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NOTES

DOUBLE SECURITY: TOWARD A LIBERTY-BASED APPROACH TO CONSTITUTIONAL STRUCTURE

Michael McCune*

INTRODUCTION

The late Justice Antonin Scalia wrote that the most important part of American democracy is not the Bill of Rights, but rather the structure of our government.[1] In fact, Justice Scalia went so far as to argue that in the effort to secure individual liberty, "[s]tructure is everything."[2] The structure Justice Scalia alluded to is represented in two doctrines: federalism[3] and separation of powers.[4] As James Madison put it, these defining features of American democracy provide "a double security . . . to the rights of the people" by diffusing political power first among

* J.D., 2021, University of Pittsburgh School of Law.

[1] Antonin Scalia, *Foreword: The Importance of Structure in Constitutional Interpretation*, 83 NOTRE DAME L. REV. 1417, 1417–18 (2008).

[2] *Id.* at 1418.

[3] "Federalism" is defined as "[t]he legal relationship and distribution of power between the national and regional governments with a federal system of government, and in the United States particularly, between the federal and state governments." *Federalism*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[4] "Separation of powers" is defined as "[t]he division of governmental authority into three branches of government—legislative, executive, and judicial—each with specified duties on which neither of the branches can encroach." *Separation of Powers*, BLACK'S LAW DICTIONARY (11th ed. 2019). The definition continues that separations of powers is "[t]he doctrine that such a division of governmental authority is the most desirable form of government because it establishes checks and balances to protect the people against tyranny." *Id.*

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sovereigns, then between branches of government.[5] In other words, "[a]mbition must be made to counteract ambition."[6]

If the end-goal of American democracy's structure is to protect individual liberty, it seems self-evident that the Supreme Court would use the doctrines of federalism and separation of powers to—well, protect individual liberty. But as ideological conservatives gained the majority on the Supreme Court under Chief Justices Rehnquist and Roberts, decisions that had the ultimate effect of limiting individual liberty have too often been decided on the basis of vaguely-articulated federalism and separation of powers arguments.[7] In recent years, the Court has curtailed Fourth Amendment protections[8] and struck down laws designed to protect religious freedom[9] and voting rights[10] in the name of respecting the doctrines of federalism and separation of powers.

This Note serves as a critique of the Roberts Court's application of the doctrines of federalism and separation of powers to weaken constitutional rights. Additionally, this Note offers a new framework for deciding cases that stress these structural pillars of American government. Part I provides background on the development of the doctrines of federalism and separation of powers. Part II analyzes Supreme Court decisions relying on structural arguments to undermine individual liberty interests. Finally, Part III offers a new framework for deciding cases that implicate the structural doctrines of federalism and separation of powers.

If the aim of American democracy's structural framework is to provide a "double security . . . to the rights of the people,"[11] then the Court errs in resorting to structural arguments to weaken constitutional protections. Indeed, undermining individual liberty on structural grounds renders hollow the words of Madison and Scalia[12] and converts the doctrines of federalism and separation of powers into

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[5] THE FEDERALIST NO. 51 (James Madison).

[6] *Id.*

[7] *See, e.g.*, Hernández v. Mesa, 140 S. Ct. 735, 739 (2020) (holding that a *Bivens* action is not available to the victim of a cross-border shooting due to separation of powers concerns); *see also* Shelby County v. Holder, 570 U.S. 529, 542–44 (2013) (invalidating key parts of the Voting Rights Act of 1965 due to federalism and separation of powers concerns).

[8] *Hernández*, 140 S. Ct. 735.

[9] City of Boerne v. Flores, 521 U.S. 507, 511 (1997).

[10] *Shelby County*, 570 U.S. 529.

[11] THE FEDERALIST NO. 51, *supra* note 5 (James Madison).

[12] *See Hernández*, 140 S. Ct. at 739; *Shelby County*, 570 U.S. at 542–44; THE FEDERALIST NO. 51, *supra* note 5 (James Madison); Scalia, *supra* note 1, at 1417–18.

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formalist straitjackets for courts and legislatures alike. To the extent that fear of blurring the lines of demarcation between the federal and state governments or the branches of the federal government informs the Court's notion of constitutional structure, such fears are speculative, and speculation is a flimsy reed upon which to rest decisions that presently diminish fundamental rights.

When faced with cases implicating the doctrines of federalism and separation of powers, courts should proceed by balancing the individual liberty interest at stake with the interest in preserving structural integrity. Further, the interest in preserving the government's structural integrity should not be based on hypothetical fears, but on articulable and substantial strains on the government's framework that would result from the decision. American democracy must do better than exalt structural formalism over individual liberty. This Note offers a new path.

I. BACKGROUND: CONSTITUTIONAL STRUCTURE FROM THE FOUNDING THROUGH RECONSTRUCTION

There is no shortage of literature on how to best organize and structure government, with famous thinkers and political philosophers from Aristotle[13] to Locke[14] and Montesquieu[15] writing extensively on the matter. The Founders were well-acquainted with these writings.[16] According to Professor Steven Calabresi and others, the American version of separation of powers owes a debt to English constitutionalism, which in turn was based on what the ancients called a "Mixed Regime," a form of government in which "[p]ower was dispersed . . . rather than

[13] ARISTOTLE, THE POLITICS OF ARISTOTLE 133 (Benjamin Jowett trans., Clarendon Press 1885) ("All states have three elements, and the good law-giver has to regard what is expedient for each state. What is the element first which deliberates about public affairs; secondly which is concerned with the magistrates and determines what they should be, over whom they exercise authority . . . and thirdly which as the judicial power?").

[14] *See* Alex Tuckness, *Locke's Political Philosophy*, STAN ENCYCLOPEDIA PHIL. (Edward N. Zalta ed., 2020), https://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=locke-political (discussing Locke's theory of separation of powers).

