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The Constitutional Principle of Separation of Powers

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I. INTRODUCTION

The Supreme Court has had many occasions in recent years to consider what it calls "the constitutional principle of separation of powers."[1] The principle in question has been effusively praised[2] and on occasion vigorously enforced.[3] But just what is it? The Court clearly believes that the Constitution contains an organizing principle that is more than the sum of the specific clauses that govern relations among the branches. Yet notwithstanding the many testimonials to the importance of the principle, its content remains remarkably elusive.

The central problem, as many have observed,[4] is that the Court

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[1] The phrase appears in the Court's statement of the question presented in *Metropolitan Washington Airports Auth. v Citizens for Abatement of Aircraft Noise, Inc.*, 111 S Ct 2298, 2301 (1991).

[2] See, e.g., *Freytag v Commissioner of Internal Revenue*, 111 S Ct 2631, 2634 (1991) ("the central guarantee of a just government"); *Mistretta v United States*, 488 US 361, 380 (1989) ("essential to the preservation of liberty").

[3] On five occasions in recent years, the Court has invalidated federal legislation on separation-of-powers grounds: *Metropolitan Washington Airports Auth. v Citizens for Abatement of Aircraft Noise, Inc.*, 111 S Ct 2298 (1991); *Bowsher v Synar*, 478 US 714 (1986); *INS v Chadha*, 462 US 919 (1983); *Northern Pipeline Construction Co. v Marathon Pipe Line Co.*, 458 US 50 (1982); and *Buckley v Valeo*, 424 US 1 (1976).

[4] See, e.g., Martin H. Redish and Elizabeth Cisar, *"If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 Duke L J 449 (1991); Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U Pa L Rev 1513, 1522–31 (1991); Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 Vir L Rev 1253 (1988);

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has employed two very different conceptions of separation of powers in recent years. On the one hand, there is the "formal" understanding, emphasizing that "[t]he Constitution sought to divide the delegated powers of the new Federal government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility."[5] On the other hand, there is the "functional" understanding, stressing that the three branches do not "operate with absolute independence," and that the Constitution requires only that "the proper balance between the coordinate branches" be maintained.[6] The Court has alternated between the formal and the functional constructions, with a swing group of Justices evidently happy to embrace one or the other as suits the needs of the moment.[7]

When we step back from the doctrinal inconstancy and examine the outcomes of the Court's recent separation-of-powers decisions, however, a readily discernible pattern emerges. The formal theory is regularly used in evaluating (and invalidating) attempts by Congress to exercise governmental power by means other than the enactment of legislation;[8] the more elastic functional approach is favored in reviewing (and approving) duly-enacted legislation that regulates or reallocates the functions performed by the other two branches.[9] Unfortunately, this pattern does not follow from the

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Cass R. Sunstein, *Constitutionalism after the New Deal*, 101 Harv L Rev 421, 493–96 (1987); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—a Foolish Inconsistency?* 72 Cornell L Rev 488 (1987); Thomas O. Sargentich, *The Contemporary Debate about Legislative-Executive Separation of Powers*, 72 Cornell L Rev 430, 433 (1987).

[5] *INS v Chadha*, 462 US 919, 951 (1983).

[6] *Morrison v Olson*, 487 US 654, 694, 695 (1988), quoting *United States v Nixon*, 418 US 683, 707 (1974) and *Nixon v Administrator of General Services*, 433 US 425, 443 (1977).

[7] On the last day of the 1985 Term, the Court handed down two separation-of-powers decisions. One, *Bowsher v Synar*, 478 US 714 (1986), applied a highly formal analysis to invalidate part of the Gramm-Rudman-Hollings Act; the other, *Commodity Futures Trading Comm'n v Schor*, 478 US 833 (1986), adopted a functional understanding to uphold the jurisdiction of an administrative agency over common-law counterclaims. Chief Justice Burger, Justice Powell, Justice Rehnquist, and Justice O'Connor joined both majority opinions.

[8] *Bowsher v Synar*, 478 US 714 (1986) (congressional agent cannot control execution of the laws); *INS v Chadha*, 462 US 919 (1983) (one-House legislative veto unconstitutional); *Buckley v Valeo*, 424 US 1 (1976) (members of Congress cannot exercise appointments power over nonlegislative officers).

[9] *Mistretta v United States*, 488 US 361 (1989) (Sentencing Commission with rulemaking powers permissible as part of judicial branch); *Morrison v Olson*, 487 US 654 (1988) (federal court may appoint independent counsel to investigate and prosecute crimes by high execu-

tenets of either formalism or functionalism. Applied consistently, formalism would impose strict limitations on efforts to scramble executive and judicial functions,[10] and functionalism would probably lead the Court to uphold at least some of the extra-legislative congressional controls that have been disapproved.[11] All of which suggests that neither formalism nor functionalism provides a satisfactory account of the constitutional principle of separation of powers—at least as it operates in practice.

In the 1990 Term the Court decided two cases that required it to revisit the constitutional principle of separation of powers—*Metropolitan Washington Airports Authority v Citizens for the Abatement of Aircraft Noise, Inc.*[12] and *Freytag v Commissioner of Internal Revenue*.[13] In terms of doctrinal development, neither decision does much to clear up the "incoherent muddle"[14] of recent years. But in terms of outcomes, we see the same pattern repeated once again. In *Washington Airports*, the Court reviewed another attempt at extra-legislative Congressional control: legislation that would allow members of Congress, serving as a state "Board of Review," to veto decisions of a regional airports authority. True to pattern, the Court invoked the constitutional principle of separation of powers and struck it down. By contrast, *Freytag* involved a challenge to the allocation of functions between the executive and judicial branches: whether the Chief Judge of the Tax Court (a non–Article III tribunal) was either a "Head of Department" or "Court of Law" for

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tive officials); *Commodity Futures Trading Commission v Schor*, 478 US 833 (1986) (administrative agency may adjudicate common-law couterclaim); *Nixon v Administrator of General Services*, 433 US 425, 443 (1977) (controls on disposition of Presidential papers permissible). The principal exception is *Northern Pipeline Construction Co. v Marathon Pipe Line Co.*, 458 US 50 (1982), where Justice Brennan's plurality opinion used a formal analysis to invalidate portions of the jurisdiction of the bankrupcty courts as being inconsistent with the judicial function of Article III courts. This aspect of *Northern Pipeline*, however, does not appear to have survived subsequent decisions. See note 91.

[10] This is the view of Justice Scalia, the Court's most consistent champion of formalism. See *Morrison*, 487 US at 703–15 (Scalia dissenting); *Mistretta*, 488 US at 413–27 (Scalia dissenting). See also Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 Cal L Rev 853 (1990) (detailing the impact that a rigorous formalism would have on territorial courts).

[11] This is the position of Justice White, the one Justice who has steadfastly endorsed a functional approach. See *Washington Airports*, 111 S Ct at 2317–21 (White dissenting); *Bowsher*, 478 US at 776 (White dissenting); *Chadha*, 462 US at 998–1002 (White dissenting).

[12] 111 S Ct 2298 (1991).

[13] 111 S Ct 2631 (1991).

[14] Brown, 139 U Pa L Rev at 1517 (cited in note 4).

Appointments Clause purposes.[15] Although the Court split 5–4 over the answer to this question, not a single vote could be mustered to endorse the formalist answer urged by the petitioners: that the Chief Judge was neither, and hence that the appointment authority was unconstitutional. Last Term's cases thus deepen the paradox of the Court applying a "notorious inconsistency of method"[16] to generate quite consistent outcomes.

In this article, I will argue for a new understanding the constitutional principle of separation of powers, what I will call the "minimal" conception. I developed this alternative inductively, by reflecting on what theory, if applied consistently, might generate a pattern of results similar to the one reached by the Court. I do not, however, suggest that the minimal conception supplies a positive explanation for the Court's decisions; there may be a variety of reasons that account for the Court's performance.[17] Instead, I offer it as a possible understanding of what the constitutional principle of separation of powers should mean, and will argue that, if adopted as a normative standard for decision-making, it would outperform formalism and functionalism on a number of fronts, including but not limited to its capacity to generate outcomes congruent with those of the past.

The foundation of the minimal conception is a simple rule: there are only three branches of government, and every federal office must be accountable to one of these branches. Thus, an attempt by Congress to create a "Fourth Branch" of the federal government would be unconstitutional. Moreover, because every federal office must be located "in" one of the three branches, each office is subject to whatever specific constitutional limitations apply to action by its branch. For example, a federal office that is an agent of Congress (like the Board of Review in *Washington Airports*) would be subject to the same Bicameral and Presentment requirements that apply to Congress itself. Because such an agent could not comply with these requirements, it would be unconstitutional.

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[15] The Appointments Clause permits Congress to vest the appointment of "inferior officers" (such as the Special Trial Judge at issue in *Freytag*) "in the President alone, in the Courts of Law, or in the Heads of Departments." US Const Art II, § 2, cl 2.

[16] Geoffrey P. Miller, *Rights and Structure in Constitutional Theory*, 8 Social Philos & Policy 196, 201 (1991).

[17] See text at note 105.

