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Standing for (and up to) Separation of Powers

Kent H. Barnett

University of Georgia School of Law, khbarn@uga.edu

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Standing for (and up to) Separation of Powers

KENT BARNETT*

The U.S. Constitution requires federal agencies to comply with separation-of-powers (or structural) safeguards, such as by obtaining valid appointments, exercising certain limited powers, and being sufficiently subject to the President’s control. Who can best protect these safeguards? A growing number of scholars would allow only the political branches—Congress and the President—to defend them. These scholars would limit or end judicial review because private judicial challenges are aberrant to justiciability doctrine and lead courts to meddle in minor matters that rarely affect regulatory outcomes.

This Article defends the right of private parties to assert justiciable structural causes of action, arguing that institutional, constitutional, and doctrinal limitations preclude the branches from serving as structural protectors. Indeed, this Article concludes, contrary to recent scholarship, that private claims fit easily within established justiciability doctrines. To address legitimate concerns over utility and judicial intermeddling, this Article argues that courts should confront the underlying doctrine directly by adopting, where appropriate, a functional separation-of-powers doctrine with meaningful remedies. Doing so will limit successful claims to only the most important and thereby properly balance the political branches’ discretion under the Constitution to design the administrative state with useful judicial oversight.

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* Assistant Professor, University of Georgia School of Law. I appreciate comments from Seth Davis, Tara Grove, Gillian Metzger, Richard Re, and Michael Sant’Ambrosio at the Seventh Annual Junior Faculty Federal Courts Workshop; Martha Chamallas, Ned Foley, Steven Huefner, Peter Shane, and Chris Walker at The Ohio State University Moritz College of Law Summer Workshop Series; Liz Lear, Sharon Rush, Amy Stein, John Stinneford, and participants at the University of Florida Faculty Colloquium; and Mehrsa Baradaran, Usha Rodrigues, Miriam Seifter, and Sasha Volokh. I am very grateful for Aziz Huq’s gracious comments and inspiration for this article.

INTRODUCTION

The Federal Election Commission issues advisory opinions that affect political candidates' campaigns.¹ But all of the Commissioners' appointments violate the Appointments Clause.² An appellate military court affirms a court-martialed defendant's conviction.³ Yet the judges' appointments violate the Constitution.⁴ An accounting firm incurs the time and costs of an investigation under the Sarbanes Oxley Act.⁵ The enforcing agency, however, is not sufficiently subject to the President's control as the Constitution requires.⁶ An Article I court rules against a party on a state-law claim, and that ruling, if effective, precludes a later-in-time state-court judgment in that party's favor.⁷ That Article I court usurps federal courts' Article III authority in deciding the state-law claim.⁸

In all of these examples, regulated parties—those whom the agencies or Article I courts had authority to require to act (or not to act) or to penalize with jail time or a fine—asserted what I refer to as “structural challenges.” These challenges are based on constitutional separation-of-powers safeguards and thereby implicate how the federal government must be structured to pursue substantive policy.⁹ The judicial decisions that established these structural defects prevented the relevant provisions from being merely hortatory¹⁰ and furthered their goal of protecting individual liberty by limiting federal authority.¹¹

1. See *Buckley v. Valeo*, 424 U.S. 1, 137 (1976) (per curiam). The Commission's 1975 advisory opinions at issue in *Buckley* are available at *Advisory Opinions*, FED. ELECTION COMM'N, <http://saos.nictusa.com/saos/searchao> [<https://perma.cc/5LD8-2QZ6>].

2. See *Buckley*, 424 U.S. at 124–43 (holding that all Commissioners' appointments violated the Appointments Clause).

3. See *Ryder v. United States*, 515 U.S. 177, 179 (1995). The tribunal affirmed the petitioner's conviction “except in one minor aspect.” *Id.*

4. The Appointments Clause, as relevant here, and the implementing statute required the Secretary of Transportation—a head of department—to appoint the judges, but the Department's General Counsel had improperly done so. See *id.* at 179–80; see also 49 U.S.C. § 323 (2012) (requiring the Secretary of Transportation to appoint officers of the Department); U.S. CONST. art. II, cl. 2 (permitting “Heads of Departments” to appoint “inferior Officers”). The government conceded that the General Counsel's appointment violated the Appointments Clause. See *Edmond v. United States*, 520 U.S. 651, 655 (1997) (referring to Brief for the United States at 9 n.9, *Ryder*, 515 U.S. 177 (No. 94-431), 1995 WL 130573).

5. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 487 (2010).

6. See *id.* at 484 (“We hold that such multilevel protection from removal is contrary to Article II's vesting of the executive power in the President.”).

7. See *Stern v. Marshall*, 131 S. Ct. 2594, 2601–02 (2011).

8. See *id.* at 2608.

9. These challenges can also include those based on federalism, as discussed where relevant in this Article. But I generally limit my discussion to separation-of-powers challenges because of my focus on regulated parties' challenges and the federal administrative state.

10. See Lawrence G. Sager, *The Incurable Constitution*, 65 N.Y.U. L. REV. 893, 898–99 (1990).

11. See THE FEDERALIST NO. 47, at 298 (James Madison) (Clinton Rossiter ed., 2003) (“The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”).

But these challenges are of debatable utility. In nearly all of these cases, the structural defect likely has little, if any, effect on substantive agency decisions. For instance, consider the improperly appointed military judges mentioned above. The judges simply reaffirmed the challenger's conviction after they were properly and swiftly reappointed.¹² As another example, leading scholar Peter Shane has explained that the regulated party's victory in challenging the recess appointments of certain National Labor Relations Board (NLRB) members in *NLRB v. Noel Canning*¹³ (the Court's most recent structural decision) will almost certainly not "change the outcome of the [regulated party's] case."¹⁴

In light of these benefits and drawbacks, should regulated parties have justiciable causes of action to set aside agency action based on structural violations?

Part I.A describes how the Supreme Court has answered affirmatively but provided little analysis.¹⁵ Sometimes the Court suggests regulated parties have interests (or, sometimes, "rights") and causes of action in structural safeguards. Other times, such as in its most recent structural decision (*Noel Canning*), it is silent.¹⁶ The Court indicated in *Bond v. United States* that individuals have prudential standing to assert structural challenges,¹⁷ but more recently the Court suggested a different paradigm that would render its analysis in *Bond* obsolete.¹⁸

In response to the Court's cursory engagement with the utility concerning structural litigation, scholars have begun to question these challenges altogether. Part I.B discusses how the Court's underlying separation-of-powers doctrine may be to blame. Relatedly, Part I.C. considers how scholars have, instead, increasingly questioned the justiciability of these actions in three key ways: (1) regulated parties'

12. The Secretary of Transportation approbated the General Counsel's appointments. *See* *Edmond v. United States*, 520 U.S. 651, 654 (1997). A properly appointed military appellate tribunal again rejected Ryder's arguments that he had presented in his original appellate hearing and again affirmed his sentence. *See* *United States v. Ryder*, No. 947, at 2–3 (C.G. Ct. Crim. App. Apr. 23, 1997) (per curiam).

13. 134 S. Ct. 2550 (2014).

14. Peter M. Shane, *NLRB v. Noel Canning: Two Cheers for Recess Appointments*, HUFFINGTON POST (Aug. 27, 2014, 5:59 AM), http://www.huffingtonpost.com/peter-m-shane/nlr-b-v-noel-canning-two-recess-appointments_b_5534824.html [<https://perma.cc/BM2N-6RK2>]. Indeed, the NLRB recently ratified administrative, personnel, and procurement decisions during the time at issue in *Noel Canning* to avoid additional legal challenges. *See* Tony Mauro, *NLRB Ratifies Actions Affected by Noel Canning Ruling*, NAT'L L.J. (Aug. 5, 2014, 12:37 PM), <http://www.nationallawjournal.com/legal-times/home/id=1202665845879/NLRB-Ratifies-Actions-Affected-by-Noel-Canning-Ruling?mcode=1202617518855&curindex=3&back=GA&slreturn=20160004151247> [<https://perma.cc/ZZZ9-FZ3S>].

15. *See* *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010). The entire discussion concerning implied causes of action occurs in three sentences in a footnote.

16. *See* 134 S. Ct. 2550 (2014).

17. 131 S. Ct. 2355, 2359 (2011); *see also infra* Part I.C.2.

18. *See* *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387–88 & n.3 (2014) (clarifying that "prudential standing" matters really concern whether a cause of action exists and that generalized grievance concerns fall under an Article III standing inquiry).

Article III and prudential standing, (2) judicial remedies, and (3) the applicability of the political-question doctrine.

First, there are Article III and prudential standing concerns. Article III generally requires that challenging parties establish their standing to sue by demonstrating that they have an injury in fact, that a causal relationship between the injury and the wrongful government action exists, and that a court's order can redress the harm.¹⁹ But regulated parties' injury in fact (e.g., having to pay a fine, being subject to an investigation, or taking an action that they would otherwise not take) does not seem causally related to the underlying wrong because, as noted above, the same harm always continues after the court invalidates a separation-of-powers problem.²⁰ Relatedly, one prominent scholar, Aziz Huq, recently addressed the question of private parties' prudential standing to assert structural challenges (i.e., whether prudential considerations should permit them to assert a structural cause of action regardless of their Article III standing). He concluded that private parties, as opposed to institutional actors, should lack standing (and a cause of action) to assert almost all separation-of-powers and federalism challenges because the regulated parties had no "rights" in the structural provisions.²¹ Huq's main point is that permitting structural challenges is inconsistent with the Court's general standing norms.²²

Second, I have highlighted elsewhere the often erratic and ineffectual remedies for successful structural challenges.²³ Although the Court occasionally considers remedial concerns,²⁴ courts often provide meaningless remedies, with little discussion, that may place prevailing regulated parties in a worse position than had they not brought their challenges at all.²⁵ I asked (but did not answer) whether, if

19. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

20. See Aziz Z. Huq, *Standing for the Structural Constitution*, 99 VA. L. REV. 1435, 1475–80 (2013).

21. See *id. passim*.

22. See, e.g., Huq, *supra* note 20, at 1464.

23. See Kent Barnett, *To the Victor Goes the Toil—Remedies for Regulated Parties in Separation-of-Powers Litigation*, 92 N.C. L. REV. 481, 517–36 (2014) (arguing that courts often provide meaningless remedies in separation-of-powers litigation that do not satisfy relevant remedial values).

24. See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 507–10 (2010) (discussing whether severance of structural defect was appropriate); *Ryder v. United States*, 515 U.S. 177, 179 (1995) (refusing to apply de facto officer or validity doctrines); *Buckley v. Valeo*, 424 U.S. 1, 142–43 (1976) (per curiam) (considering remedies and applying a "de facto validity" doctrine to validate prior agency action despite structural defect).

25. See, e.g., *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1336 (D.C. Cir. 2012), *cert. denied*, 133 S. Ct. 2735 (2013) (severing structural defect provision, although challenging party appears to have sought invalidation of underlying ratemaking decision, see Opening Brief of Appellant at 18, *Intercollegiate Broad. Sys., Inc.*, 684 F.3d 1332 (No. 11-1083), 2011 WL 3918320). Moreover, in internal conference memos in *Buckley*, then-Justice Rehnquist argued, without success, that "it would [not] be wise for the Court to make a holding [as to the proper remedy] without the benefit of any argument or briefing." See Conference Memorandum from Justice Rehnquist re: *Buckley v. Valeo* (Jan. 20, 1976). All conference memos are available in Justice Powell's papers, held at the library at Washington and Lee University School of Law. See Powell Papers, WASH. & LEE UNIV.,

courts don't improve structural remedies, they should preclude private structural challenges because, after all, a right requires a meaningful remedy.²⁶

Third, some scholars have invoked the political-question doctrine, under which courts abstain from hearing certain causes of action out of respect to the political branches. Huq, for instance, has argued that the President's ability to remove executive officials should present a political question²⁷ and that the legislative and executive branches—with limited exceptions—should be able to bargain over separation-of-powers boundaries.²⁸ Another influential scholar, Jesse Choper, has gone much further, calling for the nonjusticiability of most structural challenges.²⁹ Other scholars have advanced similar positions as to specific structural protections.³⁰ These scholars, therefore, would generally leave structural protections to the political branches for enforcement and preclude judicial review in all or certain structural challenges.

Finally, scholars have criticized the Court's underlying formalist separation-of-powers jurisprudence (as opposed to structural claims' justiciability). This formalism erects strict boundaries as a prophylactic device, but it ignores historical ambiguities,³¹ realpolitik,³² its decisions' effects,³³ and other values in fashioning an administrative state.³⁴ By tirelessly repairing fences among the branches' boundaries without regard to the significance of the intrusion, formalism encourages parties to assert insignificant challenges and courts to grant limited remedies.

<http://law.wlu.edu/powellarchives/page.asp?pageid=236> [<https://perma.cc/M8EK-MDQ9>].

26. See Barnett, *supra* note 23, at 500, 544–46.

27. See generally Aziz Z. Huq, *Removal as a Political Question*, 64 STAN. L. REV. 1 (2013).

28. See Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 COLUM. L. REV. 1595 (2014).

29. See JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* 363 (1980).

30. See, e.g., William Marks, Note, *Bond, Buckley, and the Boundaries of Separation of Powers Standing*, 67 VAND. L. REV. 505 (2014); Peter Shane, *The Supreme Court Should Avoid a Constitutional Ruling in Noel Canning*, REG BLOG (Sept. 24, 2013), <http://www.regblog.org/2013/09/24/24-shane-noel-canning/> [<https://perma.cc/SB6T-N7QZ>].

31. See, e.g., John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1944–45 (2011).

32. See, e.g., Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2314 (2006) (“[T]he branches purportedly are locked in a perpetual struggle to aggrandize their own power and encroach upon their rivals. The kinds of partisan political competition that structure real-world democracy and dominate political discourse, however, are almost entirely missing from this picture.”).

33. See, e.g., Huq, *supra* note 27, at 52 (“[T]he presidential control/democratic accountability nexus is *causally weaker* than the Court's narrative suggests. Amplifying presidential control consequently does not create a predictable quantum of greater democratic control of administrative policymaking.”) (emphasis in original).

34. See *id.* at 8 (noting that the Supreme Court in *Free Enterprise Fund* “view[ed] democratic accountability as a singularly important constitutional ideal,” despite scholars' consideration of other goals).

This Article responds to these debates in three key ways. First, it concludes that the political branches cannot serve as structural defenders, rendering regulated parties' challenges necessary for vindicating structural norms. Second, it concludes that these private challenges fit easily within existing Article III and prudential standing doctrines. Finally, it concludes that the better method of addressing concerns over judicial review's utility is to create a more functional underlying separation-of-powers jurisprudence with stronger remedies.

First. Part II concludes that faith in the political branches as structural guardians is misplaced. First, the political branches lack institutional incentive to serve as structural stalwarts. The branches are driven by partisan and policy-based concerns, and they will generally defend structural prerogatives only when a branch's constitutional powers align with the interests of the political party that controls it. Second, the Constitution and the Court's current doctrine provide significant and defensible impediments to aggrandizing the branches' litigation power, a solution for which certain scholars advocate.

The political branches' disadvantages highlight the stakes in deciding whether regulated entities have justiciable structural claims. The branches' limited incentive and questionable authority may lead to the underenforcement or nonenforcement of structural protections. Regulated parties, even if by default, are the better champions of structural rights. Courts should favor interpreting current doctrine to accommodate their structural challenges, especially if the doctrine can easily do so. In other words, courts should presume that judicial review is proper.

Second. With this presumption in mind, Part III concludes that, contrary to Huq's view, structural challenges are not aberrations of standing doctrine. Instead, these challenges rest comfortably with existing standing and cause-of-action doctrine. To be sure, Article III standing often requires injury in fact, causation, and redressability. But the causation and redressability requirements are either inapplicable or significantly relaxed for run-of-the-mill, ubiquitous procedural challenges, and structural challenges should be treated similarly. Neither procedural nor structural rights exist to preordain substantive outcomes; they exist to further other values, such as those related to better decision making or the distribution of governmental power to prevent despotism, by regulating how and who within government acts. With standing in hand, regulated parties should also have an implied cause of action because (1) they fall comfortably within structural safeguards' "zone of interests" (a longstanding inquiry) and (2) neither founding history nor historical practice is to the contrary.

Third. Although regulated parties' structural challenges should be justiciable, Part IV addresses the utility concerns surrounding structural litigation. At bottom, the various objections rest on the judiciary's overly active role in structural litigation and its failure to give the political branches sufficient discretion when structuring the administrative state. Discretion is appropriate because, as others have noted, the Court's formalism as to several provisions is overly broad, lacks sufficient historical pedigree, and denies the political branches the opportunity to balance competing values when setting up a functioning bureaucracy. At the same time, judicial review of structural design permits invalidation of administrative structures that affect the branches' core powers. Rendering structural challenges nonjusticiable (and thus unreviewable) is too strong a medicine to cure the maladies of structural jurisprudence.

This Article concludes by briefly considering how more functional jurisprudence can help and discusses two ways of how courts can turn to functionalism. First, departing from their current trajectory, courts can directly adopt, where appropriate, a more functional doctrine that grants the political branches discretion. Second, instead of the limited remedies that they now employ, courts can provide maximal remedies, such as not allowing agencies to act until the political branches enact curative legislation and not relying on various doctrines that blunt the force of judicial remedies (such as severance and stays of judgment). These meaningful remedies, perhaps counterintuitively, will lead courts to narrow the underlying rights—a phenomenon that scholars have identified in other areas.³⁵ With fewer structural violations, courts can constrict structural rights to their core meaning, leave the doctrine more functional, and allow the political branches more, appropriate discretion. The political branches can assist the courts and increase their discretion by clarifying that they do not seek severance of structural defects. With a more functional doctrine, courts can—without abandoning the structural constitution to the political branches—provide optimal enforcement and address underlying utility concerns.

I. STRUCTURAL “RIGHTS” AND JUSTICIABILITY

The Supreme Court has long recognized that regulated parties can assert separation-of-powers challenges in multiple contexts. But exactly what relationship those parties have with the separation-of-powers safeguards is unclear, and justiciability questions linger, despite recent scholarly attention to them. These unsettled questions are becoming more pressing as the Court has warmly received structural challenges and welcomed a more meaningful judicial role in separation-of-powers disputes.