[15] CHARLES LOUIS DE SECONDAT, BARON DE MONTESQUIEU, THE COMPLETE WORKS OF M. DE MONTESQUIEU 199 (1777) ("[T]here is no liberty if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.").

[16] *See, e.g.*, Ralph L. Ketcham, *James Madison and the Nature of Man*, 19 J. HIST. IDEAS 62, 68–69 (1958) (discussing Madison's intellectual influences and reading habits).

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concentrated in the hands of one social class."[17] After the American Revolution, our current, familiar form of separation of powers—dividing between separate entities the functions of government—came into being, with democracy replacing social class as the central organizing principle.[18] The Constitution thus divided the federal government horizontally among three co-equal branches: the legislature, executive, and judiciary. Article I of the Constitution vests legislative power in Congress;[19] Article II creates the executive branch, headed by the president;[20] Article III creates the federal judiciary,[21] which interprets and applies the law.[22]

Similarly, the Constitution enshrines the principle of federalism by dividing power vertically between the federal and state governments and setting boundaries between the two. Article I, Section 8 of the Constitution defines and limits the powers of Congress.[23] Article VI's Supremacy Clause provides that the laws of the federal government and Constitution "shall be the supreme law of the land."[24] Finally, the Tenth Amendment reserves to the states powers not delegated to the federal government.[25] Together, these constitutional provisions create America's federalist system by placing limits on federal power, establishing the Constitution and federal laws as the paramount national authorities, while granting ample residual authority to the respective states.[26]

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[17] Steven G. Calabresi, Mark E. Berghausen & Skylar Albertson, *The Rise and Fall of Separation of Powers*, 106 NW. U. L. REV. 527, 529–30 (2015).

[18] *Id.* at 533–34.

[19] U.S. CONST. art. I, § 1.

[20] U.S. CONST. art. II, § 1.

[21] U.S. CONST. art. III, § 1.

[22] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must if necessity expound and interpret that rule."); *see also* THE FEDERALIST NO. 78 (Alexander Hamilton) ("The interpretation of the laws is the proper and peculiar province of the courts.").

[23] U.S. CONST. art. I, § 8 ("The Congress shall have Power . . . .").

[24] U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . .").

[25] U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

[26] In the *Federalist No. 45*, James Madison wrote that "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." THE FEDERALIST NO. 45 (James Madison).

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The Federalist Papers discussed the structure of American government at length. In a series of essays, James Madison explained how the consolidation of political power leads to tyranny.[27] At the same time, the Constitution provides for some overlap in duties:[28] The President's veto power is an essentially legislative act,[29] the Senate acts as the judiciary in cases of impeachment,[30] and while federal and state governments are distinct entities, they are also "parts of one whole."[31] By the same token, state courts have the power to interpret and apply the Constitution and federal laws.[32] In the estimation of Hamilton and Madison, moreover, the states and the legislature offered more fertile ground for abuses of power than the federal government or the judiciary.[33] Taken as a whole, the Founders designed a government that first divides and diffuses power horizontally and vertically, then diffuses power further by allowing for checks across institutions.[34]

Any conception of the Constitution's framework is incomplete without giving proper weight to the reconfiguration wrought by the Civil War and Reconstruction. An in-depth discussion of the scale of constitutional upheaval that came with these events is unnecessary for the purposes of this Note. But it is crucial to briefly explain how our constitutional order changed in the years following the Civil War[35] so that we may better understand the context in which the Roberts Court operates when it uses the doctrines of federalism and separation of powers to decide cases. At the most basic level, Reconstruction changed the Constitution with the addition of the

[27] THE FEDERALIST NOS. 47–51 (James Madison).

[28] *See generally* THE FEDERALIST NO. 47 (James Madison).

[29] U.S. CONST. art. I, § 7, cl. 2.

[30] U.S. CONST. art. I, § 3, cl. 6.

[31] THE FEDERALIST NO. 82 (Alexander Hamilton).

[32] *Id.*

[33] RON CHERNOW, ALEXANDER HAMILTON 254–55 (2004); *see* THE FEDERALIST NO. 51, *supra* note 5 (James Madison) (discussing the need to divide Congress into two branches to counteract the legislature's inherent "predomina[nce]").

[34] THE FEDERALIST NO. 51, *supra* note 5 (James Madison) ("The different governments will control each other, at the same time that each will be controlled by itself.").

[35] Historian Eric Foner argues that Reconstruction lasted from 1863, the year President Lincoln issued the Emancipation Proclamation, until 1877, when political maneuvering ended the era of reform. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at xxv (1988).

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Thirteenth,[36] Fourteenth,[37] and Fifteenth[38] Amendments (collectively the "Reconstruction Amendments"), the purpose of which was to grant citizenship to former slaves.[39] More importantly for this Note, the Reconstruction Amendments elevated the federal government above state governments in significant ways.[40]

At the nation's founding, questions surrounding the institution of slavery, the privileges of citizenship, and voting rights were decided at the state level.[41] This order was supposed to end with Reconstruction, and in certain respects it did.[42] Alas, a string of infamous Supreme Court decisions[43] considerably undermined the vitality of Reconstruction's reforms, leaving states with a freer hand to enact reactionary laws[44] and courts with more power to overturn congressional legislation.[45] Important for this Note is the idea that Reconstruction was a case study in Madison's famous proposition that the deleterious effects of political faction would be mitigated by

[36] The Thirteenth Amendment abolished slavery and empowered Congress to eradicate the institution. U.S. CONST. amend. XIII.

[37] The Fourteenth Amendment granted equality of citizenship under the law for newly freed slaves and empowered Congress to pass legislation to that effect. U.S. CONST. amend. XIV, § 1.

[38] The Fifteenth Amendment banned the use of race or previous slave status to deny the vote and empowered Congress to pass legislation to that effect. U.S. CONST. amend. XV.