Like formalism, the minimal conception rests on a rule-like understanding of the constitutional principle of separation of powers. But unlike both formalism and functionalism, the minimal conception would reject the idea that separation of powers is concerned with achieving a particular allocation of "legislative," "judicial," and "executive" functions among the three branches. Instead, it would treat questions about the correct definition of the governmental powers mentioned in the Vesting Clauses of Articles I, II, and III, and their assignment to different branches, to be nonjusticiable political questions consigned to the discretion of Congress. Thus, under the minimal understanding Congress would be free to delegate "functions" any way it wants, but would be strictly limited in its options as to who could receive the deletation: only the three constitutional branches and their agents.

I will argue that the minimal conception would avoid the more glaring problems associated with formalism and functionalism, and would have several other attractive features as well. Because it would produce results consistent with the outcomes of virtually all the Supreme Court's major separation of powers decisions, it would provide a substantial measure of continuity with established understandings about the structure of government. Moreover, because it would prevent evasion of specific clauses of the Constitution that limit the power of the branches, and would promote a diffusion of power among the branches, it would achieve important purposes traditionally associated with the doctrine of separation of powers. Finally, it would be broadly consistent with both the text of the Constitution and with James Madison's explanation of how the structural features of that document would work to preserve liberty.

II. Unpacking Formalism and Functionalism

Part of the problem in trying to make sense of the Court's recent separation-of-powers jurisprudence is that the two doctrines deployed by the Court and commentators—formalism and functionalism—are complex rather than simple ideas.[18] Although

[18] For a compendium of the literature on formalism versus functionalism, see Brown, 139 U Pa L Rev at 1522–31 (cited in note 4). The tenets of formalism are spelled out more fully in Lee S. Liberman, *Morrison v Olson: A Formalistic Perspective on Why the Court Was Wrong,*

nearly always treated as alternatives along a single dimension,[19] the formal/functional dichotomy in fact operates at two different levels. At one level, it refers to different methods of justification employed by the Court, and mirrors the more general distinction in law between formal and functional styles of legal reasoning.[20] At another level, however, the dichotomy refers to different substantive interpretations of the Constitution. Although the two levels of the formal/functional distinction are closely linked in the cases and commentary, it is useful to unpack them, if only because doing so reveals the possibility of adopting a substantive interpretation of the constitutional structure different from those embedded in the current understandings of formalism and functionalism.

At the methodological level, the formal/functional dichotomy parallels the familiar division in law between rules and standards. Here, the formalist insists that the structural provisions of the Constitution establish a set of rules—an "instruction manual"[21]—that must be followed whatever the consequences. The formalist thus adopts what amounts to a deontological theory of justification: separation of powers is a rule that must be followed because it is laid down in the Constitution and the Constitution is supreme law.[22] The rule may have a higher-order justification—such as diffusing power the better to protect liberty. But, for the formalist, realization of such an end is seen as depending in good part on preserving the rule-like quality of the inquiry.[23] As the Court stated in *Chadha*, "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution."[24]

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38 Am U L Rev 313 (1989); Gary Lawson, 78 Cal L Rev 853 (cited in note 10); David P Currie, *The Distribution of Powers after Bowsher*, 1986 Supreme Court Review 19. For a thoughtful defense of functionalism, see Peter Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum L Rev 573 (1984).

[19] See, e.g., Strauss, 72 Cornell L Rev at 488 (cited in note 4).

[20] See generally, Frederick Schauer, *Formalism*, 97 Yale L J 509 (1988).

[21] Gary Lawson, *In Praise of Woodenness*, 11 Geo Mason L Rev 21, 22 (1988). See also Sargentich, 72 Cornell L Rev at 458 n 31 (cited in note 4).

[22] Sunstein, *Constitutionalism after the New Deal*, 101 Harv L Rev at 493; see also Stephen Carter, *From Sick Chicken to Sunar: The Evolution and Subsequent De-Evolution of the Separation of Powers*, 1987 BYU L Rev 719, 735–43 (describing "de-evolutionary" tradition); Geoffrey P Miller, *Independent Agencies*, 1986 Supreme Court Review 41, 53–58 (describing "neoclassical" approach).

[23] Redish & Cisar, 41 Duke L J at 127–28 (cited in note 4).

[24] *Chadha*, 462 US at 944.

The functionalist, in contrast, argues that structural disputes should be resolved not in terms of fixed rules but rather in light of an evolving standard designed to advance the ultimate purposes of a system of separation of powers.[25] Accordingly, the functional approach adopts a consequentialist theory of justification: the task of the court is to judge institutional arrangements in terms of their contribution toward attaining certain ends. The Court's functionalist opinions have consistently described the underlying purpose of a system of separation of powers in terms of preserving individual liberty;[26] functionally oriented commentators have proposed variations on this theme.[27] But all functionalists agree that legislation should be invalidated only when it disserves these ultimate ends.

At the second level, the formal/functional distinction reflects different substantive interpretations of the Constitution. At this level, interestingly, formalists and functionalists start with the same premise: that the constitutional principle of separation of powers is concerned with the allocation of governmental functions among the different branches of government. Indeed, both groups generally agree with the traditional understanding that goverumental activities can be classified under three functional headings—legislative, executive, or judicial—with each function associated with one of the three branches of government.[28] Where they disagree is over what sorts of deviations are permitted from the one function–one branch equation.

A pure formalist embraces what I will call an "exclusive functions" interpretation of the relationship between functions and branches. On this view, each of the three branches has exclusive

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[25] Sunstein, 101 Harv L Rev at 495 (cited in note 22); see also Carter, 1987 BYU L Rev at 722–35 (describing "evolutionary" tradition) (cited in note 22); Miller, 1986 Supreme Court Review at 41 (cited in note 22) (describing "pragmatic" approach).

[26] *Freytag*, 111 S Ct at 2634; *Mistretta*, 488 US at 380; *Youngstown Sheet & Tube Co. v Sawyer*, 343 US 579, 635 (1952) (Jackson concurring); *Myers v United States*, 272 US 52, 294–95 (1926) (Brandeis dissenting).

[27] See Brown, 139 U Pa L Rev at 1516 (cited in note 4) (ultimate question is "the potential effect of the arrangement on individual due-process interests"); Paul Verkuil, *Separation of Powers, the Rule of Law, and the Idea of Independence*, 30 Wm & Mary L Rev 301 (1989) (basic purpose is to avoid conflicts of interest). Some commentators have also posited that a central purpose of separation of powers is to control rent-seeking factions. See Miller, 8 Social Philos & Policy 196 (cited in note 16).

[28] See, e.g., *Humphrey's Executor v United States*, 295 US 602, 630–32 (1935); *Myers v United States*, 272 US 52, 161 (1926); *Massachusetts v Mellon*, 262 US 447, 488 (1923); *Wayman v Southard*, 10 Wheat 1, 46 (1825).

authority to perform its assigned function, unless the Constitution itself permits an exception.[29] In effect, the Vesting Clauses of Articles I, II, and III are construed as establishing a prima facie allocation of a single function to each of the branches of government. This allocation may be ignored only if a specific clause of the Constitution authorizes a deviation. For example, the Vesting Clause of Article I establishes a prima facie allocation of "all legislative power" to the Congress. Under the Presentment Clause,[30] however, the President is expressly permitted to participate in the legislative power by exercising the veto. Absent some such exception grounded in constitutional text, however, the proper classification of any governmental activity according to its function establishes which branch may exclusively perform it.

The substantive constitutional theory of the functionalists is harder to pin down. All functionalists reject the exclusive functions idea, and believe that many governmental activities can be categorized as falling within more than one function; they would have courts defer to the allocation established by Congress in these doubtful cases.[31] And all functionalists believe that the primary objective of judicial review in separation of powers cases is to insure that each branch retains "enough" governmental power to permit it to operate as an effective check on the other branches of government.[32] In the most extreme version of functionalism, the idea of a specified allocation of functions would disappear altogether, leaving only the notion of a general diffusion or balancing of power among the branches. Separation of powers would on this view become indistinguishable from a free-floating checks and balances.[33] Most functionalists would not go that far, but would instead embrace a "core functions" theory [34] This posits the existence of a nucleus of

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[29] *Mistretta*, 488 US at 426 (Scalia dissenting); Redish & Cisar, 41 Duke L J 449 (cited in note 4); Lawson, 78 Cal L Rev at 857–58 (cited in note 10). The formal theory is equivalent to what M. J. C. Vile calls the "pure doctrine" of separation of powers, with the addition of the qualification that text-based exceptions are permissible. See M. J. C. Vile, *Constitutionalism and the Separation of Powers* 13 (1967).

[30] Art I, § 7, cl 2.

[31] See Brown, 139 U Pa L Rev at 1527–29 (cited in note 4).

[32] Id at 1527

[33] Sargentich, 72 Cornell L Rev at 433 (cited in note 4).

[34] See *Bowsher*, 478 US at 776 (White dissenting); *Chadha*, 462 US at 1000 (White dissenting); *Nixon v Administrator of General Services*, 433 US 425, 443 (1977).

activities that uniquely belongs to each of the three branches, and that cannot be reassigned by Congress. Although courts would defer to Congress outside these areas, they would step in to prevent any tampering with the core.[35] The reason for preserving such a core, however, is again to insure that a balance or equilibrium of power is maintained among the branches.

