress cannot grant to an officer under its control what it does not possess."[159] Although the Court acknowledged "that, in the long term, structural protections against abuse of power were [for the Framers] critical to preserving liberty,"[160] it did not accord that idea any importance in its constitutional analysis.

Justice Stevens' concurrence examined the liberty principle more thoughtfully. Although he did not identify any specific individuals in the case who might be said to possess due-process interests, he did express his general concern that legislative delegation of authority to an agent of Congress, such as the Comptroller General, can lead ultimately to a loss of due-process protections. Noting that the problem of procedural unfairness has largely been alleviated in the case of legislative delegation to independent or executive agencies,[161] Justice Stevens perceived a danger in permitting delegation to an entity that is not constrained by such procedural requirements. Thus he avoided the futile exercise, so common in modern separation-of-powers opinions, of defining a specific governmental function as legislative or executive, and sought to protect the separation of powers instead by protecting governmental process—what he termed a "due process of lawmaking."[162] Not being subject to any specific procedural constraints, the Comptroller General was not an appropriate delegate in whom Congress could repose the challenged powers.

Justice Stevens' analysis is consistent with my ordered-liberty approach. It focuses on the threat of arbitrary government conduct which arises with the impairment of government process, rather than searching for specific instances of due-process violation. Any government action that causes such impairment, because of the threat it engenders, offends the Constitution. Once such impairment becomes evident, the Court should strike down the challenged action as a violation of separated powers.

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[159] *Bowsher*, 478 U.S. at 726.

[160] *Id.* at 730.

[161] *See infra* notes 190-206 and accompanying text (discussing nondelegation doctrine).

[162] *Bowsher*, 478 U.S. at 757 n.23 (Stevens, J., concurring).

C. *Other Doctrines Linking Due Process and Separated Powers*

The importance of due-process principles to separation-of-powers issues also informs cases decided under doctrines that do not explicitly involve the separation of powers. Examples of these doctrines are "standing," "nondelegation," and the "administrative separation of functions."

1. Standing

The doctrine of standing provides the Court with an opportunity to decide which litigants are appropriate spokespersons for the airing of complaints in a judicial forum. Those who are granted standing will be afforded the chance to litigate their claims of injury, while those who are denied standing are deprived of access to the federal Judiciary and relegated to the Legislative or Executive Branch to pursue "political" solutions to their grievances.[163]

The Supreme Court has said that a standing requirement resides in article III of the Constitution,[164] although the text of article III contains no such express requirement. The Court has long held that the need for a litigant to have standing before invoking the jurisdiction of a federal court derives from the Constitution's definition of judicial power as extending to specified "cases" and "controversies."[165]

> [T]he "case or controversy" requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded. The several doctrines that have grown up to elaborate that requirement are "founded in concern about the proper—and properly limited—role of the courts in a democratic society."[166]

Thus, from the Supreme Court's concern that it must protect the separated powers has sprung a rule affecting the individual's ability to seek judicial redress.[167]

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[163] *See, e.g.*, Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) (holding that generalized injury is insufficient to confer standing); United States v. Richardson, 418 U.S. 166 (1974) (same).

[164] *See* Allen v. Wright, 468 U.S. 737, 750-52 (1984).

[165] *See* U.S. CONST. art. III, § 2. The current three-part test for standing is discussed *infra* notes 169-75 and accompanying text.

[166] *Allen*, 468 U.S. at 750 (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)).

[167] *See* Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982). Indeed, critics of some of the Court's standing decisions point to the fact that a concern for separation-of-powers

If I am correct in positing that separation of powers is intended, in part, to ensure the protection of every individual's due-process rights, then it should follow that standing doctrine, described as a necessary corollary to the separated powers, facilitates the protection of due process in some way. A close analysis of who is included and who is excluded by the current standing rules supports just that conclusion. Although the existence of some limit on access to the federal courts may derive originally from values other than protection of individual rights,[168] the particular rules the Court has devised to accomplish that limitation do so in a way that protects due-process interests.

Under modern standing doctrine, the plaintiff must allege such a "personal stake in the outcome of the controversy"[169] as to ensure that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution."[170] Those general guidelines have been interpreted to require that a litigant allege an "injury in fact,"[171] which means a "distinct and palpable" injury,[172] one that is not "abstract," "conjectural," or "hypothetical,"[173] but suffered personally by the claimant.[174] Moreover, that injury must be "fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."[175] The three prerequisites to standing, then, are injury, causation, and redressability.

It appears that the language of article III precludes just any litigant with just any claim from invoking the jurisdiction of a federal court. The task of the Court, therefore, has been to fashion a doctrine that will permit some claims and preclude others. The particular test the Court has devised to perform this screening function is instructive: the three-part test for standing, set forth

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norms, rather than the satisfaction of the three standing requirements, appears to motivate the Court in reaching certain standing decisions. *See Allen*, 468 U.S. at 789-95, 792 n.10 (Stevens, J., dissenting); Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1459 (1988).