A. Individual Interests in Structural Protections

The Constitution has numerous structural provisions that affect administrative law. Perhaps the most prominent are the three Vesting Clauses, which vest legislative, executive, and judicial powers in the Congress, the President, and the Article III federal courts, respectively.³⁶ Disputes over Congress’s legislative powers typically concern whether Congress has impermissibly delegated its power to one of the other branches of government (usually an agency) and thus violated the “nondelegation doctrine.”³⁷ Disputes over the President’s executive powers typically arise in the administrative context when Congress has limited the President’s power to remove executive officials from office.³⁸ And disputes concerning the Article III courts’ powers usually concern agencies’ or Article I courts’ jurisdiction over certain

35. See *infra* notes 380–384 and accompanying text.

36. U.S. CONST. art. I, § 1 (legislative power), art. II, § 1 (executive power), art. III, § 1 (judicial power).

37. See, e.g., *Whitman v. Am. Trucking Ass’n, Inc.*, 531 U.S. 457 (2001).

38. See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010).

common-law claims.³⁹ But other key structural provisions, as relevant to this Article, directly affect administrative architecture. For instance, the Appointments Clause requires the President to appoint and the Senate to confirm principal officers of the United States, and it requires inferior officers to be appointed, as Congress thinks proper, in the same manner or by “the President alone, . . . the Courts of Law, or . . . the Heads of Departments.”⁴⁰ Likewise, the Bicameralism and Presentment requirements in Article I provide a specific procedure for enacting legislation⁴¹ and otherwise limit the ability of Congress to alter legal rights.⁴²

Regulated parties have some kind of “rights,” “interests,” or other undefined connection to these structural safeguards. But the Supreme Court has been unclear about the precise relationship between regulated parties and these safeguards. For instance, the Court has said, at times, that regulated parties have “personal rights”⁴³ and, at other times, “interests” in Article III protections.⁴⁴ As I have noted elsewhere, the Supreme Court “has recognized a key difference between ‘rights’ and ‘interests’ (or ‘benefits’) in the context of 42 U.S.C. § 1983” and that difference affects the availability of judicial remedies.⁴⁵ But it is not clear whether the Court intends for similar distinctions in the separation-of-powers context to have remedial consequences.⁴⁶ Likewise, the Court has held that regulated parties have an implied right of action to assert challenges based on the President’s powers and the Appointments Clause under Article II.⁴⁷ The Court has allowed challenges to proceed under Article I’s Bicameralism and Presentment Clauses, but it did so without directly addressing whether the regulated party had rights or interests in those requirements.⁴⁸

Regulated parties’ interests—however described—derive from the purpose of structural provisions. The purpose of the separation of powers (and federalism) is, at one level, to divide or limit governmental power.⁴⁹ This division of power does not, according to the Supreme Court, inure merely to the benefit of the relevant branches of government (or sovereigns) because the division of power is not an end in itself. Instead, it is a means for protecting individual liberty from tyrannical government.⁵⁰

39. *See, e.g.*, *Stern v. Marshall*, 131 S. Ct. 2594 (2011); *CFTC v. Schor*, 478 U.S. 833, 848 (1986).

40. U.S. CONST. art. II, § 2, cl. 2.

41. U.S. CONST. art. I, § 7, cl. 2.

42. *I.N.S. v. Chadha*, 462 U.S. 919 (1983). The Supreme Court summarily affirmed the D.C. Circuit’s judgment that a two-house legislative veto was also unconstitutional. *See Process Gas Consumers Grp. v. Consumer Energy Council of Am.*, 463 U.S. 1216, 1216 (1983).

43. *See Schor*, 478 U.S. at 848.

44. *See id.*

45. Barnett, *supra* note 23, at 496.

46. *See id.*

47. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010).

48. *I.N.S. v. Chadha*, 462 U.S. 919, 935–44 (1983).

49. *See Bond v. United States*, 131 S. Ct. 2355, 2364–65 (2011) (referring to both federalism and separation of powers).

50. The Court has numerous statements to this effect. *See, e.g.*, *New York v. United States*, 505 U.S. 144, 181 (1992); *Mistretta v. United States*, 488 U.S. 361, 380 (1989);

Indeed, Choper has written that the provisions' purpose "cannot be seriously disputed."⁵¹ Because protecting individual liberty is the end, individuals are "intended beneficiaries" of structural provisions.⁵² Their status, as the Court recently held when permitting a criminal defendant to challenge a federal law based on the Tenth Amendment, allows them to object to government action based on separation-of-powers principles.⁵³ This is so, despite the separation-of-powers' purpose of protecting the branches of government from the others' incursion,⁵⁴ because "a law 'beyond the power of Congress,' for any reason, is 'no law at all.'"⁵⁵

The Supreme Court has furthered individuals' structural challenges in various ways. For instance, the Court has attempted to convey the importance of the Appointments Clause, which provides relatively specific appointment procedures for federal principal and inferior officers, by rejecting the view that the Clause's requirements are mere "etiquette or protocol."⁵⁶ Getting the hint, lower courts have permitted Appointments Clause challenges outside of *quo warranto* proceedings,⁵⁷ which usually impose procedural hurdles or require approval by executive officials.⁵⁸ Moreover, they have eschewed engaging in harmless-error analysis, rendering a remedy more likely.⁵⁹

Bowsher v. Synar, 478 U.S. 714, 721 (1986); *see also* THE FEDERALIST NO. 47, at 298 (James Madison) (Clinton Rossiter ed., 2003) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."); *id.* at 299 ("There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates" (quoting Montesquieu)); F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 318–19 (2008) ("The principal reason for dividing powers among the three branches is to prevent tyranny and unwarranted government intrusion on individual rights.").

51. CHOPER, *supra* note 29, at 264–65.

52. *Bond*, 131 S. Ct. at 2364 (referring to federalism); *see also id.* at 2365 (referring to the "analogous context" of separation-of-powers challenges).

53. *Id.* at 2365.

54. *Id.*

55. *Id.* at 2368 (Ginsburg, J., concurring) (quoting *Nigro v. United States*, 276 U.S. 332, 341 (1928)).

56. *Ryder v. United States*, 515 U.S. 177, 182 (1995) (quoting *Buckley v. Valeo*, 424 U.S. 1, 125 (1976) (per curiam)). Likewise, the Supreme Court has said that Article III protections serve "primarily personal, rather than structural, interests." *CFTC v. Schor*, 478 U.S. 833, 848 (1986).

57. *See Andrade v. Lauer*, 729 F.2d 1475, 1496–97 (D.C. Cir. 1984).

58. *Taitz v. Obama*, 707 F. Supp. 2d 1, 4 (D.D.C. 2010) ("Because Ms. Taitz is neither the Attorney General of the United States nor the United States Attorney for the District of Columbia, she does not have standing to bring a *quo warranto* action challenging a public official's right to hold office."); J.H. Crabb, Annotation, *Right of Private Person Not Claiming Office To Maintain Quo Warranto Proceedings To Test Title to or Existence of Public Office*, 51 A.L.R.2d 1306 § 3 (1957) (summarizing jurisdictional differences in seeking *quo warranto*).

59. *See Landry v. FDIC*, 204 F.3d 1125, 1130–31 (D.C. Cir. 2000) (holding that showing of harm was not required for structural violation to exist); *Andrade*, 729 F.2d at 1495 ("The [Appointments] [C]lause would be a nullity if it could be assumed that these very officials would in fact have been properly appointed and (especially) confirmed by the Senate.")

B. Formalist Methodology

But the Court has done nothing more solicitous of regulated parties' structural challenges than to rely mostly upon formalist (as opposed to functionalist) separation-of-powers doctrine. Because so many others have written at length about formalism and functionalism,⁶⁰ what follows is only a brief comparison of the analytical methods. When engaging in separation-of-powers formalism, the Court understands the Constitution's three Vesting Clauses as dividing federal power cleanly into the three branches. The separation of powers is "violated whenever the categorizations of the exercised power and the exercising institution do not match and the Constitution does not specifically permit such blending."⁶¹ In contrast to formalism, the Court sometimes engages in functionalism by considering whether a particular practice or agency structure infringes the "core functions" of the branches.⁶² Functionalism grants Congress much more discretion to construct the administrative state under the Necessary and Proper Clause⁶³ and generally recognizes that the branches' outer boundaries are indefinite and porous.⁶⁴

John Manning has cogently criticized both methods' implementation. Functionalism, he contends, can improperly "privilege general constitutional purpose over specific textual detail."⁶⁵ This complaint was noticeable in *CFTC v. Schor*.⁶⁶ Despite longstanding precedent that Article III's Vesting Clause prohibited the removal of common law, equity, or admiralty claims from Article III courts' jurisdiction,⁶⁷ the Court upheld an agency's ability to hear a state-law counterclaim for the payment of brokerage fees. This was so, notwithstanding the Court's concession that the state-law counterclaims were "at the 'core' of matters normally reserved to Article III courts,"⁶⁸ because agency adjudication of the claims did not improperly undermine Article III's purposes.⁶⁹ With functionalism, in other words, even previously marked boundaries give way to administrative efficiency.

(emphasis in original); see also *Ryder*, 515 U.S. at 184 & n.4 (refusing to engage in harmless-error analysis and noting government had not preserved argument).

60. See, e.g., M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1136-47 (2000) (summarizing differences and scholarly debates concerning formalism and functionalism).

61. Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CALIF. L. REV. 853, 858 (1990).

62. Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253, 1255 (1988).

63. Manning, *supra* note 31, at 1951.

64. See Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 489 (1987).

65. See Manning, *supra* note 31, at 1943.

66. 478 U.S. 833 (1986).

67. See Manning, *supra* note 31, at 1954 (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856)).

68. *Schor*, 478 U.S. at 853.

69. See Manning, *supra* note 31, at 1953-54 (discussing *Schor* and functionalism's "underreading" of the Article III Vesting Clause).

Manning's key criticism of formalism, in turn, is that it reads into the three Vesting Clauses a background separation-of-powers norm without recognizing the following: the indeterminacy of the constitutional provisions, the failure of the Founders to set an agreed-upon separation-of-powers baseline, the import of the Necessary and Proper Clause, and the numerous compromises in the Constitution that lack any shared theoretical basis.⁷⁰ Manning identifies Justice Scalia's dissent in *Morrison v. Olson* as one example of this formalist failing.⁷¹ In arguing that the Congress could not constrain the President's removal power over executive officers, Justice Scalia began by looking at the language of the Article II Vesting Clause.⁷² He noted that it vested the President alone with all of "the executive power."⁷³ But because the clause alone did not answer whether Congress could constrain (as opposed to wholly take away) the President's power over executive officials, Justice Scalia had to turn to generalized separation-of-powers principles.⁷⁴

Despite its shortcomings, formalism has largely triumphed over functionalism. The Court has applied formalism to the legislative veto,⁷⁵ the Appointments Clause,⁷⁶ and the Tenth Amendment, generally without exception.⁷⁷ Formalism, with one notable exception,⁷⁸ has also come to rule Article II in the President's

70. *See id.* at 2022.

71. *See id.* at 1965–69.

72. *See id.* at 1966–67.

73. *See id.* at 1967–68.

74. *See id.* at 1968–69.

75. Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 431 (2012) (referring to *Chadha* as "textualist and formalist in its methodology"); Harold H. Bruff, *Legislative Formality, Administrative Rationality*, 63 TEX. L. REV. 207, 212 (1984) ("*INS v. Chadha* was rigidly formalist in effect." (footnote omitted)).

76. *See* Manning, *supra* note 31, at 1958 (noting that formalism, when applied to bicameralism/presentment and appointments, "simply enforce[s] the apparent exclusivity of the detailed procedures specified"); Matthew Hunter, Note, *Legislating Around the Appointments Clause*, 91 B.U. L. REV. 753, 759 (2011) (noting that the Supreme Court has "fairly consistently applied a formalist analysis" to Appointments Clause cases).

77. *See, e.g.*, Erwin Chemerinsky, *Formalism and Functionalism in Federalism Analysis*, 13 GA. ST. U. L. REV. 959, 960 (1997) ("[T]he Supreme Court's approach to federalism in the 1990s has been formalistic, not functional."); Allison H. Eid, *Federalism and Formalism*, 11 WM. & MARY BILL RTS. J. 1191, 1193 (2003) (noting criticisms of the Court's formalist federalism decisions).

78. *See Morrison v. Olson*, 487 U.S. 654, 691–92 (1988) (considering whether the impediment on presidential removal power was "so central to the functioning of the Executive Branch" to require that impediment's invalidation); *id.* at 690 n.29 (rejecting Justice Scalia's dissenting, formalist position).

removal-power decisions.⁷⁹ Article III Vesting Clause jurisprudence has followed a similar trend in favor of formalism.⁸⁰

Formalism's ascendancy encourages structural challenges and judicial intervention. The Court has stated that separation of powers serves as "a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict."⁸¹ By kowtowing to "the era's perceived necessity" or "an expedient solution to the crisis of the day,"⁸² a functional inquiry would improperly permit extraconstitutional government, a fate "far worse" than a failed solution.⁸³ To maintain the prophylaxis, the Court tirelessly patrols the outermost boundaries of each estate to prevent any minor incursion and repair any dented walls. Functionalism, in contrast, would permit judges to rock on the porch with shotgun in hand to protect each branch's intimate living quarters.

C. Justiciability Concerns

As the judiciary has encouraged structural challenges, scholars have begun to question their justiciability. These questions concern regulated parties' Article III and prudential standing (and related ability to assert a cause of action), prevailing parties' remedies, and the suitability of separation-of-powers questions for judicial review. The Court has generally left these questions unanswered and wholly failed to discern the multifaceted nature of the justiciability issues.

79. See *Free Enter. Fund. v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) (rejecting Justice Breyer's functionalist dissent); *Bowsher v. Synar*, 478 U.S. 714, 730 (1986) (rejecting Justice White's dissenting, functionalist position). Numerous commenters have recognized the Court's *Free Enterprise Fund* opinion as formalist. See Ronald J. Krotoszynski, Jr., *Cooperative Federalism, the New Formalism, and the Separation of Powers Revisited: Free Enterprise Fund and the Problem of Presidential Oversight of State-Government Officers Enforcing Federal Law*, 61 DUKE L.J. 1599, 1610–11 (2012) ("[T]he majority opinion[] in *Free Enterprise Fund* . . . incorporate[s] and reflect[s] strongly formalist reasoning."); accord Michael P. Allen, *The Roberts Court and How To Say What the Law Is*, 40 STETSON L. REV. 671, 683–85 (2011).

80. See Erwin Chemerinsky, *Formalism Without a Foundation: Stern v. Marshall*, 2011 SUP. CT. REV. 183, 185 ("[*Stern v. Marshall*, 131 S. Ct. 2594 (2011),] is a marked departure from other, more recent Supreme Court decisions that took a far more functional approach to deciding when Congress could assign judicial matters to non-Article III judges.") (referring to *CFTC v. Schor*, 478 U.S. 833 (1986), and *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985)); see also Krotoszynski, *supra* note 79, at 1610–11 (referring to *Stern v. Marshall* as an example of the Court's formalism).

81. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995) (concerning legislation to reopen final judgments).

82. *New York v. United States*, 505 U.S. 144, 187 (1992) (concerning federalism).

83. *Id.* at 187–88.

1. Tensions with Article III Standing

The Court has created, despite its questionable pedigree,⁸⁴ a well-known, tripartite test that plaintiffs must satisfy to establish a “case or controversy” under Article III.⁸⁵ Plaintiffs must first show that they suffer a concrete and particularized injury-in-fact,⁸⁶ in contrast to a legal wrong or mere invasion of a legal right.⁸⁷ They must show, second, that there is a “fairly traceable,” as opposed to speculative, causal connection between the injury-in-fact and the impropriety of which they complain.⁸⁸ Finally, they must show that a favorable decision will likely redress their injury-in-fact, an inquiry that often overlaps with causation.⁸⁹

Regulated parties have little trouble establishing injury in fact because they are objects of government action. In *Lujan v. Defenders of Wildlife*, the Court, before holding that beneficiaries of an environmental-regulatory scheme had failed to establish Article III standing, noted that if a plaintiff is an object of the action or inaction at issue, “there is ordinarily little question that the action or inaction has caused him injury.”⁹⁰ This is so because the regulated parties must do what they would otherwise not do (including paying a fine) or refrain from doing what they would do. Because they are objects, as opposed to third-party beneficiaries of agency action or statutory schemes, much standing scholarship—considering so-called “public actions” and problems with restricting beneficiaries from suing—becomes irrelevant.⁹¹ Regulated parties don’t present the problem of extenuated (or no) injury or generalized grievances. They suffer injury because the government is directly

84. See, e.g., Raoul Berger, *Standing To Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816, 817 (1969) (arguing that injury-in-fact was not required under British practice); Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine’s Dirty Little Secret*, 107 NW. U. L. REV. 169, 229–31 (2012) (noting historical “ambiguity” over propriety of public actions and finding historical evidence seems to favor public-rights view); Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 167 (1992) (noting that “stranger” or “citizen suits” were accepted in English and early American legal systems); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1394–1406 (1988) (discussing English and early American courts’ acceptance of suits that did not require the plaintiff suffer injury-in-fact); see also Hessick, *supra* note 50, at 277–78 (arguing that injury-in-fact inquiry for actions founded on private rights is “ahistorical and unjustified”). But see Anthony J. Bellia, Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 825–26 (2004) (arguing that proceedings were generally limited to injured parties).

85. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

86. See *id.* at 560.

87. See *Ass’n of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 152–54 (1970) (jettisoning “legal interest test” and adopting injury-in-fact test).

88. See *Lujan*, 504 U.S. at 560.

89. See *id.* at 560–61.

90. See *id.* at 561–62. Cass Sunstein has criticized the distinction between objects and beneficiaries of governmental action as a “conceptual anachronism.” See Sunstein, *supra* note 84, at 188. Unlike Sunstein, I take no position on the propriety of the distinction or of beneficiaries’ standing generally.

91. See *supra* note 84 (referring to scholarship concerning standing and “public” actions); see also Gene R. Nichol, Jr., *Rethinking Standing*, 72 CALIF. L. REV. 68 (1984).

affecting their behavior or purse. And governmental control affects only the select class of regulated parties (i.e., securities traders, companies creating pollutants, banking corporations, etc.), not the entire U.S. population. Indeed, the Court held that the challenging party who faced deportation in *Chadha* satisfied the Article III standing desiderata when bringing his structural challenge because of the effect that the agency's action would have on him.⁹²

The key standing defects in structural litigation, as Huq has noted, concern causation and redressability.⁹³ The Supreme Court's decision in *Simon v. Eastern Kentucky Welfare Rights Organization*⁹⁴ informs both issues. In that case, indigents and organizations with indigent members sued the Secretary of the Treasury and the IRS Commissioner for violating the Internal Revenue Code (and the Administrative Procedure Act (APA)) because the agencies gave favorable tax treatment through a Revenue Ruling to nonprofit hospitals that offered only emergency-room services, as opposed to both emergency and nonemergency services, to indigents.⁹⁵ The plaintiffs argued that the government's action "encouraged" hospitals to deny indigents nonemergency care.⁹⁶ Nonetheless, the Court found it "purely speculative whether the denials of [nonemergency] service . . . fairly can be traced to [the government's] 'encouragement' or instead result from decisions made by the hospitals without regard to the tax implications."⁹⁷ Relatedly, the Court noted that awarding the relief sought—requiring hospitals to provide more services to the indigent to receive favorable tax treatment—would not create a "substantial likelihood" that plaintiffs would receive their desired hospital services.⁹⁸

Analogous problems arise in structural litigation. For example, *Ryder v. United States*⁹⁹ illustrates causation problems. The Court held that the appointment of a military appellate panel violated the Appointments Clause because the appointment was not made by a head of department (the Secretary of Transportation) but by a general counsel.¹⁰⁰ Nevertheless, the same officers were later properly appointed, and they once again rejected the enlisted man's appellate arguments.¹⁰¹ The enlisted man's injury-in-fact—his conviction¹⁰²—did not appear to arise from the structural defect because the same harm occurred both before and after the defect existed.

