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Mistretta v. United States: Mistreating the Separation of Powers Doctrine

Arthur C. Leahy

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Notes

*Mistretta v. United States*: Mistreating the Separation of Powers Doctrine?

I. INTRODUCTION

In Mistretta v. United States, the United States Supreme Court upheld the Sentencing Reform Act of 1984 against contentions that the Act was a constitutional violation of the separation of powers doctrine. This Note analyzes the Court’s reasoning with respect to the separation of powers doctrine. The analysis reveals that, in Mistretta and other recent cases, the Court has departed from its traditional mode of analysis in favor of a new model. This trend is found to be misguided in that it incorrectly interprets the Framers’ intent. This misinterpretation leads to the use of incorrect factors in analyzing separation of powers issues and, therefore, incorrect decisions. The ultimate result is that the separation of powers doctrine is eviscerated and in turn the “structure” of government, which ensures individual rights and personal freedom, is threatened. In conclusion, a return to the traditional method of dealing with separation of powers issues is advocated because it is more reflective of the Framers’ intent and more likely to preserve the structure of our government and, thus, liberty.

The Sentencing Reform Act of 1984 (Act)^1 established the United States Sentencing Commission (Commission) as “an independent commission in the judicial branch of the United States.”^2 The Act, passed after a decade long effort^3 and, in response to widespread dis-

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satisfaction with the intermediate-sentencing system, was aimed at eliminating two "unjustifi[ed]" and "shameful" consequences of the previous sentencing system. The first was the great disparity in sentences imposed by federal judges upon similarly situated offenders. The second was the uncertainty over the amount of time an offender would spend in prison created by conflicting policies regarding parole, "good behavior in prison," and sentencing.

The Act attempted to combat these problems by charging the Commission with promulgating legally binding guidelines which would eliminate sentencing disparities among similarly situated defendants. Additionally, the Act prospectively abolished parole and substantially curtailed "time off" for good behavior while in prison.

The Act was given considerable guidance by Congress on the ultimate shape the guidelines should take. The Act authorized the President to appoint the seven members of the Commission, contingent upon confirmation by the Senate. Three commissioners were to be federal judges, who could serve without resigning from the bench. After the initial six year appointment, commissioners could be reappointed by the President to serve an additional six-year term. Commissioners could be removed at the discretion of the President.

Kanahele, 857 F.2d 1245, 1246 (9th Cir. 1988).

5. Id. (citing S. Rep. No. 225, 98th Cong., 1st Sess. 38, 65 (1983)).
7. Id. at 48.
8. 28 U.S.C. § 994(p) (Supp. 1989) (guidelines go into effect unless Congress, within 180 days, decides to block or modify terms); 18 U.S.C. § 3553(b), (c)(2) (Supp. 1989) (judges may deviate from guidelines, only if there are mitigating or aggravating factors that the Commission did not adequately consider in formulating guidelines, and if judges state their reasons on the record); 28 U.S.C. § 3742(a)(2)-(4) (1985) (parties may appeal any sentencing decision inconsistent with guidelines); 28 U.S.C. §§ 994(o)-(r), 995(a) (Supp. 1989) (Commission may supplement or amend guidelines).
14. Id. §§ 991(a), 992(c). Appointed by President Reagan to the three positions reserved for federal judges were then district court and later Fourth Circuit Court of Appeals Judge William W. Wilkins, Chairman of the Commission, First Circuit Court of Appeals Judge Stephen Breyer, and District of Columbia Court of Appeals Senior Judge George MacKinnon.
15. Id. § 992(a)-(b).
by the President "for neglect of duty or malfeasance in office or for other good cause."\textsuperscript{16}

The Commission adopted a set of guidelines which it submitted to Congress.\textsuperscript{17} Congress did not attempt to block or modify the guidelines within the six-month time period provided by the Act. Without congressional modification the guidelines became effective for crimes committed after November 1, 1987.\textsuperscript{18} By the time \textit{Mistretta v. United States}\textsuperscript{19} reached the United States Supreme Court, 143 district courts,\textsuperscript{20} and one court of appeals\textsuperscript{21} had struck down the Act as unconstitutional. At the same time, 108 district courts\textsuperscript{22} and one court of appeals\textsuperscript{23} had upheld the Act's constitutionality. The courts which invalidated the Act generally did so on the grounds that the Act violated separation of powers. On January 18, 1989, by a vote of eight to one, the Supreme Court upheld the constitutionality of the Act's sentencing guidelines in \textit{Mistretta v. United States}.\textsuperscript{24}

This Note examines the Court's decision in \textit{Mistretta} and the previous case law upon which it relied. This Note concludes that in recent decisions, the Court has strayed far from the intent of the

\textsuperscript{16} \textit{Id.} § 991(a).


\textsuperscript{18} Gubiensio-Ortiz v. Kanahele, 857 F.2d 1245, 1248 (9th Cir. 1988).

\textsuperscript{19} 109 S.Ct. 647 (1989). This case was argued before the Supreme Court on October 6, 1988. \textit{See} 57 U.S.L.W. 1060 (Oct. 18, 1988).


\textsuperscript{21} Gubiensio-Ortiz v. Kanahele, 857 F.2d 1245 (9th Cir. 1988).


\textsuperscript{23} United States v. Frank, 864 F.2d 992 (3d Cir. 1988).

\textsuperscript{24} 109 S. Ct. 647 (1989).
Framers of the Constitution regarding the separation of powers principle. These decisions represent a departure from a fundamental “structure” of our form of government and cornerstone of our basic liberties and rights—the separation of powers doctrine. This Note advocates a return, by the Court, to this architectonic principle of our federal government.

II. THE MISTRETTA CASE

John M. Mistretta was indicted in the United States District Court for the Western District of Missouri on three counts involving the sale of cocaine. Mistretta moved to have the sentencing guidelines declared unconstitutional because the Act’s creation of the Commission was a violation of both the separation of powers and the nondelegation doctrines. The district court rejected the nondelegation argument on the ground that the Commission, more properly characterized as belonging to the executive branch, could be delegated such duties. The court also rejected the separation of powers argument.

Mistretta subsequently pled guilty and was sentenced under the guidelines. Mistretta appealed to the Eighth Circuit. However, while the appeal was pending, both Mistretta and the United States petitioned the Supreme Court for . certiorari under Supreme Court Rule 18. By an eight to one vote, the Supreme Court sustained the constitutionality of the Commission and its guidelines.

Specifically, the Court held that the formation of the Commission and its ability to promulgate guidelines was not an impermissible delegation of power from Congress to the judicial branch. In addi-

25. Id. at 653.
26. See id. Mistretta’s motion was identical to claims made by other defendants in the Western District of Missouri, and thus, the cases were consolidated before a panel of sentencing judges. Id. at n.5.
28. Id. at 1034 (citing United States v. Spain, 825 F.2d 1426 (10th Cir. 1987) (upholding constitutionality of delegation to executive branch of power to classify controlled substances, which determines judicial sentencing power)).
29. Id. at 1035.
30. Mistretta, 109 S. Ct. at 653-54. Mistretta pled guilty to the first count of the indictment (21 U.S.C. sections 846 and 841(b)(1)(B)—conspiracy and agreement to distribute cocaine). The Government’s motion to dismiss the two remaining counts was granted. Id.
31. See id. at 654.
32. Id. This procedure allows the Supreme Court to review a case before judgment if the issue is of “imperative public importance” or if there is “disarray among the Federal District Courts.” Id. (quoting Sup. Ct. R. 18).
33. Justice Blackmun delivered the opinion of the Court. Justice Scalia was the lone dissenter. See id. at 675 (Scalia, J., dissenting).
34. Id.
tion, the Court found that placing the Commission in the judicial branch was not an unconstitutional accumulation of power within that branch, in violation of the separation of powers doctrine.\textsuperscript{35} Moreover, the Court held that service of Article III judges on the Commission did not undermine the integrity and independence of the judicial branch.\textsuperscript{36}

\textbf{A. Delegation of Powers}

Mistretta argued that Congress' authorization of the Commission to promulgate guidelines embodying substantive policy decisions violated the nondelegation doctrine.\textsuperscript{37} This, Mistretta contended, granted the Commission "excessive legislative discretion."\textsuperscript{38} The Court noted that in its entire history it had struck down only two statutes on delegation grounds.\textsuperscript{39} The Court's test for constitutional delegations required a consideration of whether Congress manifested some type of "intelligible principle"\textsuperscript{40} or "minimal standards"\textsuperscript{41} to which the Commission was required to conform.\textsuperscript{42} The Court articulated two reasons why there were ample principles and standards expressed by Congress.\textsuperscript{43} First, the Court found the delegation constitutional.\textsuperscript{44} Second, there was no case law suggesting

\begin{itemize}
\item \textsuperscript{35} Id.
\item \textsuperscript{36} Id.
\item \textsuperscript{37} The nondelegation doctrine has been described as: rooted in the principle of separation of powers that underlies our tripartite system of government. The Constitution provides that "all legislative Powers . . . shall be vested in a Congress of the United States," U.S. Const., Art. I [section] 1, and we long have insisted that "the integrity and maintenance of the system of government ordained by the Constitution," mandate that Congress generally cannot delegate its legislative power to another Branch. \textit{Id}. at 654 (citations omitted); \textit{see also} United States v. Robel, 389 U.S. 258, 276 (1967) (Brennan, J., concurring in result) ("Formulation of policy is a legislature's primary responsibility, entrusted to it by the electorate . . . .").
\item \textsuperscript{38} \textit{Mistretta}, 109 S. Ct. at 654.
\item \textsuperscript{39} See \textit{Schechter Poultry Corp. v. United States}, 295 U.S. 495 (1935) (delegation of legislative power to President to provide "codes of fair competition" for trades and industries under section 3 of National Industry Recovery Act); \textit{Panama Refining Co. v. Ryan}, 293 U.S. 388 (1935) (delegation of legislative power to President to interdict transportation in interstate and foreign commerce of petroleum and petroleum products under section 9 of National Industry Recovery Act).
\item \textsuperscript{40} \textit{Mistretta}, 109 S. Ct. at 654 (quoting J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928)).
\item \textsuperscript{41} \textit{See id}. at 658.
\item \textsuperscript{42} Id.
\item \textsuperscript{43} \textit{Id}. at 655-57; \textit{see also supra} note 12 and accompanying text.
\item \textsuperscript{44} \textit{Mistretta}, 109 S. Ct. at 658.
\end{itemize}
that delegation of policy judgments was impermissible.\textsuperscript{45}