[168] The notion that access should be limited at all is probably a consequence of the "cases" and "controversies" language of article III.

[169] Baker v. Carr, 369 U.S. 186, 204 (1962).

[170] Flast v. Cohen, 392 U.S. 83, 101 (1968).

[171] Sierra Club v. Morton, 405 U.S. 727, 734 (1972).

[172] Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979) (quoting Warth v. Seldin, 422 U.S. 490, 501 (1975)).

[173] Los Angeles v. Lyons, 461 U.S. 95, 101-02 (1983); O'Shea v. Littleton, 414 U.S. 488, 494 (1974).

[174] *See Sierra Club*, 405 U.S. at 734-35.

[175] Allen v. Wright, 468 U.S. 737, 751 (1984).

above, describes the same plaintiffs who, in a different context, would be said to have a due-process interest, or a right to procedural protections for the injury they have suffered. "The extent to which procedural due process must be afforded . . . is influenced by the extent to which [someone] may be 'condemned to suffer grievous loss'. . . ."[176]

The similarity between "injury in fact" and "grievous loss" suggests that the Court uses its standing rules to interpret the command of article III in a way to ensure that, in theory,[177] those with the type of interest that due process protects are not shut out of the federal forum on standing grounds. Thus, a rule arising out of a concern for the separation of powers has evolved into a way of protecting individuals from arbitrary denial of federal redress.[178]

Moreover, the standing rules and the law of due process have continued to develop along parallel lines. As the due process clause has evolved to provide increasing procedural protections for new kinds of interests, such as entitlements to government benefits,[179] the standing rules have followed a similar trend. In *Goldberg v. Kelly*[180] the Court abandoned the common-law distinction between rights and privileges for purposes of procedural protection, and greatly enlarged the reach of due process to include beneficiaries of federal regulatory programs.

The same month the Court issued the *Goldberg* decision it also decided *Association of Data Processing Service Organizations v. Camp*,[181] in which it abandoned the restrictive common-law "legal

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[176] Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970) (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)). The test has since been refined to focus on the expectations created by statute or custom. *See* Board of Regents v. Roth, 408 U.S. 564, 576-78 (1972).

[177] I do not mean to suggest that the test always works perfectly. *See, e.g., Allen*, 468 U.S. 737 (denying standing to parents of public-school children who claimed the IRS was not enforcing the rules denying tax exemptions to segregated private institutions).

[178] One could legitimately ask why the standing rules should not be more inclusive, if protecting individuals is the goal. My answer is that the case-or-controversy limitation governs that aspect of the standing inquiry. My point is not that individual rights are furthered by rules limiting standing, but only that if standing is to be limited, these standing rules work to avoid excluding parties whose interests are the sort that generally warrant due-process protection (not taking into account issues of state action).

[179] *See generally* Reich, *The New Property*, 73 YALE L.J. 733 (1964) (describing evolving status of government benefits).

[180] 397 U.S. 254 (1970).

[181] 397 U.S. 150 (1970). *See also* Clark v. Securities Indus. Ass'n, 479 U.S. 388, 396-402 (1987) (applying "zone of interest" test).

interest" test for standing and moved toward a much more inclusive test that examines whether the plaintiff was "arguably within the zone" of interests protected by the statutory or constitutional provision allegedly violated by the defendant.[182] That case opened the door for judicial recognition of the new class of "public-law plaintiffs" who seek to enforce the statutory rights of regulatory beneficiaries.[183] The *Data Processing* decision is the perfect counterpart to the Court's treatment of the corresponding due-process issue in *Goldberg v. Kelly.*

The analogy holds for the other two prongs of the standing test. Just as the standing rules would preclude a litigant whose injury either was caused by someone not a party before the court (causation) or whose injury is for some other reason not capable of redress by the court (redressability), the standard due-process analysis of determining "what process is due" would also find that the plaintiff's interest, under the same circumstances, is not entitled to due-process protection. Under the balancing test set forth in *Mathews v. Eldridge,*[184] which weighs the interests of the parties and determines the value of additional procedures to a given controversy, process would be denied to one who could not meet causation or redressability criteria because its value in such a case would be very low. Thus, again, the two doctrines—one designed to preserve the separation of powers and the other to protect the life, liberty, and property of individuals—yield analogous results.

The correspondence between standing and due process also emerges in an examination of who is left out by the standing rules. The Supreme Court has made quite clear that not everyone who satisfies the three-part test for standing will automatically receive it. For example, standing will be denied to anyone whose alleged injury is so generalized or diffuse that a great number of citizens are affected in the same way by the challenged action.[185] That is, to receive judicial review, a plaintiff must have been singled out in some way for disadvantageous individual treatment.[186] This focus

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[182] *Data Processing,* 397 U.S. at 153.

[183] *See* Sunstein, *supra* note 167, at 1446-47.

[184] 424 U.S. 319, 335 (1976).