[39] *See* Eric Foner, *Why Reconstruction Matters*, N.Y. TIMES (Mar. 28, 2015), https://www.nytimes.com/2015/03/29/opinion/sunday/why-reconstruction-matters.html ("Reconstruction refers to the period, generally dated from 1865 to 1877, during which the nation's laws and Constitution were rewritten to guarantee the basic rights of the former slaves.").

[40] *See* Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Race, Federalism, and Voting Rights*, 2015 U. CHI. LEGAL F. 113, 136–43 (discussing the effect of Reconstruction on federalism).

[41] *See, e.g.*, THE FEDERALIST NO. 45, *supra* note 26 (James Madison) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.").

[42] *See* U.S. CONST. amends. XIII, XIV, XV. *See generally* ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION (2019).

[43] *See* The Civil Rights Cases, 109 U.S. 3, 13 (1883) (holding that the Fourteenth Amendment does not apply to private actors); *see also* Slaughter-House Cases, 83 U.S. 36, 119 (1872) (holding that the Fourteenth Amendment's Privileges and Immunities Clause does not apply to state citizenship).

[44] *See* Henry Louis Gates, Jr., *The 'Lost Cause' That Built Jim Crow*, N.Y. TIMES (Nov. 8, 2019), https://www.nytimes.com/2019/11/08/opinion/sunday/jim-crow-laws.html (discussing the "rollback" Reconstruction's reform in Southern States).

[45] *See generally* Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801 (2010) (arguing that the Supreme Court has inappropriately limited Congress's ability to enforce the Reconstruction Amendments).

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America's pluralism.[46] While state governments were originally the principal wellspring of political power in America's constitutional system, Reconstruction and the retrenchment that followed show that liberty is not secured or promoted by elevating localism or falling back on founding era notions of separation of powers. Rather, the structural features of American democracy promote liberty by providing multiple sovereigns and institutions, each a check on the other, the whole designed to secure and protect individual rights. In other words, the symbiotic relationship between sovereigns and governmental bodies is the key, not the mere separation of power, whether horizontally or vertically. The difference is subtle but important. Madison's solution to the faction problem and Justice Scalia's theory of American's constitutional structure as liberty-promoting are emptied of meaning if our democracy's diffusion of power has the ultimate effect of undermining individual liberty.

Fidelity to the Framers' structural vision, then, is insufficient to explain the rigid formalism that began to color the Court's structural jurisprudence at the close of the twentieth century, a jurisprudence that, as discussed in Part II of this Note, continues to hold considerable sway over the Supreme Court. For not only does the Roberts Court neglect to acknowledge Reconstruction's constitutional renovation when it decides cases implicating federalism and separation of powers,[47] it utterly fails to articulate a theory of constitutional structure that is capable of protecting the liberty of vulnerable populations.[48] With this background in mind, Part II of this Note will analyze decisions by the Rehnquist and Roberts Courts that exemplify the Court's structural arguments.

II. THE RISE OF EMPTY STRUCTURE

In the closing decades of the twentieth century, the Court's ascendant conservative majority placed a new emphasis on federalism and separation of powers. From the extent of Congress's power under the Commerce Clause[49] and

[46] THE FEDERALIST NO. 10 (James Madison).

[47] *See* FONER, *supra* note 42, at 170–71 ("In affirming a commitment to federalism, the *Shelby County* decision took no note of how the second founding had altered the original federal system.").

[48] *See id.*; *see also* Charles & Fuentes-Rohwer, *supra* note 40.

[49] *E.g.*, United States v. Lopez, 514 U.S. 549 (1995).

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Reconstruction Amendments,[50] to voting rights[51] and implied causes of action,[52] the Court upended decades of precedent as part of its larger project of defining with bright lines the structure of American government. With this new, exacting eye, the Court started viewing with suspicion federal action that seemed to usurp traditional state functions. Likewise, the Court would renounce its authority to craft remedies to help vulnerable populations.[53] The Sections that follow analyze how the Court came to subvert liberty interests in voting rights and constitutional protections through implied rights of action in the name of structural integrity.

A. Voting Rights—Federalism

Supreme Court Justice Louis Brandeis in *New State Ice Co. v. Liebmann* articulated perhaps the most famous rationale for federalism when he wrote that a "state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[54] Fleshing this idea out nearly six decades later, Justice Sandra Day O'Connor in *Gregory v. Ashcroft*[55] wrote that federalism "assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation an experimentation in government; and it makes government more responsive."[56] In the same vein, Professor Michael W. McConell writes that federalism works "to secure the public good," "protect 'private rights,'" and "preserve the spirit and form of popular government."[57] Absent from these defenses of federalism, however, are concrete examples of how federalism secures liberty in the way contemplated by Madison and Scalia, for localism is no substitute for liberty. To take an example

[50] *E.g.*, City of Boerne v. Flores, 521 U.S. 507 (1997).

[51] *E.g.*, Shelby County v. Holder, 570 U.S. 529 (2013).

[52] *E.g.*, Hernández v. Mesa, 140 S. Ct. 735 (2020).

[53] *E.g.*, Rucho v. Common Cause, 139 S. Ct. 2484 (2019).

[54] 285 U.S. 262 (1932) (Brandeis, J., dissenting).

[55] 501 U.S. 452, 458 (1991).

[56] *Id.*

[57] Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1492 (1987) (quoting THE FEDERALIST NO. 10 (James Madison)).