92. *I.N.S. v. Chadha*, 462 U.S. 919, 935–36 (1983).

93. See Huq, *supra* note 20, at 1475–80.

94. 426 U.S. 26 (1976).

95. *Id.* at 28.

96. *Id.* at 42.

97. *Id.* at 42–43.

98. *Id.* at 45.

99. 515 U.S. 177 (1995).

100. 515 U.S. 177, 179 (1995).

101. See *supra* note 12 and accompanying text.

102. His injury-in-fact was not the violation of any right to a properly appointed tribunal. Such an injury would be a "legal injury" that the Supreme Court has clarified does not count as injury-in-fact and, despite contrary decisions before 1970, is no longer relevant to the standing inquiry. See *Ass'n of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 153 (1970); cf. Lee & Ellis, *supra* note 84, at 200 (noting that violation of a statutory procedural right alone under the Freedom of Information Act amounts to legal injury, not injury in fact).

Redressability can be similarly problematic. For instance, in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, the Public Company Accounting Oversight Board (PCAOB) began investigating the plaintiff accounting firm.¹⁰³ The firm argued that the PCAOB had too much independence from the President because its members could only be removed for very limited causes by the Securities and Exchange Commissioners (SEC), who, in turn, could only be removed for limited cause by the President.¹⁰⁴ The Supreme Court agreed.¹⁰⁵ The firm sought an injunction to stop the PCAOB from exercising its powers.¹⁰⁶ The Court, instead, severed one of the levels of protection from removal (leaving the PCAOB members subject to the SEC's at-will removal), otherwise left the statute and the agency fully operative, and permitted the investigation to continue before the PCAOB.¹⁰⁷ That remedy allowed the investigation—the injury-in-fact—to continue, even if it was now pursued by a properly subordinate agency, and the Court did not remedy any past harm suffered.¹⁰⁸ And, in fact, the investigation continued after the Supreme Court's decision.¹⁰⁹ To be sure, some challenges that could lead to the invalidation of a federal conviction, such as the one in *Bond v. United States*,¹¹⁰ are more likely to satisfy all three Article III-standing requirements.¹¹¹ But, as *Ryder* and *Free Enterprise Fund* indicate, Article III's desiderata do not always appear satisfied or even considered.

2. Prudential Standing (or Lack of Causes of Action)

Aside from Article III standing, challenging parties must establish their prudential standing or perhaps instead, based on a very recent Supreme Court decision, their causes of action. In *Bond v. United States*, the Court unanimously held that a criminal defendant had prudential standing to challenge a federal criminal statute under the Tenth Amendment.¹¹² In doing so, the Court—after distinguishing modern notions of standing from an earlier decision's inquiry into implied causes of action¹¹³—disapproved of earlier suggestions that private parties could not have standing to assert Tenth

103. 561 U.S. 477, 487 (2010).

104. *See id.*

105. *See id.* at 484.

106. *See id.* at 487.

107. *See id.* at 508–10, 513–15.

108. *See Barnett, supra* note 23, at 518–21 (discussing theoretical remedial deficiencies in *Free Enterprise Fund*); Huq, *supra* note 20, at 1477.

109. *See Barnett, supra* note 23, at 519 n.214 (noting that the PCAOB and the accounting firm ultimately settled the dispute).

110. *Bond v. United States*, 131 S. Ct. 2355 (2011).

111. *See Huq, supra* note 20, at 1475 (“In *Bond*, the presence of the three canonical elements of constitutional standing . . . were tolerably clear given the underlying proceeding's criminal complexion.”).

112. *Bond*, 131 S. Ct. at 2366–2367.

113. That decision was *Tennessee Electric Power Co. v. Tennessee Valley Authority*, and the language at issue is found at 306 U.S. 118, 144 (1939) (“[T]he appellants, absent the states or their officers, have no standing in this suit to raise any question under the [Tenth A]mendment.”).

Amendment claims.¹¹⁴ The Court relied upon federalism's aim of securing individual liberty and, by analogy, on separation-of-powers jurisprudence in which private parties have been the principal challengers.¹¹⁵

Huq has criticized *Bond*'s reasoning. In brief, he argued that private parties should lack prudential standing (or a cause of action¹¹⁶) to assert structural claims for the following reasons: no individual "rights" to structural safeguards exist,¹¹⁷ their adjudication has substantial "spillover effects" (such as effects on states' and federal authority) that the standing doctrine generally avoids in other contexts,¹¹⁸ plaintiffs have causation and redressability concerns,¹¹⁹ the relationship between liberty and structural safeguards is weak, and the challengers will usually be sore losers from the political realm.¹²⁰ He argues that individuals should be able to enforce structural safeguards only when the affected institution cannot do so, with exceptions for matters that implicate due process concerns "based on assertions of legal authority that are *manifestly* unreasonable"¹²¹ or Article III protections.¹²² Huq's main point is that, notwithstanding *Bond*, individuals' structural challenges rest uncomfortably with general standing jurisprudence.

More recently, the Court has indicated that prudential standing should be reconceptualized as asking whether a particular plaintiff has a cause of action.¹²³ In *Lexmark International, Inc. v. Static Control Components, Inc.*,¹²⁴ the Court, after noting its inconsistent use of the term "prudential standing" and the inquiries that are germane to it, stated that whether a plaintiff comes within the zone of interests of the law invoked is really a question of whether the plaintiff has a cause of action.¹²⁵ The

114. *Bond*, 131 S. Ct. at 2364.

115. *Id.* at 2364–65.

116. See Huq, *supra* note 20, at 1515 n.321.

117. See *id.* at 1448–52.

118. See *id.* at 1466–75.

119. See *id.* at 1484–90.

120. See *id.* at 1491–1514.

121. *Id.* at 1517 (emphasis in original).

122. See *id.* at 1519–21.

123. Scholars had so advocated for decades. See Bellia, *supra* note 84, at 779; William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 236, 252 (1988). But see Eugene Kontorovich, *What Standing Is Good For*, 93 VA. L. REV. 1663, 1684–85 (2007) (arguing that standing addresses "whether individuals' rights overlap in a way that can prevent their efficient allocation" (emphasis omitted)). The Court continued merging justiciability doctrines during the same term. It noted that "Article III standing and ripeness issues in this case 'boil down to the same question'" in *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 n.5 (2014), and reserved answering whether ripeness factors concerning fitness and hardship had "continuing vitality," *id.* at 2347.

124. 134 S. Ct. 1377 (2014).

125. *Id.* at 1387. Although the zone-of-interests test derived from prudential standing concerns under the APA, the Court has applied the test to statutory claims to which the APA does not apply, see *Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863 (2011), and to constitutional provisions, see *Valley Forge Christian College v. Am. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474–75 (1982). The Court also clarified that so-called "statutory standing" is a matter that goes to the merits and thus is not a jurisdictional inquiry under Article III. See Richard Re, *The Doctrine Formally Known as "Statutory Standing"*,

Court also clarified that, despite inconsistent treatment, inquiries into generalized grievances concern Article III standing.¹²⁶ The Court in *Bond*, merely three years before, not only never spoke of the zone-of-interests test nor framed its discussion as concerning causes of action, but specifically distinguished prudential standing from a cause-of-action inquiry.¹²⁷ Thus, it is unclear whether a prudential-standing or a cause-of-action inquiry (or both) applies to structural challenges.

Although the shift from standing to causes of action may be merely cosmetic in some contexts,¹²⁸ the more thorough inquiry for causes of action is preferable here. Standing focuses on a particular plaintiff, asking whether the plaintiff at bar is the proper person to assert a cause of action that is available to someone.¹²⁹ The cause-of-action inquiry, in contrast, focuses more broadly on whether the (or any) plaintiff has a right whose violation warrants judicial remedy.¹³⁰ As we shall see, speaking in terms of not only rights but also remedies, as causes of actions do, better reveals how regulated parties' ability to assert structural challenges fits with existing doctrine, permits a broader consideration of justiciability arguments, and allows judicial flexibility to refashion the breadth of these challenges through substantive doctrine and remedies. I pursue this more robust cause-of-action inquiry in Parts II and III.

3. Pyrrhic and Minimal Remedies

Judicial remedies for structural violations often betray courts' solicitous attitude towards structural challenges. As I have argued elsewhere, courts often fail to provide remedies that satisfy key remedial values, such as compensating for past harm, providing full prospective enforcement of the underlying right, incentivizing parties to seek redress, and deterring structural defects.¹³¹ These inadequate remedies derive from courts' penchant in structural cases for minimalistic remedies,¹³² whether through severance of offending provisions, remedial-mitigation doctrines, or stays to avoid enforcement.

Courts often use severance to mitigate the remedial effects of structural defects. For instance, the Court in *Bowsher v. Synar*,¹³³ held that Congress could not remove

RE'S JUDICATA (Aug. 27, 2014, 2:30 PM) <https://richardresjudicata.wordpress.com/2014/08/27/the-doctrine-formerly-known-as-statutory-standing/> [<https://perma.cc/2TUF-YQ58>]; see also *Lexmark Int'l*, 134 S. Ct. at 1387 n.4.

126. See *Lexmark Int'l*, 134 S. Ct. at 1387 n.3.

127. See *Bond v. United States*, 131 S. Ct. 2355, 2362–63 (2011).

128. See Huq, *supra* note 20, at 1515 n.321 (“To my mind, nothing particularly significant seems to rest on the formulation of the issue as one of standing rather than a cause of action.”).

129. See *Warth v. Seldin*, 422 U.S. 490, 500–01 (1975); Mary Siegel, *The Implication Doctrine and the Foreign Corrupt Practices Act*, 79 COLUM. L. REV. 1085, 1088 n.18 (1979) (“A cause of action is distinguishable from standing, because a cause of action denotes that some party may sue under the statute, while standing focuses on whether the plaintiff has an interest sufficiently adverse to create a ‘case or controversy.’”).

130. See *Bellia*, *supra* note 84, at 781; Siegel, *supra* note 129, at 1088 n.18.

131. See *Barnett*, *supra* note 23.

132. See *id.* at 536.

133. 478 U.S. 714 (1986).

the Comptroller General, who performed the executive function of deciding which spending cuts the President was required to implement, without impeding the President's supervisory powers under Article II.¹³⁴ The Court relied upon an express "fallback" provision in the Balanced Budget and Emergency Deficit Control Act of 1985 that, if the statute were deemed unconstitutional, called for the Comptroller General to lose his executive powers and allowed the budget-cutting process to continue without him.¹³⁵ Courts may also infer Congress's preference for severance. Take *Free Enterprise Fund*, the decision in which the Court invalidated the PCAOB members' two layers of protection from presidential oversight. There, the Court inferred that Congress would prefer the severance of one of those layers and permit the remainder of the statute to remain "fully operative."¹³⁶ The D.C. Circuit more recently extended *Free Enterprise Fund*'s inferred severance remedy in response to the unconstitutional appointment of Copyright Royalty Judges¹³⁷ because it sought to create "as little disruption as possible."¹³⁸

Remedial-mitigation doctrines and stays of judgment also play a role. The Court has done so mostly with Appointments Clause violations. In severance's place, the Court has turned to the de facto *officer* and different, though related, de facto *validity* doctrines to mitigate the effect of a structural defect. The de facto *officer* doctrine, although applied several times to prevent administrative chaos, is narrow.¹³⁹ It validates the actions of an officer whose appointment, as determined on collateral judicial review, violated statutory law.¹⁴⁰ For constitutional challenges brought on direct review, the Court has applied, yet later called into question,¹⁴¹ the de facto *validity* doctrine. Without any briefing from the parties,¹⁴² the Court in *Buckley v. Valeo* applied the doctrine after finding that all of the Federal Election Commissioners' appointments were unconstitutional.¹⁴³ The Court held that the FEC's past acts had "de facto validity" and allowed the Commissioners to continue functioning fully during a thirty-day stay that the Court granted Congress to reconstitute the FEC.¹⁴⁴ The Court also stayed its judgment in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* and granted an extension at the Solicitor General's request¹⁴⁵ to give Congress time to refashion a bankruptcy system that complied with Article III.¹⁴⁶

134. *Id.* at 733–34, 736.

135. *See id.* at 718–19, 734–36.

136. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 481 (2010) (quoting *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987)).

137. *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1334 (D.C. Cir. 2012), *cert. denied*, 133 S. Ct. 2735 (2013).

138. *Id.* at 1336–37.

139. *See Ryder v. United States*, 515 U.S. 177, 180 (1995); Barnett, *supra* note 23, at 527.

140. *See Ryder*, 515 U.S. at 180–83.

141. *See id.* at 183–84.

142. *See Barnett*, *supra* note 23, at 530.

143. 424 U.S. 1 (1976) (per curiam).

144. *Id.* at 142.

145. *See N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 459 U.S. 813 (1982) (mem.).

146. *See Barnett*, *supra* note 23, at 535.

The meaninglessness of these remedies for structural challengers may be most apparent in *Free Enterprise Fund* and *Buckley*. In *Free Enterprise Fund*, the regulated party prevailed in its Article II-based structural challenge to the agency that had begun investigating its activities. The Court's severance-based remedy failed to compensate the prevailing party for past injury, failed to stop the agency from acting, returned the prevailing party to an investigation before officers whose very legitimacy it had successfully questioned, failed to ensure that any taint from the unconstitutional investigation would not impact future events, and failed to see that Congress and the President—who created the constitutional violation—had to take responsibility for violating Article II by enacting curative legislation. The prevailing parties in *Buckley* received a more insulting remedy. Despite the blatantly unconstitutional appointment of all FEC commissioners,¹⁴⁷ the prevailing parties were not entitled to compensation or other injunctive relief for the agency's past action (any sovereign immunity notwithstanding) because the past actions were de facto valid and the agency was allowed to continue functioning fully for another thirty days.¹⁴⁸

These inadequate remedies betray the Court's paeans to structural safeguards. Regulated parties' interests or rights in structural safeguards do not appear as important as the Court's rhetoric proclaims. As the importance of the rights begins to fall away, the case for structural litigation becomes less compelling.

4. Political Questions

Unlike most other justiciability doctrines, the modern political question doctrine allows courts to ignore constitutional questions altogether—no matter who brings suit, no matter whether proper remedies are available, and perhaps no matter how patently unconstitutional a government action is.¹⁴⁹ The doctrine prevents judicial review when there exists:

a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment

147. Congress knowingly ignored the arguments that the appointments were blatantly unconstitutional. See, e.g., H.R. REP. NO. 93-1239, at 137–38 (1974); *Various Measures Relating to Fed. Election Reform: Hearings Before the Subcomm. on Privileges and Elections and the Comm. on Rules and Admin. on S. 23, S. 343, S. 372, S. 1094, S. 1189, S. 1303, S. 1355 & S.J. Res. 110*, 93d Cong. 352–54 (GAO memorandum); *Hearings Before the Subcomm. on Elections of the Comm. on House Admin. on H.R. 7612, S. 372, and Related Election Reform Bills*, 93d Cong. 141, 161, 192, 229.

148. See *id.* at 530–34.

149. See *Nixon v. United States*, 506 U.S. 224, 253 (1993) (Souter, J., concurring) (noting that judicial review may be appropriate for unusual circumstances in impeachment trials).

from multifarious pronouncements by various departments on one question.¹⁵⁰

This humorously vague, multi-headed doctrine is, in Erwin Chemerinsky's words, "the most confusing of the justiciability doctrines," becoming as unmanageable as the standards that it eschews.¹⁵¹

What is more, the Court has applied it inconsistently to structural matters. It has applied the doctrine to, among other things, the Republican "Guaranty Clause,"¹⁵² various constitutional claims arising from elections and redistricting,¹⁵³ certain matters concerning foreign relations,¹⁵⁴ congressional proceedings,¹⁵⁵ cases concerning military training,¹⁵⁶ and matters related to impeachment-trial procedure.¹⁵⁷ But the Court has refused to apply it to cases concerning the exclusion of elected members from sitting in the House¹⁵⁸ and the Origination Clause.¹⁵⁹ And the Court has addressed the merits of nondelegation, removal power, standard and recess appointments, and Article III challenges—those that are most germane to regulated parties and the administrative state—without mentioning the doctrine. Jesse Choper has urged the Court to apply the doctrine to these areas, too,¹⁶⁰ leaving them to "the national political process."¹⁶¹

Instead of addressing all structural challenges as Choper did, Huq has recently invoked the doctrine for cases concerning only the presidential removal power. He argues that the Court has not developed judicially manageable standards for resolving these disputes.¹⁶² In brief, he challenged the Court's two premises in *Free Enterprise Fund*: (1) the President's ability to remove officers gives the President control, and (2) presidential control leads to democratic accountability.¹⁶³ He argued that the removal power can work against presidential control because bureaucrats may seek to take more modest actions to prevent losing favor with later administrations and that removal may be too blunt an instrument for control when the President, with informational asymmetries, may not know which matters were within officials' control.¹⁶⁴ Removal, too, can have high transaction costs.¹⁶⁵ As for

150. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

151. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 128–30 (2d ed. 2002).

152. *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849).

153. See CHEMERINSKY, *supra* note 151, at 135–38.

154. See *id.* at 138–40.

155. See *id.* at 140–43.

156. *Gilligan v. Morgan*, 413 U.S. 1 (1973).

157. *Nixon v. United States*, 506 U.S. 224 (1993).

158. See *Powell v. McCormack*, 395 U.S. 486 (1969).

159. See *United States v. Munoz-Flores*, 495 U.S. 385 (1990).

160. See CHOPER, *supra* note 29, at 263 ("The federal judiciary should not decide constitutional questions concerning the respective powers of Congress and the President vis-à-vis one another.").

161. *Id.*

162. See Huq, *supra* note 27.

163. See *id.* at 6.

164. See *id.* at 37–38.

165. See *id.* at 41–42.

control leading to political accountability, Huq argued that Congress's budget-setting powers and committee oversight can render it difficult to tell who's to blame for agency action or inaction.¹⁶⁶ Moreover, voting is an ineffective method of signaling preferences on an "unfettered range of federal administrative actions."¹⁶⁷

II. THE NECESSITY OF JUDICIAL REVIEW

Despite the significant justiciability concerns, structural challenges should be justiciable. As a preliminary matter, courts should not apply the political-question doctrine. Instead, they should presume that judicial review of individual challenges is proper because political branches (based on their partisan and policy-based decision making) cannot serve as structural defenders. Relatedly, the branches themselves cannot litigate structural defects, as Huq would have them do, without encountering doctrinal, constitutional, and pragmatic obstacles. The branches' weakness as structural protectors in and out of court demonstrates the importance of addressing the justiciability of regulated parties' challenges.