[185] *See, e.g.,* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 227 (1974) (finding a generalized interest in independence of government branches too abstract to constitute a case); United States v. Richardson, 418 U.S. 166, 177 (1976) (finding respondent's request for release of CIA expenditures a generalized grievance and the impact of non-release policy on respondent undifferentiated and common to the public).

[186] *See* Bi-Metallic Inv. Co. v. State Board of Equalization, 239 U.S. 441, 445 (1915)

on individual treatment is a classic characteristic of due process.[187] Thus, the correlation between standing and due process holds up in this respect as well.

Another group of plaintiffs who are denied standing are those for whom Congress has legislatively precluded standing or demonstrated an intent to limit regulatory or statutory lawsuits.[188] Applying a due-process analysis to this rule of standing, such preclusion would be justified because the passage of legislation by Congress itself satisfies due-process concerns. "Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption."[189] To the extent Congress has acted, by general legislation, to deny standing to a class of potential litigants under a statutory scheme, those litigants have already received their due process.

The parallels are more than coincidence. The Court has in fact created a doctrine that seeks to afford standing to those who have the kind of interest that principles of due process protect. It has fashioned a separation-of-powers principle to further the protection of individual rights.

2. Nondelegation Doctrine

Decisions addressing the delegation of power by the Legislative Branch to the Executive also support the link between separated powers and due process. Although the nondelegation doctrine arose out of a perceived need to preserve the separation of governmental powers, the concerns that the doctrine is intended to address are, at bottom, procedural due-process concerns.

Article I, section 1 of the Constitution provides that all legislative powers shall be vested in a Congress of the United States. Although apparently a grant of power to Congress, this section also establishes that "[t]he Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions

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(finding no constitutional right for all individuals "to be heard before a matter can be decided in which all are equally concerned"); Londoner v. Denver, 210 U.S. 373, 385 (1908) (holding that residents of paving district have the right to be heard during proceeding to set paving tax).

[187] *See* INS v. Chadha, 462 U.S. 919, 960 (1983) (Powell, J., concurring); *Bi-Metallic*, 239 U.S. at 446.

[188] *See, e.g.*, Block v. Community Nutrition Inst., 467 U.S. 340, 348 (1984) ("Congress intended that judicial review of market orders issued under the Act ordinarily be confined to suits brought by handlers").

[189] *Bi-Metallic*, 239 U.S. at 445.

with which it is thus vested."[190] Limits must be imposed on Congress's authority to delegate "if our constitutional system is to be maintained."[191] This prohibition is known as the nondelegation doctrine.[192]

Early on, the Court, recognizing the need for flexibility, acknowledged Congress' authority to devolve upon others the duty of carrying out a declared legislative policy, to "fill up the details" under general provisions made by the legislature.[193] As long as Congress lays down "an intelligible principle to which the person or body authorized to [act] is directed to conform, such legislative action is not a forbidden delegation of legislative power."[194] The nondelegation doctrine, therefore, has sought to distinguish between those delegations that provide meaningful standards to ensure that "[w]hat the President was required to do was simply in execution of the act of Congress,"[195] and those that undermine the policies of article I of the Constitution.[196]

The nondelegation doctrine concerns separation of powers between the Congress and the Executive.[197] It involves "the constitutional processes of legislation which are an essential part of

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[190] Panama Refining Co. v. Ryan, 293 U.S. 388, 421 (1935).

[191] *Id.*

[192] *See* J. PIERCE, JR., S. SHAPIRO & P. VERKUIL, ADMINISTRATIVE LAW AND PROCESS § 3.4, at 51 (1985).

[193] *See* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825).

[194] J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928). *See also* Yakus v. United States, 321 U.S. 414, 424-25 (1944).

[195] Field v. Clark, 143 U.S. 649, 693 (1892).

[196] Although surely Professor Davis is correct that the Court no longer applies the doctrine in a meaningful way, *see* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 3.3., 3.5, 3.6 (2d ed. 1978), the Court continues to recite the verbal formulas and thereby effectively keeps the doctrine alive. The Court recently reiterated that "so long as Congress provides an administrative agency with standards guiding its actions such that a court could 'ascertain whether the will of Congress has been obeyed,' no delegation of legislative authority trenching on the principle of separation of powers has occurred." Skinner v. Mid-America Pipeline Co., 109 S. Ct. 1726, 1731 (1989) (internal citations omitted); *see also* Mistretta v. United States, 488 U.S. 361, 379 (1989) (applying "intelligible principle" test).

[197] *See* Kramer, *The Constitution as Architecture: A Charette*, 65 IND. L.J. 277, 288 (1990) (arguing that separation of powers requires limits on congressional delegation); Schoenbrod, *Separation of Powers and the Powers that Be: The Constitutional Purposes of the Delegation Doctrine*, 36 AM. U.L. REV. 355, 387 (1987) ("delegation is a separation of powers issue"); *Mistretta*, 488 U.S. at 371 ("The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of government."). *See also* Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U.L. REV. 62, 69-80 (1990) (discussing separation-of-powers concerns raised by private delegations).

our system of government."[198] The concern underlying the nondelegation doctrine is a concern for the structural integrity of the government.[199]

Nevertheless, the rhetoric surrounding the question of delegation does not include the traditional language about separated powers. Rather, according to the Court, the evils of excessive delegation include the possibility of conferring "unlimited power,"[200] "unfettered discretion,"[201] and "uncontrolled legislative power"[202] on the Executive Branch, and "the danger of overbroad, unauthorized, and arbitrary application of criminal sanctions."[203] Those evils do not jeopardize the institutional interests of the branches—they jeopardize *individual* rights. They pose the threat of arbitrary enforcement of the law—an injury that *due process* is supposed to prevent.