Two important insights emerge from breaking formalism and functionalism down into their composite elements in this fashion. First, we can see that the criticisms most commonly leveled against formalism and functionalism are attributable more to their substantive theories than their methodological commitments. Formalism is often attacked on the ground that the definitions of the legislative, executive, and judicial powers are elusive and lead to a question-begging analysis.[36] The elusiveness of the functional categories poses special difficulties for formalism, however, only because of the assumption of its substantive theory that each function is uniquely assigned to one branch. For example, in *INS v Chadha*,[37] the same activity—determining whether deportation of an alien should be suspended—was described by Chief Justice Burger as "legislative" when performed by one House of Congress, and as "executive" when performed by the Attorney General.[38] For good measure, Justice Powell in his concurring opinion described it as "adjudicatory "[39] Since the classification of House's decision as a "legislative act" was critical to the outcome under the formal theory, commentators had a field day lampooning the Court's reasoning.[40]

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[35] Moreover, most functionalists probably believe it is permissible for Congress to assign certain activities to entities that operate outside the chain of command of the three constitutional branches, as long as the core functions of the constitutional branches are not violated. Indeed, the creation of a Fourth Branch of government (or a Fifth or Sixth Branch) may be viewed as salutary, insofar as it creates yet another power center that can check and balance concentrated power.

[36] As Justice Stevens has wryly noted, "a particular function, like a chameleon, will often take on the aspect of the office to which it is assigned." *Bowsher*, 478 US at 749 (Stevens concurring).

[37] 462 US 919 (1983).

[38] Id at 952, 953 n 16.

[39] Id at 964.

[40] See Laurence H. Tribe, *The Legislative Veto Decision: A Law by Any Other Name?* 21 Harv J Legis 1 (1984); E. Donald Elliott, *INS v Chadha: The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 Supreme Court Review 125; Girardeau A. Spann, *Deconstructing the Legislative Veto*, 68 Minn L Rev 473 (1984).

Formalism is also attacked on the ground that it tends "to straitjacket the government's ability to respond to new needs in creative ways, even if those ways pose no threat to whatever might be posited as the basic purposes of the constitutional structure."[41] Again, the exclusivity postulate of formalism's substantive theory is the root of the problem. If each branch has only one function (absent a constitutional exception), then multifunctional entities—for example, administrative agencies that perform all three functions—would be unconstitutional.[42] To avoid this extreme conclusion, formalists are forced to adopt a grandfather strategy, preserving past deviations from formalist purity (like administrative agencies) based on stare decisis or a principle of historical settlement, while subjecting new innovations to scrutiny under a rigorous exclusive functions canon.[43] This solution, however, leads directly to the "straitjacket" that the functionalists complain about. As Justice White has asked, if in the past the Court has sanctioned deviations from constitutional purity, and those deviations are grandfathered, how do we know the proper response to new deviations should be automatic disapproval—especially if a plausible case can be made that the new deviation is designed to correct an imbalance caused by the old one?[44]

The principal criticism leveled against functionalism is not that it is too rigid but that it is not rigid enough.[45] The problem, again, derives largely from the substantive theory, and in particular from the nebulousness of the concepts of "diffusion of power" and "core functions." Because these concepts are so indeterminant, the judicial reaction will almost always be to defer to the judgments of

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[41] Brown, 139 U Pa L Rev at 1526 (cited in note 4).

[42] Id at 1524; Harold Bruff, *Presidential Power and Administrative Rulemaking*, 88 Yale L J 451, 498–99 (1979); Strauss, 84 Colum L Rev at 596 (cited in note 18).

[43] This is the strategy pursued by Justice Brennan's plurality opinion in *Northern Pipeline Co. v Marathon Pipe Line Co.*, 458 US 50 (1982). There, Justice Brennan asserted that the adjudicatory function belongs exclusively to Article III courts, subject to three exceptions designed to cover preexisting deviations: territorial courts, military courts, and tribunals considering questions involving "public rights." Id at 63–70. Because the adjudication of common law claims did not fall within any of the three exceptions, the *Northern Pipeline* plurality reasoned that the power to hear such claims could not be given to the Bankruptcy Court, a non–Article III tribunal.

[44] See *Chadha*, 462 US at 1002–03 (1983) (dissent).

[45] Redish & Cisar, 41 Duke L J 449 (cited in note 4); Stephen Carter, *Constitutional Impropriettes: Reflections on Mistretta, Morrison, and Administrative Government*, 57 U Chi L Rev 357, 375–76 (1990).

other branches when separation of powers controversies arise. The arguments in support of innovation will be concrete and immediate, while the case for preserving "diffusion" or the "core" will seem abstract and remote.[46] Thus, the "core" functions notice is unlikely to achieve its stated aim: the preservation of a system of separated and balanced powers as a guarantee of liberty [47]

Unpacking the strands of formalism and functionalism also allows us to see that although there is a natural affinity between the methodological and substantive sides of each understanding, the linkage is contingent rather than logically compelled. For the formalist, the exclusive functions construction posits that the constitutional structure incorporates a complex rule subject to many text-based exceptions. This rule-like understanding is obviously congenial to a deontological method of justification. On the functional side, the substantive theory eschews bright line rules in favor of more judgmental concepts like diffusion of power and core functions. These concepts invite a consequentialist methodology that examines every challenged institution or practice in terms of its impact on the overall purpose of a system of separation of powers. But notwithstanding these natural affinities between legal method and substantive theory, there is no reason in principle why some other substantive theory of the constitutional principle of separation of powers could not be adopted. Such a theory might avoid the more glaring problems generated by the substantive theories associated with formalism and functionalism. And it could be implemented with either a formal or a functional method of justification, or perhaps some combination of both.

III. The Minimal Conception of Separation of Powers

One pathway to a new substantive theory of separation of powers would be to break away from the shared preoccupation with the functional classification of government activities, and focus instead on the three branches of government as distinct organizations subject to specific constitutional limitations on how they

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[46] See *United States v Nixon*, 418 US 683, 712–13 (1974) (President's interest in confidential communications is "general in nature" as opposed to the need for relevant evidence which is "specific and central to the fair adjudication of a particular criminal case").

[47] Redish & Cisar, cited in note 4.

exercise governmental authority [48] Specifically, if we start with the substantive theory of the formalists, and drop the concern with the division of functions, what we would be left with is a "minimal conception" of separation of powers that would insist that there are only three branches of government, and that every federal office must be located in one of the three branches. The substantive interpretation of the constitutional principle of separation of powers would reduce to a single, simple rule: Congress may not create a Fourth Branch of the federal government.

In effect, under the minimal conception, all questions about the correct definition of the "legislative," "executive," and "judicial" powers, and about how those powers should be allocated among the branches, would become nonjusticiable political questions confined to the discretion of Congress.[49] Thus, Congress would be free to assign any function to any of the three branches of government. What Congress could not do would be to assign functions to an entity that is not accountable to one of the three constitutional branches, and hence not subject to the specific constitutional limitations that apply to each branch.[50]

In terms of legal methodology, the central proposition of the minimal conception would operate in a highly formalistic fashion. The idea that there are only three branches of government, and that every federal office must be accountable to one branch, would be regarded as a fixed rule derived from the text and structure of

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[48] For another attempt along these lines, which has helped clarify my own thinking, see Krent, 74 Vir L Rev 1253 (cited in note 4).

[49] Alternatively, one could posit that questions about the definition and allocation of functions should be answered by the "core functions" theory of formalism, which would almost always result in their being upheld. See text at note 46. In fact, if I were tasked with implementing the minimal understanding, I would not say that the definitional and allocational questions are nonjusticiable, but would follow the functionalists and say that courts should intervene to decide these questions when core functions are threatened. Keeping the core functions idea around would provide some rhetorical continuity with the past, and would offer a "failsafe" should Congress in the future ever attempt severely to cripple the ability of either the executive or judicial branch to function. See note 115. For heuristic reasons, however, I will confine myself here to developing the case for a pure minimal approach, which would treat these questions as nonjusticiable.

[50] Because it would require strict judicial enforcement of the three-branches rule, the minimal approach would be quite different from those theories that would treat all questions about the horizontal division of powers as nonjusticiable. See Jesse H. Choper, *Judicial Review and the National Political Process* 260–379 (1980). Cf. Michael J. Perry, *The Constitution, the Courts, and Human Rights* 49–60 (1982) (arguing that separation-of-powers disputes should not be justiciable if the political branches agree about the proper resolution).

the Constitution and not subject to judicial waiver. The further steps in the inquiry, such as attributing federal offices to particular branches, and determining whether branch-specific constitutional limitations have been violated, could be decided either formalistically or under a more flexible, functional inquiry

In practice, the minimal conception would require courts to make three determinations in any separation-of-powers case. First, the court would have to assign the office whose action is being challenged to one of the three constitutional branches (or determine that it constitutes an unconstitutional attempt to create a Fourth Branch). Second, it would have to determine if the action violates any specific constitutional limitations that apply to its assigned branch. Third, if the action transgresses any branch-specific limitation, the court would have to consider whether there is any basis for concluding that the action should be exempt from these limitations. A brief elaboration of each step is appropriate at this point; I will then offer some illustrations of how the approach would be employed in resolving recent separation-of-powers controversies.