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alluded to in Part I of this Note, segregation was perpetuated for decades in the name of local control.[58]

Pushing back against this version of federalism are, among others, Dean Erwin Chemerinsky and Professor Eric Foner, a prominent historian of Reconstruction. Dean Chemerinsky writes that "the Supreme Court has shifted between two models of federalism: (1) federalism as empowerment and (2) federalism as limits."[59] According to Chemerinsky, the Court under Chief Justice Rehnquist embraced the theory of "federalism as limits."[60] Moreover, writes Chemerinsky, this theory of federalism is based on "unsupported assumptions,"[61] one being that "it is for the judiciary to impose limits on Congress in the name of protecting federalism and the authority of state governments."[62] On the other hand, there is a history of the Court using federalism as a means of empowerment, a principle under which the Court "empower[s] government at all levels to deal with society's problems."[63] Similarly, Professor Foner notes that the Court today "almost always concentrates on the ideas of eighteenth-century framers" when discussing federalism, cutting out of the picture the upheaval wrought by Reconstruction.[64] Furthermore, the *Federalist Papers* shows that the Founders keenly understood that a strong national government was needed to counteract abuses of power at the state level.[65] These competing versions of federalism—one defined by local control and limits, the other by empowerment and counteraction—played out in *Shelby County v. Holder*, a landmark decision by the Roberts Court invalidating a central component of the Voting Rights Act of 1965 (VRA).[66]

Some background is required to grasp the legal context in which *Shelby County v. Holder* arose. The VRA was signed into law by President Lyndon Johnson on

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[58] FONER, *supra* note 42, at 129.

[59] Erwin Chemerinsky, *The Assumptions of Federalism*, 58 STAN. L. REV. 1763, 1764 (2006).

[60] *Id.* at 1765.

[61] *Id.*

[62] *Id.*

[63] *Id.* at 1764.

[64] FONER, *supra* note 42, at 171.

[65] THE FEDERALIST NO. 51, *supra* note 5 (James Madison).

[66] 570 U.S. 529 (2013).

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August 6, 1965.[67] By March 1966, the Supreme Court was ruling on the VRA's constitutionality after South Carolina challenged the statute in federal court. Because that challenge in the case *South Carolina v. Katzenbach*[68] presented a question "of urgent concern to the entire country," the Court invited "all of the States to participate in this proceeding as friends of the Court."[69] Alabama, Georgia, Louisiana, Mississippi, and Virginia supported South Carolina's challenge to the VRA.[70] According to the Court, the VRA centered around a "complex scheme of stringent remedies aimed at areas where voting discrimination ha[d] been most flagrant."[71] Section 4(b) of the VRA, the provision that would be ruled unconstitutional in *Shelby County*, originally set out two criteria for a jurisdiction to be covered by the preclearance requirement.[72] If both criteria were met, the statute's remedial provisions would apply to the offending state or political subdivision—that is, that jurisdiction would be "covered."[73] In turn, Section 5 of the VRA precluded covered states from enacting new voting regulations pending review by federal authorities to determine whether their use would perpetuate voting discrimination.[74]

South Carolina fell within Section 4(b)'s coverage formula on August 7, 1965, the day after the VRA was signed into law by President Johnson.[75] As a covered state under Section 4(b), South Carolina was precluded from enforcing its voting literacy test[76] unless it applied for and received advance permission from the Department of Justice or from a special three-judge panel of the United States District Court for the

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[67] Andrew Glass, *LBJ Signs Voting Rights Act, Aug. 6, 1965*, POLITICO (Aug. 6, 2017, 6:56 AM), https://www.politico.com/story/2017/08/06/lbj-signs-voting-rights-act-aug-6-1965-241256.

[68] 383 U.S. 301, 307 (1966).

[69] *Id.*

[70] *Id.* at 307 n.2.

[71] *Id.* at 315.

[72] *Id.* at 315–16.

[73] *Id.* at 317. If the Attorney General determined that, as of November 1, 1964, a state or political subdivision had maintained a "test or device," and if "the Director of the Census [] determined that less than 50% of [a state or political subdivision's] voting[-]age residents were registered" on the same date or voted in the 1964 presidential election, then the remedial sections of the VRA would automatically apply to the offending state or political subdivision. *Id.* (citing VRA § 4 (b)). *Id.* at 317.

[74] *Id.* at 315–16.

[75] *Id.* at 318. That same day "coverage was also extended to Alabama, Alaska, Georgia, Louisiana, Mississippi, Virginia, [twenty-six] counties in North Carolina, and one county in Arizona." *Id.*

[76] *Id.* at 319.

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District of Columbia.[77] South Carolina's central argument against the VRA relied on federalism—that the VRA exceeded Congress's powers by legislating in an area typically reserved to the states.[78] Upholding the VRA, the Court stated flatly that "Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting."[79] The Court continued that the "gist of the matter is that the Fifteenth Amendment supersedes contrary exertions of state power."[80] *Katzenbach* thus is an example of the Court using federalism as a means of empowerment rather than a limit on the federal government. Traditionally voting *had* been left to the states; however, the Fifteenth Amendment changed the calculus—the federal government, acting as a check on state governments, intervened via constitutional amendment to eliminate racial discrimination in voting.

Katzenbach's strong endorsement of federalism as empowerment lost favor with the Court as the reform-minded Warren Court gave way to the conservative majorities of the Rehnquist and Roberts Courts, a shift illustrated in *City of Boerne v. Flores*.[81] *Boerne* came before the Court as follows. In 1990, the Court handed down its decision in *Employment Division, Department of Human Resources of Oregon v. Smith*.[82] In *Smith*, the Court held that neutral, general laws may be applied to religious groups and practices without a compelling government interest to support them.[83] In response to *Smith*'s holding, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA)[84] to revive the compelling interest test for determining the constitutionality of laws substantially burdening the free exercise of religion.[85]

Boerne came to the Court after a church located in a historic district was denied a building permit by city officials.[86] The church's archbishop brought suit, citing

[77] *Id.* at 320.

[78] *Id.* at 323.

[79] *Id.*

[80] *Id.* at 325.

[81] *See* 521 U.S. 507 (1997).

[82] 484 U.S. 872 (1990).

