“IF ANGELS WERE TO GOVERN”*: THE NEED FOR PRAGMATIC FORMALISM IN SEPARATION OF POWERS THEORY

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INTRODUCTION

It has become fashionable in certain academic circles to urge a dramatically reduced role for the courts in enforcement of the Constitution's structural provisions.¹ In the area of constitutional federalism, the Supreme Court has largely followed this scholarly lead, basically dropping out of the business of reviewing allegedly unconstitutional federal

* The quotation is taken from THE FEDERALIST NO. 51, at 160 (James Madison) (Roy P. Fairfield ed., 2d ed. 1966): “If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.” *See infra* text accompanying note 77.

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1. *See, e.g.*, JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980); MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY 37-60 (1982) (discussing noninterpretive review with respect to separation of powers issues); *see infra* text accompanying notes 227-46.

encroachments on state power.² In the separation of powers area, however, the modern Court has evinced something of a split personality, seemingly wavering from resort to judicial enforcement with a formalistic vengeance³ to use of a so-called "functional" approach that appears to be designed to do little more than rationalize incursions by one branch of the federal government into the domain of another.⁴ The Court has gone from one extreme to the other, with the assertion of what are at best tenuous distinctions.⁵

Those constitutional theorists who have urged this stance of judicial indifference toward issues of constitutional structure have chosen instead to focus their attention on issues surrounding the scope of individual rights.⁶ The sad irony in this is that the body of the Constitution—the document to which the Framers devoted so much time and energy at the Convention in Philadelphia⁷—contained precious few direct references to the protection of individual rights.⁸ Rather, the document was primarily devoted to the implementation of an intricate and innovative political

2. See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). See generally Martin H. Redish & Karen L. Drizin, *Constitutional Federalism and Judicial Review: The Role of Textual Analysis*, 62 N.Y.U. L. REV. 1 (1987).

3. See, e.g., *Bowsher v. Synar*, 478 U.S. 714 (1986) (discussed *infra* at text accompanying notes 201-19). Most recently, the Court appears to have returned to this formalistic analysis. See *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 111 S. Ct. 2298 (1991) (discussed *infra* at note 218). This is so, even though the clear trend prior to this decision was toward a considerably more functional approach. See Arthur C. Leahy, Note, *Mistretta v. United States: Mistreating the Separation of Powers Doctrine?*, 27 SAN DIEGO L. REV. 209, 221-22 (1990).

4. See, e.g., *Morrison v. Olson*, 487 U.S. 654 (1988) (discussed *infra* at text accompanying notes 142-47 and 220-22).

5. In the words of one perceptive commentator, "the Supreme Court's treatment of the constitutional separation of powers is an incoherent muddle." Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1517 (1991); see also Erwin 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, 1084-86 (1987) (discussing the Burger Court's differing and inconsistent approach with respect to executive, as opposed to legislative, challenges for separation of powers violations); E. Donald Elliott, *Why Our Separation of Powers Jurisprudence Is So Abysmal*, 57 GEO. WASH. L. REV. 506, 531-32 (1989) (discussing literalism and its negative impact on separation of powers jurisprudence).

6. See *supra* sources cited note 1; *infra* text accompanying notes 227-46.

7. See generally CATHERINE D. BOWEN, *MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION, MAY TO SEPTEMBER 1787* (1966).

8. See, e.g., JOHN H. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 92 (1980) (noting that the Constitution was "overwhelmingly dedicated to concerns of process and structure"); see also Brown, *supra* note 5, at 1513; cf. Geoffrey P. Miller, *Rights and Structure in Constitutional Theory*, SOC. PHIL. & POL'Y, Spring 1991, at 196:

[T]he Framers were overwhelmingly concerned with matters of government structure: separation of powers . . . and federalism. Separation of powers and federalism form the fundamental matrix or Euclidian plane of our constitutional law. These issues dominated

theory: a constitutionally limited, federally structured, representative democracy.⁹ Although one may of course debate the scope or meaning of particular constitutional provisions, it would be difficult to deny that in establishing their complex structure, the Framers were virtually obsessed with a fear—bordering on what some might uncharitably describe as paranoia—of the concentration of political power. Almost every aspect of their ingenious political structure was in some way related to their implicit assumption that, simply put, “power corrupts.” Thus, much as a modern urban resident bolts his door shut with several different locks (so that if one fails, another may keep out the dangers of urban life) so, too, the Framers chose to rely on a number of different structural devices to check what they assumed to be the natural and inherent tendency of government to proceed toward tyranny.

In structuring their unique governmental form, the Framers sought to avoid undue concentrations of power by resort to institutional devices designed to foster three political values: checking, diversity, and accountability. By simultaneously dividing power among the three branches and institutionalizing methods that allow each branch to check the others, the Constitution reduces the likelihood that one faction or interest group that has managed to obtain control of one branch will be able to implement its political agenda in contravention of the wishes of the people. By dividing power on a vertical as well as lateral plane (i.e., between the state and federal governments), they sought to assure that not all policy decisions would be made at one political level. And by implementing a diluted form of popular sovereignty, they assured that those in power would be generally responsive to those they represent while reducing the danger of a tyrannical majority.

the minds of the Framers at least as fully and completely as questions of individual rights dominate contemporary constitutional thought.

The primary direct protections of individual liberty contained in the body of the Constitution appear in Article I, Section 9. They include the protection of the writ of habeas corpus and the prohibition on bills of attainder. See U.S. CONST. art. I, § 9, cls. 2-3.

9. Modern commentators have suggested—arguably anachronistically—that the Framers’ theoretical sophistication was severely limited because of their failure to comprehend the dramatic impact of interest group pluralism and social choice theory on the functioning of popular sovereignty. See, e.g., Stephen L. Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 YALE L.J. 821, 863 (1985). Yet *Federalist No. 10*, authored by Madison, is famous for its recognition of the threat posed by factions to the democratic process. See THE FEDERALIST NO. 10 (James Madison). In any event, whatever the limiting impact of modern social choice theory on the values of democracy, see WILLIAM H. RIKER, *LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE* (1982); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1545-56 (1988), the fact remains that a system ultimately premised on the concept of popular sovereignty is still qualitatively different from a totalitarian state.

None of this should come as a surprise to anyone reasonably well-schooled in the theory of American government. But that fact makes all the more puzzling the modern tendency of both the Court and commentators to treat these structural provisions with not-so-benign neglect. Even a casual review of the essence of American political theory reveals that any purported dichotomy between constitutional structure and constitutional rights is a dangerous and false one. When the two are viewed as necessary but insufficient parts of a symbiotic, organic whole, one can easily see that in certain ways, the structural provisions are designed to reduce the possibility that individual liberties will, at some future point, be directly assaulted by government. In this manner, it was hoped, direct confrontation between government and liberty could be avoided.¹⁰ It would be incorrect, however, to view the structural portions of the Constitution solely as a prophylactic protection for minority rights. They may also be seen as a prophylactic assurance of the rights of the majority—in other words, as protection against usurpation of sovereign power by those in authority from those whom they represent.

This Article focuses on one element of the Constitution's structural provisions—the separation of powers.¹¹ It is our position that the centrality of the separation of powers concept to American political theory should be recognized, and that as a result the Court's enforcement of that concept needs to become considerably more vigorous than it has been in the recent past.

Of course, unless one is a rigid adherent of originalist thinking,¹² the mere fact that the Framers intended to adopt a particular political structure does not, by itself, automatically establish its modern normative validity.¹³ Indeed, several political theorists have challenged the viability of the Constitution's system of separation of powers for modern society.¹⁴ Although those of us in constitutional law are presumably not authorized simply to ignore or overrule provisions of the Constitution that we now find inconvenient or even unwise,¹⁵ it will often be possible for a Court, unhappy with a particular provision, to construe it in a manner that dramatically reduces its impact. This is arguably what the modern

10. For a detailed discussion of the link between separation of powers and the preservation of liberty, see Brown, *supra* note 5, at 1531-40.

11. For an analysis of the proper scope of constitutional federalism, see Redish & Drizin, *supra* note 2.

12. See, e.g., Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981).

13. See *infra* text accompanying notes 17-18.

14. See *infra* sources cited note 91.

15. See Redish & Drizin, *supra* note 2, at 4-5.

Court has done in some of its most recent interpretations of the separation of powers provisions.¹⁶ However, we believe that the separation of powers provisions of the Constitution are tremendously important, not merely because the Framers imposed them, but because the fears of creeping tyranny that underlie them are at least as justified today as they were at the time the Framers established them. For as the old adage goes, "even paranoids have enemies." It should not be debatable that, throughout history, the concept of representative and accountable government has existed in a constant state of vulnerability. This has been almost as true in the years since the Constitution's ratification as it had been prior to that time.¹⁷ Abandonment or dilution of separation of powers as one of the key methods of reducing the likelihood of undue concentration of political power will dramatically increase that vulnerability. What is called for, then, is an interpretational model that will avoid the diluting impact that recent Supreme Court doctrine has sometimes had on the beneficial protective force of separation of powers. The model we recommend is a type of "formalistic" approach to the interpretation and enforcement of separation of powers—one grounded on the deceptively simple principle that no branch may be permitted to exercise any authority definitionally found to fall outside its constitutionally delineated powers.¹⁸

Any call for a return to "formalism" in constitutional interpretation naturally will expose one to the barrage of ridicule and disdain traditionally reserved by modern scholars for what is almost universally deemed

16. See *infra* text accompanying notes 201-24; see also *Mistretta v. United States*, 488 U.S. 361 (1989).

17. See *infra* text accompanying notes 127-29.

18. "Formalism" in the separation of powers context has been described in the following manner:

Any exercise of governmental power, and any governmental institution exercising that power, must either fit within one of the three formal categories [legislative, executive, or judicial] . . . or find explicit constitutional authorization for such deviation. The separation of powers principle is violated whenever the categorizations of the exercised power and the exercising institution do not match and the Constitution does not specifically permit such blending.

Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CAL. L. REV. 853, 858 (1990) (footnote omitted); see also Lee S. Liberman, *Morrison v. Olson: A Formalistic Perspective on Why the Court Was Wrong*, 38 AM. U. L. REV. 313, 343 (1989) ("A formalist decision uses a syllogistic, definitional approach to determining whether a particular exercise of power is legislative, executive, or judicial. It assumes that all exercises of power must fall into one of these categories . . .").

to be an epistemologically naive methodology.¹⁹ It is important, however, to distinguish "epistemological" formalism from what we call, perhaps oxymoronicly, "pragmatic" formalism. The former represents a commitment to a rigidity and level of abstraction that is quite probably not possible, and that is certainly unwise. "Pragmatic formalism," on the other hand, is a "street-smart" mode of interpretation, growing out of a recognition of the dangers to which a more "functional" or "balancing" analysis in the separation of powers context may create. It recognizes that once a reviewing court begins down those roads in the enforcement of separation of powers, no meaningful limitations on interbranch usurpation of power remain.²⁰ More importantly, it recognizes that even if functionalism and balancing could be employed with principled limitation, any such interpretational approach inherently eviscerates the prophylactic nature of the separation of powers protections, so essential a part of that system.²¹

The pragmatic nature of the formalistic approach we advocate is manifested in two ways. Initially, pragmatic factors lead to the choice of formalism in the first place: No conceivable alternative adequately guards against the dangers that the system of separation of powers was adopted to avoid.²² Secondly, pragmatism influences how the differing concepts of branch power are ultimately to be defined. It is important to emphasize that formalism, as we employ the term, is not intended to imply imposition of rigid, abstract interpretational formulas derived from an originalistic perspective.²³ All the term is intended to suggest is that the constitutional validity of a particular branch action, from the perspective of separation of powers, is to be determined not by resort to functional balancing, but solely by the use of a definitional analysis. In other words, the Court's role in separation of powers cases should be limited to determining whether the challenged branch action falls within the definition of that branch's constitutionally derived powers—executive, legislative, or judicial. If the answer is yes, the branch's action is constitutional; if the answer is no, the action is unconstitutional. No

19. See, e.g., Brown, *supra* note 5, at 1524-27; Paul Gewirtz, *Realism in Separation of Powers Thinking*, 30 WM. & MARY L. REV. 343 (1989); Thomas O. Sargentich, *The Contemporary Debate About Legislative-Executive Separation of Powers*, 72 CORNELL L. REV. 430 (1987).

20. See *infra* text accompanying notes 79-90.

21. See *infra* text accompanying notes 79-90.

22. See *infra* text accompanying notes 225-318.

23. In this sense, we may be distinguished from those who urge a more syllogistic brand of formalism. See, e.g., Liberman, *supra* note 18, at 343. As subsequent discussion will show, see *infra* text accompanying notes 247-72, our version of formalism also rejects use of an originalist perspective, sometimes thought to be an inherent element of formalism in general, see Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980), or in the separation of powers context in particular, see generally Leahy, *supra* note 3.

other questions are to be asked; no other countervailing factors are to be considered.

Defining those constitutional terms will naturally prove to be no simple task. Yet it should be no more difficult than the tasks facing the Court in defining numerous other constitutional terms²⁴—for example, “due process,”²⁵ “speech,”²⁶ or “cruel and unusual punishment.”²⁷ In fashioning its definitions of branch power, the Court should look to a combination of policy, tradition, precedent, and linguistic analysis.²⁸ Presumably, within certain linguistic boundaries,²⁹ the definitions may evolve over time, much as have the definitions of other constitutional terms. The key point, however, is that no matter how the terms are ultimately defined, the exercise of each branch’s power is to be limited to the functions definitionally brought within those concepts. In that sense, the powers of each branch would be “formally” separated from the powers of the other branches.

It might be argued that the inclusion within our definitional analysis of pragmatic factors effectively allows sufficient manipulability to enable the Supreme Court to employ a form of functional balancing under the guise of a definitional analysis. In a sense, of course, this is correct, because as a practical matter the Court—much like the proverbial 900-pound gorilla—may ultimately say anything that it wants. If the Court wishes to assert that a fish is a tree, for example, no one can stop it. But

24. It has been argued that the Constitution’s separation of powers protections are qualitatively different from other constitutional provisions because they are found only in the document’s implicit structure, rather than in its text. See, e.g., Elliott, *supra* note 5, at 508, 530-32. Such a distinction, however, is fallacious. The separation of powers protections are, in fact, explicitly embodied in the text—in the portions of Articles I, II, and III that convey to each branch a specific type of governmental power. Although these provisions do not place explicit prohibitions on the exercise of additional power by each branch, such prohibitions are unnecessary in light of the background understanding, textually confirmed in the Tenth Amendment, that the federal government is one of enumerated powers. Thus, when Article I conveys to Congress the legislative power, it is the failure of the text to delegate executive or judicial power to Congress that imposes the prohibition on congressional authority to exercise those powers. Judicial review of alleged branch usurpations, then, is appropriately deemed to be just as capable of textual construction as is any other constitutional provision.

25. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (establishing utilitarian calculus by which to measure procedural due process).

26. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 417-18 (1989) (extending free speech protection to flag desecration).

27. See, e.g., *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (The Eighth Amendment prohibition against cruel and unusual punishment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”).

28. See *infra* text accompanying notes 158-77.

29. See Frederick Schauer, *An Essay on Constitutional Language*, 29 UCLA L. REV. 797, 828 (1982) (Textual interpretation is “a frame without a picture, or better yet, a blank canvas. We know when we have gone off the edge of the canvas even though the canvas itself gives us no guidance as to what to put on it.”) (footnote omitted).

the Court's good-faith adoption of the pragmatic formalist model, we believe, would go far toward confining the unlimited flexibility inherent in a purely functional or balancing model. Although there will no doubt be close cases, both historical tradition and linguistic common sense will impose restrictions on the Court's use of purely pragmatic factors in its separation of powers analysis. To be sure, a Court not acting in good faith could manipulate our suggested standard into meaninglessness. But that is just as true of any conceivable doctrinal standard, or the interpretation of any constitutional provision. In any event, to do so would impose costs on the Court's institutional capital that open and admitted use of functionalism would not. The Court looks considerably sillier when it stoutly maintains that a fish is a tree than when it explains that, under appropriate constitutional theory, it simply does not matter whether the item in question is a fish or a tree.