The Court concluded its discussion on a pragmatic note, observing that the delegation to the Commission was "the sort of intricate, labor-intensive task for which delegation ... is especially appropriate."\textsuperscript{46}

\textbf{B. Separation of Powers}

The Court recognized that the Framers' intent was key to resolving the separation of powers issue.\textsuperscript{47} The Court's core concern was over the "'encroachment or aggrandizement of one branch at the expense of the other.'"\textsuperscript{48} If the shifting of power "either accrete[s] to a single branch powers more appropriately diffused among separate branches or ... undermine[s] the authority and independence of one or another coordinate branch," the shifting is invalid.\textsuperscript{49} In the specific context of the Act, the Court decided that it would not be "unconstitutional unless Congress ha[d] vested in the Commission powers that [were] more appropriately performed by the other Branches or that undermine[d] the integrity of the Judiciary."\textsuperscript{50}

\textit{1. Accumulation of Power in the Judicial Branch}

Mistretta argued that by locating the Commission within the judicial branch and partly staffing it with judges, Congress required the judiciary to perform not only its judicial functions, but legislative functions as well—that is, the making of sentencing policy. According to this argument, the accumulation of legislative and judicial power within one branch aggrandizes the power of the judiciary, violating separation of powers. Mistretta further argued that case law suggested that such rulemaking policy could be exercised by Congress, or delegated to the Executive branch, but could not be delegated to or exercised by the judiciary.\textsuperscript{51}

The Court rejected Mistretta's "aggrandizement" argument because the Commission was an independent agency separate from the courts. This separation demonstrated that there was not an accumulation of power within the judiciary.\textsuperscript{52} Additionally, because the guidelines promoted less sentencing discretion among judges, judicial power was diminished rather than "aggrandized."\textsuperscript{53} Therefore, the

\textsuperscript{45} Id.; cf. United States v. Robel, 389 U.S. 258, 276 (1967).
\textsuperscript{46} Mistretta, 109 S. Ct. at 658.
\textsuperscript{47} Id.
\textsuperscript{48} Id. at 659 (quoting Buckley v. Valeo, 424 U.S. 1, 122 (1976)).
\textsuperscript{49} Id. at 659-60.
\textsuperscript{50} Id. at 661.
\textsuperscript{51} Id. at 660.
\textsuperscript{52} Id. at 665-66.
\textsuperscript{53} Id. at 666.
delegation did not violate separation of power principles.\textsuperscript{54}

The Court acknowledged that the Commission was "a peculiar institution within the framework of our Government,"\textsuperscript{55} because rulemaking was traditionally delegated to the executive branch. However, the Court stated that separation of powers was not violated by "anomaly or innovation alone."\textsuperscript{56}

Although article III of the Constitution limits the federal judicial power to "cases and controversies,"\textsuperscript{57} and the general rule is that "executive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under Article III of the Constitution,"\textsuperscript{58} some judicial rulemaking exceptions are recognized.\textsuperscript{59}

From these exceptions the Court synthesized the rule that if the "extrajudicial activities are consonant with the integrity of the Branch and are not more appropriate for another Branch[,] . . . [there is] no separation of powers impediment."\textsuperscript{60} Since the judiciary, prior to the Act, had always decided the same type of questions now assigned to the Commission,\textsuperscript{61} the Court reasoned that sentencing judgment has been and remains appropriately exercised by the judiciary.\textsuperscript{62}

Thus, the Court decided that the delegation was not a threat to judicial integrity, nor was the delegation inappropriate.

The Court stressed the appropriateness of Congress' delegation to a Commission in the judiciary because "of the judiciary's special knowledge and expertise."\textsuperscript{63} Additionally, because the Commission was in the judicial branch and the guidelines involved "do[ing] what [judges] have done for generations[,] . . . it follows that as a matter of 'practical consequences'" the Commission should be located

\textsuperscript{54} Id. at 666-67.
\textsuperscript{55} Id. at 661.
\textsuperscript{56} Id.
\textsuperscript{57} Id. (quoting Muskrat v. United States, 219 U.S. 346, 356 (1911)).
\textsuperscript{58} Id. (citing, Morrison v. Olsen, 108 S. Ct. 2597, 2612 (1988); Buckley v. Valeo, 424 U.S. 1, 123 (1976); United States v. Ferreira, 54 U.S. (13 How.) 40 (1852); Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792)).
\textsuperscript{59} Id. at 662-64. The Court cited and discussed the following cases for this proposition: Chandler v. Judicial Council, 398 U.S. 74 (1970) (judicial authority to make all orders necessary for effective and expeditious administration of court business); Hanna v. Plumer, 380 U.S. 460 (1965) (Congress authorized judiciary to promulgate rules for conduct of its own business, rules of procedure for bankruptcy and other civil and criminal courts, and to revise the Federal Rules of Evidence); Sibbach v. Wilson & Co., 312 U.S. 1 (1941) (act authorizing judiciary to promulgate Federal Rules of Civil Procedure).
\textsuperscript{60} Mistretta, 109 S. Ct. at 664.
\textsuperscript{61} See id. at 666.
\textsuperscript{62} Id. at 667.
\textsuperscript{63} Id.
within the judiciary.\textsuperscript{94}

2. \textit{Undermining the Integrity and Independence of the Judicial Branch}

Mistretta argued that the Act, by requiring the President to appoint three federal judges to serve with non-judges on the Commission, conscripted the judges into political service. Such required service by the judges arguably resulted in undermining the essential impartiality and integrity of the judiciary.\textsuperscript{65}

The Court first observed that there is no express language in the Constitution prohibiting active federal judges from serving on an independent commission.\textsuperscript{66} Additionally, history showed that judges have assumed extrajudicial duties from time to time,\textsuperscript{67} and that the Framers participated in such practices.\textsuperscript{68} However, the Court conceded that such practices were “controversial,” and subject to much separation of powers debate.\textsuperscript{69}

The Court’s historical examination of extrajudicial service, coupled with supporting precedent,\textsuperscript{70} led it to conclude that judges, sitting in their individual capacities, were not precluded by the Constitution from participating in extrajudicial activities. As long as judges do not wield both judicial and extrajudicial power at the same time, the Court found that such service was not prohibited.\textsuperscript{71} “In other words, the Constitution . . . does not forbid judges from wearing two hats; it merely forbids them from wearing both hats at the same time.”\textsuperscript{72}

The Court thought the “ultimate inquiry” was whether the extrajudicial activity undermined the integrity of the judiciary.\textsuperscript{73} Key to this inquiry were two distinct contentions posed by Mistretta: (1) The mandatory service of the judges, and the appointment and re-
removal power of the President, which diminish the independence of the branch; and (2) judicial participation in the political policymaking of the Commission, which "'[w]eakens confidence in the disinterestedness of the [judiciary],'" thereby threatening the branch's impartiality.

The Court addressed the independence issue by stating that service on the Commission was not mandatory. The three judges on the Commission had all accepted their appointments voluntarily. The threat to independence posed by the President's ability to appoint and remove Commissioners was viewed by the Court as de minimis. The Court noted that the President always had "within his appointment portfolio" positions attractive to judges, but that, in and of itself, was insufficient to corrupt the integrity of the judiciary. Similarly, the President's removal power would have a negligible affect because it (1) may only be exercised for good cause; (2) cannot affect judicial tenure or compensation of judges; and (3) cannot be used to coerce judges in the exercise of their judicial duties.

The impartiality issue was disposed of by the Court's characterization of the Commission's endeavors as being "close to the heart of the judicial function" and therefore, politically "neutral." Because the Commission's work was "not inherently partisan," the Commission did not threaten the judiciary's impartiality "in fact or in appearance."

Summarizing, the Court stated that Mistretta's contentions were "'more smoke than fire,' and do not compel us to invalidate Congress' considered scheme for resolving the seemingly intractable dilemma of excessive disparity in criminal sentencing."

74. Id. at 671-73 (citations omitted).
75. Id. at 672.
76. Id. at 674.
77. Id.
79. Mistretta, 109 S. Ct. at 674.
80. See id. at 673.
81. Id. at 675.
82. Id. at 661.
III. INTRODUCTION TO SEPARATION OF POWERS

A. The Framers

The concept of separation of powers is recognized as essential for...
the preservation of liberty.\textsuperscript{84} "The accumulation of all powers legislative, executive and judicial in the same hands . . . may justly be pronounced the very definition of tyranny."\textsuperscript{85} The Framers attempted to balance governmental powers equally and recognized that the legislative branch was most likely to usurp the authority of the others.\textsuperscript{86}

Separation of powers was incorporated into our tripartite theory of government: "All legislative Powers . . . shall be vested in a Congress of the United States";\textsuperscript{87} "The executive Power shall be vested in a President of the United States";\textsuperscript{88} "The judicial Power . . . shall be vested in one [S]upreme Court."\textsuperscript{89} Although the concept of three distinct branches of government was of major importance to the Framers, separation of powers did not mean that the branches must be hermetically separate.\textsuperscript{90} Some overlapping of

\textit{first source.} Wilson, supra, at 83 (emphasis added).

On the other hand, \textit{The Federalist}'s authoritativeness is not completely free from attack. For example, at least one commentator stated that the Constitution was merely a document resulting from the Founders' attempt to protect their own economic interests, see C. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913), and that \textit{The Federalist} was merely "blatant propaganda" intended to gain the acceptance of the proposed Constitution, Ackerman, \textit{The Storrs Lectures: Discovering the Constitution}, 93 YALE L.J. 1013, 1018 (1984); see also Roche, \textit{The Founding Fathers: A Reform Caucus in Action}, 55 AM. POL. SCI. REV. 799, 804 (1961). Notwithstanding the fact that these views have been strongly criticized, Peterson, supra, at 1 ("Roche's presentation . . . collapses with its own inherent contradictions."); Wilson, supra, at 105-14 (summarizing numerous opponents to Beard's "economic" theory), there remains the Supreme Court's increasing use of \textit{The Federalist} in general. Id. at 65-66 n.3. In particular, it is frequently used in separation of powers issues. Id. at 91. The reason for this is not crystal clear, but one might reasonably surmise, as this Note does, that the Court has concluded that \textit{The Federalist} is the controlling source with respect to separation of powers.

Regardless of whether one considers the essays in \textit{The Federalist} as propagandistic or pedagogical, the issue of whether the Court will continue to consult the essays is not in question. In light of this, the inquiry should focus on what the Framers meant by these writings, not whether \textit{The Federalist} should be consulted.