A. ATTRIBUTION RULES

The first and in many respects key step under the minimal conception would require the Court to develop rules for assigning federal offices[51] to the three constitutional branches of government. The rules for identifying the components of the constitutional branches themselves—members of Congress, the President, and federal judges—are set forth with some particularity in the Constitution itself, and generally should not be problematic.[52] The rules for identifying federal offices that are agents of one of the branches are less self-evident. The Court's decision in *Bowsher v Synar*[53] sug-

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[51] By "federal offices" I mean both principal and inferior offices. I will not here discuss the important question of how one distinguishes persons holding federal offices from other persons performing functions under federal law, such as state officers carrying out federal statutory directives or private citizens suing to enforce federal rights. See generally Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 Nw U L Rev 62 (1990). Obviously, my thesis presupposes that this can be done, otherwise the constitutional principle of separation of powers could be circumvented simply by allocating federal functions to private corporations or state entities.

[52] US Const, Art I, § 2, cl 5; Amend XVII; Art II, § 2, cl 2; Art II, § 3; Art III, § 1.

[53] 478 US 714 (1986).

gests that this inquiry could also be governed by a formal rule: an office is an agent of a branch if the members of the branch have the power to remove the incumbent officer [54] *Washington Airports*, in contrast, suggests more of an all-things-considered standard for resolving this question. Justice Stevens noted that the Board of Review at issue in that case was "an entity created at the initiative of Congress, the powers of which Congress has delineated, the purpose of which is to protect an acknowledged federal interest, and membership in which is restricted to congressional officials."[55] He also noted that Congress as a whole could effectively remove a member of the Board.[56] Without suggesting that any one of these factors was determinative, he concluded that the Board should be regarded as exercising federal power as an agent of Congress. My own inclination would be to adopt a formal test for attributing offices to particular branches, and to make the power to remove the exclusive criterion. A simple removal test not only has the advantage of reducing uncertainty and litigation costs, it also reflects institutional reality As the Court noted in *Bowsher*, once an officer is appointed, "it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey "[57]

For present purposes, however, it is not necessary to choose between formal and functional methodological approaches to this question. I would only note that to the extent the power to remove is a relevant factor—as it surely is under either approach—it would not necessarily mean the power to remove at will. *Bowsher* held that the Comptroller General is an agent of Congress, even though he is removable by Congress only for cause. And *Morrison v Olson*[58] expressly disapproved statements in *Myers v United States*[59] to the

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[54] The Comptroller General (whose powers were at issue in *Bowsher*), like all other "civil officers," was removable by impeachment. US Const Art II, § 4. But the Court quite rightly did not suggest that this made him an agent of Congress. Because impeachments are so rare, this power does not act as a realistic day-to-day restraint on the behavior of federal officers.

[55] *Washington Airports* at 2308.

[56] Id ("Control over committee assignments also gives Congress effective removal power over Board members because depriving a Board member of membership in the relevant committees deprives the member of authority to sit on the Board.").

[57] *Bowsher*, 478 US at 726, quoting *Synar v United States*, 626 F Supp 1374, 1401 (D DC 1986); cf. *Mistretta*, 488 US at 423 (Scalia dissenting) ("It would seem logical to decide the question of which Branch an agency belongs to on the basis of who controls its actions.").

[58] 487 US 654 (1988).

[59] 272 US 52 (1926).

effect that all executive officers must be removable at will by the President. In effect, *Morrison* placed the independent counsel whose office was at issue in that case in the executive branch even though the Attorney General could remove her only for "good cause."

The effect of the attribution exercise would be to place most federal governmental entities in the executive branch. The congressional staff and a few offices like the General Accounting Office and the Congressional Budget Office would be deemed agents of Congress. The Administrative Office of the United States Courts, law clerks, and clerks of court would be agents of the federal courts. But most of the entities whose parentage has been a matter of controversy in the past—including the independent regulatory agencies like the FCC and SEC and Article I courts like the Tax Court—would become part of the executive branch. Ironically, the event that makes this allocation of offices even thinkable is the decision in *Morrison*—thought by most formalists to be a defeat for executive power. Before *Morrison*, it was assumed that all executive officers had to be removable at will by the President, a rule incompatible with the tenure rights enjoyed by the commissioners of independent agencies and judges of Article I courts.[60] But now that *Morrison* has established that some executive officers can be protected by a good cause removal requirement, reconceiving the independent agencies and Article I courts as part of the executive branch would not be that disruptive to settled institutional arrangements.

B. BRANCH-SPECIFIC LIMITATIONS

Next, having placed the office in one of the three branches, the Court would have to determine whether the actions required of that office transgress any constitutional limitations specific to the branch to which the office is assigned. As Harold Krent has observed, each branch of government is subject to certain "procedural" limitations reflected in the text of the Constitution.[61] Congress may generally act only in conformance with the Bicameral

[60] Hence in *Humphrey's Executor v United States*, 295 US 602 (1935) and *Wiener v United States*, 357 US 349 (1958), the Court upheld restrictions on the President's removal power only after finding that the offices involved were engaged in "quasi-legislative" or "quasi-judicial" rather than "executive" functions.

[61] See Krent, 74 Vir L Rev 1253 (cited in note 4).

and Presentment Clauses.[62] The executive branch, consistent with the Take Care Clause, may act only pursuant to authority given by legislation or an enumerated constitutional power [63] And the federal courts may act only through the adjudication of "cases" and "controversies."[64] Thus, the process of placing an office in a particular branch will generally result in imposing at least one set of constitutional limitations on actions taken by that office.

The procedural limitations identified by Krent do not necessarily exhaust the constitutional constraints on action taken by any particular branch. Other clauses, like the Appointments Clause, the Incompatibility Clause, and the Speech or Debate Clause, also impose constraints on action by one branch affecting one or more of the others. In addition, the Court could conceivably recognize implied branch-specific limitations. For example, one could read the *Myers* case, even after the qualifications of *Morrison*, as establishing that all principal officers of the executive branch (as opposed to inferior officers like the independent counsel in *Morrison*) must be removable at will by the President. Alternatively (or in addition), one could reason from the Constitution's creation of a unitary executive that the President must be able to issue orders to any subordinate officer in the executive branch, and deem the failure to obey such an order "good cause" for removal.[65] It could also be that the judicial branch, like the executive, has no inherent power to create rules of decision, but must derive its authority to act from some source in enacted law, such as the Constitution or a federal statute.[66]

For present purposes, the point is not to develop a complete catalogne of all limitations specific to the actions of each branch. It is sufficient to note that there is at least one recognized limitation

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[62] *Chadha*, 462 US 919 (1983).

[63] This is the lesson generally drawn from the *Steel Seizure* case, *Youngstown Sheet & Tube Co. v Sawyer*, 343 US 579 (1952). See, e.g., Currie, 1986 Supreme Court Review (cited in note 18).

[64] *Mistretta*, 488 US at 385, 389; *Morrison*, 487 US at 677· *Allen v Wright*, 468 US 737, 750 (1984).

[65] See Steven Calabresi and Kevin Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 Harv L Rev (forthcoming 1992); Liberman, 38 Am U L Rev at 316–17 (cited in note 18); Miller, *Independent Agencies*, 1986 Supreme Court Review at 86–87 (cited in note 22).

[66] As I argue in Thomas W Merrill, *The Judicial Prerogative*, 12 Pace L Rev (forthcoming 1992); see also Currie, 1986 Supreme Court Review at 25 (cited in note 18).

applicable to each branch, and that the task of the Court under the minimal conception, once it attributes the actions of an office to a particular branch, is to determine whether any applicable limitations have been transgressed.

C. EXCEPTIONS

Finally, the Court would have to consider in some cases whether an exception from the usual limitations on branch action may be applicable. The primary constraints—the Bicameral and Presentment Clauses, the Take Care Clause, and the Cases or Controversies limitation—should be construed as applying only to exercises of governmental authority by each branch. As the Court said in *Chadha*, the Bicameral and Presentment rules apply when a component of Congress takes action that has "the purpose and effect of altering the legal rights, duties and relations of persons outside the Legislative Branch."[67] By negative implication, actions that do not affect the "rights, duties and relations of persons" outside the legislative branch would be exempt from these constitutional procedures. Thus, rules relating to parliamentary procedures, congressional staff, and use of congressional facilities presumably could be adopted by Congress or a designated component of Congress without complying with the Bicameral and Presentment Clauses. Similarly, internal operating rules having no impact on the public can be adopted by the other branches without complying with specific constitutional constraints.[68] In addition, specific Clauses of the Constitution may create other exceptions. For example, there are several express exceptions to the Bicameral and Presentment requirements.[69] Again, the point is not to offer an exhaustive list of exceptions, but merely to note their role in a fully formed federal offices conception of separation of powers.

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[67] 462 US at 952.

[68] Thus, for example, the courts can be empowered to adopt rules of procedure through a rulemaking process, as authorized by the Rules Enabling Act, 28 USC § 2072 (1988), without offending the Cases or Controversies limitation. The key question would be whether such rules are "governmental" or "nongovernmental," that is, whether they are designed to control primary (prelitigational) behavior or to control the behavior of attorneys and other persons engaged in litigation. Cf. *Hanna v Plumer*, 380 US 460 (1965). Fairly clearly, such an exception would have to be developed in a methodologically functional rather than a formal fashion, that is, it would have to be developed in light of the purpose of the exception (to limit the Cases or Controversies limitation to exercises of governmental authority).