Part I of this Article examines separation of powers from the perspective of political theory. It considers the purposes, values, and costs of this system, as well as alternative governmental models recently suggested by theorists unhappy with the confining impact of this governmental form. Part II makes the case for pragmatic formalism as a doctrinal model for separation of powers cases. In so doing, it provides broad definitional guidelines for the scope of the different branches' powers. This Part also tests important Supreme Court separation of powers decisions by the standard of the "pragmatic formalist" model, and indicates how those cases should have been resolved under that structure. Part III explores the serious problems with five alternative doctrinal structures that have been either employed by the Court or suggested by commentators for resolving separation of powers disputes: the "functionalist" model, the "judicial abdication" model, the "originalist" model, the "conflict of interest" model, and the "ordered liberty" model.

I. SEPARATION OF POWERS AS POLITICAL THEORY

A. *The Origins and Rationale of Separation of Powers Theory*

1. *Pre-American Theoretical Origins.* It requires neither substantial historical background nor great political insight to recognize the profound mistrust of government reflected in separation of powers theory.³⁰ If one individual or body were trustworthy, presumably that individual or body could be entrusted with total and unreviewable power to

30. See Brown, *supra* note 5, at 1515-16; *supra* text accompanying note 9. As Thomas Jefferson warned the Virginia legislature:

[Do not] be deluded by the integrity of their own purposes, and conclude that these unlimited powers will never be abused, because [they] themselves are not disposed to abuse them. They should look forward to a time, and that not a distant one, when corruption in this, as

check all other organs of government. Instead, under a separation of powers scheme, each segment of government is simultaneously given its own limited authority and the means to check the potential excesses of other governmental units.

As a political theory, the concept of separation of powers long predates the American Constitution. In fact, separation of powers as enunciated in our Constitution and understood today is a conglomeration of the ideas of many scholars and the experiences of many governments. Locke and Montesquieu seem to have had the strongest influence in the eighteenth century, for their works were heavily cited throughout the framing period.³¹ The impact of their theories on the Framers is hard to gauge, however. Despite their frequent citation to scholarly authority, the individuals who drafted the Constitution always seemed to harken back to pragmatic, common-sense evaluations of the Constitution they proposed.³² Indeed, "when the framers referred to foreign writers such as Montesquieu, 'they did so to embellish an argument, not to prove it. The argument itself was grounded on what had been learned at home. Theory played a role, but it was always circumscribed and tested by experience.'"³³ This pragmatic philosophy was summed up by one of the

in the country from which we derive our origin, will have seized the heads of government . . . Human nature is the same on every side of the Atlantic . . .

THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 121 (William Peden ed., 1955).

31. See THE FEDERALIST No. 47, at 139 (James Madison) (Roy P. Fairfield ed., 2d ed. 1966) (citing Montesquieu); *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents*, PENNSYLVANIA PACKET AND DAILY ADVERTISER (Dec. 18, 1787), reprinted in 3 HERBERT J. STORING, THE COMPLETE ANTI-FEDERALIST, at 145, 161-62 (1981) (citing Montesquieu). Locke's influence is most evident in the Declaration of Independence. In Pennsylvania, in a conflict over the appointment of the Lieutenant Governor to the Chief Justice-ship, opponents emphasized the need for proper separation of powers and drew on Locke and Montesquieu as authority: "'Mr. Locke is an oracle as to the *principles*, Harrington and Montesquieu are oracles as to the *forms* of government.'" M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 147 (1967) (quoting BENJAMIN RUSH, OBSERVATIONS ON THE PRESENT GOVERNMENT OF PENNSYLVANIA (1777), reprinted in ROBERT L. BRUNHOUSE, THE COUNTER-REVOLUTION IN PENNSYLVANIA, 1776-1790, at 20 (1942)).

32. In *The Federalist*, James Madison examined the various state constitutions, where, despite constitutional requirements, the legislatures had been widely overstepping the bounds of their power. "[E]xperience assures us," he wrote, "that the efficacy of the provision [of merely marking the boundaries of power] has been greatly overrated . . ." THE FEDERALIST No. 48, at 146 (James Madison) (Roy P. Fairfield ed., 2d ed. 1966). Madison harked back to simple human nature to explain the proposed structure:

But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. . . . This policy of supplying, by opposite and rival interests, the defect of better motives might be traced through the whole system of human affairs, private as well as public.

THE FEDERALIST No. 51, *supra* note *, at 160.

33. William B. Gwyn, *The Indeterminacy of the Separation of Powers in the Age of the Framers*, 30 WM. & MARY L. REV. 263, 263 (1989) (quoting LOUIS FISHER, PRESIDENT AND CONGRESS: POWER AND POLICY 4-5 (1972)).

delegates to the Federal Convention: "Experience must be our only guide. Reason may mislead us."³⁴

Nonetheless, Montesquieu and Locke apparently played large parts in the theoretical foundation of the Constitution. They, too, however, did not write on a clean slate. The foundations of modern separation of powers theory can be traced to the ancient Greek and Roman theory of mixed government.³⁵ This concept was based on a "frank recognition of the class basis of society."³⁶ Each class had its own representative body that shared in all the decisions of government. The separate departments were not designed to make government more efficient, because each had a part in each decision. Rather, "their representative character enabled them to prevent the use of that power in ways which would be prejudicial to the interests they represented."³⁷ Mixed government was designed to prevent absolutism—the arbitrary use of power—by avoiding the concentration of all state power in one body. Separation of powers has the same function, but operates on different assumptions. Two major changes are required to transform mixed government into a government based on separation of powers. First, particular departments must be restricted to certain functions. Second, an independent judiciary must be established.³⁸

The transition from mixed government to separation of powers began in the seventeenth century. Although people had long realized the danger of absolute power, the creation of a division of authority not based on class lines took time. As early as 1656, political writers were stressing the importance of the separation between the legislative and executive powers. According to Marchamont Nedham, "in all Kingdomes and States whatsoever, where they have had any thing of Freedom among them, the Legislative and Executive Powers have been managed in distinct hands."³⁹ Nedham warned against allowing the gradual accumulation of power in one branch. Using Rome as an example, Nedham explained:

34. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 278 (Max Farrand ed., 1911) (statement of Mr. John Dickenson of Delaware).

35. See VILE, *supra* note 31, at 23.

36. *Id.* at 35. Vile asserts that Plato emphasized the class system as "the basic element of the theory of mixed government." *Id.*

37. *Id.* at 36.

38. See *id.* at 37.

39. MARCHAMONT NEDHAM, THE EXCELLENCIE OF A FREE-STATE (1656), reprinted in I THE FOUNDERS' CONSTITUTION: MAJOR THEMES 314 (Philip B. Kurland & Ralph Lerner eds., 1987) [hereinafter FOUNDERS' CONSTITUTION]. Nedham defined legislative power as the "making, altering, or repealing [of] Laws." Executive power was "derived from the other [legislative power] . . . for the administration of Government." *Id.*

[T]heir Emperors . . . durst not at first turn both these Powers into the Channel of their own unbounded Will; but did it by degrees, that they might the more insensibly deprive the people of their Liberty, till at length they openly made and executed Laws at their own pleasures . . . and so there was an end of the Roman Liberty.⁴⁰

George Lawson's work formed an important bridge between the theories of mixed government and separation of powers.⁴¹ Lawson's two works laid the foundation for Locke's *Second Treatise on Government*.⁴² Lawson played a key role in dividing governmental functions into three parts rather than two, and in restricting the power of the executive to its particular functions. Executive power had been perceived as the authority to execute the law through the courts, with the head of state also in command of the courts. But Lawson developed a three part division of the functions of government: "There is a threefold power civil, or rather three degrees of that power. The first is legislative. The second judicial. The third executive."⁴³ It was here that the traditional division between legislation and execution of the laws was initially made.⁴⁴ But Lawson divided execution again into "acts of Judgement"⁴⁵—the hearing and decision of causes upon evidence—and "execution."⁴⁶ Execution meant the carrying out of judgments, "rather than the carrying into effect of the law as a whole."⁴⁷ This division laid the foundation for Locke to move from mixed government to separation of powers. Lawson also was one of the first to argue for legislative supremacy.⁴⁸

Locke completed the bridge between the ancient theory of mixed government and the modern doctrine of separation of powers.⁴⁹ Although most of the *Second Treatise on Government* sets forth a division of power between two branches of government,⁵⁰ Locke did propose

40. *Id.* at 315.

41. See GEORGE LAWSON, AN EXAMINATION OF THE POLITICAL PART OF MR. HOBBS' LEVIATHAN (London 1657) [hereinafter LAWSON, EXAMINATION OF LEVIATHAN]; GEORGE LAWSON, POLITICA SACRA ET CIVILIS (London 1660) [hereinafter LAWSON, POLITICA.SACRA].

42. JOHN LOCKE, TWO TREATISES ON GOVERNMENT (Peter Laslett ed., student ed. 1988) (3d ed. 1698).

43. LAWSON, EXAMINATION OF LEVIATHAN, *supra* note 41, at 8.

44. See LAWSON, POLITICA SACRA, *supra* note 41, at 38.

45. *Id.* at 41.

46. *Id.* "[Execution] includes the infliction of penalties, dispensations of judgement, suspension of execution, and pardons." VILE, *supra* note 31, at 55.

47. VILE, *supra* note 31, at 56.

48. See LAWSON, POLITICA SACRA, *supra* note 41, at 97.

49. See VILE, *supra* note 31, at 57-58.

50. See LOCKE, *supra* note 42, at 350-51. The legislative branch—responsible for making law—was analogous to man in the state of nature doing whatever he thought fit for the preservation of himself and others. The second power was the power to punish those who had violated the law, which Locke called the executive. The function of Locke's executive was to support the sentences of those who violated the law. According to Locke, man formed "civilized" societies because he was

a division of power between three branches based on the state of nature. One of Locke's most important contributions to modern political theory was his "reconciliation of legislative supremacy with the ideas of the separation of powers."⁵¹ He defined legislative power as the "right to *direct* how the *Force of the Commonwealth* shall be imploy'd for preserving the Community and the Members of it."⁵² However, he cautioned that it "may be too great a temptation to human frailty apt to grasp at Power, for the same Persons who have the Power of making Laws, to have also . . . the power to execute them."⁵³ This pragmatic evaluation of human nature greatly influenced the Framers. Repeated reference is made in *The Federalist*⁵⁴ and other writings of the time⁵⁵ to the need to guard against such temptation. Locke solved the problem by dispersing the legislators as soon as their task was complete, subjecting them to the laws they had made (thereby ensuring that the laws would be for the public good),⁵⁶ and establishing "a Power always in being, which should see to the Execution of the Laws that are made . . . [a]nd thus the Legislative and Executive Power come often to be separated."⁵⁷

Locke believed that the legislative power should be supreme "and all other Powers in any Members or parts of the Society, derived from and subordinate to it."⁵⁸ This complete legislative supremacy was rejected by the Framers because of their recent experiences with Parliament and their own state governments.⁵⁹ Locke also recommended that the executive have a certain residual power because the legislators cannot foresee all events, and because there are many things that "the Law can by no means provide for, and those must necessarily be left to the discretion of him, that has the Executive Power in his hands."⁶⁰ Whether and to what extent the Framers adopted this recommendation is still a matter of debate.⁶¹

unable to exercise these rights effectively on his own. There was no known settled law and no indifferent judge with authority to determine the differences according to law. *Id.* Locke's formulation may have been largely derived from Lawson's work.

51. VILE, *supra* note 31, at 58.

52. LOCKE, *supra* note 42, at 364.

53. *Id.*

54. See THE FEDERALIST NOS. 47, 48, 51 (James Madison).

55. See, e.g., JOHN ADAMS, THOUGHTS ON GOVERNMENT (1776), reprinted in I FOUNDERS' CONSTITUTION, *supra* note 39, at 107; JEFFERSON, *supra* note 30, at 121.

56. See LOCKE, *supra* note 42, at 364.

57. *Id.* at 365.

58. *Id.* at 368.

59. See THE FEDERALIST NO. 48, *supra* note 32, at 147 ("The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex.").

60. LOCKE, *supra* note 42, at 374-75.

61. See *infra* text accompanying notes 178-90 (discussing the proper scope of executive power).

Despite Locke's influence, Montesquieu was invoked more often than any other political authority in eighteenth-century America.⁶² Perhaps because of the Framers' efforts, his name is most closely associated with separation of powers. But Montesquieu insisted on neither absolute separation nor on legislative supremacy. Rather, according to Montesquieu, the branches' powers are supposed to blend and overlap so that they can check each other.⁶³ Like other eighteenth-century French political writers, Montesquieu lived daily with "the excesses of Bourbon absolutism"⁶⁴ and thus recognized "the problem of controlling political power."⁶⁵ Although he never recommended that the English system be adopted in France, he did express admiration for it.⁶⁶ The English system's most attractive elements were "the substantial 'separation' of executive, legislative, and judicial power, and the 'mixture' of monarchy, aristocracy, and democracy in Crown, Lords, and Commons."⁶⁷ Montesquieu noted that "[i]n every government there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive, in regard to things that depend on the civil laws."⁶⁸ The first power is to enact laws, and the second is basically a foreign relations power—to make "peace or war, send[] or receive[] embassies, . . . and provide[] against invasions."⁶⁹ The third power is to punish crimes and resolve the disputes that arise between individuals. Montesquieu called this second aspect of executive power the "judiciary power."⁷⁰

Montesquieu was suspicious of governmental power, and observed its tendency to encroach on the rights of the citizenry:

Political liberty . . . is there only when there is no abuse of power: but constant experience shews us, that every man invested with power is apt to abuse it; he pushes on till he comes to the utmost limit. . . . To prevent the abuse of power, 'tis necessary that by the very disposition of things power should be a check to power.⁷¹

Thus, Montesquieu thought that the structure of government was the means of preserving liberty. He wrote of England: "One nation there is

62. I FOUNDERS' CONSTITUTION, *supra* note 39, at 312.

63. *Id.*

64. MONTESQUIEU, THE SPIRIT OF THE LAWS 75 (David W. Carrithers ed., 1977).

65. *Id.*

66. *See id.* at 76.

67. *Id.* at 77.

68. *Id.* at 201.

69. *Id.*

70. *Id.* at 202.

71. *Id.* at 200.

also in the world, that has for the direct end of its constitution political liberty";⁷² he took England's structure as the ideal.

2. *The Role of Separation of Powers in American Political Theory: "Ambition Must Be Made to Counteract Ambition."*⁷³ Although the Framers were not satisfied with the structure of the English government, they wholeheartedly concurred with Montesquieu's distrust of governmental power. One of Madison's defenses of the American Constitution was that it had more separation of powers than Montesquieu's ideal.⁷⁴ To preserve political liberty, which Montesquieu defined as the "tranquility of mind, arising from the opinion each person has of his safety,"⁷⁵ he argued that the legislative and executive powers cannot be united in the same body. There should be no union because the tranquility of the subject would be disturbed by the apprehension that the "same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner."⁷⁶

"If men were angels," Madison wrote in *The Federalist No. 51*, "no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary."⁷⁷ Because experience had taught that neither option was available, the Framers sought to institutionalize methods for controlling government. Montesquieu's suspicion of governmental power struck a sympathetic chord in the minds of the Framers. In fact, there was little debate about whether Montesquieu was correct about how government should be designed. Instead, much of the argument over the proposed Constitution concerned whether it was faithful to his theories.⁷⁸ The argument arose because the Framers' severe mistrust of governmental power⁷⁹ actually forced them to modify rigid separation in the sense of the mutually exclusive exercise of branch power, so that each branch could in some way check the others. It was in this manner that the Framers blended the seemingly conflicting theories of separation of powers and checks and balances—a blending that Madison was forced to explain and defend.⁸⁰

72. *Id.*

73. THE FEDERALIST NO. 51, *supra* note *, at 160.

74. *See infra* text accompanying notes 81-90.

75. MONTESQUIEU, *supra* note 64, at 202.

76. *Id.*

77. THE FEDERALIST NO. 51, *supra* note *, at 160.

78. *See, e.g.,* THE FEDERALIST NO. 47, *supra* note 31, at 139 (discussing "the celebrated Montesquieu").

79. *See supra* text accompanying notes 9-10.

80. *See, e.g.,* THE FEDERALIST NO. 51, *supra* note *.