\textsuperscript{84} Mistretta v. United States, 109 S. Ct. 647, 658 (1989). With regard to separation of powers, Madison stated, "No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty." \textit{The Federalist} No. 47, at 324 (J. Madison) (J. Cooke ed. 1961).

\textsuperscript{85} \textit{The Federalist} No. 47, supra note 84, at 324 (J. Madison).

\textsuperscript{86} "[I]t is not possible to give each department an equal power of self defence. In republican government th legislative authority, necessarily predominates." \textit{The Federalist} No. 51, supra note 84, at 350 (J. Madison).

\textsuperscript{87} U.S. CONST. art. I, § 1.

\textsuperscript{88} Id. art II, § 1.

\textsuperscript{89} Id. art III, § 1.

\textsuperscript{90} "[Separation of powers] did not mean that these departments ought to have no partial agency in, or no controul over the acts of each other. . . . [W]here the whole power of one department is exercised by the same hands which possess the whole power
power was tolerable. Violations of the doctrine arose when one branch: (1) exercised the whole power of another branch; (2) directly exercised the complete power more properly belonging to another branch; (3) possessed an overruling influence over the other branches in the exercise of their respective powers; or (4) exceeded the power assigned to it by the Constitution.

B. The Case Law

Recently, there has been a split of authority regarding what the Framers intended by the separation of powers doctrine. The traditional "formalist" view stresses the need to keep the three government branches as separate as possible, and requires that each branch only exercise its own powers as set out in the Constitution. The "functional" approach does not consider the core inquiry of the formalist view (that is, what branch is exercising what power) as determinative. Rather, commingling of powers is acceptable as long as the exerted power does not intrude into the core functions or domain of the branches involved.

of another department, the fundamental principles of a free constitution, are subverted." The Federalist No. 47, supra note 84, at 325-26 (J. Madison).

91. Id.
92. This Note does not address the modern phenomenon of the “administrative state” and the issues it raises. This topic is better suited to a nondelegation doctrine analysis, although it is conceded that the nondelegation doctrine and the separation of powers doctrine are intertwined.

Even if analyzed from the separation of powers perspective, arguably, such delegation of power by Congress to the executive branch is valid under either method of analysis used by the Court for separation of powers issues. See infra notes 97-104 and accompanying text. The functional approach would easily accommodate such a shifting or commingling of power. Under the formal theory, the commingling is more difficult to reconcile. However, the commingling could be reconciled by asserting that Congress has not delegated its whole power to the executive, or that rulemaking, as opposed to lawmaking, is not an exercise of legislative power. Additionally, it could be asserted that rulemaking power is an executive power and thus properly exercised by the President.

93. The Federalist No. 47, supra note 84, at 325-26 (J. Madison).
94. The Federalist No. 48, supra note 84, at 332 (J. Madison).
95. Id.
96. Id. at 332-33.
98. See id. at 1254. This appears to have been the prevailing view on the Supreme Court until recently. E.g., Bowsher v. Synar, 478 U.S. 714 (1986) (Congress may not exercise executive power); I.N.S. v. Chadha, 462 U.S. 919 (1983) (Congress may not exercise its power through the executive branch); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (Executive may not exercise legislative power); Myers v. United States, 272 U.S. 52 (1925) (legislative participation in executive power "infringe[s] the constitutional principle of the separation of governmental powers"); see also Mistretta v. United States, 109 S. Ct. 647, 678 (1989) (Scalia, J., dissenting) (legislative power anywhere but in the legislative branch is unconstitutional).
99. Krent, supra note 97, at 1254-55. Accord Morrison v. Olsen, 108 S. Ct. 2597 (1988) (power exerted is constitutional if not "incongruent" with functions normally exercised by endowed branch, and power does not "impede" upon ability of branches to
The trend in Supreme Court decisions has recently embraced “functionalism.” In the recent case of *Morrison v. Olsen*, the Court adopted the functional theory to analyze “independent” agency situations. *Morrison* did not apply the formalistic rule which asked: Is the power exercised by the branch power assigned to the branch by the Constitution? Instead, the inquiry was, notwithstanding the Constitution, whether the exercised power was incongruent with the branch exercising it, and whether the branch it was being exercised against was impeded in its constitutional duties. Hence, *Morrison* laid the groundwork for *Mistretta*.

C. Mistretta

*Mistretta* illustrates that the functional view of separation of powers as set forth in *Morrison* is here to stay. *Morrison* was thought by some to be a “fluke” or to be “illogical.” However, the decision by the Court in *Mistretta* appears to tip the balance of precedential

perform their constitutional duties).


101. 108 S. Ct. 2597 (1988). This case is known as the independent counsel case. In 1978 Congress passed the Ethics in Government Act (EGA). The EGA allowed for the appointment of an independent counsel with the “full power” of the Department of Justice. The independent counsel was charged with investigating and prosecuting government officials for violations of federal laws, and reporting on these activities to Congress. The independent counsel could be removed by the Attorney General, but only for “good cause.” See id. at 2602-04.

In addition, Article III judges were appointed to a “Special Division.” Their responsibilities included appointment and termination of independent counsels, as well as defining the jurisdiction of the independent counsels. Id. at 2602-05.

The Court held that even though the judiciary, through the Special Division, had the power to appoint, terminate, and define the jurisdiction of the independent counsel (not appointed by the Executive) who was exercising executive prosecutorial powers, and over whom the executive branch had little ability to terminate (only for “good cause”), the commingling of judicial and executive power by Congress was not unconstitutional. Id. at 2608-22.

Because the power vested in the judiciary was not incongruent with judicial branch activities, and did not impede the executive branch in the performance of its constitutional duties, there was no violation of the separation of powers. Id. at 2611.

102. Under the formal approach, the branch exercising the power is characterized (i.e., judicial, executive, legislative), and the power is characterized—if the branch and the power do not match there is a violation of the separation of powers. *See supra* note 98 and accompanying text.


104. *See id.* at 2619.

authority in favor of functionalism as the rule rather than the exception when analyzing separation of powers issues. Yet, functional analysis is contrary to the principles of separation of powers. Indeed, reliance on functionalism to remedy separation of powers problems runs contrary to the Framers’ intent. Mistretta helps to perpetuate a mode of analysis that “will be disastrous.” The following section argues in favor of a return to the formalistic approach in deciding separation of powers issues.

IV. FUNCTIONALISM IS MISGUIDED

What is wrong with functionalism? Proponents argue that they do not espouse excessive shifting of power between the branches which ultimately may lead to “aggrandizement” or “tyranny.” Rather, functionalists argue that small amounts of extra-constitutional shifting or commingling is acceptable, and, in fact, endorsed by the Framers. Moreover, they note that the exigencies that motivated the Framers to emphasize separation of powers are no longer critical in modern times. Today, the United States is a world power, recognized as a leader in democracy and individual rights. In addition, the enormous and complex structure of contemporary federal government is beyond anything the Framers could have contemplated. Because there is no longer the fresh memory of “tyranny,” coupled with the fact that the modern federal government is so large, some compromise of the separation of powers doctrine is needed to accommodate efficiency and convenience.

In effect, the argument for functionalism is a contemporary view: what is convenient or workable today is controlling, and the intent of the Framers’ is nothing more than a “generalized prescription that . . . [powers] should not be commingling too much.” This viewpoint, however, is flawed.

The Constitution is the “supreme law of the land.” A convention of delegates representing twelve of the thirteen original states framed the Constitution in 1787. The basic intention of the Framers resulted in the Constitution. In addition, eleven of the twelve

106. Mistretta, 109 S. Ct. at 683 (Scalia, J., dissenting).
107. See supra notes 99-104 and accompanying text.
108. See supra notes 90-91 and accompanying text; see also discussion infra notes 122-30, 196-229 and accompanying text as to why this interpretation of the Framers’ intent is misguided.
109. For example, the instability of a new nation, and the fresh memory of a non-representative and nondemocratic government.
110. Mistretta, 109 S. Ct. at 682 (Scalia, J., dissenting).
111. U.S. CONST. art. VI, § 2; Smith v. O’Grady, 312 U.S. 329, 331 (1941); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803).
states ratified the Constitution. In interpreting the Constitution, a fundamental principle of construction is to give the effect intended by the Framers and the people adopting it. Two of the Framers, James Madison and Alexander Hamilton, wrote a series of essays with John Jay collected in The Federalist. The construction given to the Constitution by the authors of The Federalist is entitled to great weight. As such, the Framers' intent (particularly that of

Constitutional Law § 20 (1984) ("The intent of the framers of a constitution is to be found in the instrument itself.") (citing State v. Kahlbaun, 64 Haw. 197, 638 P.2d 309 (1981)).


115. See Tom v. Sutton, 533 F.2d 1101, 1105 (9th Cir. 1976). "It is never to be forgotten that, in the construction of the language of the Constitution . . . as indeed in all other instances where construction becomes necessary, we are to place ourselves as nearly as possible in the condition of the men who framed the instrument." Ex parte Bain, 121 U.S. 1, 12 (1887).

Madison consistently directed those looking for the correct interpretation of the Constitution to look to the time of its "founding." In 1824, or 36 years after the ratification of the Constitution, Madison wrote that on questions of constitutional interpretation we should resort to "the sense in which the Constitution was accepted and ratified by the nation" for in that sense alone was it the "legitimate Constitution."

In a letter to Andrew Stevenson in 1826, Madison warned that if the Constitution "be interpreted by criticisms which lose sight of the intention of the parties to it . . . the purest motives can be no security against innovations materially changing the features of the government. . . ."

Thus, Madison supported the doctrine of original intention and did not believe in the doctrine of a "living" Constitution. He believed that the Constitution contained a specific meaning which did not change over time. That meaning was established and sanctified through the formal act of popular ratification and could only be changed through amendment or a clear, continued, and equivalent expression of the national will.

Ong, James Madison on Constitutional Interpretation, 3 BENCHMARK 17, 18 (1987).

Functionalists may argue that the Framers intended that the Constitution be a contemporary document, able to change with, and adapt to the issues of modern times. Indeed, the Framers did provide for such change. However, it is contended that the Framers did not intend for the Constitution to be contemporized by judicial fiat. Rather, the amendment process, which is the exclusive means endorsed in the document, was the preferred method of changing the Constitution—for any reason.

116. 3 R. ROTUNDA, supra note 83, at 515.