The due-process concerns that the Court has repeatedly articulated in the delegation context have given rise to a series of requirements that Congress must satisfy to survive a nondelegation attack. Those requirements are entirely procedural.[204] In short, to avoid an unconstitutional delegation of legislative power to an administrative agency, Congress "must enjoin upon [the agency] a certain course of procedure and certain rules of decision in the performance of its function."[205] Once that has been accomplished, the structural concerns that apparently initiated the resistance to legislative delegation in the first place vanish in the confidence that individual rights have been preserved;[206] departures from the pure principle of separated powers are "cured" of

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[198] Panama Refining Co. v. Ryan, 293 U.S. 388, 430 (1935).

[199] *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935) (stating that excessive delegation "is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of *Congress*" (emphasis added)).

[200] Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 285 (1933).

[201] *Panama Refining*, 293 U.S. at 431.

[202] *Id.* at 432.

[203] Federal Power Comm'n v. New England Power Co., 415 U.S. 345, 353 (1974) (Marshall, J., concurring and dissenting) (quoting United States v. Robel, 389 U.S. 258, 272 (1967) (Brennan, J., concurring)).

[204] *See* J. PIERCE, S. SHAPIRO & P. VERKUIL, *supra* note 192, § 3.4.2, at 55.

[205] Wichita R.R. & Light Co. v. Public Utilities Comm'n, 260 U.S. 48, 59 (1922).

[206] Professor Davis makes the transition to due process explicit. *See* K. DAVIS, *supra* note 196, § 3.15. He advocates a newly constituted nondelegation doctrine, whose acknowledged purpose should be "to protect private parties against injustice on account of unnecessary and uncontrolled discretionary power." *Id.* § 3.15, at 208. In my judgment, that purpose has been present but unacknowledged all along.

their unconstitutionality by increased provision for procedural protection of individual rights.

It seems a strange notion that process—niceties like notice, a hearing, and a decision on the record—could ever be thought to compensate for deficiencies in the three-part division of power required by the Constitution. An abundance of process effectively validates acts that the Executive Branch would otherwise be without authority to commit. But the strangeness diminishes with the recognition that procedural requirements and separated powers are simply different limitations on the exercise of government power, sharing a common goal: to restrict arbitrary government action that is likely to harm the rights of individuals. Once that principle is acknowledged as an important factor in the constitutional structure, then the different expressions of the principle no longer seem incongruous, the interchangeability no longer unpalatable.

3. Separation of Functions[207]

The remarkable point about the development of administrative agencies is that the Supreme Court has never seriously questioned the validity of the commingling of legislative, executive, and judicial functions in this context.[208] One would think that if ever there is a violation of the separation of powers, it would come from blending in a single entity the authority to exercise, in the classic sense, all three types of government power.[209]

At the same time, it is striking that the modern spate of cases expanding due-process protection has arisen primarily in the area of administrative action.[210] Almost instinctively, the law now

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[207] The so-called "separation of functions" is a concept generally associated with the requirements of the Administrative Procedure Act, 5 U.S.C. § 554(d) (1988). *See* Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 COLUM. L. REV. 759, 761-79 (1981). The effects of that Act so profoundly pervade the field of administrative law that it is difficult to distinguish which of its requirements may or may not be required by the Constitution itself. For simplicity, I will discuss the concept of separated functions as if the statutory and constitutional requirements were one and the same, recognizing that there may be pitfalls in such an approach.

[208] The Court has made sure, however, that such commingling does not interfere with the right to a "fair trial in a fair tribunal." Withrow v. Larkin, 421 U.S. 35, 46 (1975) (quoting *In re* Murchison, 349 U.S. 133, 136 (1955)).

[209] *See* Strauss, *supra* note 48, at 581-83.

[210] *See* S. BREYER & R. STEWART, ADMINISTRATIVE LAW & REGULATORY POLICY 545-61 (2d ed. 1985).

recognizes that when functions are not truly separate, individual rights need explicit procedural protections.[211]

Indeed, the commingling within one agency of all three powers that the Constitution attempts to divide has raised the eyebrows both of those who fear for the separation of powers,[212] and of those who fear for the erosion of due-process protections.[213] Both camps seem to have been placated by the adoption of certain rules that prohibit the same agency employee from participating in the investigative or prosecutorial stages of a case (executive power) and also the adjudicative or decisionmaking stages (judicial power).[214] The removal of incentives for biased decisionmaking, a core due-process notion,[215] satisfies concerns regarding how the governmental body is constituted, a structural notion. Due-process principles, therefore, compensate for departures from the structural constitutional norms.