A presumption of judicial review is sound and important. It provides a background norm in assessing whether courts, in the face of ambiguity, should craft justiciability doctrine in favor of review. Notwithstanding contrary suggestions, Part III argues that regulated parties' structural challenges rest relatively well with current justiciability doctrine. But even if others are prone to conclude otherwise, this presumption provides a normative reason for resolving doubts in favor of judicial review. For the reasons that follow, judicial review of regulated parties' structural claims is vital because the political branches, contrary to other scholars' assertions, cannot serve as faithful defenders of structural protections.

A. Political Branches' Lack of Institutional Incentive

Jonathan Siegel has made the institutional case for judicial review in the face of revived calls for "popular constitutionalism."¹⁶⁸ He concludes that the alternatives to judicial review—the electoral and the political/legislative processes—are worse for several reasons. As a preliminary matter, using the electoral process is impractical because of problems with engaging a majority of voters in relatively unimportant issues or even key civil-rights matters that don't directly affect them or a popular group (such as Eighth Amendment rights for prisoners) and because of the costs in electoral campaigning.¹⁶⁹ Likewise, theoretical differences exist between judicial review, on one hand, and electoral and political action, on the other. Judicial review is more focused,¹⁷⁰ more transparent,¹⁷¹ more appropriate for protecting the rights of

166. *See id.* at 53–56.

167. *Id.* at 64; *see also* Jonathan R. Siegel, *The Institutional Case for Judicial Review*, 97 IOWA L. REV. 1147, 1165–69 (2012) (discussing practical difficulties of using electoral process to remedy constitutional violations).

168. *See generally* Siegel, *supra* note 167.

169. *See id.* at 1167–69.

170. *See id.* at 1169–70, 1178–80.

171. *See id.* at 1171–74, 1180–82.

minorities,¹⁷² and available for individual litigants without collective action.¹⁷³ Moreover, judicial review is based on precedent, giving “rights” a more established character than when enforced through discretionary legislative or electoral processes.¹⁷⁴ Because of the courts’ institutional advantage in addressing constitutional violations, courts should invoke doctrines that prevent judicial review with care.

But Choper suggests that courts’ institutional advantages are inapplicable to structural challenges. The political branches, he argues, have sufficient political tools to guard their boundaries “jealously.”¹⁷⁵ Focusing on executive incursions into the legislative domain, Choper argues that Congress has the ability to resist executive aggrandizement through, as most relevant to the discussion here, its appropriation power,¹⁷⁶ refusal to enact law,¹⁷⁷ refusal to confirm appointments,¹⁷⁸ and impeachment.¹⁷⁹ Because of these tools, separation-of-powers challenges, he argues, should be “nonjusticiable.”¹⁸⁰ Moreover, he argues that the electorate is the “ultimate political weapon against consequential separation of powers violations.”¹⁸¹

Contrary to Choper’s foundational premise, the branches often don’t jealously guard their boundaries and thus don’t use the constitutional weapons at their disposal when structuring agencies. One needs simply to consider successful structural challenges to find supporting evidence. Consider that the President agreed to the defects that the courts have identified in the appointments in *Buckley* and *Intercollegiate Broadcasting System*, the removal power in *Free Enterprise Fund* and earlier cases, and the “legislative veto” in *Chadha*, although these defects limited executive power. Likewise, in the two cases in which the Court found a nondelegation violation,¹⁸² Congress enacted legislation that gave away its legislative power. And the courts have generally been exceedingly leery of finding Article III violations at all in the context of agency adjudication,¹⁸³ suggesting hesitation from even the judicial branch. To be sure, Congress and the President have

172. *See id.* at 1174–75, 1186–87.

173. *See id.* at 1175–76, 1187–88.

174. *See id.* at 1182–84.

175. CHOPER, *supra* note 29, at 275.

176. *See id.* at 282–85.

177. *See id.* at 285.

178. *See id.* at 285–86.

179. *See id.* at 286–88.

180. *Id.* at 263; *see also* Shane, *supra* note 30 (arguing that the Court should abstain under the political question doctrine from recess-appointment challenges).

181. CHOPER, *supra* note 29, at 311.

182. *See* *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

183. *See* *CFTC v. Schor*, 478 U.S. 833 (1986); *see also* Rafael I. Pardo & Kathryn A. Watts, *The Structural Exceptionalism of Bankruptcy Administration*, 60 UCLA L. REV. 384, 417–18, 452–60 (2012) (noting that the Supreme Court in *Stern* appears to grant Congress more room to assign adjudications to agencies than legislative courts); Joshua I. Schwartz, *Nonacquiescence*, *Crowell v. Benson*, and *Administrative Adjudication*, 77 GEO. L.J. 1815, 1882 (1989) (“This ‘public rights doctrine’ appears to afford Congress freedom to commit resolution of disputes between the government and private entities either to the article III courts or to other tribunals—‘legislative courts’ or administrative agencies.”).

taken adversarial positions in some circumstances, but these have almost always been in the context of foreign relations, war powers, or criminal activity within the executive branch.¹⁸⁴ The administrative state's architecture has failed to engender the same adversarial positioning.

Instead, partisanship often subsumes the political branches. Daryl Levinson and Rick Pildes have demonstrated that James Madison's institutional-competition model¹⁸⁵ has given way to government organized not by branch, but by political parties.¹⁸⁶ The branches do not have "wills" of their own; instead, the branches only have their respective members' (including the President's¹⁸⁷) ideological or political goals.¹⁸⁸ Divided government should generally lead political parties and the branches to have aligned interests as each party seeks to achieve different aims or limit the other party's (and branches') victories. Likewise, unified government should cause interbranch competition to wane.¹⁸⁹ Since 1832, the government has more often been unified than divided,¹⁹⁰ meaning that the competing-branches model of U.S. government is more often fictional than real. And even during divided government, the President has weakened the executive branch. For instance, the unconstitutional appointment in *Buckley*, the improper grant of removal power to Congress in *Bowsher*, and the improper tiered protections from removal in *Free Enterprise Fund* were all enacted during times of divided government.¹⁹¹ In addition, the electorate's limited concern for structural matters and its practical inability to influence structural matters, as Siegel notes, render it unlikely that the electorate will become the valiant protector of structural safeguards.¹⁹² Because institutional incentives do not necessarily align with political ones, it is far from clear that the judicial branch, as Choper argues, should abstain from deciding structural challenges.

184. See CHOPER, *supra* note 29, at 282–308.

185. See THE FEDERALIST No. 51, at 319 (James Madison) (Clinton Rossiter ed., 2003) (“Ambition must be made to counteract ambition.”).

186. See Levinson & Pildes, *supra* note 32, at 2312, 2313. Others have made similar observations about the states' failure to advocate for their own interests under our federalist system. See, e.g., Miriam Seifter, *Federalism at Step Zero*, 83 *FORDHAM L. REV.* 633, 648 (2014) (noting that “state officials have numerous reasons—ideology, political needs, fiscal concerns, personal gain, and more—to depart from the federal structure”).

187. See Levinson & Pildes, *supra* note 32, at 2322.

188. See *id.* at 2317–18.

189. See *id.* at 2329; see also *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2605 (2014) (Scalia, J., concurring) (“Senators may have little interests in opposing Presidential encroachment on legislative prerogatives, especially when the encroacher is a President who is the leader of their own party.”).

190. See Levinson & Pildes, *supra* note 32, at 2330.

191. The Federal Election Commission Act of 1971 was enacted by a Democratic legislature and Republican President, the Gramm-Rudman-Hollings Act of 1985 was enacted by a Republican President and Senate with a Democratic House, and the Sarbanes-Oxley Act of 2002 was enacted by a Republican President and House and a Democratic Senate.

192. See Siegel, *supra* note 129, at 1167–69; see also CHOPER, *supra* note 29, at 311. Despite the limited salience of structural defects, I identify the President's removal power over high-level officers as a structural safeguard whose effects (but not its violation) could be meaningful to the electorate. See *infra* notes 207–208 and accompanying text.

Huq's narrower call to deem removal-power cases nonjusticiable is more compelling. Although Choper does not clarify the precise ground for nonjusticiability, Huq identifies the Court's problem as its inability to create "judicially discoverable and manageable standards" for achieving the constitutional good of political accountability (via the President's control over subordinates).¹⁹³ Recall that Huq challenged the removal power's relationship with presidential control because of bureaucratic timidity, informal asymmetries, and transaction costs.¹⁹⁴ Recall, too, that he challenged control's relationship with political accountability because of Congress's influence over agencies and the limited ability of the electorate to signal displeasure with the President's oversight of the administrative state.¹⁹⁵ Because of what he viewed as the unsound premises underlying the Court's removal-powers jurisprudence, he called for the political question doctrine to apply. Although having some merit, Huq's arguments are not wholly satisfying because the power to remove is likely more robust than he argues (at least when the President hasn't permitted Congress to limit the President's power to remove agency officials), suggesting that the President's inattention to the removal power in initial agency structuring is misplaced.

First, bureaucratic timidity seems unlikely for many politically salient officers. Political appointees (and thus higher-level officers) are unlikely to be timid merely to retain their jobs with incoming administrations. This is because they are unlikely, by tradition, to remain at their positions when another party takes over.¹⁹⁶ Former Secretary of Defense Bob Gates's service under the Bush and Obama Administrations, for example, was noteworthy because of its rarity.¹⁹⁷ Indeed, the officers seem likely to go along with current presidential preferences to curry favor for better positions within the administration, to show loyalty that could appeal to later administrations of the same party,¹⁹⁸ or to obtain presidential protection from congressional reprisal.¹⁹⁹ Lower-level officials may have more incentive to act timidly because they seek to be career bureaucrats. Yet, even for them, many are subject to removal for insubordination by failing to fulfill higher-up officials' policy preferences.²⁰⁰ Thus, removal (whether at will or for cause) can allow the President

193. Huq, *supra* note 27, at 22 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

194. *See supra* notes 164–165 and accompanying text.

195. *See supra* notes 166–167 and accompanying text.

196. *See* David Fontana, *The Second American Revolution in the Separation of Powers*, 87 TEX. L. REV. 1409, 1410 (2009).

197. Peter Baker & Thom Shanker, *Obama Planning to Retain Gates as Defense Chief*, N.Y. TIMES, Nov. 26, 2008, at A1.

198. To be sure, Presidents, even without at-will removal power, can obtain significant influence over independent agencies because of budgeting, regulatory coordination, and chairmanship-appointment powers. *See* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 30 (2010); Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 818–23 (2013). It is hard to see how the President's power over officers whom he can remove at will is any weaker.

199. *See* Saikrishna Prakash, *How the Constitution Makes Subtraction Easy*, 92 VA. L. REV. 1871, 1877 (2006).

200. *See* Kent H. Barnett, *Avoiding Independent Agency Armageddon*, 87 NOTRE DAME L. REV. 1349, 1374–76 (2012) (discussing accepted view that insubordination is proper ground

to control them, too. This is not to say that bureaucratic timidity doesn't exist, but it is a dull sword for severing the connection between removal and control.

Second, Presidents can remedy their lack of information concerning executive officers' control over regulatory results. They can seek to educate themselves about how the decision-making process works, the legal regime in which the decision-making occurred, and the external constraints influencing the officer's action. Doing so should not become too onerous considering the rarity of threatened removals.²⁰¹ Indeed, the removal power itself is one of many tools that the President (and senior officers) can use to obtain information relevant to supervisory decisions. Thus, the removal power can have a role to play in informational gathering and in controlling bureaucrats' actions.²⁰²

Third, the significant transaction costs in and rarity of removing an official do not prevent removal—"a doomsday machine"²⁰³—from being effective.²⁰⁴ As Brigham Daniels has argued in the context of agencies' use and threat of "regulatory nukes" (such as revoking a broadcasting license or an entity's tax-exempt status) under a game-theory model, nuclear powers provide leverage less through their use than through their existence and threatened use.²⁰⁵ They allow policymakers, in other words, to get their way without incurring the political costs of detonating the nuke. This same phenomenon appears to exist with the removal power. Presidents rarely have to remove officials; the mere threat of removal encourages resignations.²⁰⁶

Fourth, the removal of senior officials, unlike almost all other structural matters, may be sufficiently salient to affect political accountability. As discussed above, one should be generally skeptical of achieving political accountability through electoral or lobbying efforts when low-salience matters or minority rights are at issue. But the removal or resignation of salient officials, including Cabinet Secretaries, can influence public attitudes of the President as the CEO-in-chief by mitigating his association with bureaucratic incompetence or wrongdoing. The removal power provides a tool for obtaining resignations and thereby allows the President to be

for removal limited to "good cause").

201. See Thomas O. Sargentich, *The Emphasis on the Presidency in U.S. Public Law: An Essay Critiquing Presidential Administration*, 59 ADMIN. L. REV. 1, 8 (2007) (noting "an outer limit on the number or frequency of terminations that any administration can tolerate without suffering the negative political repercussions of instability").

202. And, of course, the removal power can also serve as a partial antidote to bureaucratic drift. See Glenn Sulmasy & John Yoo, *Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror*, 54 UCLA L. REV. 1815, 1826 (2007).

203. Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943, 957 (1980).

204. See Barkow, *supra* note 198, at 30 (noting that removal is "politically costly for presidents").

205. See Brigham Daniels, *When Agencies Go Nuclear: A Game Theoretic Approach to the Biggest Sticks in an Agency's Arsenal*, 80 GEO. WASH. L. REV. 442, 445–46, 504 (2012).

206. See Barkow, *supra* note 198, at 30; Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1149–50 (2000).

“doing something” about governmental problems.²⁰⁷ Recent examples abound.²⁰⁸ To be sure, retaining or removing any one official is unlikely to affect many voters. But the removal power allows the President to shape the composition of the executive branch and help control the narrative that surrounds the President’s administration and his or her political party’s performance. The historical practice of encouraged resignations (likely obtained under the Damocles Sword of removal) suggests, at the very least, that presidents view removal as influencing political accountability.

All of this is not to say that the Court has correctly understood the importance of the removal power; correctly concentrated on this one executive power to the exclusion of other powers, values, and political dynamics in drawing Article II boundaries; or correctly decided *Free Enterprise Fund*. Nor is all of this to undermine Huq’s useful insight into the limitations on the Court’s Article II jurisprudence. My claim is modest. The removal power has some relationship to both control and accountability even if it is weaker than the Court or certain scholars suggest, and it suggests that the President should care about limitations on the removal power when structuring agencies. Moreover, even if *Free Enterprise Fund*’s reasoning is not satisfying (especially in the context of tiered protection from removal²⁰⁹), it does not follow that the removal power is always insignificant, that manageable standards for removal-power controversies do not exist, or—perhaps most importantly here—that judicial review is undesirable in all cases.

B. Concerns with Branches as Litigating Parties

Aside from lacking institutional incentives, the branches (or the members that comprise them) cannot assert structural challenges—as Huq advocates in almost all structural cases—without doctrinal, constitutional, and pragmatic concerns.²¹⁰ The

207. See Harold J. Krent, *From a Unitary to a Unilateral Presidency*, 88 B.U. L. REV. 523, 527 (2008) (“The power to remove an official is emblematic of a continuing relationship between the President and subordinate officials and, in the public eye, links those officials’ conduct to the Presidency itself.”).

208. See, e.g., Dave Boyer & Jacqueline Klimas, *Eric Shinseki Is Out! Obama Sacks Veterans Affairs Secretary*, WASH. TIMES, May 30, 2014, <http://www.washingtontimes.com/news/2014/may/30/eric-shinseki-out-obama-sacks-veterans-affairs-sec/?page=all> [<https://perma.cc/BP43-SMRK>] (noting that Obama accepted Secretary Shinseki’s resignation after meeting with him and agreeing that resignation was partly political “to deal with Congress and [the Press]”); Helene Cooper & David E. Sanger, *Obama Says Afghan Policy Won’t Change After Dismissal*, N.Y. TIMES (June 24, 2010), <http://www.nytimes.com/2010/06/24/us/politics/24mccrystal.html> [<https://perma.cc/8W4R-JERV>] (discussing President Obama’s firing of General Stanley A. McChrystal after McChrystal’s public criticism of Obama); Stephen Dinan, *Lois Lerner, IRS Official in Tea Party Scandal, Forced Out for ‘Neglect of Duties’*, WASH. TIMES, Sept. 23, 2013, <http://www.washingtontimes.com/news/2013/sep/23/lois-lerner-irs-official-tea-party-scandal-retires/?page=all> [<https://perma.cc/S97Z-NGBP>] (noting that IRS Official Lois Lerner retired after being warned that she would be fired).

209. Justice Breyer’s functionalist dissent is especially compelling on this point. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 526 (2010) (Breyer, J., dissenting).

210. Huq has proposed a rule that “[w]hen an individual litigant seeks to enforce a structural constitutional principle redounding to the benefit of an official institution, and there

Court has been consistently hesitant about allowing the branches and their individual members to serve as parties in litigation. The Court has worried that permitting such actions would lead courts to resolve purely political disputes. Moreover, the lack of institutional incentives for the political branches to guard their boundaries in the first instance also suggests that they would lack incentives to litigate. Branch-standing proponents overlook these doctrinal and institutional limitations,²¹¹ rendering their proposed solution more complicated than it first appears.

As noted earlier, most structural defects arise through legislation that satisfied bicameralism and presentment, meaning that both houses of Congress and the President agreed to the structure at issue.²¹² Accordingly, likely challengers would be the individual members of the affected branch who failed to convince their colleagues otherwise. But they lack standing. In *Raines v. Byrd*,²¹³ the Court held that individual senators and House members lacked standing to have the federal courts declare the Line Item Veto Act unconstitutional.²¹⁴ In so doing, the Court noted that awaiting lawsuits from private individuals, as opposed to politicians, keeps the courts out of political disputes.²¹⁵ Quoting Justice Powell's concurring opinion in *United States v. Richardson*, the Court argued that courts serve to protect individual citizens' constitutional rights and liberties, not to provide amorphous supervision for government action.²¹⁶ To support its position, the Court noted the historical practice by which legislative members, executive officials, and Presidents have not challenged legislation based on structural defects—including the limitations on the President's removal power in the Tenure of Office Act, the limitations on the Attorney General's authority based on the "legislative veto" at issue in *Chadha*, the FEC appointments in *Buckley v. Valeo*, and the President's pocket veto.²¹⁷

Moreover, allowing the branches themselves, as opposed to the individuals within the branch, to assert structural challenges presents its own problems. First, the *Raines* Court seems schizophrenic on the propriety of institutional standing. It relies upon

is no reason the latter could not enforce that interest itself, a federal court should not permit the individual litigant to allege and obtain relief on the basis of the separation of powers or federalism." Huq, *supra* note 20, at 1514. I have queried whether, if courts do not improve remedies in structural litigation, "only the branches of government themselves should have the ability to enforce . . . structural safeguards." Barnett, *supra* note 23, at 545.