117. Id.; Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601, 612 (1895); Transportation Co. v. Whelling, 99 U.S. (9 Otto.) 273 (1878); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 433 (1819). In Cohens v. Virginia the Supreme Court stated: The opinion of The Federalist has always being [sic] considered as of great authority. It is a complete commentary on our constitution; and is appealed to by all parties, in the question to which that instrument has given birth. Its intrinsic merit entitles it to this high rank; and the part two of its authors performed in framing the constitution, put it very much in their power to explain the views with which it was framed. These essays having been published, while the constitution was before the nation for adoption or rejection, and hav-
James Madison and Alexander Hamilton) should be controlling in any matters of constitutional interpretation. "[T]hose who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, . . . an act of the legislature, repugnant to the constitution is void."118

As discussed earlier,119 the Framers accepted the doctrine of separation of powers as absolutely essential to liberty.120 Therefore, one would think that when faced with the issue, the Court would scrupulously consider what the Framers intended as a valid separation of powers and, more importantly, what the Framers considered an unconstitutional shifting of powers. Moreover, because of its importance to the Framers, in situations where it is unclear whether the shifting or commingling of power is violative of separation of powers principles, courts should strike down the shifting or commingling of power so as to ensure preservation of the doctrine.

The application of the functional theory of analysis in Mistretta is flawed for four reasons. First, there is a failure to properly discern the Framers' intent.121 Second, because of this misinterpretation, in-
correct factors are used in the inquiry. Third, because the inquiry is
distorted, separation of powers issues are not given proper analysis,
resulting in destruction of the doctrine. Fourth, the evisceration of
the doctrine leads to a contraction of individual rights and freedoms.

A. Misinterpretation of the Framers' Intent

In Mistretta, the Court quotes James Madison\(^{122}\) and interprets
his writings to mean that the separation of powers doctrine is "flexi-
ble" and does not require a "hermetic division" between the
branches.\(^{123}\) This is the starting point of a major misinterpretation of
the Framers' intent. Justice Scalia, writing in dissent, finds the
Court's interpretation incorrect.\(^{124}\) The misunderstanding centers on
the interpretation of James Madison's statement that separation of
powers does "not mean that these departments ought to have no pa-
tial agency in, or no controul over the acts of each other."\(^{125}\) The
apparent meaning the Court gives this phrase is that "while the Con-
stitution mandates . . . that . . . the . . . departments . . . remain
entirely free from . . . either of the others, . . . the Fram-
ers . . . rejected . . . the notion that the three Branches must be
entirely separate and distinct."\(^{126}\) In other words, the Constitution is
merely a "generalized prescription that the functions of the Branches
should not be commingled too much."\(^{127}\) This interpretation uses the

\(^{122}\) Id.

\(^{123}\) Mistretta, 109 S. Ct. at 658-59. The Court quotes Madison because he is generally ac-
knowledged as one of the pre-eminent Framers of the Constitution.
The convention was over; it had completed its work. In the achievement of its
task James Madison had been unquestionably the leading spirit. It might be
said that he was the masterbuilder of the constitution. This is not an overvalua-
tion of his services derived from his own account of the proceedings in conven-
tion, for Madison laid no undue emphasis upon the part he himself played; in
fact, he understated it. Nor is it intended to belittle the invaluable services of
many other delegates. But when one studies the contemporary conditions, and
tries to discover how well the men of that time grasped the situation; and when
one goes farther and, in the light of our subsequent knowledge, seeks to learn
how wise were the remedies they proposed.—Madison stands pre-eminent.
M. FARRAND, FRAMING THE CONSTITUTION 196 (1962); see also Carey, supra note 83,
at 27; Peterson, supra note 83, at 1; Quint, supra note 83; at 371.

\(^{124}\) See id. at 682-83 (Scalia, J., dissenting).

\(^{125}\) The Federalist No. 47, supra note 84, at 325 (J. Madison).

\(^{126}\) Mistretta, 109 S. Ct. at 659.

\(^{127}\) See id. at 682 (Scalia, J., dissenting).
Constitution as a nondeterminative, general guide for the Court's consideration.

The Framers did not intend the Constitution as merely a starting point in analyzing separation of powers issues. Instead, they meant for the Constitution to be a definitive compilation of the acceptable commingling of powers.

To understand the true meaning of what James Madison meant by this statement, it is necessary to consider a series of essays in *The Federalist*, where Madison wrote about the separation of powers. Specifically, essays forty-seven through fifty-one were authored by Madison and, when considered in the aggregate, allow for the ascertainment of the meaning of separation of powers.

Essay forty-seven contained the phrase in question. In this piece, Madison addressed objections raised by opponents of the proposed constitution. There was much criticism at the time that the branches of the proposed government were not completely separate and distinct—a violation of the "political maxim" of separation of powers.

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128. It should be noted that there is a minor dispute regarding the authorship of essays forty-nine to fifty-one—both Madison and Hamilton have claimed to be the author at one time or another. See *The Federalist*, *Introduction*, supra note 84, at xx-xxi. However, "the more reliable evidence" indicates that Madison authored the essays in question. *Id.* at xxix-xxx. Even assuming, arguendo, that Hamilton's claims of ownership were correct, it is irrelevant for this Note's purpose—to determine the Framers' intent. Both men played large roles in the birth of the Constitution and both were considered key framers.

129. *The Federalist* No. 47, supra note 84, at 331 (J. Madison).

130. *Id.* at 323; see also 1 P. KURLAND & R. LERNER, supra note 83, at 320. Records of the Federal Convention: "Mr. Dickenson considered the business as so important that no man ought to be silent or reserved. He went into a discourse of some length, the sum of which was, that the Legislative, Executive, & Judiciary departments ought to be made as independent as possible . . . ."; Letter No. 2 from Centinel to the People of Philadelphia (Oct. 1787) (commenting on the Constitution's executive veto power): "This mixture of the legislative and executive moreover highly tends to corruption. The chief improvement in government, in modern times, has been the compleat separation of the great distinctions of power." *Id.* at 324. Letter No. 2 from William Penn (Jan. 3, 1788) (discussing the Constitution's executive veto power):

The first and most natural division of the powers of government are into the legislature and executive branches. These two should never be suffered to have the least share of each others jurisdiction, or to intermeddle with it in any manner. For which ever of the two divides its power with the other, will certainly be subordinate to it, and if they both have a share of each others authority, they will be in fact but one body; their interest as well as their powers will be the same, and they will combine together against the people.

It is therefore a political error of the greatest magnitude, to allow the executive power a negative, or in fact any kind of control over the proceedings of the legislature.

*Id.* at 324-25. The records of the Constitutional Convention chronicle discussions regarding the other branches' abilities to impeach the President:

Mr. King expressed his apprehensions that an extreme caution in favor of liberty might enervate the Government we were forming. He wished the House to recur to the primitive axiom that the three great departments of
To dispel concerns that this commingling in the proposed constitution was not a threat to liberty, Madison proceeded to consult the teachings of Montesquieu, whom Madison considered the "oracle . . . on this subject." He noted that Montesquieu considered the constitution of England the "standard" or "mirror of political liberty." Madison pointed out that within the English constitution the limited ability to commingle was allowed. It was at this point that Madison penned the phrase in question, separation of powers, and concluded that some commingling was acceptable and non-threatening. The threat existed when one branch exercised the

Gov[ernments] should be separate [and] independent: that the Executive [and] Judiciary should be so as well as the Legislative: that the Executive should be so equally with the Judiciary. Would this be the case if the Executive should be impeachable? This would be destructive of his independence and of the principles of the Constitution.


"Hence also sprung that unnecessary and dangerous officer the Vice-President, who for want of other employment is made president of the Senate, thereby dangerously blending the executive and legislative powers . . . ." Id. at 639 (discussions regarding Vice-President as head of Senate). Eldridge Gerry, remarks to the President of the Senate and Speaker of the House of Representatives of Massachusetts regarding executive veto power (Oct. 18, 1787): "My principle objections to the plan, are . . . that the executive is blended with, and will have an undue influence over, the legislature. . . ." 3 M. FARRAND, supra, at 128; Letter from "[a] citizen of New Haven" appearing in the Connecticut Courant (Jan. 7, 1788): "It is objected that the executive is blended with the legislature, and that these powers ought to be entirely distinct and unconnected. . . ." 3 M. JENSEN, THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE UNITED STATES CONSTITUTION 326 (1976); Letter from "[a]n Officer of the Late Continental Army," appearing in the Independent Gazetteer (Nov. 6, 1787):

The objections that have been made to the new Constitution are these: . . . The LEGISLATIVE and EXECUTIVE powers are not kept separate as every one of the American constitutions declares they ought to be; but they are mixed in a manner entirely novel and unknown, even to the constitution of Great Britain . . . .

2 M. JENSEN, supra, at 210-11; Letter from "[a] Democratic Federalist," appearing in the Pennsylvania Herald (October 17, 1787):

At present I shall only observe that it is an established principle in America . . . that the legislative and executive powers ought to be kept forever separate and distinct from each other, and yet in this new Constitution we find there are TWO EXECUTIVE BRANCHES, each of which has more or less control over the proceedings of the legislature. This is an innovation of the most dangerous kind upon every principle of government . . . .

Id. at 198; Letter regarding the Constitution from William Shippen, Jr. to Thomas Lee Shippen, Philadelphia (Nov. 18, 1787): "[T]he legislative and executive power should be more independent of each other . . . . It would then be an excellent Constitution don't you think so my son?" Id. at 288.

131. THE FEDERALIST No. 47, supra note 84, at 324 (J. Madison).
132. Id. at 325.
133. Id.
134. Id. at 325-26.
“whole” power of another. He then asserted that most of the states had established constitutions which expressly contained varying degrees of commingling.