[69] See *Chadha*, 462 US at 955 (listing exceptions).

D. ILLUSTRATIONS

In order to clarify the way in which the minimal conception would operate, it may be useful to indicate how that approach would resolve some recent separation-of-powers controversies.

Last Term, *Washington Airports* involved the question whether Congress can use its power over the disposition of federal property to induce a state to create an institution exercising what is in effect a Congressional veto. Assuming that the financial inducement was sufficient to establish that the Board was a federal agency,[70] then the key question under the minimal conception would be attribution. Since Congress as a whole could remove members of the Board by taking them off the relevant Congressional committees, under the formal criterion the Board would be regarded as an agent of Congress. As we have seen, Justice Stevens engaged in an all-things-considered inquiry, and reached the same conclusion.

Once the attribution question is resolved, then the case becomes easy As an agent of Congress, the Board was subject to the same constitutional limitations that apply to Congress. Since a decision by Congress disapproving action by a regional airports authority would have to be approved by both Houses and presented to the President for his signature or veto, decisions of the Board must also comply with these requirements. Given that the Board could not possibly comply with these limitations, the legislation creating it should be deemed unconstitutional.

Mistretta v United States[71] concerned the constitutionality of the United States Sentencing Commission, an entity composed in part of sitting federal judges and given broad powers to prescribe binding federal sentencing guidelines. Under the minimal conception, the initial task would be to determine where the Commission fits in the tripartite constitutional structure. Although described by the

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[70] Given that the federal legislation took the form of a conditional grant of federal property (a long-term lease of National and Dulles Airports), the Court could easily have required more evidence of federal "coercion" of Virginia before attributing the actions of the state-created Board to Congress itself. Although the issue is beyond the scope of this paper, the implicit conception of "coercion" in *Washington Airports* seems to be closer to the notion of irresistible financial inducement invoked in *United States v Butler*, 297 US 1 (1936), than to the stricter notion of coercion employed in *South Dakota v Dole*, 483 US 203 (1987) and *Steward Machine Co. v Davis*, 301 US 548 (1937). Whether this portends a permanent shift in the Court's attitude toward conditional grants of money and property remains to be seen.

[71] 488 US 361 (1989).

legislation establishing it "as an independent commission in the judicial branch of the United States,"[72] under the minimal conception the Commission should be regarded as part of the executive branch. All members of the Commission are subject to removal by the President "for neglect of duty or malfeasance in office or for other good cause shown."[73] Under the formal approach to attribution, this would settle the matter. The fact that the statute required that three members of the Commission be active federal judges—although perhaps raismg a question under the Appointments Clause[74]—would not change this result. The relevant question is whether the office is accountable to the President, not whether the President has the power to remove the incumbent officer from all forms of government service. The President clearly has the power to remove the Article III judges acting in their capacity as Sentencing Commissioners, and so they should be regarded as part of the executive branch.

Under a more contextual analysis, the same conclusion should be reached. All Commission members, including the three sitting federal judges, are appointed by the President. And it is clear that the Commission operates independent of direction from the Chief Justice, the Judicial Conference, or any other judicial body Thus, the Commission is quite unlike other entities, such as the Administrative Office of the Umted States Courts or the Federal Judicial Center, that are generally regarded as being part of the judicial branch.[75]

Once is it clear that, for separation-of-powers purposes, the Sentencing Commission is an agent of the executive branch, then the other issues in the case are straightforward. The various challenges to the Commission based on the anomaly of rulemaking by an entity in the judicial branch would be serious only if the Commission were in fact located in the judicial branch.[76] The nondelegation

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[72] 28 USC § 991(a) (1988).

[73] Id.

[74] See *Public Citizen v United States*, 491 US 440, 488–89 (1989) (Kennedy concurring) (arguing that the textual commitment of the appointments power to the President prohibits any legislative interference with the President's discretion in selecting nominees).

[75] See Brief for the United States, at 39–40, *Mistretta v United States*.

[76] Congress' designation of the Commission as an independent commission in the judicial branch, 28 USC § 991(a), might still be important for statutory purposes, such as determining whether the Commission is subject to the Freedom of Information Act. See 5 USC 552(f) (1988).

doctrine challenge necessarily fails because it rests on the notions about the proper allocation of the "legislative function" rather than some specific constitutional limitation. And the fact that Article III judges were included on the Commission is of no significance, since the Incompatibility Clause applies only to Members of Congress, and does not prohibit Article III judges from simultaneously serving in the executive branch.[77] The minimal conception thus confirms that the Court was correct in upholding the constitutionality of the Sentencing Commission.

Morrison v Olson,[78] which considered the constitutionality of the independent counsel provisions of the Ethics in Government Act, is somewhat more difficult. The attribution question may hinge on whether one adopts a formal criterion, or a contextual approach. The independent counsel is removable by the Attorney General for "good cause," thus satisfying the formal criterion for placement in the executive branch. But in other respects, the counsel's allegiance is divided between the executive and the judicial branches. The counsel must abide by the policies of the Justice Department where possible.[79] But an Article III court—the Special Division of the D.C. Circuit—confirms the counsel's jurisdiction and has the power to terminate an investigation.[80] If one concludes that, on balance, the counsel is an agent of the judicial branch, then the statute would be unconstitutional under the minimal approach, because the counsel is not confined to the adjudication of cases and controversies or permissible internal functions of the judicial branch.

On the other hand, if one finds that the independent counsel is an agent of the executive branch—as the formal criterion suggests—then most of the provisions of the Act should survive a challenge based on the principle of separation of powers. The good cause limitation on the power to remove the independent counsel is acceptable, as long as the President is afforded other means of assuring ultimate control over executive branch officers. And the claim that the Act as a whole unduly interferes with "executive" functions necessarily fails, because questions about where Congress

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[77] See *Mistretta*, 488 US at 398.

[78] 487 US 654 (1988).

[79] 28 USC § 594(f) (1988).

[80] 28 USC § 596(b)(2) (1988).

places executive powers are nonjusticiable. The provision giving the Special Division the power to terminate the office of the independent counsel, however, would appear to be unconstitutional because it transgresses the cases and controversies limitation on the judicial power.[81] To this limited extent, then, the federal officers approach would indicate a result contrary to that reached by the Court.[82]

IV. The Advantages of the Minimal Conception

Even if it is possible to state a third conception of the constitutional principle of separation of powers, and to show that it could be implemented as a legal doctrine, the question remains: what claim would it have to our allegiance? Fairly clearly, the minimal conception would eliminate the most glaring problems associated with formalism and functionalism. Because it would consider questions about the proper definition and allocation of "legislative," "executive," and "judicial" power to be nonjusticiable, it would avoid the source of the question-begging analysis that plagues formalism. Also, by eschewing any review of the questions about the distribution of functions, it would permit considerable experimentation with new forms of multifunctional entities, at least those located in the executive branch. Thus, it would eliminate the main cause of the "straightjacket" on governmental innovation associated with formalism. On the other hand, the three-branches rule at the core of the minimal understanding would provide clear signals to the judiciary and other actors in government about the outer limits of structural experimentation, and thus would avoid the vacuity associated with functionalism.

In addition, there are three positive reasons why the minimal conception presents an attractive alternative to formalism and functionalism. First, the minimal conception, unlike both formal-

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[81] See Krent, 74 Vir L Rev at 1319–21 (cited in note 4).

[82] The consitutionality of the Act was also challenged under the Appointments Clause on the grounds that the Special Counsel is a principal officer requiring presidential appointment, and that the Appointments Clause does not permit "cross branch" appointments of inferior officers. On both scores, I find the reasoning of Justice Scalia's dissent and the D.C. Circuit more persuasive than the majority's opinion. See *Morrison*, 487 US at 715–23 (Scalia dissenting); *In re Sealed Case*, 838 F2d 476 (D C Cir 1988). But since these issues are extraneous to the question of the meaning of the constitutional principle of separation of powers, I will not elaborate on them here.

ism or functionalism, is consistent with the outcomes (but not the reasoning) of virtually all the Supreme Court's major decisions on separation of powers. Second, the minimal conception would further two general purposes of a doctrine of separation of powers: preventing evasions of specific clauses limiting the powers of the branches, and encouraging a diffusion of power. Third, the minimal conception is consistent with the text of the Constitution, and is in some respects more faithful to the original understanding than are its principal rivals.

A. CONGRUENCE WITH SUPREME COURT OUTCOMES

While the Court has struggled with the yin and yang of formalism and functionalism, the outcomes it has reached have been intriguingly consistent. The Court has nearly always rejected claims based on the improper assignment of executive and judicial functions,[83] but has regularly sustained claims based on Congressional attempts to exercise governmental power in violation of the requirements for enacting valid legislation.[84] The same pattern of results would be reached under the minimal conception. The minimal conception would treat questions about proper allocation of functions as nonjusticiable; thus, like the Court, it would not overturn legislation on the ground that it improperly assigns the executive or judicial functions. On the other hand, the minimal conception would strictly enforce the requirements of the Bicameral and Presentments Clauses, and thus like the Court would invalidate attempts by Congress to assert extra-legislative governmental power. I would go further, however, and argue that the minimal conception would produce outcomes that are congrnent with virtually all of the judgments rendered by the Supreme Court in its leading separation-of-powers decisions.