Two methodological insights may be drawn from the Framers' virtual obsession with the concentration of power. First, to be meaningful, the separation of powers must be institutionalized in a manner that provides each branch with the formal tools necessary to limit the excesses of its rivals.⁸¹ Second, and of greater importance for modern doctrinal purposes,⁸² the separation of powers must operate in a prophylactic manner—in other words, as a means of preventing a situation in which one branch has acquired a level of power sufficient to allow it to subvert popular sovereignty and individual liberty.

This was by no means the only conceivable method one might have chosen to deal with the undue accumulation of power, even under a separation of powers structure. Presumably, the Framers could have established a system in which each branch could exercise any form of governmental power, unless its exercise of that power was found to reach a level that enabled that branch to impose tyranny—what might be labeled the “undue accretion” model of separation of powers theory. Alternatively, they could have chosen a slightly more protective format, in which each branch would be allowed to exercise any form of governmental power until it was determined (by whom, we suppose, could be subject to debate) that that branch's power had reached a level at which the potential for undue accretion was evident—what might be labeled the “clear-and-present danger” model. A third alternative would have been to reject separation of powers completely—to impose no prophylactic barriers to the undue accretion of power—but instead simply to prohibit the tyrannical misuse of that power in its particular exercise.

Given their recent experience with the usurpations of power under state constitutions,⁸³ not to mention the generally poor survival rate of republican governments throughout history, it should not be surprising that the Framers chose none of these alternatives. The last alternative was rejected, almost as a definitional matter: Madison described the very accumulation of all power in the hands of one body or individual as the

81. See *supra* text accompanying notes 9-10.

82. See *infra* text at note 148-50.

83. In Virginia, for example, where the state constitution had failed to provide barriers between the branches (the executive and judiciary were both dependent upon the legislature), the legislative branch had accumulated a dangerous level of power. This led Jefferson to warn that “[a]n *elective despotism* was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies . . . that no one could transcend their legal limits, without being effectually checked and restrained by the others.” JEFFERSON, *supra* note 30, at 120; see also THE FEDERALIST NO. 48, *supra* note 32.

essence of tyranny.⁸⁴ Note that under his definitional structure, "tyranny" is not limited to the misuse of this power, or even to its exercise. Rather, it is the very fact of its accumulation that Madison equated with tyranny. This might have resulted from his assumption that the very fact of accumulation would so undermine the individual's sense of security that the benefits of free government would automatically be lost. On the other hand, it could have stemmed from the assumption that the likelihood of the abuse of such accumulated power is so inevitable and imminent that the accumulation itself is both conceptually and temporally tantamount to its abuse.

One could, we suppose, define "tyranny"—assumed to be an unacceptable result—as the undue accumulation of political power, yet nevertheless adopt either the "undue accretion" or "clear-and-present danger" modifications of separation of powers as the best means to avoid such a danger. Closer examination reveals, however, that neither is acceptable. The reason to reject the "undue accretion" model derives from the same type of pragmatic, experiential, common-sense analysis that led the Framers to adopt a separation of powers structure in the first place. As Jefferson recognized, once the power is accreted it will, as a practical matter, be virtually impossible to remove it: "The time to guard against corruption and tyranny, is before they shall have gotten hold on us. It is better to keep the wolf out of the fold, than to trust to drawing his teeth and talons after he shall have entered."⁸⁵ The far wiser methodology, then, would be to focus on the means to prevent the accretion in the first place. It is this reasoning that renders the prophylactic nature of separation of powers protections so essential an element of that concept.

Arguably, the "clear-and-present danger" model does not directly suffer from the same flaw as the "undue accretion" model; yet it too is inconsistent with the prophylactic goals of the Framers' separation of powers theory. Because, in Madison's words, "power is of an encroaching nature,"⁸⁶ its accretion is likely to lead to more accretion. However, short of an overt coup, such accretion need not be—indeed, is unlikely to be—of a dramatic form. Rather, it may be almost microscopic, so that the naked eye will be unable to perceive its occurrence. It is certainly conceivable, then, that the accretion will proceed in a manner that effectively circumvents the warning system sought to be established by the "clear-and-present danger" model. Moreover, unless one can establish

84. See THE FEDERALIST NO. 47, *supra* note 31, at 139 ("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.").

85. JEFFERSON, *supra* note 30, at 121.

86. THE FEDERALIST NO. 48, *supra* note 32, at 146.

some generalizable criteria by which one may test whether a particular accretion of power is "undue," it would be impossible for any monitoring organ to determine exactly when a "clear-and-present danger" had actually been established. To date, no such criteria have been suggested, and it is doubtful that any exist.⁸⁷ The problem—one that arguably does not plague the free speech area, where "clear-and-present danger" has received its widest use—is that it is all but impossible to ascertain the concrete likelihood of the danger occurring, until it has actually occurred, and then it will be too late for effective remedial action.⁸⁸

We are, then, left with the prophylactic structure adopted by the Framers in the Constitution's text: Each branch is limited to the exercise of the power given to it, which, in turn, is exclusive of the power exercised by the other branches⁸⁹ (with the limited exceptions explicitly provided in the text that allow one branch to check another⁹⁰). Under this structure, no case-by-case inquiry is made into the likelihood that tyranny will be threatened by a breach of branch separation, for the simple reason that there is no effective method of making that inquiry—at least until it is too late to avoid the danger.

B. *Separation of Powers as a Zero Sum Game: The Modern Theoretical Assault*

It might reasonably be suggested that in this country it is too late in the day—except in the highly unlikely context of a movement for wholesale constitutional amendment—to mount a frontal assault on our system of separation of powers. The question of its normative validity has been overwhelmed by the Constitution's force, both as positive law and moral

87. See *infra* text accompanying notes 141-47.

88. See DAVID F. EPSTEIN, *THE POLITICAL THEORY OF The Federalist* (1984):

[T]he "tyrannical concentration" of power . . . precedes the tyrannical exercise of that power, so that the danger of concentration may not be clear to the people at the time their trusted representatives are concentrating it. Madison also describes legislative encroachment stemming not from cleverly concealed ambition but from legislators "eagerly bent on some favorite object, and breaking through the restraints of the Constitution in pursuit of it" . . . The object may also be a favorite of the people themselves, and its attractiveness may obscure the danger of concentrating power in pursuit of it.

Id. at 135.

89. The exclusivity of branch power may seem problematic because common sense tells us that there are certain activities that more than one branch may undertake. However, as subsequent discussion will demonstrate, although there are numerous activities that, when described in the abstract, can be performed by more than one branch, each branch's performance of that activity is limited by the surrounding structural context, rendering the performance of the same activity either legislative, executive, or judicial. See *infra* text accompanying notes 162-77.

90. Examples include the President's power to veto congressional legislation, see U.S. CONST. art. I, § 7, cl. 2, and Congress's power to impose limitations on federal court jurisdiction, see U.S. CONST. art. III, § 2, cl. 1.

tradition. One need not rely on this fallback position, however. A comparison of separation of powers to the alternative models that have been suggested to replace it reveals that, whatever its faults, separation of powers provides the optimum methodology for attaining the goal of assuring the maintenance of popular sovereignty and individual liberty.

1. *The Radical Attack.* Some of the most strident criticisms of separation of powers have come from those who argue that it deadlocks government.⁹¹ These arguments rest on the proposition that modern governments need to be able to act more quickly than a separation of powers system permits. Lloyd Cutler, for example, argues that the major shortcoming of our government is its inability "to propose, legislate, and administer a balanced program for governing."⁹² Separation of powers is the culprit, he believes, because Congress will not support presidential programs; because the opposition is not unified, however, its programs are not implemented either.⁹³ Moreover, neither the President nor Congress can be held accountable by the voters for the failure to implement new programs, because each can blame the other. Another commentator echoes Cutler's objections: "[S]eparation of powers . . . inhibits the capacity of the government, especially the president, to enact policies that are bold, timely, and comprehensive and reduces the ability of the citizenry to hold the government . . . accountable for those policies."⁹⁴ Finally, another commentator complains:

There is growing evidence that the problems confronting the American constitutional system are outstripping its capacity. . . .

. . . .

A government is an organism with work to do. It must be judged according to its fitness to perform the tasks we assign to it.

. . . When the Constitution was framed two centuries ago, only a few crucial tasks required a national government. . . .

[But times have changed, and t]he constitutional system no longer operates as the Framers intended.⁹⁵

91. See, e.g., LAWRENCE C. DODD & RICHARD L. SCHOTT, *CONGRESS AND THE ADMINISTRATIVE STATE* (1979); Lloyd N. Cutler, *To Form a Government*, in *SEPARATION OF POWERS: DOES IT STILL WORK?* 1 (Robert A. Goldwin & Art Kaufman eds., 1986) [hereinafter *SEPARATION OF POWERS*]; C. Douglas Dillon, *The Challenge of Modern Governance*, in *REFORMING AMERICAN GOVERNMENT* 24 (1985); Charles M. Hardin, *The Separation of Powers Needs Major Revision*, in *SEPARATION OF POWERS*, *supra*, at 90; Sargentich, *supra* note 19, at 465; Lester Thurow, *The Moral Equivalent of Defeat*, in *REFORMING AMERICAN GOVERNMENT*, *supra*, at 33, 38; James Q. Wilson, *Political Parties and the Separation of Powers*, in *SEPARATION OF POWERS*, *supra*, at 18.

92. Cutler, *supra* note 91, at 1.

93. See *id.* at 2-3.

94. Wilson, *supra* note 91, at 18.

95. Donald L. Robinson, *The Renewal of American Constitutionalism*, in *SEPARATION OF POWERS*, *supra* note 91, at 38, 38, 40, 51.

The solutions that these critics offer vary. Cutler proposes that we adopt a parliamentary system similar to the one employed in England.⁹⁶ Professor Wilson suggests that the crumbling two-party system be re-forged and strengthened to "overcome the separation of powers by bringing together under informal arrangements what the founders were at pains to divide by formal ones."⁹⁷ Professor Robinson suggests that bicameralism be abolished, power to call new elections be given to the majority of Congress and the President, terms of office be limited to five years, and that a national council of about 100 persons be established to manage the new election system and to advise the President.⁹⁸

One difficulty with these solutions is the underlying assumption that more federal governmental action is necessarily better than less. Making innovation difficult ensures that "foolish or sinister schemes [are] . . . exposed and defeated" and that there is "deep and broad consensus" about proposed changes.⁹⁹ Cutler's system would require a citizen to vote for a trio of candidates; each district would have teams of President, Vice President, and member of Congress for each party.¹⁰⁰ The purpose of this team voting is to join the political fortunes of the party's presidential and congressional candidates. These officers would all be elected to simultaneous six-year terms. Once per term the president could dissolve Congress and call for new elections. But within thirty days, Congress by majority vote could call for a new presidential election. The elections would be held within 120 days of the call, while Congress, even if dissolved, would remain in session during this period. Presidents would be permitted only one six-year term.¹⁰¹ According to Cutler, limiting Presidents to a single term "would enhance objectivity and public acceptance"¹⁰² of his programs. His ability to dissolve Congress would avoid the lame duck problem, and prevent impasse.¹⁰³

Perhaps the biggest problem with Cutler's proposed system is that it would sharply limit the voters' ability to choose their representatives. For example, a voter who approves of one party's congressional candidate, but opposes that party's presidential candidate, is faced with a serious dilemma. Moreover, Cutler's proposal assumes that there are few

96. See Cutler, *supra* note 91.

97. Wilson, *supra* note 91, at 18.

98. See Robinson, *supra* note 95, at 54.

99. Candace H. Beckett, *Separation of Powers and Federalism: Their Impact on Individual Liberty and the Functioning of Our Government*, 29 WM. & MARY L. REV. 635, 640 (1988).

100. See Cutler, *supra* note 91, at 13.

101. *Id.* at 15.

102. *Id.*

103. See *id.*

(probably two) strong, cohesive parties that can represent all voters' interests. Cutler's proposal thus seems to threaten the concept of popular sovereignty by reducing the electorate's ability to express its true wishes.

Under the parliamentary system, the President would have the potential to become quasi-dictatorial, in that the system would simultaneously make him more powerful and less accountable. The reason Parliament generally accepts executive programs is because it lacks the strength to object.¹⁰⁴ Moreover, it seems unlikely that Congress (even if it retained the power) would be ready to impeach the President or any of his key officers, because in response he could simply dissolve it. The English themselves have made this point.¹⁰⁵

The disruption caused by the threat of dissolution would create a more serious problem than the deadlock it seeks to avoid. The new check would weld Congress to the President in all but the most egregious situations. Moreover, these are probably situations of national crisis, when it is least desirable to put government on hold for 120 days. Indeed, dissolution "is so drastic an alternative that in Britain . . . it succeeds in forcing a new general election only two or three times a century."¹⁰⁶ Further, the valuable deliberative powers of Congress might well be lost, because the executive has no need to consult it. Thus, such a system could seriously undermine limited government, by reducing the legislature's influence on executive decisionmaking. In any event, after the President uses his once-per-term dissolution power, impasse (as Cutler calls it) could occur again.¹⁰⁷

Finally, the parliamentary system proposal depends upon the existence of cohesive political parties. The English system operates successfully because England, for the most part, has a relatively small, homogeneous culture. The problems the English have faced in Ireland¹⁰⁸

104. See Arthur M. Schlesinger, *Leave the Constitution Alone*, in REFORMING AMERICAN GOVERNMENT, *supra* note 91:

Parliament's superiority over Congress in delivering whatever the executive requests is a function of weakness, not of strength. . . .

. . . .
Thus the prime minister appoints people to office without worrying about parliamentary confirmation, concludes treaties without worrying about parliamentary ratification, declares war without worrying about parliamentary authorization, withholds information without worrying about parliamentary subpoenas, is relatively safe from parliamentary investigation and in many respects has inherited the authority that once belonged to absolute monarchy.

Id. at 50, 51.

105. See *id.* at 51 ("Parliament has really no control over the executive; it is a pure fiction.") (quoting statement by Prime Minister Lloyd George).

106. *Id.*

107. See *id.*

108. See WILL DURANT & ARIEL DURANT, *THE STORY OF CIVILIZATION: THE AGE OF NAPOLEON* 507-11 (1975); see also WILL DURANT & ARIEL DURANT, *THE STORY OF CIVILIZATION:*

illustrate the difficulty the system has had in accommodating disparate interests. Although our system has been far from perfect in this regard, even Cutler acknowledges that more representation is permitted by a system of separation of powers.¹⁰⁹

The political heritage of England's parliamentary system is also far different from our own constitutional tradition. The English have been much less concerned about factions (or the modern term, special interests) and have exhibited much more faith in both the ascertainability of a common interest and the ability and will of the executive to pursue it. The English have a history of parliamentary action by consensus;¹¹⁰ until 1646, the English Parliament generally made its decisions without voting.¹¹¹ In contrast, from the beginning the United States has struggled to accommodate regional and ethnic differences.¹¹²

The extreme differences between the systems in the United States and Great Britain arise not only from the different view of class in the two societies,¹¹³ but also from the fact that the United States has a considerably more diverse political and social culture. One of the results of this difference is the existence of a federal system of states. Because of vast differences from region to region (such as climate, ethnicity, and industry), it is unrealistic to expect all the citizens to possess the same goals and interests. We cannot transplant a governmental system designed to serve a small, homogeneous nation into our vast, heterogeneous one. It is both inevitable and desirable that the electorate in a system as large and diverse as ours will hesitate to embrace a tightly unified system.¹¹⁴ They will require more control over governmental power than

THE AGE OF VOLTAIRE 103 (1965) ("Rarely in history has a nation been so oppressed as the Irish.").

109. See Cutler, *supra* note 91, at 5.

110. See JANE J. MANSBRIDGE, *BEYOND ADVERSARY DEMOCRACY* 15 (1980).

111. See *id.* at 16.

112. One author contrasted the American with the British system in the following manner:

Constitutional norms, and the practices influenced by these norms vary in the extent to which authority is partitioned among and within such major institutions as executive, legislative, bureaucracy, and judiciary as well as such territorial structures as . . . states At one extreme in countries like . . . the United States, constitutional norms provide for an extensive division of authority by means of both federalism and separation of powers. As a result the government . . . is . . . fragmented into a number of separate subsystems, each possessing a good deal of autonomy in relation to the others. At the other extreme, in countries like . . . Britain, a unitary rather than a federal system combined with parliamentary government rather than strict separation of powers between executive and legislature, make for considerably greater concentration of constitutional authority.