The key to understanding this essay is that Madison, when writing the phrase that separation of powers does “not mean that [there] ought [to be] no partial agency in, or no controul over the [other branches],” was defending the federal constitution against criticism that there was too much commingling within the proposed document. There seems to be no other explanation, particularly since the criticism was directed solely at commingling that ultimately ended up in the Constitution. Therefore, Madison was defending only the commingling of powers that were within the text of the proposed constitution. From his discussion of state constitutions, where he

135. Id.
136. Id. at 327-31. In rationalizing the commingling in the Federal Constitution, Madison referred to the constitutions of various states, most of which contained clauses to the effect that the branches should be kept separate and distinct. He pointed out, however, that within all of those constitutions limited commingling was allowed. Importantly, the commingling that Madison pointed to, in every case, was expressly provided for within those states’ constitutions. See id.
137. See supra note 130 (executive veto power—U.S. Const. art. I, § 7, cl. 2; impeachability of the executive by other branches—U.S. Const. art. I, § 3, cl. 6; Vice-President as President of Senate—U.S. Const. art. I, § 3, cl. 4).
138. The Federalist No. 47, supra note 84, at 331 (J. Madison).
139. If we look into the constitutions of the several states we find that notwithstanding the emphatical, and in some instances, the unqualified terms in which this axiom[, separation of powers,] has been laid down, there is not a single instance in which the several departments of power have been kept absolutely separate and distinct. New Hampshire’s ... constitution accordingly mixes these departments in several respects. [For example, the Senate is a judicial tribunal for impeachments, the President is the presiding member of the Senate, the President is elected by the Senate, executive officers are chosen by the Senate, and the judiciary is chosen by the executive].

The constitution of Massachusetts ... [has a clause declaring that one branch] shall never exercise [the power of another. This] corresponds precisely with the doctrine of Montesquieu. ... [However,] in the very constitution ... a partial mixture of powers has been admitted.

The constitution of New-York ... gives ... to the executive ... controul over the legislative department [and] judiciary[,] the legislature is associated with the executive authority[,] [and] impeachments ... consist of ... the legislature and the ... judiciary ....

The constitution of New-Jersey has blended the different powers of government more than any of the preceding. ...

According to the constitution[s] of Pennsylvania, ... Delaware, ... Maryland[,] ... Virginia[,] ... North-Carolina, ... South-Carolina, ... [and] Georgia, ... [they all have commingling within them]. ...

... In citing these cases, in which legislative, executive and judiciary departments have not been kept totally separate and distinct, I wish not to be regarded as an advocate for the particular organizations of the several state governments. ... What I wish to evince is, that the charge brought against
pointed to commingling within those documents as a basis for the existence of commingling in the federal constitution, and to rebut the criticism that the federal constitution violated the separation of powers doctrine, it seems inconceivable that he was defending anything other than provisions of our subsequent constitution, such as Article I, section 3, clause 6 (the Senate’s sole power to try all impeachments of executive and judicial officers); Article I, section 7, clause 2 (the Presidential veto power); Article II, section 2, clause 2 (the Senate’s confirmation of executive and judicial officers); and Article III, section 1 (Congress’ power to define the jurisdiction of the judiciary by virtue of its authority to “ordain and establish . . . inferior Courts”). Madison was stressing that the commingling of powers allowed for within the document was not a threat to liberty. He was not advocating the commingling of powers which were not expressed in the text of the proposed constitution.

Subsequently, Madison, in Federalist number forty-eight, continued his discussion of separation of powers. He reiterated that it was inconsistent with the separation of powers for one branch to exercise the complete and direct power of another, or for one to have an overruling influence over the other’s administration of its power. Additionally, one branch should not exercise power “be-
yond the limits assigned to it.”147

First, Madison stated that there was an intent, indeed, a practice at that time, to endorse separation of powers in its pure, completely “separate and distinct” form.148 and “to mark with precision the boundaries of these departments in the Constitution.”149 Second, however, as Madison illustrated earlier, in reality the “pure” concept of separation of powers was rarely if ever used, evidenced by provisions in nearly all of the states’ constitutions allowing some commingling.150 These two facts together indicate that framers of that time engaged in a practice of marking “with precision” the requisite amount of constitutional commingling of powers. In other words, these two facts reinforce the assertion that, whatever commingling the framers of that time intended, such commingling was within the document.

To further justify the textual commingling, Madison warned that “pure” or completely separated branches were not sufficient protection against the “encroaching spirit of power” between the branches.151 In particular, the legislative branch was charged with being a constant usurper of the others’ power.152 The readers were

147. See supra notes 129-44. This doctrine is not novel in America, it seems on the contrary to be everywhere well understood and admitted beyond controversy; in the bills of rights or constitutions of New Hampshire, Massachusetts, Maryland, Virginia, North-Carolina and Georgia, it is expressly declared. That the legislature, executive and judicial departments, shall be forever separate and distinct from each other.

2 P. KURLAND & R. LERNER, supra note 83, at 324-25 (commentary at that time regarding separation of powers). “At present I shall only observe that it is an established principle in America, which pervades every one of our state constitutions, that the legislative and executive powers ought to be kept forever separate and distinct from each other.” 2 M. JENSEN, supra note 130, at 198 (commentary at that time regarding separation of powers). “The state constitution of Virginia expressly directs that the legislative, executive, and judicial departments should be kept separate.” Id. at 504 (William Findley at Pennsylvania Convention Debates, Dec. 5, 1787).

149. THE FEDERALIST No. 48, supra note 84, at 332-33 (J. Madison); see also id. at 327-28 (Massachusetts Constitution—“that the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative or executive powers, or either of them”); Id. at 330 (Maryland Constitution—“legislative, executive and judicial powers of government, ought to be forever separate and distinct from each other”); Virginia Constitution—“that the Legislative, executive and judiciary departments, shall be separate and distinct; so that neither exercise the powers properly belonging to the other”).

150. See supra note 139.

151. THE FEDERALIST No. 48, supra note 84, at 333 (J. Madison).

152. Id. at 333-34; see also id. at 333 (“The legislative department is everywhere extending the sphere of its activity, and drawing all the power into its impetuous vortex.”). Madison explained the concern about the legislative branch: The legislative department derives a superiority in our governments from other circumstances. Its constitutional powers being at once more extensive and less susceptible of precise limits, it can with greater facility, mask under compli-
cautioned to "indulge all their jealousy and exhaust all their precautions" against this branch. Madison concluded that controlling the legislature required more than pure separation of powers—"mere demarkation on parchment of the constitutional limits of the several departments is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all powers of the government in the same hands." In short, something else was necessary to ensure against tyranny.

What was that "something else"? Federalist number fifty-one asks, and then answers that question: "To what expedient then shall we finally resort for maintaining in practice the necessary partition of power among the several departments, as laid down in the constitution?"

Madison answered that the expedients that would finally control the branches were the "interior" safeguards "laid down in the constitution." He reiterated that the "external provisions" of pure separation of powers safeguards were inadequate, and therefore "[s]ome deviations," or "internal" commingling, must be allowed.

1. The plain language, "as laid down in the constitution," further validates the proposition that the commingling or "partial agency in" which Madison spoke of was within the Constitution.


3. Id. at 417-18.

4. Id. at 418.

5. Id. at 419.

6. Id. at 416.

7. Id. at 415.

8. Id. at 417.

9. Id. at 418.

10. Id. at 411, 416, 417-18.

11. The Federalist No. 51, supra note 84, at 343 (J. Madison).

12. Id. at 349.

13. The Federalist No. 52, supra note 84, at 350 (J. Madison).

14. United States v. Herman, 589 F.2d 1191, 1211 n.12 (3rd Cir. 1978) (Garth, J., concurring in part, dissenting in part) ("The design of checks and balances fundamental to our tripartite structure of government is predicated upon, and in a sense is the converse of, the separation of powers.").

15. United States v. Brainer, 515 F. Supp. 627 (D. Md. 1981) ("The separation of powers within the government was never intended, nor has it proven to be, complete. A system of checks and balances was included in the scheme to prevent one branch from
These deviations were to act as a series of internal checks and balances and were intended as a "means of keeping each [of the branches] in their proper places." Madison pointed to several examples of power commingling that would check and balance the branches—the appointment and confirmation of judges by the executive and the legislative branches, the judiciary's life tenure, a bicameral legislature, the executive veto power and the division of power between the federal and state governments. Every "deviation" that Madison cited was found in our subsequent Constitution. Madison endorsed no commingling that cannot now be found within the text. It is abundantly clear that the only commingling endorsed by Madison and his contemporaries, and later ratified by the states, was that exclusively within the document. Indeed, many other forms of commingling were proposed and considered, but were ultimately rejected at the Convention. These rejected propos-


161. The Federalist No. 51, supra note 84, at 348 (J. Madison); U.S. Const. art. II, § 2, cl. 2.

162. The Federalist No. 51, supra note 84, at 348 (J. Madison); U.S. Const. art. III, § 1.

163. The Federalist No. 51, supra note 84, at 350 (J. Madison); U.S. Const. art. I, § 1.

164. The Federalist No. 51, supra note 84, at 351 (J. Madison); U.S. Const. art. I, § 7, cl. 2.

165. The Federalist No. 51, supra note 84, at 351 (J. Madison); U.S. Const. art. IV. Shortly after ratification of the Constitution, this area was clarified somewhat by the tenth amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend X; see, I. Sloan, Desk-Top Guide to the Constitution 26-27 (1987) (Sept. 25, 1789—Senate approves Bill of Rights; Dec. 15, 1791—Bill of Rights becomes part of Constitution).

166. See generally The Federalist No. 51, supra note 84, at 347-53 (J. Madison).

167. See, e.g., 1 M. Jensen, supra note 130, at 237-38; id. at 244 (judges to serve with President on Council of Revision to veto laws of Congress); id. at 237, 244, 247 (judges to be appointed by Congress); id. at 244-45, 247, 249-50, 252, 254-55, 259, 267-68, 280-81 (jurisdiction in cases involving impeachment of national officers); id. at 249, 259, 265-66, 277-78 (judges to be appointed by Senate); id. at 265-66, 277-78 (upon request of state, Senate to establish court to settle disputes among states over lands
als, in today’s terms, are the functional equivalent of the nontextual, extra-constitutional commingling validated in *Morrison* and *Mistretta*. In light of these circumstances, hypothesizing that the Framers endorsed extra-constitutional commingling seems illogical.

Madison makes two final observations about the proposed federal system of government: (1) power usurpations are guarded against by branches of government that are relatively separate and distinct, and (2) such separateness will help to ensure that the minority is not oppressed by the majority. By having such a decentralized form of federal governmental power, "the rights of individuals or of the minority will be in little danger." The proposed federal government was thought to enhance the security of rights because it brought together a multiplicity of interests which safeguard against an oppressive majority.

Federalist number fifty-one makes the connection between the importance of keeping the powers as separate as possible, except for those within the Constitution which are needed to check and balance, and the resultant infringement upon individual rights for failure to do so. Therefore, it is extremely important to be cautious whenever analyzing separation of powers questions because ultimately the breakdown of separation of powers leads to the contraction or elimination of individual rights.