1. *Nondelegation doctrine.* The Supreme Court has steadfastly maintained that only Congress can exercise the legislative power.[85] Nevertheless, under the rubric of the nondelegation doctrine, the Court has also said that Congress may confer significant discretion

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[83] See *Freytag* and cases cited in note 8.

[84] *Washington Airports* and cases cited in note 7.

[85] *Touby v United States*, 111 S Ct 1752, 1755 (1991); *Mistretta*, 488 US 371–72; *Field v Clark*, 143 US 649, 692 (1892).

on the other branches, so long as it "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform."[86] Application of this "intelligible principle" doctrine, in turn, has resulted in widespread transfers of power to administrative agencies to promulgate "legislative rules"[87] functionally indistinguishable from statutes. In the last fifty years, the Court has consistently declined to interfere with such transfers,[88] to the point where, realistically speaking, there is no meaningful judicial limitation on Congressional decisions to delegate legislative power to other branches. The minimal conception would of course reach the same result by declaring the issue nonjusticiable.

2. *Non–Article III courts.* In no area of constitutional law is there a greater or more persistent deviation from formal or functional theories than that involving the assignment of the judicial function. The Supreme Court has permitted controversies between adverse parties under federal law to be decided by territorial courts, military courts, District of Columbia courts, various "legislative" courts like the Tax Court, and administrative agencies.[89] The one exception here is *Northern Pipeline*,[90] where the Court invalidated a portion of the jurisdiction of the bankruptcy courts as being inconsistent with the vesting of judicial power in Article III courts. But recent decisions make clear that the analysis employed by the plurality in *Northern Pipeline* has been confined to its facts.[91] Taken together, the decisions approving a wide variety of non–Article III courts overwhelmingly suggest that there is no judicially enforced limitation on assignment of the "judicial" function. The minimal conception would reach this same conclusion by declaring such questions nonjusticiable.

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[86] *J.W. Hampton, Jr. & Co. v United States*, 276 US 394, 409 (1928).

[87] See *Batterton v Francis*, 432 US 416, 425 n 9 (1977).

[88] For the most recent decisions that reach this conclusion, see *Touby v United States*, 111 S Ct 1752 (1991) (upholding delegation of power to criminalize possession of drugs); *Skinner v Mid-America Pipeline Co.*, 490 US 212 (1989) (upholding delegation of power to set rates of taxation); *Mistretta* (upholding delegation of power to set criminal sentencing guidelines).

[89] See generally Lawson, 78 Cal L Rev 853 (cited in note 10); Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv L Rev 916 (1988).

[90] 458 US 50 (1982).

[91] See *Freytag*, 111 S Ct at 2644 ("judicial power" may be given to non–Article III court); *Commodity Futures Trading Comm'n v Schor*, 478 US 833 (1986) (administrative agency may adjudicate common-law claim); *Thomas v Union Carbide Agricultural Products Co.*, 473 US 568 (1985) (value of trade secrets may be fixed by non–Article III forum).

3. *Removal cases.* The Court has decided four major cases that consider whether a congressional restriction on the President's power to remove subordinate officers interferes with the "executive power" given to the President by Article II. In one—*Myers v United States*[92]—the Court held that the restriction was unconstitutional. In the remaining three cases[93] the restriction was upheld. Although the reasoning of these four decisions is impossible to reconcile, the outcomes all comport with those that would be reached under the minimal conception. In *Myers*, the restriction took the form of a requirement that any removal of a postmaster first class be confirmed by the Senate.[94] This was a legislative veto, unconstitutional under the Bicameral and Presentment Clauses. In the other three cases, the restriction took the form of limiting the President's power of removal to a finding of good cause, and in each case the restriction was upheld. Thus, when the sole foundation for the claim is interference with the assignment of the executive function to the President, the claim has been rejected, consistent with the minimal conception.

4. *Legislative attempts to execute the laws.* On several other occasions, the Court has invalidated legislation said to permit the legislature to perform executive functions.[95] But the holdings of each of these cases can be explained on the basis of specific constitutional limitations: in each case Congress either transgressed the Bicameral and Presentment Clauses,[96] or violated an expressly enumerated Presidential power, such as the Appointments Clause or the Pardon Power.[97] Thus, the results in these cases would not be disturbed under the minimal conception, which would not permit Congress to transgress express constitutional limitations on its power.

5. *Executive privilege cases.* In three cases involving former President Nixon, the Court has recognized an "executive privilege"

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[92] 272 US 52 (1926).

[93] *Morrison v Olson*, 487 US 654 (1988); *Wiener v United States*, 357 US 349 (1958); *Humphrey's Executor v United States*, 295 US 602 (1935).

[94] See 272 US at 107.

[95] *Washington Airports*, 111 S Ct at 2312; *Bowsher*, 478 US at 726; *Buckley v Valeo*, 424 US 1, 140 (1976); *Springer v Philippine Islands*, 277 US 189, 205–06 (1928); *United States v Klein*, 80 US 128, 148 (1872).

[96] *Washington Airports*, 111 S Ct at 2312; *Bowsher*, 478 US at 754–56 (Stevens concurring); *Springer*, 277 US at 203.

[97] *Buckley*, 424 US at 143; *Klein*, 80 US at 147–48.

based on general considerations of separation of powers.[98] Such a privilege has no express textual foundation, and would have to be grounded in an understanding of the President's assigned responsibility to perform "executive" functions. Recognition of such a privilege runs counter to the minimal conception, but the ultimate holding of two of these cases was to deny the Presidential claim.[99] Although the claim was sustained in the third, the Court reserved the question whether Congress could override the privilege, suggesting that the holding was not constitutionally compelled.[100] Thus, the actual outcome reached in these cases does not necessarily conflict with the minimal conception.

6. *Foreign affairs cases.* Finally, in the foreign affairs and national defense context, there are statements suggesting that the President may act in exigent circumstances without specific legal authorization, contrary to the implication that the minimal conception would draw from the Take Care Clause.[101] However, most of the decisions in this area can be explained on alternative grounds—either the President's action could be sustained under a specific clause of the Constitution, such as the Commander-in-Chief or Receiving Ambassadors provisions,[102] or under existing statutory authority, broadly construed.[103] Thus, the actual holdings of the cases are not necessarily inconsistent with an understanding that the Take Care Clause imposes a general limitation on executive action.

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We can thus see that the Supreme Court's leading separation of powers decisions trace a generally consistent pattern overall. Claims grounded solely on an assertion about the correct allocation of functions among branches almost invariably fail; claims based

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[98] *Nixon v Fitzgerald*, 457 US 731 (1982); *Nixon v Administrator of General Services*, 433 US 425, 446–55 (1977); *United States v Nixon*, 418 US 683 (1974).

[99] *Nixon v Administrator*, 433 US at 455; *United States v Nixon*, 418 US at 713.

[100] *Nixon v Fitzgerald*, 457 US at 748 n 27.

[101] *United States v Curtiss-Wright Corp.*, 299 US 304, 319–20 (1936); *The Prize Cases*, 2 Black 635, 668 (1863).

[102] For example, *United States v Belmont*, 301 US 324, 330 (1937) (power to enter into executive agreements derived from Receiving Ambassadors Clause); *The Prize Cases*, 2 Black at 668 (power to act in military emergency supported by President's power as Commander-in-Chief).

[103] E.g., *Dames & Moore v Regan*, 453 US 654 (1981).

on the violation of a specific textual limitation on action by a branch will succeed if the Court concludes that the limitation has in fact been transgressed.[104] There may be a variety of explanations for this phenomenon. It could be, for example, that the presence of a specific clause like the Presentment Clause or the Appointments Clause increases the Court's confidence about interposing its judgment against that of the political branches. Or it could be that the pattern reflects a bias in favor of the executive branch.[105] The important point, for present purposes, is that the pattern is fully consistent with the results that would be reached under the minimal conception, which would make questions about the definition and allocation of functions nonjusticiable, but would strictly enforce specific limitations on the branches.

At a theoretical level, how much significance one attributes to this congruence depends on how one conceives of the role of the Supreme Court in interpreting the Constitution, and one's theory of precedent. If one regards the Supreme Court's decisions as authoritative, and adopts a theory of precedent that stresses the judgments reached in light of the material facts,[106] then the evidence of consistency would be very powerful support for the minimal conception. But if one does not regard Supreme Court decisions as authoritative (as opposed to, say, the original intentions of the Framers), or if one adopts a theory of precedent that stresses the

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[104] Individual Justices have also perceived this pattern. See *Chadha*, 462 US at 999 (White dissenting) ("The separation-of-powers doctrine has heretofore led to the invalidation of Government action only when the challenged action violated some express provision in the Constitution."); *Public Citizen v United States*, 491 US 440, 484–85 (1989) (Kennedy concurring) (noting that the Court employs a "balancing test" where the power at issue is "thought to be encompassed within the general grant to the president of the 'executive Power,' " but that "where the Constitution by explicit text commits the power at issue to the exclusive control of the President, we have refused to tolerate *any* intrusion by the Legislative Branch").