[83] *Id.* at 885.

[84] *City of Boerne*, 521 U.S. at 512.

[85] *Id.* at 515 (quoting 42 U.S. § 2000bb(b) (1994)).

[86] *Id.* at 512.

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RFRA as grounds for relief.[87] Thus, *Boerne* presented the question of whether RFRA was a constitutional exercise of Congress's Fourteenth Amendment enforcement powers.[88] The Court determined that, for Congress's Fourteenth Amendment legislation to be constitutional, "[t]here must be congruence and proportionality between the injury being prevented or remedied and the means adopted to that end."[89] If Congress's Fourteenth Amendment legislation went beyond "congruence and proportionality," it would become impermissibly "substantive in operation and effect."[90] This was because, as the Court explained, Congress has "remedial and preventive" power under the Fourteenth Amendment,[91] but not the power to interpret the substance, or widen the scope, of the Fourteenth Amendment's guarantees.[92] In other words, the Fourteenth Amendment, according to the Court, did not grant Congress the authority to pass general legislation, but rather the power to remedy state action violative of constitutional rights.[93] Finding the record showed that RFRA was not congruent and proportional to the problem it sought to stamp out—essentially, RFRA sought to fix a problem the Court viewed as *de minimis*—the Court held that RFRA was unconstitutional as applied against the states.[94] In sum, the Court would not give its imprimatur to Fourteenth Amendment legislation exacting a high cost on federalism with limited evidence of unconstitutional conduct in the congressional record.[95]

To date, *Boerne*'s "congruence and proportionality" test has not been adopted by the Court in the context of voting rights or Fifteenth Amendment legislation. However, *Boerne*'s unstated proposition—that vaguely articulated federalism concerns can render remedial or prophylactic legislation unconstitutional—would feature heavily in the Roberts Court's move to invalidate parts of the VRA. In

[87] *Id.*

[88] *Id.* at 511.

[89] *Id.* at 520.

[90] *Id.*

[91] *Id.* at 524.

[92] *Id.*

[93] *Id.* at 525 (quoting The Civil Rights Cases, 109 U.S. 3, 15 (1883)).

[94] *Id.* at 533, 536.

[95] *Id.* at 534.

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Northwest Austin Municipal Utility District Number One v. Holder,[96] a utility district challenged the constitutionality of the preclearance requirement codified in Section 5 of the VRA.[97] The utility district had an elected board, and thus was required to obtain federal preclearance prior to changing anything relating to its elections.[98] Chief Justice Roberts, writing for the majority, decided that the question before the Court—whether the district was able to "bail out" of the preclearance requirement—could be decided in the district's favor while avoiding the question of Section 5's constitutionality.[99]

Constitutional avoidance, however, did not stop Chief Justice Roberts from planting seeds that he could use in a later case. First, Justice Roberts noted that Sections 4 and 5 of the VRA "were temporary provisions."[100] Justice Roberts then turned to the Court's opinion in *Katzenbach*, framing that decision narrowly by highlighting Chief Justice Warren's assertion that the constitutionality of the VRA's invasive provisions were buttressed by the unusually pernicious problem that the VRA sought to eliminate.[101] After acknowledging the undeniable success of the VRA,[102] Justice Roberts laid bare his federalism concerns. Citing a litany of concurring and dissenting opinions, Justice Roberts wrote that Section 5 of the VRA achieves its goals through "substantial costs" to federalism.[103] Justice Roberts continued that "Section 5 goes beyond the prohibition of the Fifteenth Amendment by suspending *all* changes to state election law—however innocuous—until they have been precleared by federal authorities."[104] This regime, according to Chief

[96] 557 U.S. 193 (2009).

[97] *Id.* at 196.

[98] *Id.*

[99] *Id.* at 206. The Court avoided the constitutionality of Section 5 by deciding the case on the statutory grounds raised by the plaintiff utility district. *See id.* Specifically, the Court held that *all* political subdivisions, including utility districts such as Plaintiff, may file a bailout suit under Section 4(b) of the VRA. *Id.* at 211.

[100] *Id.* at 199.

[101] *See id.*

[102] *Id.* at 201.

[103] *Id.* at 202 (quoting Lopez v. Monterey County, 526 U.S. 266, 282 (1999)).

[104] *Id.*

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Justice Roberts, quite likely amounted to federal overreach, especially in light of "improved conditions" in the South.[105]

Chief Justice Roberts with his opinion in *Shelby County* finished the job of elevating federalism concerns over the need to protect the voting rights of racial minorities. In *Shelby County*, Justice Roberts asserted that *Katzenbach* was not decided on general principles of construction regarding Congress's enforcement power under the Fifteenth Amendment, but rather on the grounds that the extraordinary problem of rampant voter discrimination justified "legislative measures not otherwise appropriate."[106] According to Justice Roberts, the conditions that prompted the VRA's strong preventive measures were no longer present in covered jurisdictions.[107] In light of these changed circumstances, the question before the Court was "whether the [VRA's] extraordinary measures, including its disparate treatment of the States, continue[d] to satisfy constitutional requirements."[108] Working his way through the VRA's history, Justice Roberts noted that when Congress reauthorized the VRA in 1982 and 2006, it failed to update Section 4(b)'s coverage formula.[109] Justice Roberts then turned to the foundation he laid in *Northwest Austin*, reiterating that the majority in that case stressed Section 5's heavy toll on federalism. The guiding principles in *Shelby County*, then, would be whether the VRA's "disparate geographic coverage" was "sufficiently related to the problem that it targets" thereby justifying the resulting federalism costs.[110] Federalism, according to Chief Justice Roberts, dictates that "all powers not granted to the Federal Government are reserved to the States or citizens."[111] Furthermore, our federalist system "secures to citizens the liberties that derive from the diffusion of sovereign power."[112]

Missing from all this was an overt reference to the test set out by the Court in *Boerne*; that is, that legislation passed pursuant to Congress's enforcement power

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[105] *See* Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 202–03 ("[T]he Act imposes current burdens must be justified by current needs.").