Federalist numbers forty-nine and fifty deal with the subject of constitutional amendment. The essays express Madison’s disapproval of a proposed method of amending the Constitution. The writings convey that (1) to change the Constitution it must be amended, and (2) the legislature, once again, should be feared.

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169. *Id.* at 351-53.
170. *Id.* at 351.
171. "In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may truly be said to reign, as in a state of nature where the weaker individual is not secured against the violence of the stronger . . . ." *Id.* at 352.
174. Indeed, a plan to amend the Constitution was incorporated into the document.
The legislature "possesses so many of the means of operating on the motives of the other departments."

These essays demonstrate that amending the Constitution was the only method the Framers endorsed to change the instrument. Consistent with this proposition is the fact that, a short time after ratification of the Constitution, the Bill of Rights was added. Because the only commingling of powers endorsed by the Constitution was in the document, numbers forty-nine and fifty suggest that extra-constitutional commingling requires an amendment.

Consolidating the principles synthesized from the essays in *The Federalist*, the following conclusions may be reached: because "pure" separations of powers are an insufficient safeguard against power consolidation, and nontextual commingling was not endorsed by the Framers, all nontextual commingling is invalid if it is an exercise by the branch of power beyond the limits assigned to it. Furthermore, if extra-constitutional commingling is desired, it must be accomplished by means of amendment. Also, because the legislative branch is the strongest branch and the one most likely to usurp power, any shifting or commingling of power by this branch should be carefully scrutinized.

Functionalists might argue that, although it is reasonable to disallow commingling when Congress takes power away from one branch and gives it to itself, there is no harm where (as in Mistretta) Congress is giving its own power away or, where (as in Morrison) it is reassigning powers between the judicial and the executive branches (assuming the branches, after the shifting, retain the same aggregate amount of power). Superficially, this sounds like a valid argument. However, upon further analysis, there are strong reasons to disallow commingling even when Congress is giving its power away or shifting power between the other branches.

First, and foremost, the Framers' intent indicates that the Consti-

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See U.S. Const. art V.
176. The Federalist No. 49, supra note 84, at 339 (J. Madison).
177. See I. Sloan, supra note 165, at 26-27.
178. "Madison . . . believed that the Constitution . . . could only be changed through amendment or a clear, continued, and equivalent expression of the national will." Ong, supra note 115, at 18. Indeed, if proximity of these essays in *The Federalist* to one another (essays forty-seven to fifty-one), as well as dates of authorship (all five essays are dated within eight days of one another, Feb. 1-8, 1788), and the continuity of the targeted readership (all essays written to The People of New York) are any indicator, it seems very plausible that Madison was giving those opposed to the commingling of powers in the Constitution the avenue for change.
179. See supra notes 151-65 and accompanying text.
180. See supra notes 129-44 and accompanying text.
181. See supra note 144 and accompanying text.
182. See supra notes 173-78 and accompanying text.
183. See supra note 152 and accompanying text.
stitution is the definitive answer to what power shifting is acceptable.\(^{184}\)
As Federalist number forty-seven explained, and numbers forty-eight and fifty-one supported, acceptable shifting of power was in the text of the document, and any other shifting was void unless it was a power expressly assigned to it by the Constitution.\(^{185}\)

Second, Congress is the most powerful of the three branches.\(^{186}\) Congress can give its power away, yet continue to predominate.\(^{187}\) In addition, Congress has "a prevailing influence over the pecuniary rewards of those who fill the other departments . . . ."\(^{188}\)

The shift of power to the other branches could be used as an inducement to obtain the endorsement or the silence of the executive or of the judiciary, so that Congress might accomplish unconstitutional ends. Because members of Congress would "be able to plead their cause most successfully with the people,"\(^{189}\) its conduct would likely remain unimpeded by either the electorate or the other branches. If Congress were given this bargaining or leveraging tool, coupled with the power of the purse strings, it would be able to manipulate the other two branches for its own "aggrandizement."\(^{190}\) Mistretta exemplifies this notion. Congress gave the executive branch the power to appoint and the judicial branch the power to promulgate laws, and thus allowed itself to avoid potential political accountability for any laws regarding sentencing. Neither branch complained that the commingling was unconstitutional. The end result was that Congress created a "junior varsity Congress,"\(^{191}\) within the judiciary with the power to promulgate guidelines with the binding effect of law—an unconstitutional expansion of its power to legislate.\(^{192}\)

\(^{184}\) See, e.g., Mistretta v. United States, 109 S. Ct. 647, 682 (1989) (Scalia, J., dissenting); supra notes 129-72 and accompanying text.

\(^{185}\) See supra notes 129-72 and accompanying text.

\(^{186}\) See supra note 152.

\(^{187}\) See supra note 86.

\(^{188}\) See supra note 152.

\(^{189}\) The Federalist No. 49, supra note 84, at 342 (J. Madison).

\(^{190}\) "The tendency of the legislative authority to absorb every other, has been fully displayed and illustrated . . . ." The Federalist No. 71, supra note 84, at 483 (A. Hamilton).


\(^{192}\) Gore v. United States, 357 U.S. 386, 393 (1958). "[T]he proper apportionment[s] of punishment . . . are peculiarly questions of legislative policy." Id.; see also Gubiensio-Ortiz v. Kanahele, 857 F.2d 1245, 1254 (9th Cir. 1988) ("Reason and authority point squarely to the conclusion that the Commission is assigned the function of promulgating substantive rules and policies governing primary conduct and having the force and effect of law, tasks that only the legislative or executive branches, not the judicial branch, may constitutionally perform.") (emphasis added).
Similarly, this tool, when used to shift power to the executive and judicial branches, could be used as a reward or as punishment to induce capitulation to congressional will.\textsuperscript{193} Congress, when it wished to accomplish a constitutionally impermissible goal, could placate the complaining branch by granting it some new power.\textsuperscript{194} Also, Congress, under a functionalism model, would be able to punish a branch that did not go along with its wishes by taking power away from the branch and giving it to another.\textsuperscript{195}

\textbf{B. Incorrect Factors Are Used in Functional Analysis}

In \textit{Mistretta}, the Court incorrectly assumed that extra-constitutional commingling of powers was permissible. Therefore, the entire focus of the analysis was distorted. Rather than focusing on what the Framers intended as strong authority for its decision, the Court used the Framers' intent expressed in the Constitution merely as a starting point for its analysis. As pointed out by Justice Scalia in dissent, the Court

\begin{quote}
treat[s] the Constitution as though it were no more than a generalized prescription that the functions of the Branches should not be commingled too much—how much is to be determined, case-by-case, by this Court. The Constitution is not that. . . . [T]he framers themselves considered how much commingling was[ . . . ] acceptable, and set forth their conclusions in the document.\textsuperscript{196}
\end{quote}

The Court's inquiry starts with the premise that powers may be commingled if the shifting is not "more appropriately performed by the other Branches."\textsuperscript{197} This premise is equivalent to the inquiry whether the exercise of power is "incongruent" to the branch exer-

\textsuperscript{193} E.g., Morrison v. Olsen, 108 S. Ct. 2597 (1988). Pursuant to the Ethics in Government Act of 1978, the legislature gave the judiciary power to appoint, terminate, and define the jurisdiction of an independent counsel. The independent counsel had investigatory and prosecutorial power, and was required to report to Congress. In effect, the independent counsel, endowed with executive powers, was beholden to both the judiciary and Congress.

Unsurprisingly, the judiciary validated the Act. The Supreme Court's decision allowed the taking of power from the executive branch and shifting power to the judiciary and legislature. One might speculate that the motive behind the Act was to retaliate for recent conflicts between the executive branch and Congress during the Nixon era. As a result of Nixon's clashes with congressional will, the legislature decided to take power away from the executive and give it mainly to the judiciary, reserving some of the power to itself. The judiciary accepted the power, and subsequently validated its (and Congress') own aggrandizement.

\textsuperscript{194} See id. (Congress grants judiciary power to appoint, terminate, and determine jurisdiction of independent counsel endowed with Executive's prosecutorial and investigatory powers).

\textsuperscript{195} Id. (Congress takes power to appoint, terminate (except for "cause") and generally control independent counsel exercising executive power from the President).


\textsuperscript{197} See id. at 661.

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Another factor considered in Mistretta is whether the exercise of power "undermines the integrity of the Judiciary."\(^{198}\) This factor is the same as Morrison's inquiry of whether the exercise of the power impedes a branch in the discharge of its Constitutional duties.\(^{200}\)

The Court in Mistretta also uses an administrative convenience factor in resolving the issues. For example, the Court characterizes the Commission's job as "the sort of intricate, labor-intensive task for which delegation . . . is especially appropriate."\(^{202}\) "Practical consequences" dictated that it was best to have the judicial branch formulate the guidelines because "of the judiciary's special knowledge and expertise," and because the work involved "do[ing] what [judges] have done for generations."\(^{203}\)

The use of "incongruity," "impeding," and "administrative convenience" to determine whether a commingling violates the separation of powers doctrine is erroneous because none follow a fundamental rule of constitutional construction;\(^{204}\) they do not properly interpret the Framers' intent as evidenced in The Federalist.\(^{206}\)

The inquiry into whether the power exercised is incongruent with that branch ignores the Framers' intent as illustrated in The Federalist.\(^{208}\)


\(^{199}\) Mistretta, 109 S. Ct. at 661.

\(^{200}\) Morrison, 108 S. Ct. at 2619.

\(^{201}\) Carter, supra note 105, at 13. According to Professor Carter:

Justice Harry Blackmun's majority opinion quite cleverly asserted that the legislation simply "consolidates" in the Sentencing Commission "the power that had been exercised by the sentencing judge and the Parole Commission to decide what punishment an offender should suffer." This is a bit like saying that the Constitution simply consolidates in the federal government the power that had been exercised by the several states. Both statements make radical restructuring of the allocation of authority by treating them as mere administrative conveniences.

\(^{202}\) Id.

\(^{203}\) See id. at 667.

\(^{204}\) See, e.g., Bowsher v.Synar, 478 U.S. 714 (1986) (no inquiry regarding impeding or incongruence of power shifting); I.N.S. v. Chadha, 462 U.S. 919 (1983) (no inquiry regarding impeding or incongruence of power shifting); Buckley v. Valeo, 424 U.S. 1 (1976) (no inquiry regarding impeding or incongruence of power shifting); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (no inquiry regarding impeding or incongruence of power shifting); Muskrat v. United States, 219 U.S. 346 (1911) (no inquiry regarding impeding or incongruence of power shifting); Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792) (no inquiry regarding impeding or incongruence of power shifting). For the error in using administrative convenience as a factor, see infra notes 221-27 and accompanying text.