[105] See 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 (1987). The pro-executive bias explanation was dealt a severe setback by *Morrison*, where the Court, over the vigorous objections of the Solicitor General, curtailed the scope of the President's removal power recognized in *Myers*. The Court also rejected the position of the Solicitor General in *Mistretta*, *Freytag*, and *Washington Airports*, although in the last case the effect of the Court's decision was to give the executive more protection against Congressional aggrandizement than it sought.

[106] See Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 Yale L J 161 (1930). For a recent discussion, see Charles W. Collier, *Precedent and Legal Authority: A Critical History*, 1988 Wis L Rev 771.

reasons given by the Court rather than the judgments rendered on material facts, then the evidence would be less than compelling.

On a more practical level, however, the congruence must be regarded significant, if only as a measure of continuity with our institutional past. As Justice Frankfurter once observed in this context, "[d]eeply embedded traditional ways of conducting government" represent "the gloss which life has written" on the words of the Constitution.[107] The outcomes the Court has reached in resolving major separation-of-powers controversies reflect that gloss and in turn shape it. Ordinarily, of course, the articulated understanding of the Supreme Court is also an important ingredient in comprehending the past and providing guidance for the future. But where the Court has developed two rivalrous understandings of the constitutional principle of separation of powers, neither of which can account for the full range of its judgments, the Court's reasons naturally play a less significant role. Because the minimal understanding would reach essentially the same outcomes the Court has arrived at (by whatever means), it would largely preserve the settled pattern of institutional arrangements under our Constitution.

B. PROMOTING THE PURPOSES OF SEPARATION OF POWERS

The mimimal construction would also advance two important purposes associated with a doctrine of separation of powers: it would prohibit evasion of the specific clauses of the Constitution that limit the governing authority of the branches, and it would promote a diffusion of power among the branches. If Congress were free to create a Fourth Branch of government, that is, an entity not accountable or subject to the limitations that apply to the three constitutional branches, then it would be easy to circumvent these provisions altogether. For example, Congress could bypass the Cases or Controversies limitation of Article III by enacting a statute making the Justices of the Supreme Court an independent agency with power to render advice to the President. Alternatively, Congress could evade the Presentment Clause by constituting both Houses of Congress an independent agency and delegating to that agency the power to promulgate legislative rules.

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[107] *Youngstown Sheet & Tube Co. v Sawyer*, 343 US 579, 610 (1952) (concurring opinion).

The decisions in *Chadha*, *Bowsher*, and *Washington Airports* suggest that the Court is sensitive to the problem of evasion. When Congress adopts legislation delegating governing authority to a subunit of Congress or a Congressional agent, such legislation does not literally violate the Bicameral and Presentments Clauses. The statutes incorporating the delegations (which are the statutes held unconstitutional) technically comply with the Clauses—they have been passed by both Houses and signed by the President.[108] The problem is that these statutes set up institutional mechanisms that would permit wholesale evasion of these Clauses in the future. Thus, the Court has invalidated statutes that permit Congress to assert extra-legislative governmental authority because "[a]ny other conclusion would permit Congress to evade the 'carefully crafted' constraints of the Constitution."[109]

The minimal conception of separation of powers, by forcing all federal offices into one of three constitutional branches, would function more generally to prevent evasion of the specific clauses of the Constitution. Because every federal office would be located in one of the branches, every office would be subject to one set of constitutional limitations—those that apply to the branch to which it belongs. To be sure, by transferring functions back and forth among the branches, Congress would have the power to shift from one set of limitations to another. But it could never circumvent the constitutional limitations altogether, and assuming that it was forced to give some functions to each branch (as I shall argue momentarily it would be), each limitation would be given effect.

The minimal conception would also create a dynamic tension between Congress and the other branches of government that would serve the central end of a system of separation of powers—the diffusion of power to "protect the liberty and security of the governed."[110] Perhaps the easiest way of seeing this is to consider

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[108] See *Chadha*, 462 US at 980 (White dissenting).

[109] *Washington Airports*, 111 S Ct at 2308. Admittedly, the Court has been less vigilant about the possibility of evasion with respect to the Cases or Controversies limitation on the judicial branch. The decision in *Mistretta*, for example, seems to suggest that Article III judges may in special circumstances participate in legislative rulemaking. But at least at the rhetorical level, the Court has continued to insist that Article III courts are constitutionally restricted to deciding cases and controversies, see *Morrison* 487 US at 677, suggesting that at some point it would invalidate attempts to bypass this limitation too.

[110] *Washington Airports*, 111 S Ct at 2310. See also cases cited in note 26 .

the structure of options that the minimal understanding would present to Congress. This approach would give Congress unreviewable discretion to delegate functions, but would impose strict limits on who may receive the delegation. Congress (*a*) could not delegate governing authority to a subunit of itself or to a Congressional agent, (*b*) could delegate to the federal courts only on the understanding that they would be limited to deciding cases and controversies, but (*c*) could make virtually unlimited delegations to the executive branch. How would Congress respond to this menu of options?

Consider, first, the possibility that Congress might decide to assign all functions to itself. Because there would be no judicially enforced limits on the allocation of functions, it would be free to do this. But any governmental action by Congress (or an agent of Congress) must comply with the Bicameral and Presentment Clauses, and Congress is severely limited in the number of times it can surmount these cumbersome barriers in any legislative session. Because the legislative agenda is a scarce resource, one would predict that Congress, if it wanted to maximize its own influence within the tripartite system, would typically use the legislative process to promulgate general rules for the governance of society, and would resist requests to engage in the more routine and high-volume activities traditionally associated with the executive and judicial functions. The great reluctance of Congress to conduct impeachment proceedings,[111] and the self-imposed limitations it has adopted on the use of private bills,[112] tend to confirm these observations.

Once Congress decides to delegate most routine functions outside the legislative branch, its only options would be the judicial branch and the executive branch. Because courts cannot act expeditiously or on their own initiative, and could make law only through the development of federal common law, the best choice for most purposes would be the executive branch. But the President is historically the principal constitutional rival of the Congress, and so Congress would be reluctant to give unconstrained discretion to the executive. Thus, the mimimal understanding would provide an

[111] Mitch McConnell, *Reflections on the Senate's Role in the Judicial Impeachment Process and Proposals for Change*, 76 Ky L J 739 (1987–88).

[112] Note, *Private Bills in Congress*, 79 Harv L Rev 1684, 1688–93 (1966).

incentive for Congress to make key policy decisions itself through legislation—probably far more of an incentive than the toothless nondelegation doctrine provides. In addition, Congress would want some assurance that those executive entities that receive delegated power respect its intentions as set forth in general law.[113] Given that Congress is severely limited in its ability to enact remedial legislation correcting executive interpretations, the only effective monitoring device would be to provide for judicial review by Article III courts.[114] Thus, Congress would almost surely want to give the independent judiciary significant power to review executive action.

In short, given the three branches rule and the procedural limitations that attach to each branch, the most logical choices for Congress in disbursing functions would be to keep large elements of the lawmaking function for itself, give important elements of the case deciding function to the Article III courts, and transfer what is left over to the executive. The resulting allocation of powers would look very much like those that the formal and functional theories would have the judiciary impose directly through enforcement of some constitutionally compelled allocation of functions.

For the same reasons that Congress would want to call upon the aid of each of the other two branches, it is not plausible that Congress would want seriously to "encroach" on their capacity to function effectively. Thus, although it is possible to hypothesize various horribles—Congress demanding that C-Span be allowed to broadcast from the Oval Office, or from the Conference Room of the Supreme Court—it is highly unlikely that any of these horribles would ever materialize. Because Congress would want each of the other branches to perform efficiently in order to realize its own objectives, it could not afford to adopt measures that would cripple the ability of the executive or the courts to function.[115]

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[113] William Landes and Richard Posner, *The Independent Judiciary in an Interest Group Perspective*, 18 J Law & Econ 875 (1975).

[114] See Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L J 969, 993–98 (1992); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 Colum L Rev 452 (1989).

[115] If one thinks that the dynamic incentives created by the minimal construction are not enough to insure against congressional mischief, there is no reason why it could not be "backstopped" by some version of the core functions understanding. See note 49. Under such a dual theory, most of the work of preserving equilibrium among the branches would

In sum, the incentive structure created by the minimal understanding would establish a dynamic tension that should lead Congress to allocate significant powers to all three constitutional branches. Because it would not trust the executive and judiciary with all functions of government, Congress would want to retain significant powers for itself. Yet because of the Bicameral and Presentment Clauses, it would have to give significant powers away Given its rivalry with the President, it would want to provide for a substantial measure of judicial review of executive action. And because of the disability of courts to govern other than through the cases or controversies, it could not dispense with the executive for most of what we regard as executive functions. Thus, the minimal understanding should lead to a dispersion of power among the branches—not because of direct judicial enforcement of an allocation of governmental functions, but because of the incentive structure presented to Congress. This dispersion, in turn, would provide the foundation for the checking and balancing of governmental power that both the formalists and the functionalists seek as means of protectmg liberty

C. TEXT AND ORIGINAL UNDERSTANDING

What about the ultimate touchstone of constitutional law· the text and original understanding of the Framers? The minimal conception of separation of powers would seem to be consistent with, but admittedly not compelled by, the text of the Constitution. To be sure, the opening clauses of Articles I, II, and III each speak in terms of the vesting certain "powers" in each of the three departments of government: "All legislative Powers herein granted" are vested in the Congress;[116] "The executive Power" is vested in the President;[117] and "The judicial Power" is vested in the Supreme Court and "in such inferior Courts as the Congress may from time to time ordain and establish."[118] These clauses provide some sup-

be performed by the minimal understanding. But the core functions idea would be kept around, like an old gun in the closet, just in case this prediction proved wrong and Congress in a fit of pique tried to cripple one of the other branches. If this happened, the Court could declare an invasion of a "core" function not supported by adequate justifieation, and strike the encroachment down.