[106] Shelby County v. Holder, 570 U.S. 529, 535 (2013).

[107] *Id.*

[108] *Id.* at 536.

[109] *Id.* at 538–39.

[110] *Id.* at 542.

[111] *Id.* at 543 (citing U.S. CONST. amend. X).

[112] *Id.* (quoting Bond v. United States, 564 U.S. 211, 221 (2011)).

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under the Fourteenth Amendment (or the Reconstruction Amendments generally) must be congruent and proportional to the constitutional violation Congress sought to remedy or prevent.[113] A close reading of Justice Roberts's opinion, however, betrays the influence of *Boerne*'s reasoning. First, by framing *Katzenbach* as standing for the principle that the extraordinary remedy of Section 5 preclearance passed constitutional muster in 1966 because it matched the scope of racially-motivated voter suppression present *at that time*, Justice Roberts's opinion weakened *Katzenbach*'s authority as a strong defense of Congress's Fifteenth Amendment enforcement power.[114] Moreover, by framing *Katzenbach* in this way, Justice Roberts allowed that decision to be more easily squared with the Court's reasoning in *Boerne*—namely, that legislation passed pursuant to Congress's enforcement power under the Reconstruction Amendments must be tailored to match the scope of the constitutional violation Congress is seeking to remedy. From this angle, Justice Roberts's *Shelby County* opinion is influenced by the Court's reasoning in *Boerne* without formally adopting the "congruence and proportionality" test to strike down Section 4(b)'s coverage formula.

Practically speaking, Chief Justice Roberts's holding that, to pass constitutional muster, prophylactic measures passed under the Fifteenth Amendment must match the scope of current discriminatory practices is no different than *Boerne*'s holding that prophylactic measures passed under the Fourteenth Amendment must be congruent and proportional to the constitutional violation at issue. Going forward, proper Fifteenth Amendment legislation must evince *current* voter discrimination; in the eyes of the Court, the strong medicine of congressional intrusion into an area traditionally left to the states, like voting, warrants nothing less.

B. Bivens *Actions—Separation of Powers*

A prime example of the Court's shift in its separation of powers jurisprudence is in the area of implied causes of action. "Implied rights of action are judicially inferred rights to relief from injuries caused by another's violation" of a federal statute or constitutional provision.[115] A *Bivens* action is a suit for damages against a federal official who, acting under the color of federal law, violates the

[113] *See supra* text accompanying notes 82–95.

[114] *See Shelby County*, 570 U.S. at 545 (arguing that the *Katzenbach* Court rested its analysis on the principle that extraordinary problems require extraordinary remedies).

[115] Donna L. Goldstein, *Implied Private Rights of Action Under Federal Statutes: Congressional Intent, Judicial Deference, or Mutual Abdication?*, 50 FORDHAM L. REV. 611, 611 (1982).

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Constitution.[116] In other words, "[a] *Bivens* action allows federal officials to be sued in a manner similar to that set forth at 42 U.S.C. § 1983."[117] The action is named after the first case to allow for a suit for damages against a federal official for an alleged constitutional violation—*Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.[118] *Bivens* came to the Court in an era when liberals such as Justices William Brennan, Thurgood Marshall, and William O. Douglas were unafraid to elevate justice above structure. That is to say that *Bivens* actions have long been a bugaboo of conservatives on the federal bench, and with its decision in *Hernández v. Mesa*,[119] the Roberts Court went a long way toward eliminating the action altogether.

On November 26, 1965, federal agents arrested Webster Bivens without a warrant on drug charges at his apartment.[120] The agents then proceeded to search Bivens's apartment without a warrant.[121] Furthermore, Bivens alleged that the agents used excessive force in arresting him and threatened to arrest his family.[122] Bivens subsequently sued the federal agents, stating that they violated his constitutional (i.e., Fourth Amendment) rights.[123] Based on the facts alleged, the federal agents in question undoubtedly violated Webster Bivens's constitutional right to be "secure . . . against unreasonable searches and seizures."[124] The rub was that Bivens had alleged that *federal* rather than *state* agents had violated his constitutional rights. At the time, § 1983 allowed for suits against state officials who, acting under color of law, violated a plaintiff's rights;[125] however, there was no statute allowing for a cause of action against federal officials accused of doing the same. Thus, the question

[116] *Bivens action*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[117] *Id.*

[118] 403 U.S. 388 (1971).

[119] 140 S. Ct. 735 (2020).

[120] *Bivens*, 403 U.S. at 389.

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] U.S. CONST. amend. IV.

[125] 42 U.S.C. § 1983 (2018); *see* Monroe v. Pape, 365 U.S. 167, 172 (1961) ("Congress . . . meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position.").

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presented to the Court was whether a cause of action for damages against federal officials was implied by the Fourth Amendment.[126]

For the majority, Justice William Brennan articulated a forceful defense of constitutional protections, arguing that while

> the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequence of its violation . . . "it is well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."[127]

Therefore, Bivens had a right to sue the federal agents for damages. That this decision was in keeping with other decisions of the Court around that time providing for judge-made rules that better effectuated the purposes of the Fourth Amendment[128] is further evidence of the unextraordinary nature of the holding. Indeed, Professor Akhil Amar argues that the Court's decision in *Bivens* is a direct descendent of *Marbury v. Madison*,[129] as it too stands for the principle "that where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded."[130] Professor Amar goes so far as to argue that "[t]he Framers would have found [the idea that] a victim of [a] constitutional tort" cannot recover damages "a shocking violation of first principles" enshrined in *Marbury*.[131] In subsequent years *Bivens* actions were extended to violations of the Fifth Amendment[132] and Eighth Amendment.[133]

These ringing endorsements from such authorities as Justice Brennan and Professor Amar, in addition to the extension of *Bivens* to other constitutional violations, make it more striking that the continued viability of *Bivens* actions is on

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[126] *Bivens*, 403 U.S. at 389.