What is most intriguing is that the Court and the commentators seem to accept the barter. To me that means that the correlation between due process and separated powers has a deep-seated, if not acknowledged, place in constitutional jurisprudence.

IV. THE THEORY APPLIED

The theory of ordered liberty as a component of separated powers can supply strong guidance to the courts in their efforts to resolve specific cases. Applying the ordered-liberty analysis to a separation-of-powers attack, a court first would inquire whether the challenged action tends to foster unaccountable, biased, or

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[211] This principle underlies some of the jurisprudence surrounding the right to a tribunal independent of the political controls of Congress. In Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87 (1982), for example, the Court held that the possibility of congressional control over bankruptcy judges, empowered to adjudicate private rights but not afforded the guarantees of independence provided under article III, rendered the federal bankruptcy scheme unconstitutional. *See* Krattenmaker, *Article III and Judicial Independence: Why the New Bankruptcy Courts are Unconstitutional*, 70 GEO. L.J. 297, 304-05 (1981). The lack of true separation between the authorizing legislature and the tribunals it established, in an area where individual rights would be directly affected, was fatal to the scheme.

[212] *See, e.g.*, S. BREYER & R. STEWART, *supra* note 210, at 41-43 (arguing that traditional practice of separated powers has been threatened by creation of agencies).

[213] *See, e.g.*, Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 407, 471-72 (1989) (discussing the Constitution's role in providing procedural safeguards in administrative context).

[214] *See* Administrative Procedure Act, 5 U.S.C. § 554(d) (1988); Withrow v. Larkin, 421 U.S. 35 (1975).

[215] *See* Tumey v. Ohio, 273 U.S. 510, 523 (1927).

otherwise arbitrary government decisionmaking and, if so, whether that impairment of government process will affect individuals.

The objective of this approach is not to substitute a due-process claim for a separation-of-powers claim.[216] Clearly, situations often arise in which an individual suffers an actual violation of due process because of a deviation from structural norms,[217] but those cases can be disposed of under the due process clause; no separation-of-powers analysis is required. Rather, the goal of the ordered-liberty approach is to interpret the structural provisions of the Constitution consistently with their purpose and spirit. It follows that the kinds of concerns that would be relevant to the structural inquiry under the ordered-liberty approach would be different, at least in degree, from those that would be pertinent to analysis of a claimed violation of the due process clause. Some examples follow.

There are three general types of cases in which a party challenges some action as structurally flawed, but does not claim to have suffered an actual violation of due-process rights: (1) those in which an individual claims direct injury as a result of government action; (2) those in which no individual has clearly been injured directly, but the government action has had some effect on persons; and (3) those in which the challenged action has no discernible effect on any identifiable person. In the first group are those cases in which an individual is subjected directly to the suspect government conduct and launches a challenge under the structural provisions of the Constitution. Cases of this type present clear individual-rights considerations, which the Court implicitly recognizes when it accords standing to these plaintiffs to enforce structural provisions of the Constitution. Under the ordered-liberty approach, those considerations, emanating from due-process traditions, should inform the Court's resolution of the structural issues pressed in the case.

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[216] *See* Verkuil, *supra* note 4, at 306 (asking "whether due process can do the work of separation of powers").

[217] *See, e.g.*, Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 815-25 (1987) (Scalia, J., concurring in the judgment) (finding due-process violation where judges promulgate rule, prosecute its violation, and adjudicate guilt); *Tumey*, 273 U.S. at 522-26, 531-33 (finding due-process violation where mayor adjudicates prohibition violations and receives fines from those found guilty); *In re* Ross, 99 Nev. 1, 656 P.2d 832, 837-39, *reh'g denied* 99 Nev. 657, 668 P.2d 1089 (1983) (finding due-process violation where state bar association adjudicates disciplinary actions and receives fines from those found guilty).

In *Morrison v. Olson*,[218] for example, the target of an independent counsel investigation claimed that the counsel's independence from presidential control was constitutionally improper, but he probably could not have shown that he personally suffered the type of injury necessary to support a claim of due-process violation.[219] Thus Olson crafted his constitutional argument under the rubric of separation of powers rather than the due process clause.

The ordered-liberty approach begins with an inquiry into the potential for procedural unfairness caused by the independent counsel scheme. As discussed above,[220] the independent counsel statute at issue in the case contained numerous procedural protections to guard against arbitrary or biased decision-making on the part of the government actors—the independent counsel and the court. Despite formalist arguments that the independent counsel should have been subject to the control of the Executive Branch to achieve some abstract conformity with constitutional text, it appears that any actual likelihood of harm to a target had been ameliorated in advance by procedural formalities provided in the statute.[221] As the Court concluded when it resolved this case under principles which it alone understood, a court applying the ordered-liberty approach would probably determine that the statute should survive separation-of-powers attack.