ROBERT DAHL, *DILEMMAS OF PLURALIST DEMOCRACY* 65-66 (1982).

113. The system of Lords, Commons, and Monarch is based upon a theory of mixed government founded on a class system. Granted, the influences of class have lessened in England, but here (at least officially) they have been rejected from the founding.

114. See Don K. Price, *Words of Caution About Structural Change*, in *REFORMING AMERICAN GOVERNMENT*, *supra* note 91, at 39, 43.

a mere choice between two political parties. The political elite is always tempted to "distort its perception of national policy . . . to maintain its own profit and power."¹¹⁵ The United States is simply too big and its population too heterogeneous for a single set of policies to accommodate.

2. *The Moderate Attack.* Other, less radical solutions to the problems of separation of powers do not require constitutional amendment, as Cutler's obviously would. They call for informal measures to combat the perceived inefficiency of separation of powers. One commentator, for example, suggests that we reforge the party system and rely on it to overcome legislative-executive deadlock.¹¹⁶ This solution, however, shares the weaknesses of the parliamentary proposal. Strong parties require both a single set of policies and strict adherence to party lines in voting. But the same diverse population that prevents accommodation of many interests in a parliamentary system would also prevent them in a strong party system. The crumbling of the party system was due in large measure to the need to satisfy the broadening field of constituents.¹¹⁷ Thus, even if it were possible to reunite the parties or to form new strong ones, they would still leave many effectively unrepresented.

A less drastic method proposed to alleviate the fragmenting of federal power is to make changes in our "unwritten constitution."¹¹⁸ "The first step in the right direction," according to one commentator, "would be to quit talking about the constitutional separation of powers."¹¹⁹ The proponent of this solution first suggests modifications in Congress's informal checks on the executive: Congress should be permitted to act only "on what the [P]resident actually decides and recommends publicly";¹²⁰ the President should have the ability to manage the preliminary processes and procedures at his discretion;¹²¹ and structural values are to be balanced against political ones.¹²² Although the plan urges that "we must pay at least as much attention to insuring the accountability of our executive institutions as to improving their efficiency and economy,"¹²³ it

115. *Id.*

116. See Wilson, *supra* note 91.

117. See JAMES L. SUNDQUIST, DYNAMICS OF THE PARTY SYSTEM: ALIGNMENT AND REALIGNMENT OF THE POLITICAL PARTIES IN THE UNITED STATES 342-411 (1983).

118. Price, *supra* note 114, at 39.

119. *Id.* at 40.

120. *Id.* at 45.

121. *Id.* at 44-45.

122. *Id.* at 47 ("[I]n political practice Americans followed Burke in making their main adjustments in their unwritten constitution on the basis of Burke's 'computing principle'—the unquantifiable process of working out 'balances between differences of good; in compromise between good and evil, and sometimes between evil and evil.'").

123. *Id.* at 44.

is not clear that it preserves executive accountability. Initially, ensuring executive efficiency by imposing informal (i.e., non-statutory, non-constitutional) restraints on Congress seems naive at best. If the restraints are not enforceable, what will keep self-interested members of Congress¹²⁴ from encroaching on the executive sphere? If the "unwritten constitution" can modify the tenets of the written one, this proposal effectively advocates a circumvention of the amendment process. These modifications and the precedent they set actually present greater dangers than the radical parliamentary proposals because their subtlety might prevent them from being held up to public scrutiny, as they would be if the Constitution were sought to be formally amended.

3. *The Costs of Abandoning Separation of Powers.* The most significant problem with the modern attacks on separation of powers is that they completely ignore the very real fears that led to the adoption of the system in the first place. No critic has adequately demonstrated either that the fears of undue concentrations of political power that caused the Framers to impose separation of powers are unjustified, or that separation of powers is not an important means of deterring those concentrations.

It might be argued that the dangers of tyranny thought to be prevented by the use of separation of powers are at best speculative. After all, no one can predict with certainty that, but for the formal separation of branch power, the nation would be likely to sink into a state of tyranny. It is, then, conceivable that all of the Framers' efforts to separate and check powers have been wasted. But that is a risk inherent in the use of any form of prophylactic protection: We cannot be sure that, but for the use of the protection, the harm we fear would result.

The decision regarding whether to employ a particular prophylactic device, then, must come down to a comparison of the costs incurred as a result of the device's use with an estimate of both the likelihood and severity of the feared harm.¹²⁵ Although some undoubtedly believe that separation of powers imposes severe costs on the achievement of substantive governmental goals, it would be inaccurate to suggest that government has been paralyzed as a result of separation of powers. Too much legislation is enacted by Congress to accept such a criticism. More importantly, in critiquing the failure of the federal government to act, one

124. We do not necessarily mean personal self-interest here, but rather political self-interest, i.e., seeking to represent one's constituents to ensure re-election.

125. In a sense, this analysis is parallel to Learned Hand's formula for determining negligence. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

must do so behind a Rawlsian "veil of ignorance":¹²⁶ Assuming that abolition of separation of powers would result in an increase in governmental action, we cannot know whether those actions will be ones with which we agree. Moreover, the facilitation of governmental action could just as easily lead to a withdrawal of existing governmental programs that we deem to be wise and just. For example, but for separation of powers, election of Ronald Reagan could have easily led to the abolition of social welfare programs that had been instituted in previous Democratic administrations. Liberals who criticize separation of powers for the constraints it imposes on governmental action should therefore recognize how removal of separation of powers could act as a double-edged sword.

Thus, the costs imposed by maintenance of separation of powers are probably nowhere near as great as critics have suggested. Whether the costs that we actually do incur are justified by the system's benefits requires us to examine the likelihood and severity of harm that could result if separation of powers were removed. As previously noted, some might question the likelihood of tyrannical abuse of power if separation of powers were abolished. After all, England lacks our system of formalistic separation of powers, and democracy still flourishes. Why, then, could we not do the same here? The same could, however, be said of the First Amendment rights of free speech and press: In England, speech and press receive no counter-majoritarian constitutional protection, yet it is probably reasonable to believe that for the most part those institutions flourish there. Yet few, we imagine, would feel comfortable with the repeal of the First Amendment.

In any event, the political history of which the Framers were aware tends to confirm that quite often concentration of political power ultimately leads to the loss of liberty. Indeed, if we have begun to take the value of separation of powers for granted, we need only look to modern American history to remind ourselves about both the general vulnerability of representative government, and the direct correlation between the concentration of political power and the threat to individual liberty.¹²⁷

126. JOHN RAWLS, *A THEORY OF JUSTICE* 136-42 (1971).

127. It might be argued that the examples of threats to liberty in the nation's political history that have occurred despite the existence of a separation of powers structure only demonstrate the ineffectiveness of separation of powers as a means of preserving liberty. However, the examples to which we point are, for the most part, cases in which the judiciary failed to enforce the limits on branch power imposed in the Constitution. Obviously, no system can work if the body obligated to enforce it chooses not to do so. In certain instances, however, the judiciary may attempt to enforce separation of powers yet be rebuffed by the stronger political branches. All this proves, however, is that separation of powers, like every other constitutional protection, is not foolproof. That hardly constitutes a basis for concluding that it serves no valuable positive function. Separation of powers is

The widespread violations of individual rights that took place when President Lincoln assumed an inordinate level of power, for example, are well documented.¹²⁸ Arguably as egregious were the threats to basic freedoms that arose during the Nixon administration, when the power of the executive branch reached what are widely deemed to have been intolerable levels.¹²⁹ Although in neither instance did the executive's usurpations of power ultimately degenerate into complete and irreversible tyranny, the reason for that may well have been the resilience of our political traditions, among the most important of which is separation of powers itself. In any event, it would be political folly to be overly smug about the security of either representative government or individual liberty. Although it would be all but impossible to create an empirical proof to demonstrate that our constitutional tradition of separation of powers has been an essential catalyst in the avoidance of tyranny, common sense should tell us that the simultaneous division of power and the creation of interbranch checking play important roles toward that end.

To underscore the point, one need imagine only a limited modification of the actual scenario surrounding the recent Persian Gulf War. In actuality, the war was an extremely popular endeavor, thought by many to be a politically and morally justified exercise. But imagine a situation in which a President, concerned about his failure to resolve significant social and economic problems at home, has callously decided to engage

little more than the equivalent of a "speed bump" to tyranny. But speed bumps perform valuable preventative functions, even though someone determined to ignore them will ultimately not be stopped.

128. President Lincoln suspended the writ of habeas corpus on April 27, 1861, leading to the military arrests of thousands, even though it had been widely thought that only Congress had the authority to suspend the writ. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES *482-89. Lincoln's suspension was not public; he authorized the General in Chief of the Union forces, who in turn delegated the authority to other commanders, to arrest citizens without the protections of the writ. "No one informed the courts or other civil authorities." MARK E. NEELY, JR., *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES* 9 (1991). "Once [Lincoln] suspended the writ of habeas corpus without suffering dire political consequences, similar actions grew easier and easier." *Id.* at 10. He made individual suspensions of the writ and quickly overcame any initial hesitation to use his power to suspend it. Although the suspension was originally limited to areas near the battle-lines, it was soon extended nationwide. *Id.* at 14-15.

First in Missouri and then in other states, Lincoln permitted military commissions, "essentially courts-martial," to try civilians. *Id.* at 35. Suspension of the writ only permitted imprisonment without charge. The military trials determined the final disposition of the prisoner. Lincoln authorized a mass relocation of all the inhabitants of certain Missouri counties. These "mischievous" citizens were deemed to be consorting with the enemy. *Id.* at 48. Moreover, "any person . . . who may be engaged, by act, speech, or writing, in discouraging volunteer enlistments" was to be arrested and imprisoned. *Id.* at 53. A series of orders "allow[ed] a horde of petty functionaries to decide without any legal guidelines one of the highest matters of state: precisely who in this civil war was loyal or disloyal." *Id.* at 54.

129. See generally Peter E. Quint, *The Separation of Powers Under Nixon: Reflections on Constitutional Liberties and the Rule of Law*, 1981 DUKE L.J. 1.

the nation in war, simply to defer public attention from his domestic failures. To be sure, the President was presumably elected by a majority of the electorate, and may have to stand for reelection in the future. However, at this particular point in time, but for the system established by separation of powers, his authority as Commander in Chief¹³⁰ to engage the nation in war would be effectively dictatorial. Because the Constitution reserves to the arguably even more representative and accountable Congress the authority to declare war,¹³¹ the Constitution has attempted to prevent such misuses of power by the executive.¹³² It remains unproven whether any governmental structure other than one based on a system of separation of powers could avoid such harmful results.

In summary, no defender of separation of powers can prove with certitude that, but for the existence of separation of powers, tyranny would be the inevitable outcome. But the question is whether we wish to take that risk, given the obvious severity of the harm that might result. Given both the relatively limited cost imposed by use of separation of powers and the great severity of the harm sought to be avoided, one should not demand a great showing of the likelihood that the feared harm would result. For just as in the case of the threat of nuclear war, no one wants to be forced into the position of saying, "I told you so."

II. PRAGMATIC FORMALISM AS AN ANALYTICAL MODEL IN SEPARATION OF POWERS CASES

A. *The Case for Pragmatic Formalism*

Once one accepts (as we do) that separation of powers is an essential means of preserving both individual liberty and representative government,¹³³ the next task is to find the most effective doctrinal model to preserve those protections. Our answer to that inquiry is "pragmatic formalism"—an approach that requires a "formal" separation of branch power, to be determined by means of a pragmatically-based definitional analysis of the concepts of "executive," "legislative," and "judicial" power.

The primary rationale for the choice of pragmatic formalism is the relative inadequacy of every conceivable doctrinal alternative as a means of ensuring the effectiveness of separation of powers.¹³⁴ In this sense, our

130. See U.S. CONST. art. II, § 2, cl. 1.

131. See *id.* art. I, § 8, cl. 11.

132. See generally J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27 (1991).

133. See *supra* text accompanying notes 125-32.

134. See *infra* text accompanying notes 225-318.

argument is not that pragmatic formalism is free from doubt or difficulty, but rather—much like Churchill's defense of democracy as a form of government¹³⁵—that it is a preferable to any of its competitors.

Before exploring the fatal defects in those alternatives, however, it is necessary to flesh out our concept of pragmatic formalism, and in so doing alter widespread—but unjustified or misleading—perceptions. Professor Thomas Sargentich, for example, has characterized "formalism" as "a range of possible legal theories stressing the centrality of rules or principles as guideposts of analysis. . . . The key idea is that legal norms are distinct from sheer moral and political discourse, and that the former have guiding normative force on their own."¹³⁶ Having so characterized "formalism" as an abstract matter, Sargentich criticizes the concept's application to separation of powers doctrine as "simplistic," and representative of an "inflexible and unrealistic attitude."¹³⁷ Sargentich's description of the place of formalism in the spectrum of legal thought represents, for the most part, an accurate characterization.¹³⁸ To the extent that the term is thought necessarily to imply a rigid separation of law and morality, or the use of abstract and unbending legal principles, we naturally reject it. Any reasonably competent first-year law student knows that that is not how law evolves. In the sense in which we employ the term, "formalism" implies merely the formal separation of "executive," "legislative," and "judicial" power, without either an attempt to discern whether a breach of those barriers presents a danger of "undue" accretion of power in a particular instance or any discounting for countervailing political or social interests. This approach is chosen because of the pragmatic assessment that it is far and away the best means of ensuring the viability of separation of powers, which is itself designed to foster broader social and political values.¹³⁹ Thus, far from representing a formal separation of law on the one hand and politics and morality on the other, the brand of formalism we advocate is adopted for the very purpose of implementing carefully reasoned political values.

135. See Winston Churchill, Speech to the House of Commons (Nov. 11, 1947), quoted in THE OXFORD DICTIONARY OF QUOTATIONS 150 (3d ed. 1979) ("No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of Government except all those other forms that have been tried from time to time.").

136. Sargentich, *supra* note 19, at 458 n.31.

137. *Id.* at 439; see also Gewirtz, *supra* note 19, at 343 (suggesting that a rigid categorization of branch power "simplistically disregard[s] the real complexities of government structure as we know it and as our country has known it for a very long time").

138. For a description of the negatives of formalism, see Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1988).

139. See *supra* text accompanying notes 125-37.

The justification for the use of pragmatic formalism flows from a recognition of the purposes served by separation of powers in the first place.¹⁴⁰ Central to that concept are three simultaneous insights: (1) the very fact of the concentration of political power in the hands of one governmental organ is unacceptable, even absent a showing of misuse of that power; (2) it will, as a practical matter, be all but impossible to determine when the level of the concentration of political power has reached the danger point; and (3) the point at which such an unacceptable concentration is actually reached is too late for the situation to be remedied.¹⁴¹ Separation of powers guarantees are, then, prophylactic in nature. They are designed to avoid a situation in which one might even debate whether an undue accretion of power has taken place. In short, the idea is to provide a buffer zone between government and the accretion of even potentially abusive power.

No doctrinal model other than a formalistic approach can assure that a system of separation of powers will perform its prophylactic function. The key advantage of a formalistic analysis is that it frees a reviewing court from the impossible task of determining whether a particular usurpation of branch power presents a serious step toward tyranny. Indeed, avoidance of the need for such a subjective case-by-case analysis is undoubtedly the very reason that those who drafted the Constitution chose not to impose a fact-based standard for separation of powers.

The intellectual bankruptcy of a doctrinal approach that measures the validity of branch usurpations in terms of the particular threat of undue concentration of power posed in each case is well illustrated by the Court's most recent use of such a standard in *Morrison v. Olson*.¹⁴² Title VI of the Ethics in Government Act of 1978¹⁴³ allows for appointment of an independent counsel to investigate and potentially prosecute certain government officials. The Act provides substantial authority to a specially created Article III court (the "Special Division") both to appoint and to supervise the independent counsel.¹⁴⁴ According to the Court, "[i]t is undeniable that the Act reduces the amount of control or supervision that the Attorney General and, through him, the President exercises over the investigation and prosecution of a certain class of alleged criminal activity."¹⁴⁵ However, noting that the Act nevertheless "gives the Executive a degree of control"¹⁴⁶ over the counsel's actions, the Court

140. See *supra* text accompanying notes 125-37.

141. See *supra* text accompanying notes 83-88.

142. 487 U.S. 654 (1988).