\(^{205}\) See supra note 115 and accompanying text.

\(^{206}\) See supra note 117 and accompanying text.
This inquiry does not concern itself with whether the power being exercised is “the whole power of another branch,”\textsuperscript{207} whether the branch exercised the complete power more properly belonging to another branch,\textsuperscript{208} whether it possesses an overruling influence over the other branches in the exercise of their respective powers,\textsuperscript{209} or whether the power exceeds the power given to the branch by the Constitution.\textsuperscript{210} The inquiry ignores that the Framers specified in the Constitution what amount of commingling was acceptable.\textsuperscript{211}

Although the incongruity inquiry in \textit{Mistretta} considers whether the judiciary is exercising the power more properly belonging to another branch, this factor is apparently dismissed with little or no treatment by the Court. The Court heeded the warning and inquired into whether the power exercised more properly belonged to another branch. It conceded that the Commission was involved in substantive rulemaking that allowed the judiciary to “exercise a greater degree of \textit{political} judgment than has been exercised in the past by any one entity within the Judicial Branch.”\textsuperscript{212} However, because the work of the Commission was related to judicial duties and because the Commission was independent from the judicial branch, the exercise of power was deemed constitutional.\textsuperscript{213} In effect, the Court decided that the exercise of the power by the judiciary was not unconstitutional even though it was political and indeed substantive rulemaking—clearly legislative domain. The Court acknowledged Madison's

\begin{itemize}
\item \textsuperscript{207} \textit{See supra} note 93 and accompanying text.
\item \textsuperscript{208} \textit{See supra} note 94 and accompanying text.
\item \textsuperscript{209} \textit{See supra} note 95 and accompanying text.
\item \textsuperscript{210} \textit{See supra} note 90 and accompanying text.
\item \textsuperscript{211} \textit{Mistretta} v. United States, 109 S. Ct. 647, 682 (1989) (Scalia, J., dissenting). (“[T]he framers themselves considered how much commingling was, in the generality of things, acceptable, and set forth their conclusions in the document.”). \textit{Id.}
\item Justice Blackmun's summary quote of Madison's words are uninformed and simply distort the meaning of Madison's words in order to justify a result. \textit{See Wilson, supra} note 83.
\item Professor Wilson observes that, generally “the Court has not made a real effort to understand \textit{The Federalist}.” \textit{Id. at} 67. The Court “has not taken advantage of the abundant research and theories of scholars” on this subject. \textit{Id. at} 125. “A legal realist . . . may conclude that . . . the Court . . . decide[s] cases by relying primarily on their own values.” \textit{Id.}
\item \textsuperscript{212} \textit{Mistretta}, 109 S. Ct. at 666-67 (emphasis added).
\item \textsuperscript{213} \textit{See id. at} 666-67; \textit{but cf.} Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 589 (1952) (“The founders of this Nation entrusted the law making power to the Congress alone in both good times and bad.”). Justice Scalia pointed out the inconsistency in the Court's opinion with respect to their holding that the Commission was within the judicial branch yet was independent:
\item Separation of powers problems are dismissed, however, on the ground that “[the Commission’s] powers are not united with the powers of the [j]udiciary in a way that has meaning for separation of powers analysis,” since the Commission “is not a court, does not exercise judicial power, and is not controlled by or accountable to members of the [j]udicial [b]ranch . . . .” In light of the latter concession, I am at a loss to understand why the Commission is “within the [j]udicial branch” in any sense that has relevance to today's discussion. \textit{Mistretta}, 109 S. Ct. at 680-81 (Scalia, J., dissenting).
\end{itemize}
admonition that combining legislative and judicial powers would result in "arbitrary control" over life and liberty, yet it apparently dismissed the warning as unimportant. This demonstrates a disregard for a portion of the Framers' intent and a basic concept of our government—that the judiciary should not get involved in the political arena. Therefore, reliance on an incongruity factor, as it is interpreted by the Court in Mistretta, circumvents the separation of powers doctrine.

The Court next inquired into whether the power exercised by the Commission impeded the judiciary's integrity or its ability to remain impartial. This factor, like the incongruity factor above, disregards the Framers' intent on the separation of powers doctrine. There is no inquiry into the three factors set out by the Framers. There is no acknowledgement that the Constitution is the definitive answer on acceptable comminglings of power. The only inquiry is whether the exercise will impede or undermine the judiciary in its constitutional functions. As noted above, the Court conceded that the power exercised by the Commission was political. However, the Court felt that this newly acquired political power did not impede or undermine the integrity of the judiciary.

Although the judiciary is the weakest of the three branches, it remains weak only as long as it "remains truly distinct from both the legislative and executive [powers]." "[T]here is no liberty, if the power of judging be not separated from the legislative and executive powers." Once again, the Court's analysis directly contradicts the Framers' separation of powers doctrine.

The use of an administrative convenience factor also runs contrary to the Framers' intent on separation of powers. Instead of consulting the Constitution, case law, or the Framers, the Court merely concludes that the delegation of power was acceptable because the Commission was better suited to perform that work.

216. Mistretta, 109 S. Ct. at 671. The Court uses the term, "undermines the judiciary's integrity." Essentially this inquiry is the same as "impedes," in that the Court asks whether the power shifting thwarts or frustrates the judiciary's integrity or impartiality. See supra notes 199-200.
217. See supra notes 207-09 and accompanying text.
218. Mistretta, 109 S. Ct. at 672.
219. The Federalist No. 78, supra note 84, at 523 (A. Hamilton).
220. Id.
221. Mistretta, 109 S. Ct. at 658, 667; see supra notes 46, 63-64 and accompanying text.
Notwithstanding that this is an unprecedented basis for allowing a shifting of power, the Court forgets that an administrative convenience rationale has repeatedly failed in the past when used to resolve other pressing constitutional issues.\(^2\)\(^2\)\(^2\) It is particularly inapplicable to separation of powers issues. "[I]t is crystal clear from the records of the Convention, contemporaneous writings and debates, that the Framers ranked other values higher than efficiency."\(^2\)\(^2\)\(^2\)\(^2\) The choices the Framers made in the Constitutional Convention about the separation of powers impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked. There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit constitutional standards may be avoided. . . . With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to carefully crafted restraints spelled out in the Constitution.\(^2\)\(^4\)

Our governmental structure of checks and balances was intended to "[slow] the operation of government."\(^2\)\(^5\) "In sum, the Framers chose our structure of government, for all its inefficiencies, the better to secure liberty and to guard against tyranny."\(^2\)\(^6\)

The use of the above factors is very troublesome. They ignore the Framers' intent\(^2\)\(^7\) and seriously imperil the concept of separation of powers.\(^2\)\(^8\) If functionalism, as used in Mistretta, has not delivered a death blow to the doctrine of separation of powers, it has at least, put separation of powers "on the ropes."\(^2\)\(^9\)

\(^2\)\(^2\)\(^2\) See Frontiero v. Richardson, 411 U.S. 677, 690-91 (1973); Stanley v. Illinois, 405 U.S. 645, 656 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969). Although these cases dealt with equal protection claims, they should be equally applicable here. The reason is that separation of powers is the vehicle that ensures individual rights such as equal protection. If administrative convenience does not apply in the context of equal protection, surely it should not apply to the cornerstone that protects and allows such rights to exist.


\(^2\)\(^4\) Id. at 959. Indeed, if the framers intended to facilitate governance, one would think that they would have created an "uni-parte" form of government where one centralized branch would make all decisions. This would have been much more convenient from an administrative perspective. But, instead they purposefully chose a system that eschewed administrative convenience in favor of one that protected the masses from easy overreaching by the government.


\(^2\)\(^7\) See, Carter, supra note 105, at 13.

\(^2\)\(^8\) Id.

\(^2\)\(^9\) Id.
C. Contraction of Individual Rights and the Destruction of Separation of Powers

As noted before, the concentration of power in the same hands is the very definition of tyranny. There can be no liberty where the legislative and executive powers are combined. Similarly, there is no liberty where the judicial power is not separated from the other two branches. The separation of powers doctrine is the essential precaution in favor of liberty. Separation of powers ensures that individual rights and the rights of minorities are protected against the oppression of the majority.

It is hard to believe, in this day and age, that a Supreme Court decision on separation of powers is a threat to individual rights and freedoms. Nevertheless, it is, and for several reasons. Separation of powers provides the governmental structure that prevents tyranny, or dictatorships. The lack of tyranny allows for the development and embellishment of individual rights. Separation of powers “is not deeply ingrained in the American constitutional ethos.” The average citizen, and even lawyers, do not recognize the vital link between separation of powers and liberty. This ignorance, or apathy, gives Congress the ability to enact legislation that ultimately aggrandizes its power. The average American takes personal liberties for granted, and actions by Congress seem unimportant or inconsequential. However, “[t]hat’s the problem with tyranny: It creeps.” It is interesting to note that the only federal appeals court opinion to overturn the Act was written by a person that experienced tyr-
anny. This is at least some indication that persons who have experienced a deprivation of liberty are more sensitive and attuned to the seriousness of separation of powers issues. Those who have known nothing but liberty are wise to take heed.

V. Formalism is the Better Approach

Undoubtedly, determining the Framers’ intent is very elusive. However, the Framers themselves commanded courts to discern the Constitution’s meaning by focusing on what they intended to mean. This Note concludes that formalism as opposed to functionalism, better reflects this intent. Although formalism may not mirror the Framers’ intent with absolute exactitude, it comes much closer than functionalism.

The Framers considered the separation of powers indispensable in ensuring liberty. Formalism better ensures separation of powers by not considering misguided factors (such as incongruity, impeding, and administrative convenience) that effectively ignore the doctrine as the Framers intended. Instead, the inquiry is whether the exer-

241. Judge Alex Kozinski authored the opinion in the case of Gubienio-Ortiz v. Kanahele, 857 F.2d 1245 (9th Cir. 1988). Judge Kozinski immigrated to the United States at age 12 from Communist Romania in Eastern Europe. MacLean, Boyish U.S. Judge Vigorously Fights Excesses of Power, L.A. Times, Feb. 19, 1989, pt. 1, at 3, col. 5. “I remember from my childhood seeing people locked up in their pajamas in the middle of the night by police,” he said. “My father and I had a signal. I was very small, and he said, ‘If you ever start talking, and I give you the signal, you must stop.’ He couldn’t afford to let a small child say stupid things in public . . . things critical of the government,” Kozinski recalled. “I feel probably more suspicious of governmental power than most people . . . .” Id. at 42, Col. 1.