A paradigmatic case in the first group is *Mistretta v. United States*,[222] in which the Court considered the constitutionality, under principles of separated powers, of the United States Sentencing Commission and the guidelines it promulgated.[223] Caught

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[218] 487 U.S. 654 (1988).

[219] *See* Oyler v. Boles, 368 U.S. 448, 456 (1962) (concluding that to prevail on a selective prosecution claim, defendant must show impermissible classification factors).

[220] *See supra* notes 130-34 and accompanying text.

[221] Some showed surprise at the decision in *Morrison* because it was the first time the modern Court departed from its rather rigid, apparently formalistic approach to such cases. *See* Alfange, *supra* note 50, at 671. The decision also surprised those who thought the driving force behind the Court's modern separation-of-powers jurisprudence had been a desire to protect the unitary executive from encroachments by the Congress. *See* Carter, *supra* note 61, at 360-61. When one sees that due process has really been an animating principle all along, however, the outcome of *Morrison* is perfectly predictable, even if the express analysis obscures the best rationale for the decision: the independent counsel statute at issue adequately protected the due-process rights of actually and potentially affected individuals; there was thus no reason for the Court to strike it down.

[222] 488 U.S. 361 (1989).

[223] The composition of the Commission and its placement in the Judicial Branch are described *supra* notes 138-42 and accompanying text.

up in such questions as whether one branch impermissibly arrogated to itself the powers of another, or attempted to "undermine the authority and independence of one or another coordinate branch,"[224] the Court overlooked entirely the deeper values that consolidation of power threatens, and found, simply, that the *branches* had been adequately looked after in the statute.[225] The Court upheld the entire sentencing scheme.

The Court's complete disregard for the effects of the sentencing scheme on individual rights led it to the incorrect result. Sentencing in criminal cases is clearly an area in which individual rights are especially vulnerable. The Court should have decided whether the innovative structural techniques Congress employed in commissioning the sentencing guidelines posed a threat to individual rights, a question it did not even consider.

If the Court had contemplated the ways in which the structural changes made by the statute might impair the integrity of governmental process, it would have recognized that the statute brought about a substantial shift in the control of sentencing decisions. The Act provided that the sentencing guidelines promulgated by the Commission would be binding on federal judges, leaving them very little flexibility or discretion once a conviction was returned. In place of the traditional role of judge as the critical figure in the sentencing phase of a criminal case, the new scheme, in effect, placed the bulk of sentencing decisionmaking in the hands of the prosecutor through a combination of the charging choices available and the mandatory sentencing laws. Thus, the statute brought about a significant structural change, consolidating in the Executive Branch the power both to prosecute and to sentence. Classic principles of due process, including the right to be judged by an impartial tribunal, counsel against such a commingling of essential functions.

Indeed, after the Supreme Court decided *Mistretta*, a federal district court held that the authority this sentencing scheme vests in

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[224] *Mistretta*, 488 U.S. at 382.

[225] The opinion is a model of the institutional perspective. *See, e.g., id.* at 390 ("the sentencing function long has been a peculiarly shared responsibility among the Branches of Government and has never been thought of as the exclusive constitutional province of any one Branch"); *id.* at 393 ("no threat of undermining the integrity of the Judicial Branch or of expanding the powers of the Judiciary beyond constitutional bounds"); *id.* at 395 ("Congress cannot be said to have aggrandized the authority of that Branch or to have deprived the Executive Branch of a power it once possessed").

the prosecutor actually violates due process.[226] Existence of an actual due-process violation is not necessary to the ordered-liberty analysis, but is surely sufficient to suggest that the Court's consideration of the structural issues in *Mistretta* should have included these concerns. If consideration of individual rights had held sway with the Court, it is likely that the statute would not have survived the constitutional attack on separation-of-powers grounds.

A final example of a case in the first category[227] is *Youngstown Sheet & Tube Co. v. Sawyer*.[228] The government action at issue was the President's attempted seizure of private property—the steel mills—during the Korean conflict. Ordered liberty would support the Court's decision to enjoin the seizure as a violation of structural principles of the Constitution. In addition to the Court's rationale—the President lacked substantive constitutional authority for the seizure—that act also deviated from procedural norms for the taking of private property, bypassing both statutory authorization and judicial proceedings, as well as working a direct harm on the property rights of individuals. The ordered-liberty analysis indicates a due-process concern that renders the President's exercise of power suspect.

A second category comprises cases in which there is no such clear property or liberty interest, but which nonetheless involve impairment of process in some way that threatens the values underlying separated powers. In this group, although the violation has no obvious "victim," there does exist some plaintiff who can achieve standing to bring the claim. In such cases, the ordered-liberty analysis would have the Court ask whether the challenged scheme fosters tendencies toward inaccuracy, lack of accountability, or unfairness. If so, the scheme is constitutionally suspect under principles of separation of powers.