143. 28 U.S.C. §§ 591-599 (1988).

144. *Id.* § 593(b)(1); see *Morrison*, 487 U.S. at 678.

145. *Morrison*, 487 U.S. at 695.

146. *Id.* at 696.

concluded that “these features of the Act give the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties.”¹⁴⁷ But at no point does the Court even attempt to tell us how one can begin to know whether a particular usurpation of branch power leaves “sufficient” power in the hands of the undermined branch, or what would constitute an undue accretion of power to the undermining branch. Such an “analysis” not only represents a total failure of the judicial function, but also constitutes an effective abandonment of the inherently prophylactic nature of separation of powers.

Resort to formalism in the shaping of separation of powers doctrine has been severely criticized. The use of formalism in separation of powers doctrine, one commentator has alleged, “tends to produce excessively mechanical results,”¹⁴⁸ and also “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.”¹⁴⁹ Another commentator has charged that “[t]o insist upon the maintenance of an absolute separation [of powers] 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.”¹⁵⁰ But such criticisms fail to recognize the manner in which formalism uniquely fosters one of the central structural elements of separation of powers theory: its inherently prophylactic nature. The concept of a prophylactic is that it prevents the creation of a critical situation by proceeding on the assumption that it will be impossible to determine, in the individual instance, the existence of a real threat to the values sought to be fostered. This assumption appears grounded in both logic and experience, in the case of separation of powers, and one upon which the Constitution’s text clearly proceeds. Thus, to criticize formalism for producing overly mechanical results or for failing to produce recognizable gains misses the point of the preventive methodology inherent in our separation of powers theory.

Criticism of formalism for imposing an unrealistic “straitjacket” on governmental innovation¹⁵¹ likewise misses the point. Quite obviously, separation of powers protections, like many other structural elements of

147. *Id.*

148. Brown, *supra* note 5, at 1525.

149. *Id.* at 1526.

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

151. See *supra* text accompanying notes 148-50.

the Constitution,¹⁵² were inserted for the very purpose of preventing precipitant governmental action. If one believes that the use of such "speed bumps" to action are unwise, presumably one would concur with one or more of the proposals for radically reshaping our governmental structure¹⁵³—proposals that we believe to be extremely dangerous to the values of liberty and representationalism central to our nation's political theory.¹⁵⁴ To shape modern separation of powers doctrine based upon a hostility toward the very purposes it seeks to serve, however, would ignore the limited role that the judiciary was designed to play within our constitutional system.¹⁵⁵ In any event, as long as one employs a "pragmatic" brand of formalism in the shaping of branch power,¹⁵⁶ the constraints imposed on governmental action by a formalistic approach to separation of powers doctrine should not prove to be wildly impractical.¹⁵⁷

B. *The Problem of Definition*

1. *The Issue of Linguistic Skepticism.* One who is skeptical about the meaning of text¹⁵⁸ might well respond to our defense of pragmatic formalism that this doctrinal model provides no more protection against undue accretions of power than would a case-by-case standard because of the inherently vague and manipulable nature of the constitutional terms

152. In particular, we refer to the Constitution's protections of federalism. See *supra* text accompanying notes 8-10.

153. See *supra* text accompanying notes 91-124.

154. See *supra* text accompanying notes 91-124.

155. See MARTIN H. REDISH, *THE FEDERAL COURTS IN THE POLITICAL ORDER: JUDICIAL JURISDICTION AND AMERICAN POLITICAL THEORY* 7 (1991).

156. See *infra* text accompanying notes 162-77.

157. Professor Brown has suggested an additional criticism of the use of formalism in separation of powers: that it "supports majoritarianism." Brown, *supra* note 5, at 1526. She explains that "[i]t 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." *Id.*

However, it is difficult to understand a criticism of constitutional doctrine for no reason other than that it "supports majoritarianism"—as if that description were somehow thought to be inherently damning. Although it is true that the use of formalism would generally provide support to the theory of the unitary executive (under which "the President has unfettered control over any officer who can be said to exercise executive power," *id.* at 1526 n.53), it is unclear why that renders the formalist model inherently defective, as Professor Brown appears to assume. In any event, to the extent that Professor Brown fears that formalism would lead to the dangerous expansion of executive power, she should note that use of a formalist model would also logically reject a theory of inherent and unenumerated executive power in general, see *infra* text accompanying notes 178-91, and a theory of unlimited executive power in the foreign policy area in particular, see *infra* text accompanying notes 172-73. Thus, it is by no means clear that use of a formalist model would lead to a dramatic expansion of executive power.

158. See, e.g., STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES* (1980); Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373 (1982).

to be defined.¹⁵⁹ If the terms “executive,” “legislative,” and “judicial” are incapable of any meaningful distinction, then reliance on the definitional analysis inherent in the pragmatic formalist model would actually prove to be counter-productive, in that it would force a reviewing court to engage in a meaningless, abstract linguistic analysis, instead of attempting to deal with cold, hard political realities.

Concededly, one who believes that words are inherently capable of infinite, equally acceptable meanings will not likely be impressed with our interpretational model. However, we proceed on the assumption—previously both articulated and defended¹⁶⁰—that the constitutional text is not so easily inamenable. To be sure, it would be equally unwise to posit that constitutional terms are to receive rigid, unbending, and abstract definitions. But surely there exists a happy medium in constitutional interpretation between these two hermeneutical extremes. Words in the text of the Constitution are, for the most part, sufficiently broad-based that they may evolve over time, in order to take into account pragmatic and social concerns, yet not simultaneously descend into a pit of linguistic anarchy.¹⁶¹

2. *Defining Branch Power.* Construction of the terms “legislative,” “executive,” and “judicial,” as employed in Articles I, II, and III respectively, provides a classic illustration of this mode of textual interpretation.¹⁶² With relatively narrow, historically-based exceptions,¹⁶³ “legislative” power includes only the authority to promulgate generalized standards and requirements of citizen behavior or to dispense benefits—to achieve, maintain, or avoid particular social policy results. So broadly phrased, of course, such a standard could conceivably be employed also to describe the functions performed by the judicial and executive branches. However, the difference is the structural “baggage” that the exercise of the judicial and executive powers are required to carry—

159. See, e.g., Brown, *supra* note 5, at 1524 (“[A] belief that legislative, executive, and judicial powers are inherently distinguishable as well as separable from one another [is itself] a highly questionable premise.”); see also Gewirtz, *supra* note 19, at 343, 348.

160. See Redish & Drizin, *supra* note 2, at 23-28; Schauer, *supra* note 29, at 809-10.

161. See generally *supra* sources cited note 160.

162. It is important to emphasize, once again, that the separation of powers protections are not, as certain commentators have suggested, merely implied in the structure of the Constitution. Rather, they are derived from the Constitution’s affirmative grants of political power to the respective branches, construed in light of the background understanding of delegated powers. See *supra* note 24.

163. The main historical exception to this requirement is the use of so-called “private bills,” by which Congress voted to award funds to individuals harmed by governmental action. Such legislative awards, however, were necessary because sovereign immunity precluded private suits against the federal government. This problem was resolved by a limited congressional waiver of sovereign immunity and the creation of the Court of Claims. See *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962).

baggage that does not affix itself to the exercise of the legislative power. The judicial branch may establish such rules of behavior only in the context of the performance of the "traditional" judicial function of the adjudication of live cases or controversies.¹⁶⁴ Indeed, that it is (at least to a large extent) the procedural and structural context in which a policy choice is made—rather than the substance of that choice—that distinguishes the legislative and judicial functions is demonstrated by the fact that, on non-constitutional issues, Congress may overrule judicial policy choices that have been made in the context of case adjudication.¹⁶⁵

The executive branch, on the other hand (with certain exceptions specified by the Constitution¹⁶⁶), is confined to the function of "executing" the law. Such a function inherently presupposes a pre-existing "law" to be executed. Thus, the executive branch is, in the exercise of its "executive" power, confined to the development of means to enforce legislation already in existence.¹⁶⁷ Hence, every exercise of executive power not grounded in another of the executive's enumerated powers must accurately purport to enforce existing legislation.

It should be emphasized that this requirement in no way implies that the executive branch's power should somehow be confined to the performance of "ministerial" functions, bereft of any room for the exercise of creativity, judgment, or discretion. All it means is that, unless some other specifically delegated executive branch power applies, the executive branch must be exercising that creativity, judgment, or discretion in an "implementational" context. In other words, the executive branch must be interpreting or enforcing a legislative choice or judgment; its actions cannot amount to the exercise of free-standing legislative power.

164. As Justice Rehnquist wrote in *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982), the federal courts are not "debating societies." *Id.* at 472.

165. For example, in the Civil Rights Act of 1991, Pub. L. No. 102-166 (1991), one of Congress's express purposes was "to respond to recent Supreme Court decisions by restoring the civil rights protections that were dramatically limited by those decisions." H.R. REP. NO. 40, 102d Cong., 1st Sess. 1 (1991).

166. In addition to the obligation to execute the laws, Article II expressly vests in the executive branch such authority as the power to serve as Commander in Chief, U.S. CONST. art. II, § 1, cl. 8, to make treaties (with the advice and consent of two-thirds of the Senate), *id.* § 2, cl. 1, to appoint ambassadors and other executive officers, and to issue pardons, *id.* § 2, cl. 2.

167. Although it has been suggested that the President may also exercise inherent executive authority not specifically enumerated in Article II, we reject this interpretation for reasons of textual analysis as well as political theory. See *infra* text accompanying notes 178-91.

A helpful doctrinal illustration of this point is *United States v. Curtiss-Wright Export Corp.*¹⁶⁸ In *Curtiss-Wright*, a Joint Resolution of Congress had provided:

That if the President finds that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace between those countries, and if . . . he makes proclamation to that effect, it shall be unlawful to sell [any arms to those countries], except under such limitations and exceptions as the President prescribes¹⁶⁹

The issue before the Court was whether the resolution constituted an impermissible delegation of "legislative" power to the executive.¹⁷⁰

Under our analysis, if the power given to the President was, in fact, properly characterized as "legislative" rather than "executive," the Joint Resolution should have been found unconstitutional. Justice Sutherland, speaking for the Court, did not reach that conclusion, reasoning—in a highly tenuous and convoluted opinion¹⁷¹—that the power to control foreign policy was inherently an executive function.¹⁷² For reasons that will be discussed,¹⁷³ we reject Justice Sutherland's logic in reaching this conclusion. We agree, however, with the Court's ultimate conclusion in *Curtiss-Wright* that the Resolution was constitutional for the simple reason that the power to be exercised by the President should properly have been classified as "executive," rather than "legislative." To be sure, the President's performance of the task dictated by the Resolution would require the exercise of a substantial degree of judgment and discretion. But in so doing, the President would nevertheless be "implementing" a preexisting legislative policy choice. By its Joint Resolution, Congress had determined that "the reestablishment of peace" in that area of the world was the policy choice of the United States. This was a decision that the President was neither authorized nor permitted to reject.¹⁷⁴ All the President was authorized to do was to make the decision whether a prohibition on the sale of arms would "contribute" to attainment of that goal.

168. 299 U.S. 304 (1936). *Curtiss-Wright* is not usually thought of in this vein; it is most widely known for its holding that the executive branch possesses broad, unenumerated power to control foreign affairs. See *infra* text accompanying notes 178-79.

169. H.R.J. Res. 347, 73d Cong., 2d Sess., 48 Stat. 811 (1934), quoted in *Curtiss-Wright*, 299 U.S. at 312.

170. See *Curtiss-Wright*, 299 U.S. at 315.

171. See *infra* text accompanying notes 178-91.

172. See *Curtiss-Wright*, 299 U.S. at 319-21.

173. See *infra* text accompanying notes 178-91.

174. The argument might be made that the goal of reestablishing peace is so vague and nebulous that it effectively provides no meaningful legislative limitation on executive power. However, if we

Characterization of the President's power under the Resolution as "executive" illustrates the appropriately pragmatic nature of the definitional process.¹⁷⁵ Presumably, Congress could reasonably conclude that political conditions in the area were so volatile that they required the potential for flexible and immediate response, the kind of response for which the cumbersome legislative process is ill-suited. It was therefore necessary for Congress to be able to vest in the President the authority to make this judgment, the very type of judgment that the executive branch is best suited to make. As long as such pragmatic considerations are not allowed to consume all other relevant factors, such as accepted tradition and language, their influence is no more inappropriate in the fashioning of separation of powers doctrine than in any other area of constitutional interpretation. This is especially true in light of the fact that pragmatic considerations, learned the hard way during the tumultuous period without an executive under the Articles of Confederation,¹⁷⁶ led to the recognition of the need for an executive in the first place.¹⁷⁷

Presumably, the decision to prohibit the sale of arms could, in the abstract, also be classified as legislative power. Had Congress itself chosen to prohibit such sales, it could hardly be doubted that this action would properly fall within Congress's legislative power. But this fact does not imply a fungibility of executive and legislative power; it merely underscores that the distinctions between branch powers will often turn not on the abstract nature of the substantive decision, but rather on the

were to transport the goal of the congressional resolution involved in *Curtiss-Wright* to a hypothetical resolution enacted during the period immediately prior to the recent Gulf War, we could see how dramatic a limitation it could have imposed on the President's options.

175. See *supra* text accompanying notes 19-30.

176. See, e.g., GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 3 (2d ed. 1991) (referring to the "perceived need for executive authority to provide energy and resolution in domestic and foreign affairs" as one of the problems encountered under the Articles of Confederation).

177. One other illustration of the pragmatic nature of the definitional process appeared in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (The Steel Seizure Case). In that case, the Court had to decide "whether the President was acting within his constitutional power when he issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation's steel mills." *Id.* at 582. The opinion of the Court, over the dissent of Chief Justice Vinson, see *id.* at 667, refused to find that this authority could be grounded in the President's Article II power as Commander in Chief:

Even though "theater of war" be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities.

Id. at 587. Linguistically, we suppose it would not be irrational to construe the Commander in Chief power to cover a domestic situation arguably so closely tied to the success or failure of the nation's war effort. However, because of an obvious concern over the dangers of extending military power over domestic matters, a majority of the Court declined to do so.

surrounding political and structural context. In *Curtiss-Wright*, for example, the President's authority to ban arms sales is appropriately characterized as "executive" because, under the circumstances, it constituted a means of implementing Congress's previously expressed legislative goal. Had the President decided to ban arms sales as a free-standing decision, however, it could not properly be viewed as an exercise of "executive" power, for the obvious reason that it would have failed to implement a specific congressional policy judgment. Only Congress, in the exercise of its legislative power, could have made this free-standing choice.

3. *The "Inherent Executive Power" Theory.* Some scholars have suggested that the President's authority is not limited to those powers specifically enumerated in Article II, but rather includes an ill-defined group of "inherent" powers not explicitly embodied in the Constitution's text.¹⁷⁸ If this theory were accepted, the preceding effort to define the meaning of "executive" power would be pointless: Any exercise of power by the President not found to fall within the terms of Article II could simply be justified as falling within his "inherent" authority. But although such a theory actually does find support on some levels in Supreme Court doctrine,¹⁷⁹ it represents a highly dubious, and arguably very dangerous, construction of constitutional power.

The textual argument supporting so broad a construction of executive power could be charitably described as strained. It is premised on the theory that Article II's "vestiture" clause, providing that "the executive power shall be vested in a President,"¹⁸⁰ constitutes an independent grant of unspecified authority, above and beyond the specific powers subsequently enumerated in the body of Article II.¹⁸¹ Although supporters of this construction readily concede that the comparable provision concerning congressional power in Article I¹⁸² implies no such expansive power, they point to the presence in Article I of the words "herein

178. See, e.g., LOUIS FISHER, *PRESIDENT AND CONGRESS: POWER AND POLICY* 30-32 (1972); CHARLES M. HARDIN, *PRESIDENTIAL POWER AND ACCOUNTABILITY: TOWARD A NEW CONSTITUTION* 1-8 (1974); Eugene V. Rostow, *What the Constitution Means By Executive Power*, 43 U. MIAMI L. REV. 188, 190-91 (1988).

179. See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) (executive power over foreign affairs). See *supra* text accompanying notes 168-74.

180. U.S. CONST. art. II, § 1, cl. 1.

181. The argument premised on the language of the vestiture clause is described in EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787-1984*, at 4-10 (5th rev. ed. 1984); see also Thomas E. Cronin, *The President's Executive Power*, in *INVENTING THE AMERICAN PRESIDENCY* 180, 181, 193 (Thomas E. Cronin ed., 1989).