[127] *Id.* (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)).

[128] *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961) (holding that the exclusionary rule applies to the States).

[129] Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 813 (1994).

[130] Marbury v. Madison, 5 U.S. 137, 163 (1803) (quotation omitted).

[131] Amar, *supra* note 129, at 812.

[132] Davis v. Passman, 442 U.S. 228 (1979).

[133] Carlson v. Green, 446 U.S. 14 (1980).

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life support. The major groundwork for *Bivens*'s demise was laid in *Ziglar v. Abbasi*.[134] In *Ziglar*, the Court "rejected constitutional claims brought by Muslim aliens who were detained—allegedly in cruel and harsh conditions, and because of their race, religion, or national origin—in the United States after the attacks of September 11, 2001."[135] Writing for the majority, Justice Kennedy first reviewed the state of the law regarding implied causes of action. According to Kennedy, in cases like *J.I. Case Co. v. Borak*[136] the Court was too quick to imply a cause of action where federal statutes did not expressly provide for one.[137] However, in time the Court came to its senses (or so Kennedy seems to say) when it "[c]larified in a series of cases that, when deciding whether to recognize an implied cause of action, the 'determinative' question is one of statutory intent."[138] No longer would the Court take on the arguably legislative function of implying causes of action; going forward the Court would limit itself "to determining whether Congress intended to create the private right of action asserted."[139]

Still, Justice Kennedy acknowledged the question is somewhat different in the context of "whether to recognize an implied cause of action to enforce a provision of the Constitution itself."[140] Nevertheless, Justice Kennedy argued that "it is a significant step under separation of powers principles for a court to determine that it has the authority, under the judicial power, to create and enforce a cause of action for damages against federal officials in order to remedy a constitutional violation."[141] For these reasons, "the *Bivens* remedy is a 'disfavored' judicial activity"[142] and should not be extended to "any new context or new category of defendants."[143] Therefore, courts must ask whether there are "special factors" weighing against

[134] 137 S. Ct. 1843 (2017).

[135] Jules Lobel, Ziglar v. Abbasi *and the Demise of Accountability*, 86 FORDHAM L. REV. 2149, 2149 (2018) (citing *Abbasi*, 137 S. Ct. at 1853–54).

[136] 377 U.S. 426 (1964).

[137] *Abbasi*, 137 S. Ct. at 1855.

[138] *Id.* at 1855–56 (citing Alexander v. Sandoval, 532 U.S. 275, 286 (2001)).

[139] *Id.* at 1856 (citing Touche Ross & Co. v. Redington, 422 U.S. 560, 568 (1979)).

[140] *Id.*

[141] *Id.*

[142] *Id.* at 1857 (citing Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009)).

[143] *Id.* (quotation omitted).

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extending *Bivens* to new contexts or classes of defendants.[144] In addition, Justice Kennedy provided that "if there is an alternative remedial structure present in a certain case, that alone may limit the power of the judiciary to infer" a *Bivens* action.[145] The plaintiffs in *Ziglar* thus found themselves before a Court far less receptive to implied causes of action; one with severe notions of separation of powers.

The Court put this framework to use in *Hernández v. Mesa*,[146] another case alleging unconstitutional conduct on the part of a federal agent. *Hernández* presented the following facts to the Court. Sergio Adrián Hernández Güereca, 15-year-old Mexican boy, was playing with friends in a culvert separating El Paso, Texas from Ciudad Juárez, Mexico.[147] Hernández and his friend were on the U.S. side of the border when his friend was detained.[148] Hernández then ran back onto Mexican soil,[149] at which point Border Patrol Agent Jesus Mesa, Jr. fired two shots, one of which struck Hernández in the face, killing him.[150] Initially the Court remanded the case to the Fifth Circuit so that it could decide the case in light of the framework set forth in *Ziglar v. Abbasi*.[151] On remand, the Fifth Circuit found that Hernández's claim arose in a "new context" and that "multiple factors—including the incident's relationship to foreign affairs and national security," counseled against extending a *Bivens* remedy to this context,[152] a decision the Court ultimately upheld, emphasizing that its new-found wisdom as to implied causes of action was due to appreciating "more fully the tension between" implying a cause of action "and the Constitution's separation of legislative and judicial power."[153] Meanwhile, Justice Thomas, in a concurring opinion joined by Justice Gorsuch, would have gone one step further and

[144] *Id.*

[145] *Id.* at 1858.

[146] 140 S. Ct. 735 (2020).

[147] *Id.* at 740.

[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] *Id.* at 741.

[153] *Id.*

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done away with *Bivens* altogether on the grounds that it was incorrectly decided and thus unprotected by *stare decisis*.[154]

Since Hernández had the misfortune of being killed by a federal agent rather than a state agent, and on the Mexican side of the border rather than the American side, his family was precluded from suing the officer who killed him. This injustice was not lost on Justice Ginsberg, who in a dissenting opinion argued that the *Hernández* case arose "in a setting kin to *Bivens* itself" because it involved a federal agent's alleged Fourth Amendment violation.[155] Moreover, Justice Ginsberg argued, the majority's separation of powers concerns were overstated. Indeed, "no policies or policymakers [were] challenged" in *Hernández*; rather, Hernández's suit targeted "the rogue actions of a rank-and-file law enforcement officer acting in violation of rules controlling his office."[156] Furthermore, to the extent the litigation created tension between the United States and Mexico, the Mexican government had alerted the Court that "refusal to consider Hernández's parents claims on the merits . . . is what has the potential to negatively affect international relations."[157] Notwithstanding Justice Ginsberg's logic and moral authority, the Court had set its course in *Ziglar*: it would use the doctrine of separation of powers to renounce its authority to imply causes of action, and in turn leave vulnerable individuals like Hernández without legal recourse. Part III of this Note offers a new way forward for cases that create tension between liberty and the structural integrity of the Constitution.