211. See generally, e.g., Huq, *supra* note 20 (failing to address doctrinal difficulties of institutional standing for structural challenges).

212. See *supra* Part II.A.

213. 521 U.S. 811 (1997).

214. *Id.* at 813.

215. See *id.* at 827–28; see also *United States v. Windsor*, 133 S. Ct. 2675, 2704 (2013) (Scalia, J., dissenting) (noting the "opportunities for dragging courts into disputes hitherto left for political resolution are endless" if branches can seek judicial review for usurpations of the other branch); *Melcher v. Fed. Open Mkt. Comm.*, 836 F.2d 561, 565 (D.C. Cir. 1987) (denying review, on equitable grounds, of individual legislators' lawsuit even if private parties lacked standing); *Riegle v. Fed. Open Mkt. Comm.*, 656 F.2d 873, 881–82 (D.C. Cir. 1981) (noting that court would approve of congressional standing when private parties could not bring claim at issue).

216. *Raines*, 521 U.S. at 829 (quoting *United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring)).

217. See *id.* at 826–28.

the failure of the President (the head of the executive branch) and the Attorney General (the head of a department) to assert structural challenges in the past when arguing that the individual legislators lacked standing and suggests that such standing is improper under the “regime that has obtained under our Constitution to date.”²¹⁸ But, then cryptically, it “attach[ed] some importance to the fact that [the individual legislators] ha[d] not been authorized to represent their respective Houses of Congress in [the] action, and indeed both Houses actively oppose[d] their suit.”²¹⁹ How much importance attached is unclear, especially because the Court closed its opinion by saying that “[w]hether the case would be different if any of these circumstances were different [including if the Houses approved of the litigation], we need not now decide.”²²⁰ At the very least, institutional standing after *Raines* was of questionable propriety.²²¹

The Court’s recent decision in *Arizona State Legislature v. Arizona Independent Redistricting Commission*²²² further undermines branch standing. To be sure, the Court held that the Arizona legislature, as authorized by both legislative houses, had standing to challenge under the Elections Clause an independent redistricting commission’s power to set legislative districts.²²³ But, citing *Raines*, the Court carefully distinguished a state legislature’s standing from congressional standing: “The case before us does not touch or concern the question whether Congress has standing to bring a suit against the President. There is no federal analogue to Arizona’s initiative power, and a suit between Congress and the President would raise separation-of-powers concerns absent here.”²²⁴

But even if the federal political branches have standing, the Court’s jurisprudence suggests that the branches can serve, at most, as proper parties only when they are defending, as opposed to challenging, structural norms that the branches themselves enacted. When Congress has served as a party in litigation, the Court has blessed its service in defending legislation from a structural attack. This was the case in *Chadha*, where the executive branch sided with the private party who argued that the legislative veto violated bicameralism and presentment, and both Houses of Congress intervened as parties in the litigation to defend the legislative veto.²²⁵ Likewise, although not resolving whether the House had standing, the Court in *United States v. Windsor*²²⁶ relied upon the House of Representatives’ Bipartisan Legal Advisory Group’s (BLAG’s) intervention to defend the constitutionality of the Defense of Marriage Act (DOMA) when holding that the executive branch, despite its agreement with a challenging private party that DOMA was unconstitutional, had prudential standing.²²⁷ Justice Alito, in his dissenting opinion in *Windsor*, found that

218. *Id.* at 828.

219. *Id.* at 829.

220. *Id.* at 829–30.

221. See Tara Leigh Grove, *Standing Outside of Article III*, 162 U. PA. L. REV. 1311, 1326–27 (2014).

222. 135 S. Ct. 2652 (2015).

223. *Id.* at 2663–66.

224. *Id.* at 2665 n.12.

225. See *INS v. Chadha*, 462 U.S. 919, 939–40, 930 n.5 (1983).

226. 133 S. Ct. 2675 (2013).

227. *Id.* at 2686, 2688–89.

the BLAG had standing “to defend the undefended statute.”²²⁸ These opinions all suggest that legislative standing extends to the defense of enacted legislation but say nothing about standing to assert initial challenges.

Although space constraints prevent full discussion of institutional standing’s normative contours, doctrinal limitations make sense in light of circumscribed, enumerated powers under Articles I and II. As Tara Leigh Grove has recently argued, the President obtains standing in federal court based on his or her power under Article II to “take Care that the Laws be faithfully executed.”²²⁹ This power allows him or her to defend federal law and to refuse to enforce unconstitutional laws.²³⁰ But it doesn’t give the President standing, Grove argues, to challenge a federal statute merely to protect his or her own institutional or political interests.²³¹ The President does not need judicial standing to prevent the enforcement of an unconstitutional act; instead, he or she has the power to refuse to enforce or comply with it. Article I, for its part, does not grant Congress any enumerated power to challenge federal laws.²³² Instead, Congress has familiar tools to control what it views as structural defects—for instance, the House’s withholding of originating revenue bills,²³³ the Senate’s refusing to confirm executive officers,²³⁴ and both branches’ refusing to enact legislation that the President favors.²³⁵ Moreover, permitting lawsuits by only affected individuals ensures that the dispute is more than merely abstract and any judicial opinion more than advisory. By looking outside of Article III when considering institutional standing, it becomes apparent that allowing the branches to assert structural challenges would create, at the least, significant constitutional questions and upset longstanding historical practice with a defensible normative basis.

Finally, the same concerns that surround institutional incentives for the branches to monitor separation-of-powers boundaries²³⁶ likely also apply to litigation. Recall that partisanship and policy concerns affect how the branches look after their own interests in drafting legislation.²³⁷ Recall, too, that the branches would be less likely to protect their boundaries during times of unified government than during times of divided government.²³⁸ These same concerns should be expected to affect the branches’ decisions to litigate. The incentives for legislating and litigating are the

228. *Id.* at 2714 (Alito, J., dissenting).

229. *See* Grove, *supra* note 221, at 1314–15 (quoting U.S. CONST. art. II, § 3) (internal quotation marks omitted).

230. *See id.* at 1327, 1329–30.

231. *See id.* at 1326 (“The Supreme Court has never held that the executive has standing to assert an institutional interest in the enforcement of federal law or, relatedly, in protecting any other duties or powers conferred by Article II. In fact, the Court has suggested precisely the opposite: the executive lacks standing to protect its institutional concerns.”).

232. *See id.* at 1356, 1361. Indeed, Grove argues that, contrary to *Chadha* and *Windsor*, Article I does not allow Congress even to defend federal law.

233. *See* U.S. CONST. art. I, § 7, cl. 1.

234. *See* U.S. CONST. art. II, § 2, cl. 2.

235. *See* U.S. CONST. art. I, § 7, cl. 2.

236. *See supra* Part II.A.

237. *See supra* note 186 and accompanying text.

238. *See supra* note 189 and accompanying text.

same; it is merely the nature of the action that differs. Accordingly, substantial doctrinal and institutional-competence concerns suggest that reliance on the branches as litigants is misplaced.

Disallowing institutional standing does not mean that the branches cannot have a role in structural litigation when they are so inclined. As Huq has insightfully noted, structural litigation—which impacts the powers and rights of competing branches and individuals—is multipolar and thus “inevitably generates . . . spillovers to unrepresented parties.”²³⁹ Allowing the branches to serve as amici and present their views, as the Court has done,²⁴⁰ addresses much of this concern because it allows courts to account more easily and thoroughly for the various interests involved. To be sure, amici do not control when to sue, factual development, or the framing of legal issues.²⁴¹ But given the Court’s current receptiveness to interlocutory structural challenges²⁴² and formalism, it is far from clear that any narrowing of legal issues is necessary or that factual development has much effect on the resolution of the structural questions.

III. REGULATED PARTIES’ CHALLENGES SHOULD BE JUSTICIABLE

Regulated parties have Article III standing to assert structural challenges, despite causation and redressability concerns, because these challenges are akin to procedural challenges for which Article III relaxes or ignores its otherwise mandatory desiderata. Likewise, regulated parties can also establish causes of action because they are within the structural provisions’ zone of interests and because history provides no compelling basis for holding otherwise. In short, their challenges, contrary to others’ arguments, rest comfortably with existing doctrine.

A. Article III Standing

Not only do regulated parties serve as better guardians of structural protections than the branches, but the Article III causation and redressability concerns surrounding their structural challenges are not meaningful because of their procedural complexion. The Court relaxes (or ignores) these two traditional Article III standing requirements for procedural challenges to agency action. If it did not do so, the mere possibility of a different outcome in continued or later proceedings would, under *Simon*, be insufficient to establish standing.²⁴³ Structural challenges should be understood as analogous to procedural challenges because both kinds of challenges concern values related to how and who within the government acts, not substantive outcomes.

239. Huq, *supra* note 20, at 1469; *see id.* at 1469–72.

240. *See* Grove, *supra* note 221, at 1361.

241. *See* Huq, *supra* note 20, at 1507–08. Huq also argues that allowing the branches to serve as amici does not solve causation and redressability problems for Article III standing. *Id.* at 1508. But, as described *infra*, the lack of causation and redressability is not meaningful for structural rights. *See* Part III.A.

242. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010) (addressing legal challenge before agency proceedings had concluded).

243. *See supra* text accompanying notes 95–98.

When understood as analogous to procedural challenges, structural challenges fit well within existing standing doctrine (notwithstanding *Bond*). This is important. Huq, in seeking to limit individual structural challenges, readily concedes that his proposal is inconsistent with *Bond* and several other cases.²⁴⁴ But recall that he contends that *Bond*, which permits individual standing, does not fit as comfortably with current standing doctrine as his proposal for more muscular institutional standing.²⁴⁵ Not only did Part II, *supra*, identify significant concerns over institutional standing, but this Part concludes that Huq is mistaken as to justiciability.

1. Relaxed Article III Desiderata for Procedural Challenges

Article III does not require causation and redressability (nor even injury in fact) in all cases. In a footnote after outlining the three-part Article III test, the *Lujan* Court deemed procedural rights “special” because one asserting a procedural right need not meet all the “normal standards for redressability and immediacy.”²⁴⁶ The Court then gave an example in which a challenger who lived next to a proposed federally-licensed dam could challenge an agency’s failure to prepare an environmental impact statement, as required by statute.²⁴⁷ Presumably the challenger’s injury in fact would include the aesthetic or economic harm from having to live next to a dam. This challenge would be permissible despite, as the Court admitted, a lack of a causal connection between the statement’s preparation (the procedure at issue) and whether the dam would be built (the substantive decision that creates the injury in fact).²⁴⁸ And, relatedly, a judicial order that required the agency to prepare the statement would not necessarily redress the challenger’s harm in fact because the dam could be built after the agency prepared it. The Court reaffirmed the procedural-challenge exception in *Massachusetts v. EPA*, holding that standing exists “if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant.”²⁴⁹

Evan Tsen Lee and Josephine Mason Ellis have identified an even more striking example under the Freedom of Information Act (FOIA).²⁵⁰ FOIA allows “any person” to obtain nonexempt records if properly requested.²⁵¹ The requesting party can obtain the documents for any reason, including idle curiosity.²⁵² If the request is denied, the curious party could sue to obtain the documents.²⁵³ The denial would not create an injury in fact because hindering one’s curiosity would, under the Court’s doctrine, very likely not constitute a sufficiently concrete or otherwise cognizable

244. Huq, *supra* 20, at 1515.

245. *See id.* (“[M]y proposed rule fits more comfortably with current standing doctrine than *Bond*.”).

246. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992).

247. *Id.*

248. *See id.*

249. 549 U.S. 497, 518 (2007) (citing *Lujan*, 504 U.S. at 572 n.7).

250. *See Lee & Ellis, supra* note 84, at 193–201.

251. *See id.* at 194 (quoting 5 U.S.C. § 552(a)(3)(A) (2006)).

252. *See id.* at 194, 173 n.18.

253. *See id.* at 194.

harm.²⁵⁴ Moreover, the mere violation of one's legal right to obtain documents is not an injury in fact, but a mere (and, since 1970, irrelevant) legal injury. Because there need not be any harm, there is no causation between the nonexistent injury-in-fact and the complained-of action, and a judicial order requiring the government to grant the request does not (and cannot) redress the nonexistent injury in fact.²⁵⁵

The procedural exception—although rarely expressed as such before *Lujan*—has established provenance in judicial review of administrative agencies. Under a well-enshrined principle from *SEC v. Chenery*, courts can uphold agency action only on the grounds upon which the agency relied.²⁵⁶ If the court does not uphold the agency action, the court generally must remand to the agency for the agency to reconsider its decision.²⁵⁷ The judicial remedy provides the prevailing party a chance for the agency to change its decision and thus a chance to cure its injury in fact. But the remedy does not guarantee it because “most petitioners have at most a slim chance their underlying injury will ever be redressed.”²⁵⁸ Ultimately, had *Lujan* not recognized a procedural exception, *Lujan* would have “imposed a constitutional obstacle to most ordinary administrative law cases.”²⁵⁹

The procedural-rights exception makes sense because requiring redressability misses the point of procedural rights. “[P]rocedural rights have only speculative consequences for a litigant.”²⁶⁰ They do not exist, as Cass Sunstein has pointed out, to “dictate outcomes but to . . . produce certain regulatory incentives.”²⁶¹ Unless the Article III desiderata are relaxed, judicial review would be absent. The consequence is that the regulatory incentives for better decision making, accountability, transparency, and fairness, among other values, lose their force. Regulated parties' procedural rights—such as the rights to provide comments on pending rules to the agency, to have the agency follow self-enacted rules, to require the agency to disclose certain information publicly, or to appear before unbiased fact-finders—would be nothing but platitudes whose enforcement depends upon the whim of the administering agency.

Moreover, allowing these procedural challenges to proceed is consistent with broader historical practice.²⁶² Public actions, whereby private parties seek to vindicate public interests and limitations on government action without establishing injury in fact, were features of English and early American law.²⁶³ This was so even after the enactment of the Federal Constitution, which requires a “case or

254. *See id.* at 196.

255. *See id.* at 197.

256. 318 U.S. 80, 88 (1943).

257. *See id.* at 95.

258. *See Lee & Ellis, supra* note 84, at 202.

259. Sunstein, *supra* note 84, at 208.

260. *Id.* at 225.

261. *See id.* at 226.

262. *See Lee & Ellis, supra* note 84, at 229.

263. *See id.* at 174; *see also supra* note 84. Likewise, “[f]airness, as a property of procedural schemes, may also be a value that generates rights that do not necessarily promote the interests of particular right-holders in either a well-being or an agency sense.” Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343, 355 (1993).

controversy” under Article III.²⁶⁴ Indeed, “there is no direct evidence that injury in fact or concrete interest was intended to be a constitutional prerequisite under Article III.”²⁶⁵

As a final matter, procedural rights can be reasonably defined. Procedural rights, as Sunstein argued, do not mandate *what* government does.²⁶⁶ Instead, the values that they seek to further relate to different matters: *how* government must act to implement policy and *who* within government can act. Within the former category are rules that, for example, require agencies to provide notice-and-comment opportunities or provide explanations of their decisions.²⁶⁷ Within the latter category are rules requiring an administrative law judge to preside over formal hearings²⁶⁸ or provisions that identify which agency has jurisdiction over a particular regulated party.²⁶⁹ In contrast, provisions that foreclose certain outcomes that affect regulated parties’ behavior—like triggers for deportation or those that concern elements for a civil violation—are substantive.

To be sure, these distinctions between substantive and procedural actions, as elsewhere in the law, are not without indeterminacy problems. Debates are almost certain to occur around the margins in the procedural-exception context, just as they do in the *Erie* choice-of-law context.²⁷⁰ For instance, how should one categorize statutory or regulatory rules of evidence? Although they concern how the government must prove its case, they are subject to harmless-error review, thereby leading courts to consider the likelihood of changed results on remand (and notions of causation and redressability, even if not in the standing context).²⁷¹ Likewise, questions of an agency’s jurisdiction over certain subject matter may implicate not only who may regulate (for instance, as to which agency has authority to regulate the challenging party’s industry) but also what that agency may do (for instance, whether the agency can require certain industry disclosures even if other procedures are followed). This definitional indeterminacy gives me pause. But I take comfort in the fact that, despite more than twenty years passing since *Lujan*, courts have not appeared to face significant difficulty over categorization,²⁷² the solid footing upon

264. See, e.g., *Union Pac. R.R. Co. v. Hall*, 91 U.S. 343, 354 (1875) (allowing suit in which merchants sought to enforce “a duty to the public generally”); *Winter*, *supra* note 84, at 1394–95 (“[T]he English, colonial, and post-constitutional practices suggest that the contemporaneous understanding of the ‘case or controversy’ clause considered as justiciable actions concerning general governmental unlawfulness, even in the absence of injury to any specific person, and even when prosecuted by any common citizen . . .”).

265. Sunstein, *supra* note 84, at 173.

266. See *id.* at 226.

267. See 5 U.S.C. § 553(c) (2012).

268. See 5 U.S.C. § 556(b)(3) (2012).

269. See Kim B. Perez, Note, *The CFPB “Indirectly” Regulates Lending Through Auto Dealers*, 18 N.C. BANK. INST. 399 (2014) (discussing debate over CFPB’s ability to regulate auto dealers under the Equal Credit Opportunity Act (ECOA)). If not subject to the CFPB’s oversight, auto dealers would be subject to the Federal Trade Commission’s. See 15 U.S.C. § 1691(c) (2012).

270. See, e.g., Jay Tidmarsh, *Procedure, Substance, and Erie*, 64 VAND. L. REV. 877, 882–83, 896–904 (2011).

271. See, e.g., *Gunderson v. U.S. Dep’t of Labor*, 601 F.3d 1013, 1027 (10th Cir. 2010).

272. The majority in *Lujan* did not define “procedural rights.” Lee and Ellis defined the

which the procedural exception rests in administrative law based on *Chenery*, and the ubiquitous substantive-procedural divide throughout law.

2. Similarities Between Structural and Procedural Challenges

Structural rights share key characteristics with procedural ones found in statutes or regulations. None seek to mandate a particular outcome for any substantive decision. Instead, they seek to further other values. For instance, presentment and bicameralism seek to “protect[] residents of small states and minimiz[e] interest group influence.”²⁷³ The Appointments Clause, as another example, seeks to limit despotism (through what the Founders understood as the “insidious” appointments to office) and create accountability in appointing officials or branches.²⁷⁴ Judicial enforcement of these and other constitutional structural safeguards, like statutory or regulatory ones, does not mean that a prevailing party will always obtain relief for its injury in fact.²⁷⁵ It merely provides validation of the norm that seeks to further underlying values.