182. See U.S. CONST. art. I, § 1 ("All legislative powers herein granted shall be vested in a Congress of the United States . . .").

granted" following "[a]ll legislative powers," and the simultaneous absence of this wording in Article II.¹⁸³ At best dispositive of nothing, this textual argument's fatal flaw becomes evident when one points to a similar absence of such wording in Article III (concerning the judicial power), despite the fact that the well-accepted view is that this fails to imply the existence of judicial powers not expressly outlined in Article III.¹⁸⁴ Moreover, it is by no means clear that even the broadest reading of the vestiture clause provides significant support to the "inherent power" theory. Even if viewed as an independent grant of authority, all the clause vests in the President is "executive" power, i.e., power to "execute" the laws—an obligation subsequently imposed on the President by Article II in any event.¹⁸⁵

Most damning to the inherent executive power theory, however, is its inescapable inconsistency with the fundamental "horizontal" and "vertical" tenets of American political theory. In the "horizontal" sense (i.e., relations among the coordinate branches of the federal government) it would make little sense, given the deeply ingrained mistrust of the concentration of political power in general¹⁸⁶ and the mistrust of executive power in particular¹⁸⁷ that prevailed at the time, to tie two of the branches to specifically enumerated authority, yet simultaneously vest in the executive branch what amounts to unlimited political authority. Such a construction of Article II would effectively circumvent the separation of powers structure that the Framers had so carefully crafted.

So broad a reading of executive power would also seriously disrupt the intended "vertical" relationship between the state and federal governments. It was clearly understood by all involved that, under the Constitution, the federal government was one of enumerated (and therefore

183. See *supra* sources cited note 181.

184. See, e.g., *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 615 (1949) (Rutledge, J., concurring); *id.* at 646-47 (Frankfurter, J., dissenting). See generally MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 23-25 (2d ed. 1990).

185. See U.S. CONST. art. II, § 3, cl. 4 (directing the President to "take Care that the Laws be faithfully executed").

186. See *supra* text accompanying notes 77-80.

187. See EPSTEIN, *supra* note 88, at 132 ("A representative republic is constructed with an eye on the dangers of kings, and thus carefully limits the executive's power."). Although Madison expressed primary concern about the dangers posed by the legislative branch, see *THE FEDERALIST* No. 48, *supra* note 32, this was only because the executive branch had already been sufficiently curbed in the body of the Constitution. See EPSTEIN, *supra* note 88, at 131-32.

limited) powers.¹⁸⁸ To assuage any lingering doubts, the Tenth Amendment¹⁸⁹ was enacted expressly declaring the limited nature of federal power.¹⁹⁰ Yet the "inherent authority" model of executive power automatically extends the power of one branch of the federal government beyond any constitutionally described limits. Such a model therefore undermines the carefully crafted structure of constitutional federalism.¹⁹¹ In light of the tenuous textual basis for the "inherent authority" model of executive power, as well as its extremely detrimental impact on the core premises of American constitutional and political theory, it should be clear that it has no place in a proper definitional analysis of branch power.

4. *The "Cumulative Effects" Approach.* Another important issue to be examined from the perspective of the definitional analysis of the pragmatic formalist model is what might be labeled the "cumulative effects" approach to separation of powers.¹⁹² This approach is most often associated with Justice Jackson's famed concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, the so-called "steel seizure" case.¹⁹³ In that opinion, Justice Jackson posited a tripartite approach to the validity of presidential power:

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . .

2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. . . .

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for

188. See LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-2, at 298 (2d ed. 1988).

189. The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

190. See TRIBE, *supra* note 188, § 5-20, at 379.

191. For a parallel argument against an unlimited construction of Congress's power under Article I, see Redish & Drizin, *supra* note 2, at 12-14.

192. In using this terminology, we intend to distinguish its use here from its more common usage in commerce clause jurisprudence. See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942).

193. 343 U.S. 579 (1952); see *supra* note 177; see also Edward S. Corwin, *The Steel Seizure Case: A Judicial Brick Without Straw*, 53 COLUM. L. REV. 53 (1953).

then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.¹⁹⁴

In key respects, such an approach is fundamentally inconsistent with the definitional analysis associated with the pragmatic formalist model. Although Justice Jackson's analysis appears consistent with some form of a definitional approach to separation of powers,¹⁹⁵ by positing a principle of transferability of branch power (at least for the executive and legislative branches) he has largely rejected the premise that underlies the pragmatic formalist model.

Justice Jackson's assumption that the executive branch's power may be either augmented or decreased by congressional addition or subtraction—a type of congressional additur and remittitur—is valid in the narrow sense that if Congress has exercised its legislative power directing or authorizing implementation or enforcement, the President is expressly obligated by Article II to “execute” those laws, a power to act that the President would lack in the absence of such legislation. Beyond that limited usage, however, Justice Jackson's “cumulative effects” theory makes neither textual nor theoretical sense.

Justice Jackson's first category¹⁹⁶ assumes a situation in which the President's actions, if premised exclusively on his Article II power, might be subjected to legitimate constitutional challenge. However, because Congress has, hypothetically, approved or authorized the President's actions, Jackson believes that the President's questionable power under Article II is somehow strengthened by an infusion of Congress's Article I power. Other than in the narrow sense already described,¹⁹⁷ such an approach effectively destroys the “separation” of branch powers: One branch would be exercising power clearly marked for another branch.

It might be argued, however, that as long as Congress has voluntarily chosen to convey its power to the executive branch (an assumption of Justice Jackson's first category), no separation of powers violation has occurred. Congress has effectively waived that protection, deciding that separation of powers concerns are outweighed by the competing need for an increase in executive authority. Separation of powers values are preserved, the argument proceeds, as long as Congress retains the option of curbing executive usurpation.¹⁹⁸ But both theoretically and practically, this waiver analysis is unacceptable. From the perspective of American

194. *Youngstown Sheet & Tube*, 343 U.S. at 635-37 (Jackson, J., concurring).

195. See *supra* text accompanying notes 158-77.

196. See *Youngstown Sheet & Tube*, 343 U.S. at 635 (Jackson, J., concurring).

197. See *supra* text accompanying notes 195-96.

198. In effect, this reasoning provides a key assumption behind Dean Choper's proposed “Separation Principle.” See CHOPER, *supra* note 1, at 260-379.

political theory, the concept of congressional waiver ignores the fact that separation of powers protections were not inserted to protect the other branches, but rather to protect the populace. Thus, just as a litigant is not permitted to waive limitations on a court's subject-matter jurisdiction because such limitations are imposed to protect the system rather than the litigant,¹⁹⁹ so too should Congress not be authorized to waive systemic protections of the electorate.²⁰⁰ From a practical perspective, the waiver theory ignores the obvious possibility that Congress may be controlled by the same party as the executive branch, effectively reducing Congress's check on the President. In such a situation, the only means of assuring the prevention of branch usurpation is by judicial enforcement of separation of powers.

In Justice Jackson's third category, negative action by Congress may detract from what would otherwise be a valid exercise of executive power. This principle ignores the fact that if the President may properly ground his actions in his enumerated powers described in Article II, those actions stand on their own bottom. To allow Congress to undermine them would defeat the purposes of separation of powers, by enabling Congress to interfere with the exercise of constitutionally authorized executive power. Thus, if separation of powers principles are to remain as meaningful limitations on the exercise of political power, Justice Jackson's "cumulative effects" analysis must be rejected.

C. *Applying the Pragmatic Formalist Model*

Examination of two recent Supreme Court decisions will increase understanding of the pragmatic formalist model. In *Bowsher v. Synar*,²⁰¹ the Court held unconstitutional the provision of the Gramm-Rudman

199. See ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* § 5.1, at 219 (1989) ("[F]ederal court jurisdiction cannot be gained by consent of the parties. The restrictions on federal court jurisdiction advance the important values of federalism and separation of powers.").

200. Rejection of the waiver principle would logically lead to a reassertion of the classic non-delegation doctrine, see *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), a doctrine that has been largely ignored, if not discredited, by modern doctrine. See, e.g., *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968). But see *Kent v. Dulles*, 357 U.S. 116, 129 (1958) (reliance on non-delegation doctrine when legislation impinges right to travel). The problem facing a reassertion of the non-delegation doctrine will be the problem of distinguishing the "executive" power to interpret and to enforce legislation from the power to legislate. A detailed discussion of the proper scope of the non-delegation doctrine, itself the proper subject of article-length treatment, is beyond the scope of this Article. Suffice it to say at this point that however one ultimately conceptualizes the differences between legislative and executive power, that definitional structure should control the separation of powers, and not be subject to congressional waiver.

201. 478 U.S. 714 (1986).

Act²⁰² that assigned to the Comptroller General the authority to specify spending reductions binding on the President. The Act set a maximum deficit amount for each fiscal year between 1986 and 1991²⁰³ and provided that if in any fiscal year the budget exceeded the maximum amount, across-the-board cuts were required to reach the target deficit.²⁰⁴ Under the Act, the Comptroller General, after reviewing the recommendations of the directors of the Office of Management and Budget and the Congressional Budget Office, was to report his conclusions to the President,²⁰⁵ who would then issue a "sequestration" order mandating the spending reductions specified by the Comptroller.²⁰⁶ Congress could then reduce spending to avoid the need for the sequestration order.²⁰⁷

In an opinion by Chief Justice Burger, the Court held that the Act unconstitutionally vested executive functions in the Comptroller General, who, as an officer subject to congressional removal, was deemed to be part of the legislative branch.²⁰⁸ "The Constitution," he reasoned, "does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts."²⁰⁹ The Chief Justice further stated that "[t]o permit the execution of the laws to be vested in an officer answerable only to Congress would, in practical terms, reserve in Congress control over the execution of the laws."²¹⁰

In terms of its broad methodology, the Court's approach in *Bowsher* is entirely consistent with the pragmatic formalist model. Under that model, in a case such as *Bowsher* the Court is directed to make two inquiries: what type of power is being exercised, and which branch is exercising it. The Court in *Bowsher* decided that the Comptroller General is part of the legislative branch, and, under the Act, was improperly exercising executive power.²¹¹ Although the former conclusion appears reasonable,²¹² the latter is subject to debate. Justice Stevens, in a separate

202. Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, § 251, 99 Stat. 1038, 1063.

203. See *id.* § 201(a), 99 Stat. at 1039.

204. See *id.* §§ 241(b), 251(a)(2), 99 Stat. at 1063-64.

205. See *id.* § 251(b), 99 Stat. at 1068.

206. See *id.* § 252, 99 Stat. at 1072.

207. See *id.* § 254(b), 99 Stat. at 1078.

208. See *Bowsher*, 478 U.S. at 726-27, 732.

209. *Id.* at 722.

210. *Id.* at 726.

211. See *id.* at 731-32, 734.

212. The Court noted that although the Comptroller General is nominated by the President and confirmed by the Senate, he is removable only at the initiative of Congress—not only through impeachment, but also by joint resolution for permanent disability, inefficiency, neglect of duty, malfeasance, or a felony or conduct involving moral turpitude. See *id.* at 728. These criteria, the Court reasoned, would allow removal for any number of real or perceived "transgressions of the legislative will." *Id.* at 729. The Court further noted that Congress had consistently viewed the Comptroller

concurrence, argued that "the powers assigned to [the Comptroller General] under [the Act] require him to make policy that will bind the Nation"²¹³ In this sense, as Justice White noted in dissent, the decision as to which programs are to be funded is a fundamentally congressional appropriations decision, pursuant to Article I, Section 9.²¹⁴ They are in no way properly viewed as "executive," he reasoned, because they implement no preexisting legislative decision.²¹⁵ Rather, they are nothing less than free-standing, legislatively unguided policy choices. Yet the Comptroller General, under the Act, did not possess discretion to pick and choose which programs were to be cut.²¹⁶ In this sense, the majority's characterization of his power as executive is plausible. *Bowsher* thus demonstrates that a definitional approach will occasionally have to be applied to situations in which the answer is not automatically obvious. Because no other approach would be able to avoid such complexities, this fact should not disqualify pragmatic formalism.

Even if one were to conclude that the power exercised by the Comptroller General pursuant to the Gramm-Rudman Act is legislative in character, it would not necessarily follow that the Act should have been upheld. As Justice Stevens argued, for legislative power to be properly exercised, it must meet the bicameralism and presentment requirements imposed by the Constitution,²¹⁷ presumably for many of the same reasons that the Framers adopted inter-branch separation of powers: namely, to encourage deliberation and to avoid the concentration of political power in only a few hands.²¹⁸ In this sense, the bicameralism and presentment requirements foster each of the three instrumental values upon which our system is based: diversity, accountability, and checking.²¹⁹ To vest unchecked authority to make basic policy choices in a single individual (such as the Comptroller General) who is not directly accountable to the electorate would simultaneously undermine each of

General as an officer of the legislative branch. "Against this background," it concluded, "we see no escape from the conclusion that, because Congress has retained removal authority over the Comptroller General, he may not be entrusted with executive powers." *Id.* at 732.

213. *Id.* at 737 (Stevens, J., concurring).

214. *See id.* at 763 (White, J., dissenting).

215. *See id.*

216. *See id.* at 764.

217. *See id.* at 754-55 (Stevens, J., concurring).

218. This was the import of the Court's decision in *INS v. Chadha*, 462 U.S. 919, 959 (1983) (invalidating the one-house legislative veto). *See also* *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 111 S. Ct. 2298, 2312 (1991) (holding that the use of a nine-member congressional board with power to veto Metropolitan Washington Airports Authority decisions unconstitutionally fails to adhere to bicameral and presentment procedures).

219. *See supra* text accompanying notes 9-10, 148-57.

these goals. Thus, even in those cases in which a conceptual characterization of governmental power is not clear, use of a pragmatic formalist model may nevertheless provide a resolution.

In the second decision, *Morrison v. Olson*,²²⁰ the Court upheld the power of Congress to establish an independent counsel, not part of the executive branch and supervised by a unit of the judicial branch, to investigate and prosecute high government officials for certain criminal activity.²²¹ The Court did so, despite its express concession that the powers to investigate and prosecute crime were definitionally characterizable as "executive" power.²²² Under the pragmatic formalist model, this concession would of course have ended the inquiry. It is unconstitutional for the legislative branch to vest executive power in the judicial branch.

Some might suggest that such an apparently simplistic analytical model ignores the inherent complexities of the situation, where competing interests must be carefully reconciled.²²³ It might further be charged that reliance on simple-minded definitional approaches to constitutional interpretation, without any regard for the specific social and political consequences of those decisions, ignores the vital political role that the judiciary must exercise in constitutional adjudication. But as we have already demonstrated,²²⁴ such a characterization of pragmatic formalism unfairly sees only the tip of the iceberg. The judiciary's role in separation of powers analysis should be narrow (albeit in many cases anything but simple), not because of the dictates of rigid and abstract principles of legal formalism, but because the Constitution's drafters wisely concluded that a case-by-case analysis to determine "undue accretions" of power was simply too speculative a method to provide effective protection against the incremental development of a threat of tyranny.

III. THE DEFECTS IN ALTERNATIVE ANALYTICAL MODELS

A. The "Functionalist" Model

The flaws in a functional model of separation of powers analysis (the leading competitor to pragmatic formalism) have to a great extent already been catalogued²²⁵ because much of the case for the pragmatic formalist model is the woeful inadequacy of its chief rival. Functionalism in

220. 487 U.S. 654 (1988).

221. See *id.* at 670-77.

222. See *id.* at 671.

223. See *supra* sources cited note 19.

224. See *supra* text accompanying notes 19-21.

225. See *supra* text accompanying notes 142-47.

the separation of powers context actually divides into two sub-models.²²⁶ Under the first sub-model, the reviewing court invalidates branch usurpation only if it is found to reach some unspecified quantitative level of intensity—in other words, if it is found to undermine another branch's performance of its essential function or to accrete "too much" power to the usurping branch. Under the second sub-model, branch usurpation may be justified by a sufficiently strong competing social interest—in other words, an application of an *ad hoc* balancing approach.