242. Judge Kozinski’s Romania has recently overthrown its Communist dictatorship in favor of a democracy. It is in the process of drafting a new constitution. Judge Kozinski’s views were requested in establishing the new Constitution. See Wiehl, Constitution, Anyone? A New Cottage Industry, N.Y. Times, Feb. 2, 1990, § B, at 6, col. 3. The first draft of the new Romanian constitution, reportedly is based on the separation of powers between the executive, legislative and judicial branches. See Mackenzie, Draft Romanian Constitution Emphasizes Human Rights, REUTERS (Jan. 10, 1990). Other eastern block countries, such as Hungary, who have overthrown their Communist governments and are in the processing of instituting a new form of government, are “particularly interested in the separation of powers.” Wiehl, supra, at 6, col. 3.

243. See Brest, supra note 83, at 218-23.

244. See Ong, supra note 115, at 18.

245. See supra notes 196-229 and accompanying text.

246. See supra notes 83-96, 120 and accompanying text.

247. See supra notes 196-229 and accompanying text. Any argument that the factors of functionalism merely refine the need for separation of powers is erroneous. This argument is the equivalent of saying that Framers’ intent is nondeterminative. Additionally, it ignores the text of the Constitution. It totally ignores the fact that the Framers determined and expressed within the Constitution what form separation of powers would take. In place of a doctrine that has been little changed for over 200 years (until recently), and which has resulted in a nation generally considered a bastion of liberty, is substituted a doctrine that will change or “refine” our governmental structure, “[ifrom
cising branch is the same as the power being exercised. This rule is much less lenient in allowing commingling of power. To say it another way, the inquiry stops if the power exercised is not being exercised by the proper branch. The restrictiveness of the rule coincides with the fact that the Framers outlined the only permissible situations where powers could be commingled. If the power exercised is not consonant with the exercising branch, or is not excepted by the allowances within the Constitution, there should be no inquiry time to time], . . . so long as, in the changing view of the Supreme Court, . . . 'too much commingling' does not occur." Mistretta v. United States, 109 S. Ct. 647, 683 (1989) (Scalia, J., dissenting).

In other words, the responsibility for deciding the structure of our government is shifted from the Founding Fathers to a group nine men and women, and their value judgments. Stare decisis and history are abandoned in favor of allowing the unprecedented "refining" of our government structure by a politically unaccountable group. This would allow unbridled freedom for the Supreme Court to legislate their own views without the restraints of history, precedent and political accountability to guide and control them. Such a doctrine consolidates the power to legislate and adjudicate within one branch, and thus, "the life and liberty of the subject would be exposed to arbitrary control." Mistretta, 109 S. Ct. at 666 (quoting THE FEDERALIST No. 47, supra note 84, at 326 (J. Madison) (quoting Montesquieu)).

Formalism requires "[a]dherence to the text and original understanding [which] . . . constrains the discretion of decisionmakers and assure[s] that the Constitution will be interpreted consistently over time." Brest, supra note 83, at 204. Surely, one would prefer a model that ensures a stable government structure that has proven its worth as a protector of liberty, as opposed to a structure that changes upon the whims of an unaccountable, uncontrollable decisionmaker.

248. See supra notes 98-99 and accompanying text. [T]he key to separation of powers disputes lies in determining whether the challenged action should be characterized as lawmaking, in which case the power is to remain in the province of the legislature; as enforcing the law, in which case it is to remain the prerogative of the executive branch; as interpreting the law, in which case it falls within the domain of the judiciary. Krent, supra note 97, at 1254; see also Bowsher v. Synar, 478 U.S. 714 (1986); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 589 (1952) ("The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times."); Massachusetts v. Mellon, 262 U.S. 447 (1923).

249. If such a rule were employed in Mistretta (judiciary admittedly exercising substantial rulemaking power of legislature) the power shifting would certainly have been invalidated. E.g., Youngstown Sheet & Tube, 343 U.S. at 589 ("The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times."). Morrison (judiciary exercising control over counsel with executive powers), too would be invalidated. E.g., Bowsher, 478 U.S. at 734 ("The Constitution does not permit[] . . . intrusion" by other branches into the executive's responsibility for "execution" of the laws).

250. E.g., Youngstown Sheet & Tube, 343 U.S. at 589; Bowsher, 478 U.S. at 726-27, 734.

251. See supra notes 129-44 and accompanying text. In light of the historical evidence showing the rejection of numerous proposals for commingling at the Constitutional Convention, to think that the Framers considered ad hoc, extra-constitutional commingling as appropriate, is gravely mistaken. See supra note 167 and accompanying text.
into the validity of the commingling ends—the commingling is impermissible. Once it is determined that the commingling is void, and therefore unconstitutional, there is no need to consider whether the commingling is incongruent, whether it impedes, or whether it is convenient. Formalism does not consider the former, and therefore, is more consistent with the Framers' intent.

The Framers were very uneasy about tyranny. This explains why they formed a government of “distinct and separate departments,” and wove the concept of separation of powers into the Constitution. The net result of formalism is that, compared to functionalism, it keeps the branches separated in a manner more closely akin to the way it was when the Founding Fathers framed the Constitution. Therefore, it better maintains “this well-worn but durable doctrine.”

One may think that Morrison's commingling of power was not a bad idea in light of past executive abuses such as Watergate and the Reagan administration's “sleaze factor.” Additionally, commingling power so that uniformity in sentencing can be achieved does not seem likely to lead to tyranny. The problem with these examples is that they do not appear to attack individual rights and democratic freedom. Indeed, a cursory look indicates that Morrison and Mistretta may actually enhance individual rights. For example, Morrison improves the chances of discovering and eliminating unconstitutional executive activities that could possibly implicate individual rights; Mistretta better ensures that convicted individuals will not be


253. Formalism does not create new comminglings of power that are not endorsed within the Constitution, as does functionalism. Therefore, the doctrine is preserved in a manner more akin to the way the Framers instituted it. Functionalism, on the other hand, in many cases would validate a commingling that does not make it past the threshold inquiry of formalism. E.g., Mistretta v. United States, 109 S. Ct. 647 (1989); Morrison v. Olsen, 108 S. Ct. 2597 (1988); see also supra note 249 and accompanying text.

254. The Federalist No. 51, supra note 84, at 351 (J. Madison); see also Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50, 57 (1982) (“[T]he Framers provided that the Federal Government would consist of three distinct branches. . . .”).


Of the doctrine of the separation of powers, so familiar to readers of Supreme Court opinions, the Constitution says not a word. . . . Yet the framework of government outlined in the Constitution of 1787 presupposes the separation of powers [and] gives expression to it. . . . The Constitution, far from being a dubious exemplar of the separation of powers, became a classic instance of the doctrine it never mentions.

1 P. KURLAND & R. LERNER, supra note 83, at 311.

256. Professor Carter made the following observations about differences between the analysis used in formalism versus that used by functionalism: “The painstaking assessment of the original understanding that had . . . dominated separation of powers jurisprudence [until Morrison] was conspicuous by its absence. . . . [T]he Court [in Mistretta and Morrison] deemed it unnecessary to consider the views of the founders on separation of powers.” Carter, supra note 105, at 13.

257. Id.
deprived of their liberty longer than other, similarly situated persons. Superficially, these cases appear to advance desirable objectives. However, ""[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted."" To be sure, where this line of cases interpreting separation of powers will lead is uncertain. But it is clear the Court, with the advent of Morrison and Mistretta, which basically discard Framers' intent and its inherent restraint on decisionmaking, is giving itself much more leeway to determine the architecture of our system of government. Unfortunately, this newly found discretion appears to be nothing more than capitulation to ""the congressional judgment on what was needed to facilitate independence. . . . [C]ongressional judgment on wise policy . . . [is] what matter[s] most."" Congress, with its sleight-of-hand legislation in Mistretta, gives the appearance that ""[n]othing has changed"" with respect to separation of powers. This is reason for concern, as the legislature has begun to do just what Madison warned us it would do—usurp power, and thus pave its way toward power consolidation, ""the very definition of tyranny."" The Supreme Court is steering away from the meaning of the separation of powers doctrine as it has been traditionally known—indeed, away from a meaning that has resulted in the world's longest surviving written constitution—into uncharted waters of future uncertainty. The ""essential precaution in favor of liberty,"" as formalism has known it, appears to be headed for extinction.

VI. CONCLUSION

Mistretta v. United States stands as dangerous precedent in future separation of powers cases. This Note concludes that the analysis endorsed in Mistretta is flawed in that it fails to accurately discern

259. See supra note 247 and accompanying text. Formalism requires ""[a]dherence to the textual and original understanding [which] . . . constrains the discretion of decisionmakers and assure[s] the Constitution will be interpreted consistently over time."" Brest, supra note 83, at 204.
261. Id.
262. The Federalist No. 47, supra note 84, at 324 (J. Madison).
263. Justice Scalia, the lone dissenter, was the only Justice whose analysis was harmonious with formalism. The landslide majority (8-1) embracing functionalism seems certain to extinguish formalism as a mode of analysis for the foreseeable future.
the Framers' intent, and therefore inaccurately reflects the Constitution. Admittedly, it is very difficult to determine with preciseness what the Framers intended or what the Constitution means in many instances—separation of powers included. However, ample evidence supports the position of formalism. Notwithstanding this evidence, there is an underlying theme to this Note: The fundamental reason the Framers included separation of powers within the Constitution was to ensure liberty and individual rights, and to thwart the legislature's unquenchable thirst for power. Thus, when considering separation of powers issues, if after consulting original intent, the answer is unclear, the interpreter should err in favor of the outcome which promotes liberty and individual rights, that is, on the side of rebuffing congressional will. This guarantees that the basic intent of the Framers will prevail in a situation which is otherwise uncertain—a desirable result in such circumstances.

Formalism, as compared to functionalism, assures that courts construing the separation of powers doctrine will reach a result more harmonious with what the Framers intended. Such decisions will ensure that liberty flourishes and that Congress' will remains controlled. Thus, what the Framers intended through the Constitution is accomplished, while preserving a structure that has guaranteed and nourished liberty for over 200 years.

ARTHUR C. LEAHY

264. See supra notes 129-95 and accompanying text.
265. This assumes, again, that Framers' intent is important in interpreting the Constitution. See supra note 83.