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[226] *See* United States v. Roberts, 726 F. Supp. 1359, 1367 (D.D.C. 1989) (Greene, J.), *rev'd sub nom.* United States v. Mills, 925 F.2d 455 (D.C. Cir. 1991). Judge Greene's holding in *Roberts* was in effect a determination that the separation-of-powers issues to which the creation of the Sentencing Commission had given rise need never be reached because there were already justiciable claims of due-process violation. My treatment of *Mistretta* proceeds as if there were no such viable due-process claim. This reflects the posture in which the case went to the Supreme Court, as well as the conclusion reached by the court of appeals in *Mills*.

[227] An additional case in this group is INS v. Chadha, 462 U.S. 919 (1983), discussed *supra* notes 148-56 and accompanying text.

[228] 343 U.S. 579 (1952).

Bowsher v. Synar[229] is such a case. The Comptroller General's authority to make budget cuts was challenged on separation-of-powers grounds.[230] Although there was no individual with an immediate role in the challenged process, the Court granted standing to a union of federal employees who were to lose a scheduled increase in benefits as a result of the Comptroller's budget cuts.[231]

The ordered-liberty approach to this case is quite similar to the approach outlined in Justice Stevens' concurrence.[232] As that opinion articulated (although probably with something a bit different in mind), the delegation of power at issue in *Bowsher* provided for none of the procedural protections that are available either when Congress acts as a whole or when Congress delegates legislative power to the Executive Branch.[233] In both situations, measures are built into the system to ensure the integrity of the process—that is, to protect the rights of individuals potentially affected.[234] No such protection existed to ensure that the Gramm-Rudman-Hollings Act would not become an instrument of tyrannical consolidation of power; none had already been established by case law, and none was provided in the statute itself. There was no need for any inquiry into whether the "rights" of the Executive Branch had been trammeled or the powers of Congress aggrandized.[235] What was important was whether the system adequately guarded against the arbitrary exercise of government power. It did not. Thus the scheme compromised the principles of separated powers.

Another example in the second category is *United States v. Nixon*,[236] the famous Watergate tapes case. The Court considered whether a district court, engaged in a criminal trial to which certain materials in the possession of the President (the Watergate tapes) had been determined to be relevant, had the power to compel the

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[229] 478 U.S. 714 (1986).

[230] *See supra* notes 157-60 and accompanying text.

[231] *See Bowsher*, 478 U.S. at 721.

[232] *See supra* notes 161-62 and accompanying text.

[233] *See Bowsher*, 478 U.S. at 757-59 (Stevens, J., concurring).

[234] For example, when Congress itself legislates, it must follow the procedures articulated in article I. *See* INS v. Chadha, 462 U.S. 919, 956-57 (1983). When it delegates legislative power to an agency, it must provide for substantive guidance and procedural protection in order to make the delegation valid. *See supra* notes 190-206 and accompanying text (discussing delegation).

[235] *See Bowsher*, 478 U.S. at 726-27.

[236] 418 U.S. 683 (1974).

President to turn over those materials under subpoena. The President urged the Court to recognize an absolute privilege shielding him from judicial compulsion. The Court ultimately recognized the existence of a qualified executive privilege emanating from article II, but determined that in *Nixon* the privilege was outweighed by interests favoring disclosure.

The ordered-liberty approach would begin the analysis with an examination of who is likely to be injured by the government action under consideration—here, in effect, the insulation of the Executive Branch from the compulsory process of the Judiciary. In *Nixon,* the prosecution requested the subpoena and stood to benefit from the forced disclosure.[237] At first blush there would appear to be no individual rights at stake: the case is a struggle among the President, an independent counsel, and the Judiciary, all of which represent institutional, rather than personal, interests. If individual due-process interests are prerequisite to any interference by the Supreme Court in the affairs of the other branches, then this appears to be a case in which the Court should have let the President do as he pleased. But the analysis goes deeper.

The Court next should consider whether the proposed exercise of government power (here the power to assert executive privilege in the face of a subpoena in a criminal case) has a real potential for increasing the risk of injury to individual rights; whether, by tainting the governmental *process,* it will create an environment conducive to the arbitrary exercise of power that the Constitution seeks to prevent. And in this case, such a risk exists. There is no reason why a request for production of documents from the President in a criminal case will always or even usually come from the government; on the contrary, in most cases, where the Executive Branch is itself prosecuting the criminal action, such a request is much more likely to come from the defense. If the prosecution (executive) could assert privilege to prevent defense access to relevant information with impunity, a clear issue of due process would arise.[238]

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[237] Chief Justice Burger's opinion for the Court made it seem that the case involved a constitutional right to discovery, even discussing the "right to the production of all evidence at a criminal trial [which] has constitutional dimensions." *Id.* at 711. He also cited the danger of "cut[ting] deeply into the guarantee of due process of law" by recognizing a presidential privilege. *Id.* at 712. He did not make clear that, in *Nixon,* those rights had no application because no criminal defendant had requested production of the tapes.