One important problem with both categories of functionalism is that neither provides any comprehensible standard by which to judge particular incursions on the separation of powers. As the Court's decision in *Morrison* demonstrates, the "undue accretion" standard ultimately degenerates into little more than the statement of a wholly subjective conclusion. The *ad hoc* balancing approach, on the other hand, effectively attempts to measure apples against oranges. How can one reasonably quantify the harm to separation of powers interests, and then weigh that against an equally unquantifiable—and totally different—interest in governmental efficiency? Equally important, both types of functionalism undermine the key structural assumption of separation of powers theory—that it will be impossible (at least until it is too late) to determine whether or not a particular breach of branch separation will seriously threaten the core political values of accountability, diversity, and checking. Thus, functionalism, as the basis for the design of a doctrinal model of separation of powers, fails to fulfill the goals intended by the choice of a governmental system premised on separation of powers.

B. The "Judicial Abdication" Model

An alternative model of separation of powers actually amounts to the absence of a model. The suggestion is that the judiciary simply avoid all constitutional disputes over the scope of separation of powers. This "judicial abdication" model, associated primarily with Dean Jesse Choper's "Separation Principle,"²²⁷ proceeds on two key assumptions: (1) that the political branches will effectively police separation of powers violations;²²⁸ and (2) that judicial resolution of separation of powers disputes will drain the judiciary's precious limited institutional capital

226. For a detailed discussion of these sub-models of functionalism in the particular context of Article III, see REDISH, *supra* note 184, at 13-19.

227. See CHOPER, *supra* note 1, at 260-75. Choper argues that "the ultimate constitutional issues of whether executive action (or inaction) violates the prerogatives of Congress or whether legislative action (or inaction) transgresses the realm of the President should be held to be nonjusticiable, their final resolution to be remitted to the interplay of the national political process." *Id.* at 263.

228. See *id.* at 275 ("[T]he participation of the Supreme Court is unnecessary to police constitutional violations by one political department against the other.").

needed for the protection of individual rights, where those affected are likely to be unable to protect themselves.²²⁹

Dean Choper's theory has been the subject of substantial scholarly commentary,²³⁰ much of it critical,²³¹ so there is no need to belabor its flaws. Suffice it to say that neither of Choper's fundamental assumptions comports with political and constitutional reality. Choper believes that through formal and informal checks and influences, the interdependent political branches will be forced toward an equilibrium that reflects the preferences of the majority of citizens. The main actors (the President and Congress) each have sufficient motivation and resources to pursue their constitutional interests. Unless one of these actors violates an individual's rights, Choper believes, the courts should declare these controversies non-justiciable.²³² Yet, as one commentator stated: "[I]t is by no means clear that the legislative and executive branches tend toward an equilibrium in which neither branch has a systemic structural advantage over the other."²³³ At different times significant imbalances in their relative power may exist.²³⁴ If no tendency toward equilibrium can be established, Choper's faith that separation of powers is self-enforcing seems highly questionable. One of the assumptions underlying Choper's model is that congressional silence signals Congress's approval of executive action.²³⁵ "Because Congress has the power to limit the President's conduct, it is assumed that its failure to do so represents implicit consent to the Executive's actions."²³⁶ But this assumption is unwarranted, because institutional barriers may prevent Congress from acting despite its disapproval of the President's action.²³⁷ Further, the President's veto power limits Congress's ability to control him. To restrain an independent-minded executive, two-thirds of the Congress must agree. Moreover,

229. See *id.* at 2, 64-65, 139-40.

230. See, e.g., Sargentich, *supra* note 19, at 441-44.

231. See, e.g., Erwin Chemerinsky, *Controlling Inherent Presidential Power: Providing a Framework for Judicial Review*, 56 S. CAL. L. REV. 863, 888 (1983); Redish & Drizin, *supra* note 2, at 34-41.

232. See CHOPER, *supra* note 1, at 263.

233. Sargentich, *supra* note 19, at 442.

234. See *id.*

235. See Chemerinsky, *supra* note 231, at 888.

236. *Id.*

237. See *id.* These informal barriers may include:

[Congress may not want] to be viewed as disruptive; or Congresspersons may not want to embarrass the President; or Congress may want to score political points by attacking the executive's action rather than accepting political responsibility for some action itself; or Congresspersons may be busy running for reelection or tending to constituents' individual problems

Paul Gewirtz, *The Courts, Congress, and Executive Policy-Making: Notes on Three Doctrines*, LAW & CONTEMP. PROBS., Summer 1976, at 46, 79.

Choper's approach is unable to detect whether or not separation of powers has been maintained because it makes no attempt to define or examine it. He solves the problem of interbranch disputes by simply assuming they do not require resolution (at least not by the judiciary).²³⁸ In any event, one may reasonably question whether the assent of one political branch necessarily purifies a usurpation of power by the other political branch, because the concept of branch waiver misses the point of separation of powers protections in the first place.²³⁹

Choper's assumption that the judiciary's institutional capital is transferable from structural cases to individual rights cases is no more credible. Common sense should tell us that the public's reaction to controversial individual rights cases—for example, cases concerning abortion,²⁴⁰ school prayer,²⁴¹ busing,²⁴² or criminal defendants' rights²⁴³—will be based largely, if not exclusively, on the basis of its feelings concerning those particular issues. It is unreasonable to assume that the public's acceptance or rejection of these individual rights rulings would somehow be affected by anything the Court says about wholly unrelated structural issues.

Perhaps the most basic difficulty with Choper's approach is his assumption that the paramount purpose of the judiciary is to protect individual rights. This is a highly anachronistic view because the Bill of Rights did not appear in the Constitution when Article III first vested in the judiciary the power to adjudicate cases arising under the Constitution. Moreover, Choper's theory ignores the fact that the entire Constitution was created to avoid tyranny and protect liberty.²⁴⁴ To separate out the individual rights provisions for special judicial protection ignores the document's careful intertwining of "back-up" systems.

Finally, the judicial abdication model improperly implies that the Court is free to pick and choose the constitutional provisions it is willing to enforce. Nothing in the nature of the judiciary's role authorizes it effectively to repeal provisions of the Constitution. Because of its uniquely insulated position,²⁴⁵ the judiciary is especially suited to enforce

238. See CHOPER, *supra* note 1, at 275; Sargentich, *supra* note 19, at 443.

239. See *supra* text accompanying notes 198-99.

240. *E.g.*, *Roe v. Wade*, 410 U.S. 113 (1973).

241. *E.g.*, *Engel v. Vitale*, 370 U.S. 421 (1962).

242. *E.g.*, *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43 (1971).

243. *E.g.*, *Miranda v. Arizona*, 384 U.S. 436 (1966).

244. See *Brown*, *supra* note 5, at 1513-17.

245. Article III provides protections of judicial salary and tenure, see U.S. CONST. art. III, § 1, designed to insulate federal judges from acute political pressures. See Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 496-97 (1986).

the provisions of a counter-majoritarian Constitution.²⁴⁶ And because all constitutional provisions, not merely those protecting individual liberty, are subject to Article V's supermajoritarian amendment process, there is no basis in either constitutional text or theory to justify selective judicial abdication.

C. *The "Originalist" Model*

Yet another suggested means of dealing with separation of powers controversies, associated with Professor Stephen Carter,²⁴⁷ is through resort to a selective form of originalism. At the risk of oversimplification, originalism attempts to maintain the legitimacy of the anti-majoritarian Court by confining it to the ascertainment of the Framers' original intent as a means of constraining constitutional interpretation.²⁴⁸ Rather than accept a generic form of originalism, however, Professor Carter divides the Constitution into two parts: the political Constitution, which establishes the governmental structure in general and the system of checks and balances in particular;²⁴⁹ and what he deems to be the less precise provisions that protect individual rights.²⁵⁰ Carter believes that because important parts of the text are indeterminate, the definite portions setting out the system of checks and balances are "of crucial importance"²⁵¹ as a means of providing limits on the governmental transformation of values into policy.²⁵² He argues that because the Framers were careful to describe clearly their institutional design, "the interpretive task is simply to discover what they meant."²⁵³ As Carter articulates his selective resort to originalism:

When . . . the language or structure of a clause makes plain that its authors had in mind a specific conception, the purpose of the interpretive rules is plain. In that case, the task of the theorist is to discover precisely what that something was. . . . The purpose of the rules for

246. For a detailed discussion of the point, see REDISH, *supra* note 155, at 75-85.

247. See Stephen L. Carter, *From Sick Chicken to Synar: The Evolution and Subsequent De-Evolution of the Separation of Powers*, 1987 B.Y.U. L. REV. 719; see also Carter, *supra* note 9.

248. See, e.g., Monaghan, *supra* note 12. According to one commentator, under the theory of originalism:

[T]he constitutional text is the verbal or linguistic embodiment of various beliefs about how the polity ought to live various aspects of its life. In proposing and ratifying particular constitutional provisions . . . the proposers and ratifiers . . . were, on this view, according authoritative status to particular beliefs about how the polity ought to live its life.

Michael J. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation"*, 58 S. CAL. L. REV. 551, 597 (1985) (footnote omitted).

249. See Carter, *supra* note 9, at 848.

250. See *id.* at 849-52.

251. *Id.* at 853.

252. See *id.* at 857.

253. *Id.* at 854.

interpreting the more determinate clauses . . . ought to be to discover the objectives of the drafter.²⁵⁴

In one sense, Professor Carter's use of originalism is conceptually aligned with what we have labeled pragmatism. In contrast to all other analytical models, both originalism and pragmatism approach separation of powers from a conceptual-definitional framework: Both limit the judiciary's role in separation of powers disputes to an ascertainment of the meaning of the terms employed in the constitutional text to describe branch authority.²⁵⁵ It is there, however, that the similarity ends. For unlike Carter's originalist model, pragmatism (as the name implies) posits that a reviewing court is not tied to particular conceptions of branch power found to be held by the Framers, but rather may treat those concepts—much as other constitutional provisions are construed—as part of an evolutionary, pragmatically-based definitional process.²⁵⁶

Serious questions may be raised about the validity of Professor Carter's use of selective originalism. Carter's resort to originalism in the structural context is plagued by all of the difficulties that plague generic originalism as a model of constitutional theory. Chief among them are the many variations in opinions among the Framers and the difficulty of extrapolating how the Framers would approach unforeseen problems or take into account modern developments.²⁵⁷

Professor Carter asserts that the best evidence of original understanding will be obtained from a comprehensive review of the political theory and practical concerns that motivated the founders; the second best is a study of the ratification debates, including pamphlets and newspaper articles; the third best evidence is Madison's notes of the Convention.²⁵⁸ But it is unclear why these inquiries are likely to be more successful in the context of the separation of powers provisions than they generally have been in constitutional interpretation.

254. *Id.* at 859.

255. *See supra* text accompanying notes 158-77.

256. *See supra* text accompanying notes 158-77.

257. *See* Robert W. Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445 (1984):

Even if we knew all the values the intenders consciously held *before* they encountered a constitutional case, that would not tell us how those intenders would have decided a case differing in nontrivial ways from ones they had actually considered; nor would it tell us the values they would have held *after* the decision. Only the process of decision can elicit and shape the relevant values, and only the interpreters—successive courts—go through that process. Over time, those courts could reach conclusions that seem diametrically opposed to the intenders' initial ones without being untrue to "original intentions" in the sense that those intentions would have informed the intenders' decisions had the decisions been theirs to make.

Id. at 472 (footnote omitted).

258. *See* Stephen L. Carter, *The Independent Counsel Mess*, 102 HARV. L. REV. 105, 111 n.21 (1988).

Carter's resort to the political question doctrine casts further doubt on the usefulness of his theory. Whenever resort to original intent leaves the matter indeterminate, Carter asserts, the judge must defer to the determination of the political branches.²⁵⁹ Judges are to invoke the political question doctrine whenever they "will have trouble applying" their originalistic interpretation to the case at hand.²⁶⁰ Considering the vast differences in the nature of government since the Constitution's framing, a firm commitment to this rule would quite probably require the Court to abstain in most cases. Carter's approach, then, simultaneously over- and under-regulates majoritarian power.

Carter is forced to resort to an originalist approach to separation of powers because he incorrectly views the conceivable interpretational models from an all-or-nothing perspective. He sees the choice as one between "evolutionary" and "de-evolutionary" models. In Carter's framework, the evolutionary tradition "emphasizes the need to adapt the powers of the federal government to the perceived demands of a changing society."²⁶¹ It "is highlighted by a deference to the congressional judgment on the most effective means for deploying its authority."²⁶² The extreme flexibility of the evolutionary approach is underscored by Carter's reference to Justice White's deferential use of functionalism in his *Bowsher* dissent as an illustration of such a model.²⁶³

The "de-evolutionary" tradition, in contrast, "actively seeks return to a system of balanced and separated powers modeled closely on the governmental design that the Framers had in mind when they established a constitutional government."²⁶⁴ It "rejects the view that evolution in the larger society requires a concomitant evolution in the manner in which the federal government organizes itself for the exercise of power."²⁶⁵

Although Carter sees dangers in both interpretive traditions,²⁶⁶ he ultimately feels forced to conclude that a modified de-evolutionary model

259. See Carter, *supra* note 247, at 801.

260. *Id.*

261. *Id.* at 719.

262. *Id.*

263. See *id.* at 731-32 (discussing *Bowsher v. Synar*, 478 U.S. 714, 759 (1986) (White, J., dissenting)).

264. *Id.* at 720.

265. *Id.*

266. See *id.* at 744 ("[T]he two traditions that have governed the separation of powers jurisprudence both raise analytical questions sufficiently grave as to cast doubt on whether either one, in its pure form, can supply the courts a relatively coherent analytical approach for cases involving this system of balanced and separated powers.").

is required for interpretation of the separation of powers provisions²⁶⁷ because "the structural clauses . . . are concerned with *authority* as well as power."²⁶⁸ Carter warns:

[U]nless the jurisprudence regarding the structure of the government, including the system of balanced and separated powers, relies for its force on disciplining interpretive rules capable of generating answers that are in most cases relatively determinate, the legitimacy of the entire project of constitutionalism, and of judicial review in particular, is set seriously at risk.²⁶⁹

One could debate whether Carter has adequately defended his assertion that the need for determinate rules is more compelling in the case of the structural provisions than in that of the individual rights provisions. The key problem is that, as Carter to some extent acknowledges,²⁷⁰ a historical inquiry will often reveal precious few answers. Of course, if the only conceivable alternative to such a historically-based inquiry were the intellectual chaos associated with Carter's version of the "evolutionary" model, one might sympathize with his attempt to escape his interpretational dilemma. But as our discussion of pragmatic formalism has demonstrated,²⁷¹ there exists a mid-course between the extremes of a fruitless search for rigid historical answers on the one hand, and chaotic, unlimited judicial deference on the other. That course is to recognize that although constitutional terminology was usually chosen—quite consciously—for the purpose of allowing evolutionary change over time,²⁷² it does not follow that the chosen wording imposes no constraints at all. Thus, although the terms "executive," "legislative," and "judicial" are to be construed in an appropriately flexible manner to allow (within a certain range) examination of pragmatic factors, linguistic meaning that is shaped in part by tradition imposes restrictions that cannot rationally be circumvented simply to meet what are perceived to be countervailing social needs.

267. See *id.* at 765 ("[T]he aims of liberal democratic theory and of constitutionalism generally will best be served if interpretation of the structural provisions of the political Constitution begins, and frequently ends, with consideration of the text and its historical background."); see also *id.* at 761. Professor Carter contrasts this conclusion with the treatment required for interpretation of the individual rights provisions, where he believes that "judicial muddling . . . does not necessarily represent a threat to the legitimacy of American constitutional democracy." *Id.* (footnote omitted).

268. *Id.* at 761.

269. *Id.* at 764.

270. *Id.* at 722.