Procedural and structural rights further these values in similar ways. They seek to affect either values related to how a decision is reached²⁷⁶ or who can take a certain action. For example, the Bicameralism and Presentment Clauses and the Appointments Clause detail how to enact legislation and to appoint officers (and to some extent, who can legislate, sign legislation, and appoint). Similarly, the Vesting Clauses, the Recess Appointments Clause, and Impeachment Clause identify who can exercise judicial, legislative, and executive functions. None of these clauses require or prohibit any particular underlying policy decision. The same substantive policy that failed to undergo bicameralism and presentment (say, as particularly germane in 2015, immigration policies promulgated via questionable executive orders²⁷⁷) can gain force as legislation by following constitutional procedural

term as they understood Justice Scalia to have done—rights conferred by statute or regulation that are divorced from “‘real-world’ desiderata” and that may not “make any difference in the real world.” Lee & Ellis, *supra* note 84, at 174 n.21. But Justice Blackmun, in his *Lujan* dissent, lamented that the meaning of the term was far from clear and sympathized with “courts across the country that will struggle to understand the Court’s standardless exposition of this concept.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 601–02 (1992) (Blackmun, J., dissenting). I have not uncovered a decision in which the federal appellate courts, in the more than twenty years since *Lujan*, have had to grapple with the definitional problems in footnote seven, suggesting that the significant definitional problem that Justice Blackmun feared has not come to pass.

273. Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1761 (2002).

274. *Freytag v. Comm’r*, 501 U.S. 868, 883–84 (1991) (quoting GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787* 143 (1969)).

275. See *supra* notes 100–102 and accompanying text (discussing *Ryder* and proceedings after remand).

276. See *supra* text accompanying notes 260–261.

277. For example, the President’s executive actions concerning immigration have been the subject of much debate. See Michael Bargo, Jr., *Obama Shreds Constitution*, AM. THINKER (Nov. 24, 2014), http://www.americanthinker.com/articles/2014/11/obama_shreds_constitution.html [<https://perma.cc/KE7P-BFY7>].

requirements. An individual who was appointed by the wrong process, entity, or person can still be appointed by the constitutionally appropriate one. A matter that was improperly adjudicated in an Article I court can be adjudicated in an Article III court, and the Article III court can reach the same outcome as the Article I court. Congress can legislate the same norms that violate the nondelegation doctrine when the executive enacts them without sufficient legislative guidance. The President could retain or remove an officer that the legislative branch, without proceeding through impeachment proceedings, had attempted to retain or remove. In contrast, other limitations on government actions, principally those in the Bill of Rights and other constitutional amendments, concern what the government can substantively do: abridge the right to free speech, constrain the free exercise of religion, limit gun ownership, take property without reasonable compensation, or inflict cruel and unusual punishment. Although not free from all indeterminacy, the structural concept is established and cabined (especially because the structural provisions in the Constitution are necessarily limited in number) and thus may be even better defined than its “procedural” counterpart.²⁷⁸

Indeed, the D.C. Circuit and the Supreme Court’s discussion of harm in the context of structural safeguards reveals their similarity to procedural rights. In *Landry v. FDIC*, the D.C. Circuit rejected the government’s argument that a regulated party had to show prejudice from an administrative law judge’s alleged unconstitutional appointment.²⁷⁹ In so doing, the court noted that the Supreme Court in *Ryder* left open the question of whether harmless error could apply.²⁸⁰ But it noted that the Court had referred to separation-of-powers safeguards (including those arising under the Appointments Clause) as “structural.”²⁸¹ These structural errors require automatic reversal without regard to harm.²⁸² The Supreme Court, in fact, said that structural safeguards are not “a remedy to be applied only when specific harm, or risk of specific harm, can be identified.”²⁸³ Thus, treating structural challenges like procedural ones not only makes sense but even fits comfortably within separation-of-powers doctrine and rhetoric.

Finally, the courts’ relaxed (or absent) injury requirement for structural violations to federal administrative architecture is consistent with the relaxed injury requirement for “structural errors” in the judicial process. For instance, courts do not require a showing of causally-related harm for matters that go to the structure of a

278. The differences in statutory or regulatory procedural rights, on one hand, and constitutional structural rights, on the other, are not meaningful for Article III standing purposes. To be sure, they originated from different sources, and, as discussed above, may affect agencies in different ways. But these differences, alone, do not concern Article III standing. None of these differences affect whether the plaintiff has an injury in fact, whether the government had to follow some norm, or whether the harm could be cured on remand. Instead, these differences may affect whether the provision at issue conveys an express or implied private cause of action. *See infra* Part III.B.

279. 204 F.3d 1125, 1130–31 (D.C. Cir. 2000).

280. *See id.* at 1130 (citing *Ryder v. United States*, 515 U.S. 177, 182–83 (1995)).

281. *See id.* at 1130–31 (citing *Freytag v. Comm’r*, 501 U.S. 868, 878–79 (1991) and *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995)).

282. *See id.*

283. *Plaut*, 514 U.S. at 239.

judicial trial, including the appearance of impartiality of the judge, the denial of a criminal defendant's right to counsel, the exclusion of certain races from the jury, or the denial of a public trial.²⁸⁴ In all of these cases, the error concerns how the judiciary went about exercising its powers, but it does not assume that the court, when complying with structural protections, could not reach the same judgment as before. Likewise, structural challenges to the administrative state concern how (and who within) the government acts without suggesting that the government cannot, through proper means, orchestrate the same outcome. In sum, the Court routinely treats claims that concern how government or courts go about exercising their substantive powers as different in kind from other challenges.

To be sure, the Court has sometimes indicated that structural errors require no showing of harm because the presumed harm, often in criminal trials, is extremely likely.²⁸⁵ Errors concerning government architecture, the argument goes, may not warrant the same presumption of harm as in criminal matters and thus should not be deemed structural errors for which no harm is required. But the Court's stated likely-harm justification is questionable because presuming harm often presents its own problems or is unsound. For instance, successful *Batson* challenges concerning the exclusion of jurors based on their race are not subject to harmless-error review and call for an automatic new trial.²⁸⁶ But this remedy is very likely not actually based on presumed harm to the defendant.²⁸⁷ If it were, courts would have to presume that jurors of different races would reach different verdicts and would have to engage, thereby, in the very stereotyping of races (with notions of groupthink) that the *Batson* doctrine seeks to prevent.²⁸⁸ Relatedly, defendants are more likely, as the Court has recognized, to cause harm to themselves by demanding to proceed pro se in a criminal trial, instead of relying upon counsel.²⁸⁹ Despite the lack of any likely harm to the individual in having counsel, the violation of the individual's Sixth Amendment right to represent himself or herself is a structural error for which

284. See David A. Perez, *Deal or No Deal? Remediating Ineffective Assistance of Counsel During Plea Bargaining*, 120 YALE L.J. 1532, 1568–69 (2011).

285. See, e.g., Eric L. Muller, *Solving the Batson Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 YALE L.J. 93, 112 (1996) (discussing how the Court grounded its remedy of automatic reversal after right-to-counsel violation on the premise that an infected criminal trial “cannot reliably serve its function as a vehicle for determination of guilt or innocence”) (emphasis omitted) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991) (Rehnquist, C.J., for the Court in part and dissenting in part)).

286. See, e.g., *United States v. McFerron*, 163 F.3d 952, 955 (6th Cir. 1998) (“The government contends that even if the district court committed error [in rejecting the Defendant's *Batson* argument], we should consider such an error harmless. This suggestion has been resoundingly rejected by every circuit court that has considered the issue.”).

287. Cf., e.g., *Carter v. Jury Comm'n*, 396 U.S. 320, 329 (1970) (“Defendants in criminal proceedings do not have the only cognizable legal interest in nondiscriminatory jury selection. People excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion.”).

288. See Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 891 (1999).

289. See *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984).

automatic reversal is required.²⁹⁰ These examples reveal that grounding a structural error on something more than serious, likely individual harm is not novel.

B. Granting a Cause of Action—Rights and Remedies

As with Article III standing, regulated parties should have inferred structural causes of action because they fit well with existing doctrine. Whether a party should have a cause of action is an indeterminate inquiry. The current conception of a cause of action looks at the “operative facts” to determine whether “a plaintiff is entitled to some remedy,” with less focus than in the past on a particular remedy.²⁹¹ Because the Constitution’s text fails to answer whether regulated parties have a cause of action for structural violations,²⁹² any viable cause of action must be inferred. With statutory implied private rights of action for damages, the Court has, of late, required clear legislative intent to create private rights of action.²⁹³ But the Court has been much more permissive of allowing causes of actions premised on the Constitution that seek only nonmonetary equitable relief.²⁹⁴ This permissive attitude makes sense in the context of structural challenges, too. Regulated parties fall within the zone of interests of most structural safeguards, suggesting a colorable individual right in structural provisions. Although some contend that the historical record undermines inferred structural rights, that record is, at best, unclear.

1. Colorable Rights in Structural Safeguards

How the Court goes about inferring a private cause of action for equitable relief under the Constitution is far from settled. It often handles structural cases under a generalized-grievances standing paradigm and advances no further.²⁹⁵ Or the Court simply operates with the presumption that equitable relief against the government is appropriate.²⁹⁶ When considering the more controversial question of whether an implied cause of action for money damages exists, the Court requires that the basis for the relief “fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.”²⁹⁷ But when the Court considers the availability of equitable relief under the APA (and, at times, under the Constitution²⁹⁸), the Court applies what appears to be a more liberal inquiry: the

290. *See id.*

291. *Bellia, supra* note 84, at 798 (emphasis omitted).

292. *See Huq, supra* note 20, at 1449.

293. *See, e.g., Alexander v. Sandoval*, 532 U.S. 275, 286–88 (2001).

294. *See John F. Preis, In Defense of Implied Injunctive Relief in Constitutional Cases*, 22 WM. & MARY BILL RTS. J. 1, 3 (2013).

295. *See, e.g., United States v. Richardson*, 418 U.S. 166, 175 (1974) (concerning Receipts and Expenditures Clause); *Taitz v. Obama*, 707 F. Supp. 2d 1, 3–4 (D.D.C. 2010) (concerning Presidential Eligibility Clause).

296. *See Preis, supra* note 294; Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 COLUM. L. REV. 1612, 1613–14 (1997).

297. *OPM v. Richmond*, 496 U.S. 414, 432 (1990) (quoting *United States v. Testan*, 424 U.S. 392, 401–02 (1976)).

298. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*,

zone-of-interests test. That test requires “the plaintiff [to] establish that the injury he complains of (his aggrivement, or the adverse effect upon him) falls within the ‘zone of interests’ sought to be protected by the . . . provision whose violation forms the legal basis for his complaint.”²⁹⁹ The Court has recently clarified that the zone-of-interests inquiry asks whether a cause of action exists for a “particular plaintiff’s claim,”³⁰⁰ although the inquiry may be narrower with provisions, such as constitutional ones, that exist outside the APA.³⁰¹ Because of the Court’s recent reliance on the zone-of-interests test in determining whether a statutory cause of action exists, because the Court has applied the test to constitutional provisions and suits for equitable relief, and because the test is as developed as any other for inferring causes of action, I rely on it for the inquiry here.³⁰²

Regulated parties’ challenges easily fall within the structural provisions’ zone of interests. Their harm is the cost of being regulated by a government that has not followed constitutional protocols before acting. This harm causes loss to property (regulatory fines), liberty (ability to act in a certain way or within a certain industry), or dignity (having to engage in administrative proceedings by an unconstitutional entity). The Founders intended the structural provisions, as even Choper concedes, to prevent tyranny and despotism and thereby preserve liberty (and perhaps also property).³⁰³ In fact, Choper says that this understanding “cannot be seriously disputed.”³⁰⁴ And, as previously discussed, the Court has repeatedly and consistently noted that the provisions’ purpose is to preserve individual liberty.³⁰⁵ Indeed, in his recent concurring opinion in *NLRB v. Noel Canning*, Justice Scalia (joined by three other Justices), noted that structural provisions are “designed first and foremost not

Inc., 454 U.S. 464, 760 (1982); *Bos. Stock Exch. v. State Tax Comm’n*, 429 U.S. 318, 320–21 n.3 (1977).

299. *Air Courier Conf. v. Am. Postal Workers Union*, 498 U.S. 517, 523–24 (1991) (emphasis omitted) (quoting *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 883 (1990)) (internal quotation omitted). As a corollary, when “the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff’s interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.” *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 399 (1987). Presumably, the same standards govern suits based on constitutional, as opposed to statutory, provisions.

300. *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 (2014).

301. *See Clarke*, 479 U.S. at 400 n.16.

302. This is not to say that the zone-of-interests-test doctrine is without its own problems. *See* Sanford A. Church, Note, *A Defense of the “Zone of the Interests” Standing Test*, 1983 DUKE L.J. 447, 456–59 (describing critics’ views of the test); *infra* note 307. Nevertheless, the test has had an ever-expanding place for more than fifty years in the Court’s doctrine and facilitates easier discussion of implied causes of action than other, lesser defined inquiries. In other words, I take no position on the propriety of the test as a normative matter; I use it as an accepted tool for discussing implied causes of action in the regulatory context.

303. *See* CHOPER, *supra* note 29, at 264–65.

304. *Id.* at 264.

305. *See supra* notes 49–52 and accompanying text.

to look after the interests of the respective branches, but to ‘protect[] individual liberty.’”³⁰⁶

Even if the branches are more closely connected than regulated parties to the structural provisions’ purposes, regulated parties are still within the zone of interests. The Court has noted, albeit in a statutory context, that the subject of a regulatory action need not be the only one with a cause of action. Because “[t]he test is not meant to be especially demanding,” the provisions need not be intended to benefit the plaintiff at issue.³⁰⁷ Instead, the plaintiff need only be “arguably” within the zone of interests that the provision at issue intends to protect.³⁰⁸ Under these principles, it is beside the point that the branches of government may be the subjects of the structural provisions. Instead, it is enough that the regulated parties are within the zone of interests that the structural provisions seek to further—preserving individual liberty and limiting despotism.

Relatedly, even if the zone-of-interests test is more demanding in the constitutional context,³⁰⁹ it should still cover regulated parties’ claims. The regulated parties can point to a specific invasion of their property or liberty interests because the agency directly regulates their behavior by, say, ordering the regulated party to pay a fine or to stop (or start) certain activities.³¹⁰ In contrast, structural challenges from the populace at large (taxpayers or voters)³¹¹ or perhaps the beneficiaries of a regulatory regime who seek to challenge an officer or agency’s deviation from Congress’s regulatory objective provide concrete examples of plaintiffs whose interests (regardless of Article III standing concerns) are too tangentially related from the purposes of the underlying structural provisions.³¹² The relationship between their interests (whether liberty, property, or dignity) and structural defects are much more attenuated than regulated parties’.

Analogizing individual enforcement of structural rights to procedural rights helps allay prudential concerns over structural causes of action. For instance, the fear that expending judicial resources on litigation that may have little impact on the outcome seems misplaced because the same concern exists for the much broader category of procedural rights. Likewise, structural safeguards’ procedural complexion reveals

306. 134 S. Ct. 2550, 2593 (Scalia, J., concurring) (alteration in original) (quoting *United States v. Bond*, 131 S. Ct. 2355, 2365 (2011)).

307. *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 399–400 (1987). *But see* *Air Courier Conf. of Am. v. Am. Postal Workers Union*, 498 U.S. 517, 524–25 (1991) (considering whether “Congress intended to protect jobs with the Postal Service” when determining if union fell within zone of interests).

308. *Clarke*, 479 U.S. at 400.

309. *See id.* at 400 n.16.

310. *Contra* *Shane*, *supra* note 30 (“[U]nlike other separation of powers disputes that the Court has resolved – in cases such as *Youngstown Steel*, *Chadha*, or *Boumediene* – *Noel Canning* does not relate to individual rights or liberties. . . . Life, liberty and property are simply not at issue.”).

311. *See* *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974) (stating in the context of an Article III standing inquiry that “[t]he proposition that all constitutional provisions are enforceable by any citizen simply because citizens are the ultimate beneficiaries of those provisions has no boundaries”).

312. *See, e.g.,* *Marks*, *supra* note 30, at 506 (describing hypothetical where regulatory beneficiaries assert Appointments Clause challenge against EPA Administrator).

the shortcomings of the “absolute privilege” objection. Some have argued that structural safeguards cannot be individual rights because they do not create an “absolute privilege to act in a certain way,” where an “individual (or firm) has a zone of privileged action from any federal or state regulation.”³¹³ Instead, structural safeguards do not create rights, they argue, because “the exact same act by the exact same individual can plainly be regulated by some governmental entity.”³¹⁴ But this argument proves too much because it would also lead courts to stop entertaining ordinary procedural challenges. Procedural rights provide no “absolute privilege” from governmental action. Instead, the privilege falls away after the government complies with procedural requirements, whether statutory or constitutional. Those requirements may even apply to one sovereign but not another (for example, a state constitution’s due process requirements that exceed the Federal Constitution’s), but their limited reach does not prevent individual enforcement.

In the separation-of-powers context, the fact that one branch of government may face procedural or structural limitations before acting, while another does not, says nothing about whether individuals can challenge the noncompliance. Structural rights permit the government to act against the individual when the entity’s composition complies with structural norms. If the entity does not, it has no authority to achieve its chosen end, and regulated parties retain their privilege from government action. This is so even when the structural norms apply to only certain branches. Due process limitations may be the most obvious example. For instance, common-law courts and legislatures can establish similar substantive norms although legislatures need not comply with due process. The mere fact that one branch must comply with constitutional procedural requirements while another branch does not has no bearing on whether enforceable rights exist. A private party could seek to enforce due process protections if a court acted without doing so. Furthermore, one government entity may be required to follow certain procedures before enacting a substantive norm, but it may be able to reach the same end by taking another kind of action without having to comply with those same procedural requirements. For instance, an agency must comply with due process in adjudication that creates a substantive norm (like a common-law court’s adjudication), but it likely has little or no obligations under the Due Process Clause if it enacts that same norm through rulemaking.³¹⁵ In other words, the limited reach of a procedural or structural safeguard to one branch or to certain methods of action does not prevent an individual from enforcing that safeguard.³¹⁶

313. Huq, *supra* note 20, at 1450 (emphasis omitted). Choper made a similar argument: “[I]f the presidential conduct allegedly violates individual constitutional rights—that is, those personal liberties that are secured against all governmental abridgements, presidential or congressional—then . . . the Court should intervene.” CHOPER, *supra* note 29, at 272 (emphasis omitted).