[238] *See* Roviaro v. United States, 353 U.S. 53, 60-62 (1957) (holding that district

Recognition of an absolute privilege residing in article II would have had tremendous potential to affect important individual rights. It would have amounted to the Judiciary's acquiescing in a criminal system which allowed one governmental department both to prosecute a defendant and to control his defense. That appears to be just the type of consolidation of power that the system of separated powers was intended to thwart.

By denying the President the absolute privilege he claimed, the Court did the correct thing under the "ordered-liberty" analysis. It may have gone too far, however, when it acknowledged the existence of some "qualified" executive privilege that might be successful in other cases. At the point where individual interests end and the institutional interest represented by article II alone remains, the Court should not be the champion of the latter interest.

The third and final group of structural cases embraces those in which, again, the structural violation has no obvious victim, but in which no plaintiff with standing exists.[239] In these cases, even if one branch has violated the principle of separated powers in some way, the ordered-liberty analysis has no application.

The mission of the separation of powers—protection of individual rights—has no role to play when the potential effect on such rights is either non-existent or so attenuated as to be incapable of informing the structural analysis. In those cases, therefore, through the doctrines of standing or political question, the Court should leave the political branches to work out for themselves the appropriate allocation of power, using the weapons provided to them in the Constitution.

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court committed reversible error by allowing government to refuse to disclose material information to defense; recognition of privilege in such circumstances violates fundamental fairness); H.R. REP. NO. 831 (I), 96th Cong., 2d Sess. 2 (1980) (discussing "disclose or dismiss" dilemma when defendant is denied use of relevant but classified information, often resulting in dismissal). These issues have been dealt with in the Classified Information Procedures Act, Pub. L. No. 96-456, 94 Stat. 2025 (codified as amended at 18 U.S.C. App. III §§1-16 (1988)).

[239] The ordered-liberty analysis suggests that so-called "congressional standing" should be denied. If standing has as its goal the protection of individual rather than institutional rights, then congressional standing is inconsistent with these purposes. Indeed, one avowed purpose of congressional standing is to permit an individual to protect an institutional interest of Congress—an interest that I claim is not the job of the courts to protect. *See generally* Barnes v. Kline, 759 F.2d 21 (D.C. Cir. 1985) (holding that a group of members of Congress had standing to challenge presidential pocket veto of legislation), *cert. granted sub nom.* Burke v. Barnes, 475 U.S. 1044, *motion denied* 419 U.S. 879 (1986), *vacated as moot* 479 U.S. 361 (1987).

Goldwater v. Carter[240] is an example of such a case. Senator Goldwater challenged President Carter's decision to abrogate a treaty without Senate advice and consent. In that case it is difficult or impossible to identify a due-process interest to help inform analysis of the issue. There is no role for the ordered-liberty approach, and, I claim, no reason for the Court to interfere with the political actions of the Executive and Congress. Thus, the Court could decline to decide the case on threshold grounds such as standing or political question, or it could equally plausibly determine on the merits that no violation of the separation of powers had occurred.[241] In *Goldwater,* the Court reached effectively the same conclusion, albeit for entirely different reasons.[242]

The application of the ordered-liberty theory to the cases the Court has decided involving separated powers often yields the same result the Court reached, but for reasons different from those expressed by the Court. That does not diminish the profound change that its adoption would have on the Court's jurisprudence, however. The change would lie in enabling the Court for the first time to embrace a theory, supported by reason, tradition, and history, that would breathe life into the structural provisions of the Constitution, dignifying them with a mission and an intelligibility they have not enjoyed.

CONCLUSION

Judicial efforts to protect the institutional interests of the various branches of government are misguided. The Court's role in cases involving separated powers, no less than in those involving the Bill of Rights, ought to be as vigilant arbiter of process for the purpose of protecting individuals from the dangers of arbitrary government. When exercises of power by one branch of government, or by coalitions of two or more acting together, threaten the integrity of government process, then the Court should consider

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[240] 444 U.S. 996 (1979).

[241] The ordered-liberty analysis would require an altogether different result if the specific facts of the case involving a treaty termination included the abrogation of identifiable individual interests, such as concrete commercial interests. In such a case, due-process scrutiny might well require judicial intervention.

[242] A plurality of the Court found that the case presented a non-justiciable political question because it involved foreign relations and the Constitution did not expressly provide an answer to the question presented. *See id.* at 1002-03 (Rehnquist, J., joined by Burger, C.J., Stewart, J., and Stevens, J.). Justice Powell found the case not ripe for review. *See id.* at 997 (Powell, J., concurring).

interfering to restore a balance of power, a balance of process. In the absence of such a threat, however, there is no need for the Court to step in, and the political branches should be allowed to use their powers of mutual checks and balances to work out the conflict.

In short, courts should not be in the business of protecting government. They should be protecting people. That is true, even—or perhaps especially—in cases involving governmental structure. Only with that proper mission in mind will the Court be able to bring a new rationality to its jurisprudence in the area of law devoted to the separated powers of government. Only then will that jurisprudence offer any fidelity to the original genius of the tripartite division of power, and only then will it do justice to the Constitution "proper," which, after all, was all that we had from the start.