[116] US Const Art I, § 1.

[117] Art II, § 1.

[118] Art III, § 1.

port for the shared assumption of the formalists and the functionalists that the constitutional principle of separation of powers is concerned with the division of powers or functions among the branches of government, not just the assignment of federal offices to branches.

But the text provides very little support for the further proposition that the Constitution adopts a fixed definition or allocation of the three powers, certainly not to the degree necessary to support judicial enforcement comfortably. The Constitution makes no effort to define the "legislative," "executive," and "judicial" powers. Instead, it specifically confers power on Congress "[t]o make all laws which shall be necessary and proper for carrying into Execution the foregoing [legislative] powers, and *all other powers* vested by this Constitution in the Government of the United States. . . ."[119] Thus, the text plausibly can be read as committing questions about the definition and allocation of the three great powers to Congress, not the courts.

Nor does the federal Constitution, like some of the state constitutions of the period, contain a clause requiring that the functions or powers given to the different branches remain separate.[120] Indeed, an amendment that would have committed the national government to something like the exclusive functions construction[121] was proposed as part of the package of provisions that became the bill of rights, but was rejected by the Senate.[122] The failure of such an amendment is notoriously ambiguous: it could either mean that the Senate thought the principle of strict functional division ought not to be in the Constitution, or that it thought it was already reflected

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[119] Art I, § 8, cl 18 (emphasis added).

[120] For example, the Virginia Constitution of 1776 provided: "The legislative, executive, and judiciary department, shall be separate and distinct, so that neither exercise the powers properly belonging to the other: nor shall any person exercise the powers of more than one of them, at the same time. . . ." 7 Francis N. Thorpe, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States* 3815 (1909).

[121] The Sixteenth Article of Amendments approved by the House on August 24, 1789, provided:

> The powers delegated by the Constitution to the government of the United States, shall be exercised as therein appropriated, so that the Legislative shall never exercise the powers vested in the Executive or Judicial; nor the Executive the powers vested in the Legislative or Judicial; nor the Judicial the powers vested in the Legislative or Executive.

Daniel A. Farber & Suzanna Sherry, *A History of the American Constitution* 436 (1990).

[122] Edward Dumbauld, *The Bill of Rights and What It Means Today* 46–47 (1957).

in the Constitution, making the amendment unnecessary. But given that the first Congress did not shy away from adopting two other "truistic" or "redundant" amendments—the Ninth and the Tenth[123]—it is plausible to think that some persons may have regarded the proposed separation-of-powers amendment not just as clarifying what was already implicit in the document but rather as imposing an unwanted restriction on congressional discretion to organize the new government.

On the other hand, the text of the constitution is surely consistent with the proposition that there are only three branches of government. The first three articles of the Constitution are not just about "powers," they are about institutions. At the highest level there are only three institutions: "a Congress of the United States,"[124] "a President of the United States of America,"[125] and "one supreme Court."[126] A number of other institutions are also mentioned: "Departments," "the Army," "the Navy," and "inferior Courts." But it is clear from context that, three of these subordinate institutions—"Departments," "the Army," and "the Navy"—are accountable to the President. The Departments are at one point referred to as "*executive* Departments," where it is further specified that the President may require the opinion in writing of the principal officer of each on any subject relating to the duties of his office.[127] And the President is expressly made the commander-in-chief of the Army and Navy.[128] The other named institution—the inferior courts—is expressly placed in the judicial branch. Thus, it is entirely natural to construe the Constitution as creating a government with three and only three branches of government.

What we know of the drafting history sheds virtually no light on whether the Framers would have preferred a functions-oriented

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[123] See *United States v Darby*, 312 US 100, 124 (1941) ("The [Tenth] Amendment states but a truism that all is retained which has not been surrendered."); *Griswold v Connecticut*, 381 US 479, 529–30 (1965) (Stewart dissenting) ("The Ninth Amendment, like its companion the Tenth, [was adopted] to make clear that the adoption of the Bill of Rights did not alter the plan that the Federal Government was to be a government of express and limited powers").

[124] US Const Art I, § 1.

[125] Art II, § 1.

[126] Art III, § 1.

[127] US Const Art II, § 2, cl 1 (emphasis added).

[128] Id.

or a three-branches construction of the Constitution. The Committee of the Whole adopted a resolution on May 30, 1787 stating "that a national government ought to be established consisting of a supreme legislative, judiciary, and executive." This resolution is facially consistent with either a functions or branches construction. We will never know which was intended, for as Gerhard Casper has observed, "this event was the beginning and the end of the consideration of separation of powers *as such* in the Convention."[129] The current language referring to legislative, executive, and judicial "powers" was first added the Committee on Detail on August 9.[130] It does not appear to have generated any discussion at that time, and remained (at least in this respect) unchanged until the final draft was agreed upon.

The ratification materials, on the other hand, provide evidence that at least one important Framer—James Madison—thought of separation of powers in terms closer to what I have called the minimal conception than to either of the rival theories. Many anti-Federalists criticized the Constitution because it contained too many departures from a pure model of separation of powers.[131] Madison set about responding to these concerns in *The Federalist* with two lines of thought. One, which was expressed in No. 37, was to deny that any pure theory of separation of powers was possible:[132]

> Experience has instructed us that no skill in the science of Government has yet been able to discriminate and define, with sufficient certainty, its three great provinces, the Legislative, Executive and Judiciary; . . . Questions daily occur in the course of practice, which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science.

Obviously, this response does not suggest any understanding that the Constitution incorporated a fixed definition or allocation of governmental functions, such as might be enforced by courts.

The other Madisonian response, laid out in Nos. 47–51, was

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[129] Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 Wm & Mary L Rev 211, 220 (1989).

[130] Farber & Sherry at 423 (cited in note 121).

[131] Herbert J. Storing, *What the Anti-Federalists Were For* 55 (1981).

[132] Federalist 37 (Madison) in Jacob E. Cooke, ed., *The Federalist* 235 (1961).

that even if a strict division of powers was possible, it was not desirable. Here Madison stressed the futility of trying "to mark with precision the boundaries of these departments in the Constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power."[133] Instead, he argued that separation could only be maintained by "so contriving the interior structure of the government, as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places."[134]

In effect, Madison argued that the structure of government established by the Constitution would be preserved through institutional competition—ambition made to counteract ambition[135]—rather than by through any direct enforcement of definitions of powers. This understanding is far more consistent with the minimal understanding than with either formalism or functionalism. The minimal approach would call upon courts to preserve a government of three branches, with all federal offices assigned to one of those branches, and it would do so in part to create the conditions that give rise to institutional competition. In contrast, both formalism and functionalism would have courts enforce the "parchment barriers" that Madison disparaged.

V. Conclusion

The "constitutional principle of separation of powers" could be understood to mean any one of several different things. It could mean, as the formalists argue, that each branch has exclusive power to perform a single designated function, unless the Constitution expressly permits an exception. Or it could mean, as the functionalists believe, that courts should strive to maintain a diffusion of power among the branches. Conceivably, it could mean nothing—the constitutional principle of separation of powers could just be a shorthand reference for the sum of all specific clauses that govern relations among the branches, but add nothing to what these clauses individually require. Each of these interpretations would have serious drawbacks. The exclusive functions construction

[133] Federalist 48 (Madison), id at 332–33.

[134] Federalist 51 (Madison), id at 347–48.

[135] Id at 349.

would be too rigid, the diffusion of power understanding too flexible, and neither comports with the full range of Supreme Court decisions defining the structural Constitution. The conclusion that the principle adds nothing to the specific clauses would be more consistent with the pattern of outcomes reached by the Supreme Court, but would be an open invitation to create a Fourth Branch of government that would permit massive evasions of those clauses in the future.

A better strategy would be to interpret the principle as incorporating a minimal requirement that there be only three branches, with every federal office accountable to one of the constitutional branches. Such an understanding would provide substantial continuity with the past: it would be consistent with the text of the Constitution and with Madison's explanation of the mechanism for preserving the constitutional structure, and would not contradict any of the Supreme Court's judgments in major separation-of-powers cases. For the future, it would prevent Congress from circumventing the specific clauses of the Constitution that limit the power of the branches, and would preserve the dynamic tension among the branches that has worked well for over 200 years in maintaining "the liberty and security of the governed."[136]

[136] *Washington Airports*, 111 S Ct at 2310.