314. Huq, *supra* note 20, at 1451.

315. Compare *Londoner v. City & Cnty. of Denver*, 210 U.S. 373 (1908) (holding that due process attaches to agency adjudications), with *Bi-Metallic Invest. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915) (holding that due process does not reach rulemaking or quasi-legislative actions).

316. Proponents of the contrary view have offered no reason to support their views. See CHOPER, *supra* note 29, at 272; Huq, *supra* note 20, at 1450–51.

Finally, challengers' potential loss in the political realm over the agency's structure or powers should not limit their structural challenges.³¹⁷ Understanding structural rights as similar to procedural rights is key here, too. It may well be that challengers lost the substantive battle in the political arena over, say, whether or how a particular industry or action should be regulated. But the federal government—just like agencies and courts—has to comply with constitutional and statutory procedural norms to act. Challenging an agency's structure may prevent or delay agency action. Nevertheless, even assuming that seeking such prevention or delay is somehow improper, losing parties can cause the same delay in procedural challenges, too, such as those brought under the APA, under the Due Process Clause, or under the Federal Rules of Civil Procedure. Unless one is ready to end procedural challenges generally, structural challenges should be able to proceed even if their goal is to stop or slow government action. From an even broader perspective, the mere fact that the Constitution gives losing factions a weapon against governmental action is neither novel nor contrary to current conceptions of judicial review—whether in the procedural or substantive context. Allowing the Constitution to serve as a countermajoritarian check on legislative action is foundational to judicial review.

Considering the propriety of regulated parties' structural cause of action from a zone-of-interest and procedural vantage point is another way of vindicating the valid-rule doctrine, often encountered in overbreadth or facial challenges. Under this well-accepted doctrine, "[E]veryone has a personal constitutional right not to be subjected to governmental sanctions except pursuant to a constitutionally valid rule of law."³¹⁸ Indeed, Justice Ginsburg and Justice Breyer concurred in *Bond* by relying on this doctrine.³¹⁹ The valid-rule doctrine is consistent with judicial allowance for procedural challenges and the ability of regulated parties (as contrasted with other third parties) to demonstrate why they are sufficiently related to the structural provisions to seek their enforcement. What the doctrine fails to explain is how structural challenges fulfill Article III standing requirements. The procedural exception helps fill this void and bolster the valid-rule doctrine.

Armed with examples, Huq argues that because the Court fails to apply the doctrine consistently to all structural matters, the doctrine cannot explain the Court's structural-standing jurisprudence.³²⁰ To be sure, the Court's haphazard use of the political-question doctrine, as discussed in Part I.C.4, reveals consistency problems with structural provisions that tend to arise outside of the administrative context. But Huq's examples aren't as damning as they first appear. For instance, he notes that the Court has significantly limited Bicameralism Clause challenges by deferring conclusively to congressional leaders' factual attestation that each congressional

317. See Huq, *supra* note 20, at 1491–1514.

318. Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1331 (2000).

319. See *Bond v. United States*, 131 S. Ct. 2355, 2367–68 (2011) (Ginsburg, J., concurring).

320. See Huq, *supra* note 20, at 1453 (“But [the valid-rule doctrine] is simply not a plausible account of current constitutional practice. Individual litigants cannot now complain about any flaw in the official process leading to the enactment of a challenged law.”).

house passed the bill in question.³²¹ But in the absence of an attested bill and a conclusive presumption on a matter of fact, the Bicameralism Clause challenge could proceed. Likewise, he notes that the Court has denied taxpayers and citizens standing to assert challenges under the Emoluments Clause (which prevents congressional members from serving in the executive branch while serving in Congress and from being appointed to offices that were created or given a raise during the congress member's elected term³²²).³²³ Yet nothing in these cases indicates that a *regulated party's* challenge would be nonjusticiable. His broader point that the Court's jurisprudence is inconsistent is correct, but it does not mean that the valid-rule doctrine is mistaken. Instead, it suggests that the Court should do a better job of applying the doctrine to all of the Constitution's structural provisions, relying on factual presumptions,³²⁴ and limiting (or at least better distinguishing) political questions. Recognizing structural challenges' analogy to procedural challenges may well help courts improve their consistency.

Similarly, Huq argues that the courts' remedial practice—with harmless error, qualified immunity, and nonretroactivity, for example—undermines the valid-rule doctrine. I agree, although I identify different culprits in the structural context, such as severance and stays of judgment.³²⁵ But these remedial failings do not indict regulated parties' ability to assert structural challenges. Instead, their identification serves as a call for the Court to improve its remedial practice to render regulated parties' causes of action more meaningful.

2. Neither History nor Practice Are to the Contrary

The Founders' intent as to structural causes of action is too indeterminate to serve as a meaningful objection to allowing individuals to vindicate structural safeguards. I am not aware of any direct evidence of whether the Founders intended regulated parties to have structural causes of action. But Alexander Hamilton's *Federalist No. 78* made the case for significant judicial review, whereby the courts "must . . . declare all acts contrary to the manifest tenor of the Constitution void."³²⁶ He repeatedly advocated for broad judicial review to reach "every act of a delegated authority, contrary to the tenor" of the Constitution.³²⁷ Reaffirming the sovereignty of the people to limit governmental action through the Constitution, he stated that "[n]o

321. *See id.* (citing *Pub. Citizen v. U.S. Dist. Ct. for D.C.*, 486 F.3d 1342, 1351 (D.C. Cir. 2007)) (discussing enrolled-bill rule from *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892)).

322. U.S. CONST. art. I, § 6, cl. 2.

323. *See* Huq, *supra* note 20, at 1453–54 (citing *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974)); *see also* *Ex Parte Levitt*, 302 U.S. 633, 634 (1937) (per curiam) (denying motion for leave to file petition concerning Justice Black's ineligibility to serve on the Supreme Court based on petitioner's generalized grievance).

324. For instance, the Supreme Court of Kentucky, along with certain other states, applies only a prima facie presumption (as opposed to a conclusive one) that an enrolled bill is valid and permits clear and convincing evidence to overcome the presumption. *See D&W Auto Supply v. Dep't of Revenue*, 602 S.W.2d 420, 425 (Ky. 1980).

325. *See supra* Part I.C.3.

326. THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

327. *Id.* at 466.

legislative act . . . contrary to the Constitution[] can be valid.”³²⁸ And he stated that it is the courts’ role “to keep [the legislature] within the limits assigned to their authority.”³²⁹ In other writings, Hamilton said that “there ought always . . . be a constitutional method of giving efficacy to constructional provisions.”³³⁰ Implied structural causes of action are consistent with Hamilton’s call for strong judicial review.

To be sure, James Madison failed to mention judicial review in his discussions of the mechanisms for ensuring the separation of powers.³³¹ But as Raoul Berger concluded after reviewing the constitutional debates and concern over legislative aggrandizement, the “[F]ounders must have welcomed *any* traditional mechanism that could aid in keeping Congress within bounds.”³³² In fact, Berger pointed to statements of James Wilson during the Pennsylvania ratifying convention that “if any congressional act should be ‘inconsistent with those powers vested by this instrument in Congress, the judges . . . will declare such laws to be null and void.’”³³³ These calls for significant judicial review do not suggest exceptions for governmental overstepping.

Huq identifies another of Hamilton’s statements, but it’s inapposite. Huq argues that Hamilton “urged that the original Constitution—which, of course, contained the separation of powers and federalism principles—not be understood in terms of vested rights” because, in arguing against a Bill of Rights, Hamilton argued that the Bill “would contain various exceptions to powers not granted; and on this very account, would afford a colorable pretext to claim more than were granted.”³³⁴ Yet Hamilton’s point was not that individuals had no ability to challenge governmental action that exceeded federal power or violated constitutional provisions.³³⁵ His point was that the Bill of Rights would, contrary to its purpose, undermine individual freedom by intimating that the federal government had powers not mentioned in the Constitution’s text.³³⁶ Hamilton gives no indication that he eschewed individual rights in structural provisions. To the contrary, he suggested that rights remain with the people to prevent government action that is not constitutionally given because he argued that a bill of rights was unnecessary for a constitution “professedly founded upon the power of the people.”³³⁷ Bradford Clark, reviewing the debates over the Bill

328. *Id.*

329. *Id.*

330. THE FEDERALIST NO. 80, at 474 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

331. THE FEDERALIST NO. 51, at 317–22 (James Madison) (Clinton Rossiter ed., 2003).

332. Berger, *supra* note 84, at 834 (emphasis in original). The historical absence of structural challenges by the branches suggests that the Founders may not have viewed these challenges as “traditional mechanisms” for checking congressional action.

333. *Id.* at 835 (quoting 2 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 489 (1881)).

334. See Huq, *supra* note 20, at 1449 (quoting THE FEDERALIST NO. 84, at 513 (Alexander Hamilton) (Clinton Rossiter ed., 2003)).

335. See *id.* (“Alexander Hamilton thus urged that the original Constitution—which, of course, contained the separation of powers and federalism principles—not be understood in terms of vested rights.”).

336. See THE FEDERALIST NO. 84, at 512 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

337. *Id.*

of Rights and federalism, concluded that “the Founders understood individual rights vis-à-vis the federal government to depend in large measure on the limited nature of federal power. Given this understanding, it is anachronistic to distinguish sharply between judicial review under the Bill of Rights and judicial review of the scope of federal powers.”³³⁸

Like the Founders’ intent, more recent congressional intent does not provide grounds for a meaningful objection. Although congressional intent (as well as its relevance)³³⁹ is far from clear, the APA suggests that structural claims are permissible. Most regulated parties’ challenges to agency action fall within the APA (even if the parties fail to recognize this).³⁴⁰ The APA requires courts to set aside agency action that is, among other things, “contrary to constitutional right, power, privilege, or immunity.”³⁴¹ Although the legislative history on the meaning of this provision is unhelpful,³⁴² it is notable how broadly the provision is written. It does not limit itself to constitutional rights or privileges. It also refers to actions that are contrary to constitutional power, a conception that would easily cover actions that contravene structural safeguards. After all, government action through an agency is contrary to constitutional power if the agency’s architecture violates structural principles because those provisions limit how and who within government can act. It is doubtful that Congress intended the words to serve as appositives for one another. While privileges, immunities, and rights seem to have broadly consistent meanings concerning the freedom of an individual from governmental action in ordinary parlance, power focuses not on individuals but on the government’s authority to act or not.

Moreover, even if congressional approbation is unclear in the structural context, longstanding judicial practice awards equitable relief for violations of federal

338. Bradford R. Clark, *Unitary Judicial Review*, 72 GEO. WASH. L. REV. 319, 337 (2003).

339. See Fletcher, *supra* note 123, at 223–24 (“Congress should have some, but not unlimited, power to grant standing to enforce constitutional rights. The nature and extent of that power should vary depending on the duty and constitutional clause in question.”). In the statutory context, Justice Kennedy argued in his concurrence in *Lujan* that Congress has the power to define injuries broadly and thus bestow standing on a broad section of the public. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580–81 (1992) (Kennedy, J., concurring); see also *Summers v. Earth Island Inst.*, 555 U.S. 488, 501 (2009) (Kennedy, J., concurring). If Congress’s attempt to define injuries is germane in the constitutional context as well, then the APA provides relevant guidance on whether challenging parties have standing.

340. See Siegel, *supra* note 296, at 1669. Key exceptions are for interlocutory challenges, 5 U.S.C. § 704 (requiring final agency action for judicial review of administrative action), and challenges to actions by the President, the Congress, or other non-agencies, see *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992) (holding that President is not an “agency” under the APA).

341. 5 U.S.C. § 706(2)(B) (2012).

342. Unfortunately, the most specific statement about the provision that I uncovered in the tome of collected legislative history on the APA was the following from Representative Springer: “There is no one in the world who could object to a provision of that kind [the contrary-to-the-constitution provision] because that is based upon the sound philosophy of the law.” 92 CONG. REC. 5657 (1946) (remarks of Rep. Springer). The four listed terms track Hohfeld’s well-known list of legal conceptions. See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 710 (1917).

statutory or constitutional law. So-called nonstatutory review (so named because courts have traditionally provided review without pointing to any statutory authority for doing so) permits courts—whether or not the APA applies—to provide injunctive relief against government officers to prevent unconstitutional action or to invalidate entire statutes on constitutional grounds.³⁴³ The longstanding practice of granting injunctive relief for constitutionally prohibited executive action³⁴⁴ suggests that courts should have few qualms in awarding equitable relief in structural litigation. And indeed, the ground for liberal equitable relief comes from the fear that constitutional limitations on legislative authority (including those concerning how the legislature may structure the government) “amount to nothing,” a fear that seems even more pronounced in the structural realm.³⁴⁵ To deny an implied private right of action for equitable relief for structural matters would be to create an exception to standard judicial practice.

This is not to say, as I have elsewhere, that courts cannot improve remedial practice in the structural context. Remedies for structural violations often fail to incentivize litigants properly or deter the political branches because they seek to create “as little disruption as possible.”³⁴⁶ But these concerns do not mean that the courts cannot provide a sufficient remedy. Indeed, sometimes they do, generally by requiring legislative or executive action.³⁴⁷ Instead, as I discuss in Part IV.B, *infra*, it suggests that courts should be more cognizant of effective remedies and ultimately, from a realist’s perspective, less willing to find violations in the first instance. Curable remedial insufficiencies should not overcome otherwise strong arguments for judicial review.

By examining the fit between regulated parties’ standing for structural actions and other standing doctrine, and the relative ease of inferring a cause of action under traditional doctrine, one can see that regulated parties’ structural challenges are not aberrations of justiciability doctrine. Moreover, the procedural exception for causation and redressability requirements makes normative sense because it is the process, as opposed to the substantive outcome, that procedural rules seek to regulate. The doctrinal and institutional limitations on branch standing further complicate the ability of the branches to serve as defenders for structural norms, and these limitations provide additional normative support for permitting claims by regulated parties in the structural context. Calls to abandon the individual action and permit mere branch

343. See Siegel, *supra* note 296, at 1623; *id.* at 1668–69 (noting that nonstatutory review is so common, courts don’t “even think[] about it”); *id.* at 1669–70. For actions under the APA, the legislative history indicates that Congress sought to codify so-called nonstatutory review “where Congress has made no contrary provision for judicial review.” See 92 CONG. REC. 5654 (1946) (remarks of Rep. Walter).

344. See Preis, *supra* note 294, at 34–38 (discussing Court’s equitable remedies in constitutional cases).

345. See Siegel, *supra* note 296, at 1630 (quoting THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

346. *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1336–37 (D.C. Cir. 2012), *cert. denied*, 133 S. Ct. 2735 (2013).

347. See Barnett, *supra* note 23, at 527–36 (discussing more successful remedies in *Ryder* and *Northern Pipeline*).

enforcement—whatever their doctrinal and normative bases—must grapple not only with doctrinal disruption but also with the normative basis for this doctrine.

IV. ADDRESSING UNDERLYING CONCERNS

To say that individuals should have a cause of action for structural challenges is not to say that structural challenges should remain as they are. Legitimate concerns continue to bedevil structural challenges, including the overall utility of structural litigation (in light of causal and redressability questions),³⁴⁸ challengers' opportunism in seeking legal redress after losing political fights,³⁴⁹ the failure of the courts to consider factors that lead to structural innovation and thus not allow the political branches discretion in creating the administrative state (absent relatively clear constitutional prohibitions),³⁵⁰ and the limited effectiveness of judicial remedies for prevailing parties.³⁵¹ Courts can address many of the problems that create discomfort with an individual cause of action in less dramatic ways than denying individuals the right to sue.

The underlying cause of much of these concerns is too much judicial involvement in structural challenges. For instance, by setting strict branch boundaries, courts decide matters concerning relatively immaterial structural innovations (such as the tiered protections from removal in *Free Enterprise Fund*) and thereby exacerbate concerns over the utility of structural litigation. Relatedly, judicial decisions that sharply delineate the branches' boundaries deny the political branches discretion to adjust them in the face of new challenges. As the courts reach more issues and encourage more litigation, they attempt to limit the effect of their rulings by providing less meaningful remedies.³⁵² Limiting, but not ending, judicial review mitigates these concerns.

Courts can limit their review by turning, where appropriate, to functionalism for separation-of-powers jurisprudence. The Court can get there in two ways. First, it can directly alter the underlying doctrine. Second, if the Court is hesitant to alter its doctrine directly, it can reach the same ends indirectly by providing more significant remedies. In doing so, as I explain below, courts will very likely begin to defer to the political branches without abandoning judicial review altogether.

But, before considering how to alter the underlying substantive law, let me address a potential objection: Why shouldn't the Court instead alter its justiciability doctrine to permit only the most significant challenges and thereby give the branches more structural discretion? The key reason is that the focus of the justiciability doctrines is not the quantum of harm or the potential benefits from innovation. Instead, it focuses on the mere existence of harm (if required). Relatedly, justiciability doctrines are intended to be trans-substantive because they apply

348. See *supra* Part I.C.1.

349. See Huq, *supra* note 20, at 1502–14.

350. See CHOPER, *supra* note 29, at 298–305; Huq, *supra* note 28, *passim*.

351. See *supra* Part I.C.3.

352. See *infra* notes 379–380 and accompanying text.

generally to all lawsuits or, at the very least, challenges of a particular kind.³⁵³ But some structural protections, as discussed below, permit more discretion (the President's removal power, for instance) than others (say, those under the Appointments Clause). The underlying doctrine, which is provision-based and not trans-substantive, can better address how much or little discretion exists for the political branches as to each structural protection. Moreover, creating more doctrinal disruption in an already confused area of the law³⁵⁴ is especially troubling in the structural context because regulated parties' structural challenges, as discussed above, fit reasonably well within existing justiciability doctrines and respond to theoretical concerns over lackluster institutional incentives. For these reasons, the substantive doctrine itself can better accommodate concerns over structural challenges.

A. Proper Place for Functionalism and Political Discretion

Formalism is ill-suited for interpreting indeterminate text. This is the case with the vesting clauses for each branch because they fail to describe where the branches' boundaries should be. Indeed, it is very difficult to argue that prophylactic boundaries are appropriate³⁵⁵ after courts have recognized that the boundaries must, by necessity, be somewhat porous.³⁵⁶ To use the President in an example, the President in executing the law must create generalized standards to fill statutory gaps (for instance, when are veterans as a class sufficiently "incapacitated" to trigger entitlement to benefits?) and adjudicate specific issues (for instance, is a particular veteran entitled to benefits?). Moreover, as Manning has explained, formalists must often rely upon a separation-of-powers background norm despite the Founders' lack of any agreed-upon baseline norm³⁵⁷ and ignore Congress's powers under the Necessary and Proper Clause.³⁵⁸ And there is the concern that certain symbols of a branch's power assume disproportionate importance. The removal power, for

353. See, e.g., Michael Coenen, *Constitutional Privileging*, 99 VA. L. REV. 683, 691–93 (2013); Michael Wells, *Naked Politics, Federal Courts Law, and the Canon of Acceptable Arguments*, 47 EMORY L.J. 89, 148–51 (1998).