271. See *supra* text accompanying notes 133-77.

272. See generally H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

D. The "Conflict of Interest" Model

Paul Verkuil has offered still another solution to the separation of powers controversy.²⁷³ His "conflict of interest" model²⁷⁴ is offered as a "tie breaking rationale," designed "to extract the separation of powers debate from the realm of maxim."²⁷⁵ Verkuil contends that current separation of powers doctrine is deadlocked between two competing theoretical goals: preventing tyranny (at the cost of slowing the wheels of government); and ensuring that government functions efficiently. He observes that originally, governmental powers were separated to make government more efficient.²⁷⁶ The Framers emphasized the ability of separated powers to check governmental power. "The exclusive focus on the checks and balances aspect," Verkuil asserts, "turned the original purpose for separation of powers on its head."²⁷⁷ He concedes, however, that "both the efficiency and counterefficiency, or tyranny, rationales are correct."²⁷⁸

Verkuil posits that a way out of this deadlock is to recognize another purpose for separating the branches—to neutralize conflicts of interest.²⁷⁹ This model sees as the premise of separation of powers the maxim that no one can be above the law or judge his own case.²⁸⁰ Conflicts can occur at three levels: between branches, within a particular branch, and involving an individual's personal stake in the outcome of a particular proceeding.²⁸¹ These conflicts, Verkuil contends, are inherent in the governmental process.²⁸² One example of a personal conflict is a Congressperson second-guessing an agency's application of a statute in the face of pressure from a constituent. Verkuil asserts that a conflict of interest always exists when the same authority that makes the law executes it.²⁸³ Conflicts of interest also occur when a decisionmaker is dependent upon a person affected by his decision for some benefit.²⁸⁴ For example, the Comptroller General in *Bowsher* faced a conflict of interest because he was dependent on Congress for his position.²⁸⁵

273. See Paul R. Verkuil, *Separation of Powers, The Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301 (1989).

274. See *id.* at 307.

275. *Id.* at 304.

276. See *id.* at 303.

277. *Id.* at 303-04.

278. *Id.* at 304.

279. See *id.* at 307.

280. *Id.* at 305.

281. *Id.* at 307.

282. See *id.* at 304.

283. See *id.* at 315.

284. *Id.*

285. See *supra* text accompanying notes 201-19.

A recurrent theme in Professor Verkuil's analysis is the intertwining of separation of powers and other constitutional provisions. In other words, to avoid the problems inherent in the application of the Constitution's structural provisions, Verkuil asserts that the Court should employ the Constitution's individual rights protections as a measuring rod for separation of powers. He suggests, for example, that if due process is not offended by a delegation of Article III power to an Article I court (where arguably due process and separation of powers serve congruent interests), "why should the latter be offended if the former is satisfied?"²⁸⁶

The conflict of interest model focuses on the need for independent decisionmakers. Thus, it exerts pressure on the system to de-politicize the administrative process.²⁸⁷ Under Verkuil's model, then, the role of separation of powers as a check upon government is deemphasized, and the need for independence and professionalism in governmental decision-making becomes the central focus. To achieve this professionalism, Verkuil reasons that very few executive officials should be removable at will by the President; only the Secretaries of State and Defense and other "inner circle" officers should be subject to the will of the President.²⁸⁸ This model thus permits Congress to insulate every other executive officer from plenary presidential control.²⁸⁹

Verkuil's model was largely "designed to answer the independent counsel inquiry."²⁹⁰ Verkuil frames the issue as "[w]hether Congress can cure an *intrabran*ch conflict of interest without producing a greater *inter*branch separation of powers crisis in the process."²⁹¹ Rather than weigh the values and explicitly conclude that independent prosecutions are more important than executive freedom from congressional intrusions, he adopts the "least restrictive alternative" analysis. This analysis, derived from First Amendment doctrine,²⁹² asks: Do the restrictions upon executive prerogatives "advance some vital government interest, and are they the least restrictive means of achieving that end?"²⁹³ Because most would agree that controlling criminal behavior in the executive branch is vital, separation of powers concerns are, not surprisingly, trumped.

286. Verkuil, *supra* note 273, at 316-17.

287. *Id.* at 323-25.

288. *Id.* at 337.

289. *Id.* at 338.

290. *Id.* at 326.

291. *Id.* at 327.

292. See, e.g., *Keyishian v. Board of Regents*, 385 U.S. 589 (1967). See generally Jerold H. Israel, *Elfbrandt v. Russell: The Demise of the Oath?*, 1966 SUP. CT. REV. 193, 217-19.

293. Verkuil, *supra* note 273, at 327.

At best, Verkuil's conflict of interest model artificially truncates the values designed to be fostered by separation of powers, rendering its protections dangerously incomplete. At worst, the model could be said to miss completely both the theoretical and methodological essence of the American system of separation of powers. It is not incorrect to see the concern over biased decisionmaking as an important theme in separation of powers theory. The logic behind separation of the power of legislation and of execution, for example, is to assure that those who make society's basic policy choices (the legislators) are not in a position to exempt secretly themselves or those close to them from the consequences of those decisions.²⁹⁴ But surely it is incorrect to assume that separation of powers concerns are exhausted when the independence interest is satisfied.²⁹⁵ Generally, the constitutional concern for decisionmaking independence is adequately handled through resort to the protections of due process.²⁹⁶ To a certain extent, particularly in the preservation of judicial independence from the political branches, this concern overlaps both due process and separation of powers.²⁹⁷ But to collapse completely the two concepts, so that meeting the requirements of one will automatically satisfy the requirements of the other, renders the separation of powers protections largely superfluous. More importantly, it ignores the interlocking back-up systems employed by the Framers to avoid the threat of tyranny.²⁹⁸

When placed in a separation of powers context, then, the independence concern can be seen as merely one small portion of a broader checking concern. For example, by requiring that those who make the laws cannot be charged with the responsibility for executing them, separation of powers does, of course, preserve the independence of both decisionmakers. However, in so doing separation of powers simultaneously prevents the concentration of political power in one governmental organ and enables one branch to check the other. The same is true when an independent judiciary is given final say on the constitutionality of the actions of the political branches.²⁹⁹ But it would be incorrect to conclude that independent decisionmaking is all that separation of powers is about.

294. See *id.* at 304-05.

295. See Gewirtz, *supra* note 19, at 344 ("The problem with Verkuil's approach . . . is that it seeks to apply a *unitary* principle to an area of law where there really are *multiple* concerns.").

296. See, e.g., *Tumey v. Ohio*, 273 U.S. 510 (1927); see also Redish & Marshall, *supra* note 245, at 464-68.

297. See, e.g., *Ng Fung Ho v. White*, 259 U.S. 276 (1922).

298. See *supra* text accompanying notes 9-10.

299. See REDISH, *supra* note 155, at 78-85.

It should not be difficult to imagine situations in which interbranch usurpation of power poses no immediate threat to independent decisionmaking, yet may well present the very dangers of the concentration of political power that separation of powers was designed to prevent.³⁰⁰ Thus, Professor Verkuil's model does not go nearly far enough in protecting the values sought to be fostered by separation of powers.

At the same time, the conflict of interest model could, paradoxically, be said to go much too far. By focusing so much constitutional energy on the preservation of independent decisionmaking, it actually poses a serious threat to branch separation. The conflict of interest model emphasizes decisionmaking independence as an abstract and unwavering value, ignoring the surrounding political context that, in certain instances, may render an exclusive focus on the independence concern nonsensical. For example, although it is wise to have a decisionmaker in an adjudicatory context be independent of the parties appearing before him, the interests are quite different when one considers the need for a subordinate official in the executive branch to act independently of the President. Interbranch checking, in the manner set out in the Constitution, is a necessary part of an effective separation of powers scheme. Intrabranh checking, on the other hand, only weakens one of the branches in the performance of its constitutionally assigned duties, and thus undermines both the balance of constitutionally prescribed power among the branches and the political value of accountability.³⁰¹ It is, after all, the President who was elected by and is accountable to the public. Thus, to establish an unelected subordinate executive officer, independent of the President, does no service to the values sought to be fostered by separation of powers.

Although decisionmaking independence plays an important role in separation of powers theory, it is necessary to understand its limits; independence of the executive from the legislative branch assures an absence of conflict of interest in translating policy into action. Independence of the judiciary from the political branches assures a counter-majoritarian constitutional check on majoritarian institutions. But rendering subordinate executive officers independent of the one representative official in the executive branch is only counter-productive to the goals of separation of powers.

300. An example would be the President's usurpation of Congress's power to declare war. See *supra* text accompanying notes 130-32.

301. For this reason, we believe that *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935), in which the Court rejected presidential removal of an FTC Commissioner contrary to statute, was incorrectly decided.

E. *The "Ordered Liberty" Model*

In a provocative recent article, Professor Rebecca Brown has posited what she labels the "ordered liberty" approach to separation of powers doctrine.³⁰² "Ordered liberty," she suggests, "has come to represent a counter-majoritarian protection of the rights of the individual against arbitrary or unfair treatment at the hands of the government, rights now embodied in the due process clauses of the fifth and fourteenth amendments."³⁰³

Proceeding from the premise that "the structure of the government is a vital part of a constitutional organism whose final cause is the protection of individual rights,"³⁰⁴ Professor Brown argues 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 structure of government."³⁰⁵ In other words, "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."³⁰⁶ Professor Brown contrasts her suggested model with an approach that focuses on the "aim of preserving the government for its own sake"³⁰⁷—an approach she criticizes because it does not look "beyond any specific case to a higher objective that the separation of powers may serve."³⁰⁸

Although Professor's Brown's suggested model admirably rejects the false dichotomy between issues of constitutional structure and individual rights thought to exist by certain commentators,³⁰⁹ she goes too far to the other extreme and in so doing confuses the goals of separation of powers with the instrumental methodology chosen to implement those goals. This confusion is revealed in her contrast of separation of powers to interpretation of the Eighth Amendment's cruel and unusual punishment prohibition.³¹⁰ In commenting on the Supreme Court's doctrinal approach to the Eighth Amendment, Professor Brown notes that "the Court . . . relies on a vision of the amendment's underlying goal and spirit in the process of deciding cases"³¹¹—an approach that she deems far preferable to a doctrinal analysis of separation of powers that does

302. See Brown, *supra* note 5.

303. *Id.* at 1513-14.

304. *Id.* at 1514.

305. *Id.* at 1515-16.

306. *Id.* at 1516.

307. *Id.* at 1520.

308. *Id.*

309. See *supra* text accompanying notes 227-43.

310. See U.S. CONST. amend. VIII.

311. Brown, *supra* note 5, at 1520.

not look "beyond any specific case to a higher objective that the separation of powers may serve."³¹² Under such an approach, she argues, "it is easy to lose sight of the big picture."³¹³

Although Professor Brown's critique possesses a superficial appeal, it ignores important differences in the wording of the Eighth Amendment on the one hand, and the separation of powers provisions on the other. These differences reveal a significant distinction in the methodology chosen to implement the respective provisions' underlying goals. By its terms, the Eighth Amendment imposes what might be called a "conditional" standard—that is, rather than prohibiting all punishments, it prohibits only those that the Court classifies as "cruel" or "unusual." It does this because its goal is not to prevent all forms of punishment, but only those that exhibit certain elements deemed to be offensive, and there is no risk that an enforcing court will be unable to distinguish those punishments that exhibit the relevant characteristics from those that do not. Thus, the drafters collapsed the Amendment's goal and methodology into a single standard.

The separation of powers provisions (i.e., the vesting of only a certain type of power in each branch)³¹⁴ may arguably have an equally conditional goal—to prohibit only those inter-branch usurpations of power that may, at some future point, evolve into tyranny.³¹⁵ However, a casual examination of the constitutional language reveals that, unlike the Eighth Amendment, the provisions that protect separation of powers do not collapse goal and methodology. By their terms, they do not limit the branches only to usurpations that do not present a threat of tyranny. Rather, when read in light of the understanding that the federal government possesses only those powers delegated to it by the Constitution,³¹⁶ the separation of powers provisions clearly impose an absolute, rather than a conditional, standard of implementation.

It should be emphasized that our primary point is not a textual one (although the relevance of the textual argument against the use of a conditional standard in separation of powers cases should not be underestimated).³¹⁷ Our argument, rather, is that an absolute standard of implementation was employed in the separation of powers area because of the fully justified fear that an enforcing court would be unable, on a case-by-case basis, to distinguish between those interbranch usurpations

312. *Id.*

313. *Id.* at 1522.

314. *See supra* note 24.

315. *See supra* text accompanying notes 77-89.

316. *See supra* note 24.

317. *See supra* note 24.

that presented a threat of tyranny and those that did not—at least until it would be too late to avoid that tyranny. This dichotomy between constitutional goal and constitutional methodology reflects the inherently prophylactic nature of our separation of powers structure.

To put the point in terms familiar to all, the difference in the nature of the Eighth Amendment on the one hand, and the separation of powers provisions on the other, is analogous to the difference between a “yield” sign and a “stop” sign. Like the Eighth Amendment, a “yield” sign imposes a conditional behavior restriction: One must stop only if vehicles with the right of way are present. A “stop” sign, on the other hand, imposes an absolute behavioral requirement: One must come to a full stop, whether or not other vehicles are present in the intersection at the time. Presumably, the purpose served by both types of signs is to prevent collisions (there is, after all, no inherent social benefit to be derived from stopping for its own sake). Yet it surely is no defense to a charge of failing to stop at a “stop” sign that no other vehicles were present in the intersection at the time. A “stop” sign is employed, rather than a “yield” sign, presumably at locations where we do not wish to risk the consequences of an incorrect judgment as to the presence of the specific danger sought to be avoided. Hence, we impose a restriction upon action, even in specific instances in which it can be established that the danger sought to be avoided did not exist. Similarly, the Framers chose to provide a buffer zone of protection in their separation of powers structure that they did not deem necessary in the prohibition of cruel or unusual punishment.

What Professor Brown urges, then, amounts to a wholesale abandonment of the carefully reasoned method of implementation chosen by those who established our constitutional system of separation of powers. The fact that in so doing she may preserve the ultimate political goals sought to be fostered by separation of powers³¹⁸ is of only minimal consolation, because without use of the instrumental methodology employed to achieve that goal, she has done more than simply ignore a clear textual directive. By collapsing separation of powers into the goal of preserving “ordered liberty,” she has effectively undermined both the inherently prophylactic nature of separation of powers and the use of multi-barrier “safety nets” against tyranny, which the Framers so wisely inserted into our intricate constitutional structure. The net result is an abandonment

318. Even this conclusion might be subject to debate. As previously noted separation of powers may be viewed as a means of protecting the majoritarian interest in avoiding tyrannical usurpations of power, as well as in avoiding infringements on individual liberty. See *supra* text accompanying notes 9-10.

of the entire separation of powers structure, despite her obvious desire to do no such thing.

IV. CONCLUSION

Professor Brown's critique of the reliance on formalism in separation of powers analysis³¹⁹ underscores the problems facing anyone who urges resort to a formalistic analytical model. Those of us trained in the law in the post-realist period³²⁰ (which includes all but the most senior legal scholars) quite naturally feel uncomfortable with any doctrinal structure that appears to interpret and to enforce governing text in a mechanical manner, untied to the discernible social and political purposes that the relevant provision was designed to achieve. Our pragmatic brand of formalism, however, grows not out of a rejection of an inquiry into the social and political purposes that underlie text, but out of a careful search for them. Although it is probably correct to discern the goal of avoiding tyranny from the Constitution's separation of powers structure, any interpretational inquiry that ends at that point is fatally incomplete.

The Constitution's drafters knew all too well—from a study of history as well as from their own experience—that those who govern are anything but angels. The danger of tyranny is always present, yet it may develop in forms so insidiously subtle that its recognition will come at a point too late to avoid the ultimate danger.³²¹ For this reason, power must be divided, and not only in those instances in which a threat to liberty is discerned; additional constitutional enclaves of liberty have been inserted to deal with such individualized threats. Rather, it must be divided always and for all time. To be sure, the limited definitional flexibility traditionally associated with constitutional terminology may provide a reviewing court some degree of pragmatically-based maneuverability.³²² But, for pragmatic reasons of the most compelling sort, the judicial inquiry must still be limited to defining the scope of each branch's delegated authority. Such an inquiry must be untied to any investigation of whether the ultimate political goal of separation of powers is threatened by inter-branch usurpation in the particular case, or whether harm to competing social or political interests would result from

319. See Brown, *supra* note 5, at 1522-31; *supra* text accompanying notes 19-20.

320. See Randy E. Barnett, *Foreword: Unenumerated Constitutional Rights and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 615, 616 (1991) ("The legal realists charged that adhering to the rule of law resulted in a 'mechanical jurisprudence'—now widely called 'formalism.'").

321. See *supra* text accompanying notes 85-89.

322. See *supra* text accompanying notes 158-77.

enforcement of separation of powers. Analytical models that fail to engage in such an inquiry give rise to all of the dangers that those who established our system correctly sought to avoid.