III. TOWARD A LIBERTY-FOCUSED APPROACH TO STRUCTURE

Part I of this Note provided background as to how constitutional structure in theory helps preserve individual liberty. Part II illustrated how the Court has come to use structural arguments to undermine individual liberty. Thus there is tension between the aim of our constitutional structure and the way that structure is wielded by the Court today. Accordingly, this part of the Note attempts to resolve this tension by setting out a two-part test for cases that stress the joints of our constitutional structure.

At the outset, it is important to emphasize that this test will not be applicable in all cases. For example, in a case that presents the Court with the question of the

[154] *Id.* at 750 (Thomas, J., concurring).

[155] *Id.* at 756 (Ginsberg, J., dissenting).

[156] *Id.* at 757.

[157] *Id.* at 758 (quoting Brief for the United States as Amicus Curiae Supporting Respondent at 12, Hernández v. Mesa, 140 S. Ct. 735 (2020) (No. 17-1678)).

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proper interpretation of a federal statute or constitutional provision, the Court is plainly performing its essential function of interpreting or applying the law. In these instances, the case before the Court does not implicate the doctrines of federalism or separation of powers. Simply put, such cases do not stress the Constitution's structure.

The cases discussed in Part II, however, are a different story. For example, *Shelby County v. Holder* stresses the doctrine of federalism by putting the Court in the position of having to determine the scope of Congress's power under the Fifteenth Amendment in relation to state power to enact voting laws. Likewise, *Hernández v. Mesa* implicates the doctrine of separation of powers by forcing the Court to ascertain the proper role of the judiciary. Thus, cases involving an implied cause of action not only task the Court with seeking out congressional intent, but also with drawing lines between the legislative and judicial functions. In cases such as these, the structure of our Constitution is in play. Over the past few decades, too often has the Court resolved cases in the name of structure while at the same time diminishing liberty interests. Accordingly, the Court should ask the following questions when deciding whether protecting the structural integrity of the government should come at the expense of liberty.[158]

First, the Court should determine the liberty interest at stake. For example, in *Shelby County*, the interest is the right of racial minorities to access the ballot free from arbitrary state laws designed to keep them from voting. In *Hernández*, the liberty interest is a deceased boy's right to be free from an unreasonable seizure that resulted in his death, and in turn his family's ability to have their son's rights vindicated in a court of law. In both cases the liberty interest at stake is extremely important, and thus should carry great weight in the Court's analysis.

Second, the Court should determine the interest of protecting the structural integrity of the government. This interest should be based on articulable strains on the government's structure that would ensue from elevating liberty above structure, not speculation. For example, in *Shelby County*, the structural interest at stake is the states' ability to regulate their elections free from federal reform efforts. And in *Hernández*, the structural interest at stake is the Court's usurpation of the arguably legislative function of providing for causes of action.

[158] This test takes inspiration from the Court's test for determining what process is due from *Mathews v. Eldridge*, 424 U.S. 319 (1976). To determine what process is due, that test considers: (1) the individual's interest at stake, (2) the risk of error or the value of procedural safeguards, and (3) the interest of the government in efficiency. *Id.* at 335.

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Finally, the liberty interest at stake should be balanced with the structural interest at stake. Of the two cases discussed above, *Hernández* presents the more difficult question for the Court, but ultimately both cases under this proposed framework would be decided in favor of preserving liberty. In *Shelby County*, the liberty interest of protecting racial minorities' right to vote is one of the major concerns of American democracy, while the interest of maintaining state oversight of elections was pretextual.[159] Moreover, Reconstruction and the Fifteenth Amendment specifically interjected the federal government into the area of voting rights, an area in which the states had proved incapable of governing responsibly.[160]

Hernández presents a more delicate balancing because the question before—whether courts can imply a meaning onto a legislative text—more acutely stresses the joints of the Constitution's structural integrity. But ultimately the liberty interest prevails in that case as well; after all, *Bivens* itself has been good law for nearly fifty years and has not resulted in a substantial blurring of judicial and legislative functions feared by conservative members of the Court. And according to Professor Amar, the Framers would not recognize a Constitution that did not allow individuals to sue for damages either the government or government official responsible for violating his or her rights.[161]

No less an authority than *Marbury v. Madison* supports the proposition that when there is a legal injury, there is a legal remedy.[162] In Hernández's case, he lost his life at the hands of a federal official without so much as a day in court on the merits because the Court believed that allowing Hernández's family to sue would upset the doctrine separation of powers. The Court should do better than fall back on structural arguments while undermining individual liberty. This Note's proposed balancing test would remedy these injustices and realign the doctrines of federalism and separation of powers with their theoretical underpinning of promoting individual liberty.

CONCLUSION

The Supreme Court's conservative majority has elevated structure over liberty and exalted form over function. Our Constitution derives meaning from its structure; federalism and separation of powers are not ends themselves, but doctrines designed

[159] *See* Charles & Fuentes-Rohwer, *supra* note 40, at 129 (noting that, under the VRA, 99 percent of laws submitted to preclearance were precleared).

[160] *See* discussion *supra* Part II.

[161] Amar, *supra* note 129.

[162] Marbury v. Madison, 5 U.S. 137, 163 (1803).

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to mitigate arbitrary government and abuses of power. Under the balancing test proposed here, the Court would need to face the liberty interest at stake in a given case and determine whether that liberty interest can or cannot be vindicated in light of structural concerns. The Court should consider this Note's balancing test to realign the doctrines of federalism and separation of powers with their theoretical underpinning of promoting individual liberty.

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