354. See, e.g., John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1010 (2002) (referring to standing doctrine as a "jumbled mess").

355. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995) (stating that separation of powers serves as "a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict").

356. See *Mistretta v. United States*, 488 U.S. 361, 380 (1989) ("[T]he Framers did not require—and indeed rejected—the notion that the three Branches must be entirely separate and distinct."); *id.* at 381 ("Madison recognized that our constitutional system imposes upon the Branches a degree of overlapping responsibility, a duty of interdependence as well as independence the absence of which 'would preclude the establishment of a Nation capable of governing itself effectively.'") (quoting *Buckley v. Valeo*, 424 U.S. 1, 121 (1976) (per curiam)).

357. See Manning, *supra* note 31, at 1993–2005.

358. See *id.* at 1986–93.

instance, has come to symbolize the President's executive power despite longstanding questions surrounding its utility.³⁵⁹

Formalism still has a limited role. For instance, it makes sense to apply formalism to the fairly detailed text of the Appointments Clause and the Bicameralism and Presentment Clause.³⁶⁰ But its reach should be much more limited than under the Court's current jurisprudence for the reasons discussed above.

The Court's overreliance on formalism has caused much of the concern over structural actions. By serving as a prophylaxis for demarcating boundaries and proudly recognizing one concern to the detriment of other values,³⁶¹ formalism provides more victories to challengers than functionalism would and thereby encourages structural litigation over relatively minor structural innovations. Because the impact of the innovation on the branches or individuals is irrelevant, formalism encourages litigation whose utility is, at the very least, questionable because the ruling may do little to protect while invalidating useful structural innovations.³⁶² Relying upon functionalism helps mitigate these concerns because the Court, by deeming fewer structures unconstitutional, will discourage litigation over minor structural innovations. Indeed, functionalism has limited nondelegation³⁶³ and Article III challenges.³⁶⁴ Moreover, as structural challenges are generally less successful, regulated parties will necessarily take their administrative-structure concerns to the political branches.³⁶⁵

By giving the branches more breathing space, functionalism allows the branches to set their own boundaries. Huq's call for allowing the branches to bargain over structural boundaries (in both a federalism and separation-of-powers context) comports with original meaning. He notes that nothing in the text prohibits bargaining, and, indeed, it is consistent with the First Congress's rejection of Madison's proposal to treat the branches' powers as exclusive (and thereby prevent structural innovation).³⁶⁶ Moreover, looking at acquiesced-in actions, as the Court

359. See Barkow, *supra* note 198 (considering other methods of creating agency independence and noting limited effect of removal power).

360. See Manning, *supra* note 31, at 1943–44, 1958.

361. See Huq, *supra* note 27, at 16 (“[T]he *Free Enterprise Fund* majority opinion is drafted as if the only constitutional good to be pursued in administrative agency design is democratic accountability. The Court, that is, ignored the pleadings of scholars who had pointed to the plurality of goods a reasonable designer could seek to vindicate in drawing up an administrative agency.”) (emphasis omitted)).

362. See Huq, *supra* note 20, at 1480–90 (discussing spillover effects in structural litigation).

363. See, e.g., Randolph J. May, *The Public Interest Standard: Is It Too Indeterminate To Be Constitutional?*, 53 FED. COMM. L.J. 427, 443 (2001) (“[T]he *Whitman* decision does not foreclose the possibility that nondelegation challenges can be successfully (if only rarely) mounted in the future.”).

364. Article III challenges outside of bankruptcy are exceedingly rare.

365. See Huq, *supra* note 20, at 1491–1508 (discussing regulated parties' litigating purposes and concerns over allowing “losers” in political process to use structural challenges to pursue deregulatory goals).

366. See Huq, *supra* note at 28, at 1649.

recently did in *Noel Canning*, can reveal the branches' accumulated wisdom.³⁶⁷ After all, from a perspective of institutional competence, the political branches have access to factors that "courts systematically lack," such as political costs, responses from other political actors, relevant norms within bureaucratic institutions, and the efficacy of other constitutional or political instruments to control agency costs.³⁶⁸

Of course, there are limits to this discretion and bargaining.³⁶⁹ Providing a governing rule under a functionalist approach is probably impossible (and therein lies the allure of rigid formalism), but one could do worse than the standard that the Court in *Morrison v. Olson* applied—asking whether a structural innovation impeded the central functions of the branch at issue.³⁷⁰ *Morrison*, however, can be criticized for misapplying its standard in that case (because the President's control over prosecutors is central to the effective functioning of the executive branch, as the Clinton-Lewinsky investigation later suggested)³⁷¹ and for not giving the standard more definition by identifying prohibited structures. Despite *Morrison's* failing, certain structural "innovations" would likely command widespread condemnation. For instance, the political branches should not be permitted to limit the President's power to remove key Cabinet members—such as the Secretary of State or Secretary of Defense—whose positions go to the heart of traditional and constitutionally specified executive powers over foreign affairs and national defense.³⁷² Likewise, permitting only Article I courts to decide constitutional questions would likely violate Article III because it strikes at the heart of Article III courts' power of judicial review and the rationale for creating a judiciary independent of the political branches. Outside of these and similarly significant structural innovations, the branches deserve discretion. By granting the branches room while retaining judicial review for especially troubling cases, courts can provide the discretion that the political question doctrine permits without allowing the constitutional safeguards to become merely aspirational.³⁷³

367. *See id.* at 1625; *see also passim* *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014) (relying on historical practice surrounding recess appointments to determine what qualifies as a "recess" and when vacancies "happen").

368. Huq, *supra* note 27, at 72.

369. Manning, *supra* note 31, at 1989 ("Even an indeterminate bargain, however, has boundaries."); *see* *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2573–77 (2014) (finding violation of Recess Appointment Clause, despite largely functionalist reasoning in prior portions of the opinion, because three-day break between pro forma Senate sessions was insufficient to permit recess appointments).

370. *Morrison v. Olson*, 487 U.S. 654, 691–92 (1988) ("[W]e simply do not see how the President's need to control the exercise of that discretion is so central to the functioning of the Executive Branch as to require . . . that the counsel be terminable at will by the President.").

371. *See* Barnett, *supra* note 200, at 1356 (noting Kenneth Starr's investigation into Whitewater highlighted the problems with permitting independent counsel to investigate the executive branch).

372. *See* U.S. CONST. art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States . . ."); U.S. CONST. art. II, § 2, cl. 2 & § 3 (referring to powers "to make Treaties" and "receive Ambassadors and other public Ministers").

373. *See* CHEMERINSKY, *supra* note 151, at 132.

B. The Utility of Maximal Remedies

Because of the Court's general trend in favor of formalism,³⁷⁴ it may be hesitant to return to functionalism. But there is a way of getting there more gradually and indirectly—by providing more significant remedies. As I have argued elsewhere, the courts' minimalistic remedies for prevailing parties in structural litigation undermine structural safeguards. Recall that this minimalism takes shape by using severance, de facto doctrines, and stays of judgment.³⁷⁵ I have suggested that courts provide more meaningful remedies, such as requiring the political branches—without stays of judgment or de facto doctrines as countervailing forces—to enact curative legislation for the agency to continue acting.³⁷⁶ By doing so, they provide, for instance, a better chance for the challenging party to get something beneficial from the successful challenge (an incapacitated agency) and a meaningful rebuke to the political branches to deter future structural violations.³⁷⁷ But I asked—but did not resolve—whether such remedies may unfairly affect those who rely upon the agency to go about their businesses and favor parties who advance a deregulatory agenda.³⁷⁸

After more reflection, I conclude that maximalist remedies are likely to prove useful, even if accompanied by some unfair consequences, because they will be rare. My reasoning, although perhaps paradoxical, is simple: as judicial remedies expand, the underlying rights shrink.³⁷⁹ This phenomenon exists because courts do not seek to expend judicial capital on defending judgments with significant resistance, either because of political backlash or pragmatic problems for third parties.³⁸⁰ Empirical evidence of this phenomenon is limited, as Daryl Levinson has noted, by our inability to know whether judges would act differently with different remedial regimes in place, but we can evaluate how judges have responded over time to maximal remedies.³⁸¹ The inverse relationship between remedies and rights is perhaps most evident in Fourth Amendment litigation, where the powerful exclusionary rule came to limit the reach of the underlying right to be free from warrantless searches and seizures.³⁸² Similarly, the Supreme Court has limited the notion of a “liberty interest” in the face of significant monetary remedies for due process violations under 42 U.S.C. § 1983.³⁸³

374. See *supra* Part I.B.

375. See *supra* Part I.C.3.

376. See Barnett, *supra* note 23, at 538–39.

377. Cf. David H. Gans, *Severability as Judicial Lawmaking*, 76 GEO. WASH. L. REV. 639, 644 (2008) (arguing that when courts use severance too freely, “the legislature may come to depend on the courts to fix statutes rather than doing the hard work necessary to enact a properly tailored statute in the first instance”).

378. See Barnett, *supra* note 23, at 538–39.

379. See Levinson, *supra* note 288, 866–70.

380. See Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 589–91 (1983).

381. See Levinson, *supra* note 288, at 890 (discussing methodological problems with obtaining empirical evidence and noting “the best we can do is observe the changes in judicial decisionmaking over time and test likely causes”).

382. See William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881 (1991).

383. See Levinson, *supra* note 288, at 892–94 (discussing the Court's decision in *Paul v. Davis*, 424 U.S. 693 (1976), which held that reputation does not count as a liberty interest under the Due Process Clause).

One may observe this inverse relationship, too, from a partly controlled experiment concerning whether trial and appellate courts find the same number of *Batson* violations, that is, challenges to the exclusion of a juror based on that juror's race. Faced with a *Batson* violation, trial judges can simply include the wrongly excluded juror, while appellate courts must order a new trial for this structural defect.³⁸⁴ Pamela Karlan found that appellate courts—which must issue a more severe remedy than trial courts—hesitate more than trial courts in finding a *Batson* violation.³⁸⁵ In the separation-of-powers context, maximal remedies should likewise be rare.

Congress, for its part, should express its desire for maximal judicial remedies to obtain more discretion. The Court's current presumption is that Congress prefers the severance of structural defects instead of the invalidation of the agency's organic act or substantive power.³⁸⁶ In *Free Enterprise Fund*, for instance, the Court severed a removal provision after saying that it generally sought to sever structural defects when the remainder of the act could function independently and when Congress did not make it "evident" through statutory text or historical context that it would prefer a maximalist remedy.³⁸⁷ To have courts apply maximalist remedies in the future, Congress needs to overcome this presumption by clarifying in newly enacted legislation that it intends courts not to sever structural violations. Although the political branches fear administrative disruption, the disruption, as discussed above, should be rare and ultimately give the branches more discretion in structural matters.

Turning to maximalist remedies does no violence to the Court's general remedial practice. First, the Court's presumption concerning severance remains, but the presumption is overcome (perhaps categorically over time) if Congress makes its preference for maximalist remedies for structural defects clear. The Court need not alter its baseline for all constitutional remedies. Second, it makes sense to seek maximalist remedies here, as opposed to other constitutional rights, to give the prevailing parties a meaningful benefit. As I have argued elsewhere, structural remedies are less effective than remedies for most other constitutional rights. With the enforcement of substantive rights, the prevailing party gets something—the ability to act in a certain way and the ability to avoid government sanction.³⁸⁸ This benefit is not always certain with procedural rights; the right to procedure does not guarantee a favorable outcome. But typical administrative procedures—such as the right to comment on agency action, limits on *ex parte* communications, or

384. See *id.* at 891–92 (citing Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2015 (1998)).

385. See *id.* Levinson notes that notions of appellate deference to trial-court observations may play a part in the more limited appellate findings of a *Batson* violations, but he contends that "Karlan's study should be counted as strong evidence that the scope of the *Batson* right on appeal has been diminished by the reversal remedy." *Id.* at 892.

386. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010).

387. *Id.* at 508–10.

388. See Barnett, *supra* note 23, at 502, 515 n.190. To be sure, challenges may decrease in number if challengers noticed the ineffective remedies awaiting them at judgment. But history (and current challenges, see, e.g., First Amended Complaint for Declaratory and Injunctive Relief ¶¶ 240–45, *State Nat'l Bank of Big Spring v. Geithner*, No. 1:12-cv-01032 (D.D.C. Sept. 20, 2012), 2012 WL 4229466 (asserting several structural challenges to the CFPB)), suggests that they have not noticed or have otherwise allowed hope to spring eternal.

requirements for impact studies—often affect substantive decisions.³⁸⁹ Structural safeguards, however, seem even less likely than run-of-the-mill procedural rights to affect agency action. Because the prevailing party is less likely to obtain any benefit from the challenge, the remedy must be more significant than in other constitutional litigation to incentivize litigation and deter structural defects. A maximalist remedy that hinders regulation likely qualifies. Nevertheless, in a balanced fashion, a more functionalist doctrine that finds few structural defects will limit the number of challenges to the most meaningful.

One of the benefits of turning to remedies for structural challenges is that it causes little disruption to existing doctrine. Courts have given scant attention to these remedies. They are undertheorized, barely discussed, and often provided without the parties' request.³⁹⁰ Because of the relationship between remedies and rights, by turning to remedies and providing significant ones, courts can adjust the doctrine gradually. Nor is there anything improper about doing so as long as the Court is candid about what it is doing. Elsewhere, I have argued that the Court should not pretend that structural safeguards are more important than their remedies indicate.³⁹¹ Maximal remedies would be congruent with the importance that the Court has ascribed to structural safeguards, while recognizing, even if only over a series of decisions, that those safeguards should refer to core protections or those that have a strong textual basis in the Constitution.

Finally, the disruption that maximal remedies cause will be limited and appropriate. Because the rights will constrict as the remedies become stronger, the use of the remedies will be rare and thereby limit the instances of disruption. But when the remedies apply, the disruption that they cause will be appropriate because the structural defect will go to the core of the structural safeguard or violate a specific constitutional requirement. An agency, for instance, whose principal officers are all improperly appointed (as in *Buckley v. Valeo*) should not function. The disruption is appropriate because Congress has ignored straightforward constitutional requirements. The Court should seek to deter Congress and require it to absorb political fallout from the structural defect. And the Court should give the challenging party something that it seeks—a deregulatory remedy—to incentivize the regulated party's suit. In this way, the putative vice of maximal remedies becomes their virtue. And, at any rate, the political branches aren't helpless. They can seek to mitigate the disruption by taking curative action, such as by providing, as the political branches did in *Noel Canning*, unquestionably constitutional appointments before judicial decision.³⁹²

C. Achieving Optimal Enforcement

Validating, yet limiting, individual structural actions with more functional jurisprudence and maximalist remedies provides optimal enforcement of

389. See Barnett, *supra* note 23, at 511–12.

390. See *supra* Part I.C.3.

391. See Barnett, *supra* note 23, at 541–44.

392. See *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2558 (2014) (“[T]he President has nominated others to fill the positions once occupied by Members Block, Griffin, and Flynn, and that the Senate has confirmed these successors.”).

constitutional structural norms. The optimal amount of enforcement is not static throughout the Constitution. Instead, as discussed *supra* in Part IV.A, Manning has persuasively demonstrated that formalism should apply to well-defined structural provisions and functionalism should apply to open-ended provisions. The formalist provisions benefit the most from rigorous individual enforcement, while the functional provisions need only occasional defense and should properly remain largely within the discretion of the political branches to define.

First, regulated parties' ability to enforce provides a meaningful check on governmental action when the political branches have failed to heed defined structural limitations. The political branches' failure is most evident with the more formalist provisions, such as the Appointments Clause violations in *Buckley v. Valeo*, where both the President and the Senate permitted the dilution of their appointment and consent powers,³⁹³ or such as the bicameralism and presentment violations in *INS v. Chadha*, where both the President and the Congress, once again, permitted dilution of their powers to agree to legislative action.³⁹⁴ Regulated parties in both instances validated the clear, detailed structural provisions. Permitting regulated parties' actions does not impede the political branches from enforcing structural protections; the regulated parties merely serve as a second line of defense when the branches fail to do so.

Second, the regulated parties can protect the functional structural provisions from the political branches' abuses of discretion. The political branches properly have significant discretion in defining the boundaries between the branches through the Vesting Clauses because the Founders did not prove strict boundaries or even agree on what underlying principles should guide the separation of powers generally.³⁹⁵ Moreover, the necessary overlap of legislative, executive, and judicial functions reveals the impossibility of setting crisp boundaries between the branches, and this indeterminacy permits the political branches to account for the various values and goals that they hope to balance or achieve with components of the administrative state.³⁹⁶ But such discretion can be abused, as I suggested it was with the overly independent counsel in *Morrison v. Olson*.³⁹⁷ It is in these rare cases that the regulated parties' ability to sue and obtain a meaningful remedy adds value and permits optimal enforcement.

Let me conclude with a final, possible objection. Do these benefits of litigation matter if the Founders' connection between liberty and separated powers was mistaken either originally or in the modern administrative state?³⁹⁸ In other words, should we waste judicial energy in enforcing structural provisions whose utility is questionable?

Even assuming that the Founders overstated the connection between liberty and separated powers, that mistake should be corrected by constitutional revision, not judicial dereliction. The formalist provisions have not meaningfully prevented

393. 424 U.S. 1 (1976) (per curiam).

394. 462 U.S. 919 (1983).

395. See *supra* Part I.B.

396. See *supra* Part IV.A.

397. 487 U.S. 654 (1988); *supra* Part IV.A.

398. See Huq, *supra* note 20, at 1484–89 (arguing that the link between liberty and structural requirements is contestable empirically and normatively).

government action (because, after curing the structural defect, the government almost always pursues the same substantive policy) and thus require no judicial self-help to keep the federal government functioning. Moreover, such self-help is especially troubling in the structural context because the judiciary, by refusing to enforce relatively detailed provisions whose purpose is well understood and instead championing its own notions of good constitutional policy, would usurp constitutional (and macrolegislative) prerogative. The danger of the courts ignoring structural prohibitions becomes even more apparent when one considers the normative case for the judiciary ignoring court-related procedural requirements merely because the court doesn't think that the constitutional framers or legislature made the correct policy decision in the first instance.

CONCLUSION

As this Article's title suggests, my goal here is to further two independent conversations and reveal how they relate to one another. First, regulated parties should have standing for separation-of-powers challenges. That is, they should have a justiciable cause of action based on separation-of-powers protections because these actions, contrary to recent scholarship, rest well within current doctrine and normative goals of judicial review. Second, scholars and jurists should stand up to the Court's currently overly formalistic separation-of-powers jurisprudence. A more functionalist jurisprudence will better address lingering litigation-utility concerns than fiddling with justiciability. Regulated parties' challenges, when properly limited, provide the best mechanism for providing enforcement of constitutional structural safeguards while still allowing the political branches to structure an effective administrative state.