

# Madisonian Tectonics: How Form Follows Function in Constitutional and Architectural Interpretation

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## ABSTRACT

*This Article is the first interdisciplinary work exploring architectural and constitutional theories of interpretation. This “conarchitectural” perspective is used to explore the concepts of form and function in both disciplines to better understand the meaning of structure. While form and function are often referenced in legal analysis, there is little work on the inherent meaning of structure. Constitutional structure is often treated as an instrumental rather than a normative element in modern conflicts. This Article challenges that view and suggests that the Madisonian system is a case of “form following function” in core elements like the separation of powers and federalism. This Article explores the influence of scientific and philosophical theories on the structure of government for Madison. These “Madisonian tectonics” give constitutional structure a normative or deontological value that should frame interpretive analysis. Indeed, the Article explores the role of constitutional structure as a type of “choice architecture” in shaping choices and directing actions within the system. In a conarchitectural approach, an understanding of form and function can lead to a fading of those distinctions—as it did for modernist architect Mies van der Rohe. What emerges is a more consistent and coherent approach to constitutional interpretation that is based on structuring truth behind a design. This Article traces the influences of structure from Madison to Mies to better understand the truth in the meaning of architectural and constitutional structure.*

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During its long incubation, this Article was previously titled—and cited as—*Of Mies and Men: How Form Follows Function in Constitutional and Architectural Interpretation*. I frankly found the Steinbeckian pun irresistible until I realized that the title was contributing to the mispronunciation of “Mies” as sounding like “mice” rather than its proper pronunciation as “Meese.”

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## INTRODUCTION

*"It is the pervading law of all things organic and inorganic, of all things physical and metaphysical, of all things human and all things superhuman, of all true manifestations of the head, of the heart, of the soul, that the life is recognizable in its expression, that form ever follows function. This is the law."*<sup>1</sup>

Form follows function. It is the mantra of much of modern architectural thought. At the same time, functionalism is the very touchstone of modern constitutional thought. For decades, constitutional interpretation has steadily moved in classrooms and courtrooms from a formalist to a functionalist emphasis, particularly in addressing claims under the separation of powers. The concept of the formal and the functional pervades both architecture and constitutional interpre-

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<sup>1</sup> Louis H. Sullivan, *The Tall Office Building Artistically Considered*, LIPPINCOTT'S MAG., Mar. 1896, at 403, 408. This quote from Sullivan shows the influence of American sculptor Horatio Greenough, who is believed to have first used the phrase. See Edward Robert DeZurko, *Greenough's Theory of Beauty in Architecture*, 39 RICE INST. PAMPHLET 96, 98-99 (1952). Mies van der Rohe later integrated this concept centrally into his own modern architectural vision. See *infra* note 24 and accompanying text. Mies was familiar with this concept from Sullivan, who himself appears to have taken it from Horatio Greenough.

tation in ways that are strikingly similar. In both disciplines, scholars have sought to find an inherent truth or validity in certain forms or structures. Yet, scholars in both fields have long treated architecture and the law as being inherently inapposite even though both often reference the needs of humans in modern society. Lawyers view architecture as impressionistic and idiosyncratic, while architects view law as descriptive and didactic. This sense of incompatibility has robbed both fields of a wealth of work that could be mutually beneficial. Indeed, architectural theories offer a foundation that is often missing in discussions of formalism and functionalism in the law—a different perspective on what we mean by form and function, as well as a sense of structure as a normative statement.

Rival theories of formalism and functionalism have long shaped our constitutional interpretations—theories that tie the act of interpretation to different visions of static versus fluid structure.<sup>2</sup> For jurists, functionalism allows for a broader nontextual interpretation in such controversies as Congress’s taxing authority without adopting a classic “liberal” interpretation. For scholars, functionalism allows for “updating” constitutional provisions to meet contemporary demands and thereby gives breath to a “living Constitution.” Functionalism is commonly juxtaposed with “formalism”—a term often presented as a dated and rigid approach to constitutional analysis. The meaning of functionalism is often loosely defined as being self-evidently dichotomous with formalism.<sup>3</sup> The rigidity of formalism and the fluidity of

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2 As shown most recently with Chief Justice John Roberts’s preservation of the individual mandate in the health care legislation, functionalism is often tied to a recognition of the changing character of federal governance in both the relationship of the three branches to each other as well as the federal government’s relationship with the states. See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2579–80 (2012). I recently explored these interpretive schools in the context of recess appointments and other contemporary controversies. See Jonathan Turley, *Constitutional Adverse Possession: Recess Appointments and the Role of Historical Practice in Constitutional Interpretation*, 2013 WIS. L. REV. 965, 968–70 [hereinafter Turley, *Constitutional Adverse Possession*] (discussing the tension between formalist and functionalist approaches that has led to “demonstrably dysfunctional practices” in the context of recess appointments); Jonathan Turley, *A Fox in the Hedges: Vermeule’s Vision of Optimized Constitutionalism in a Suboptimal World*, 82 U. CHI. L. REV. 517, 559–70 (2015) [hereinafter Turley, *A Fox in the Hedges*]; Jonathan Turley, *Recess Appointments in the Age of Regulation*, 93 B.U. L. REV. 1523, 1526–28 (2013) [hereinafter Turley, *Recess Appointments*] (discussing the rivaling approaches in the context of recess appointments and the new model of governance with the rise of the “fourth branch,” administrative agencies).

3 Professor Manning described this view in his recent article on separation of powers theory:

[T]he Constitution not only separates powers, but also establishes a system of checks and balances through power-sharing practices such as the presidential veto, senatorial advice and consent to appointments, and the like. In light of that com-

functionalism have led to a long line of articles contesting the foundations and applications of one theory over the other.<sup>4</sup> Formalism emphasizes the need for clear and consistent lines of separation in areas ranging from the separation of powers to federalism.<sup>5</sup> In a legal version of the adage “good fences make good neighbors,” formalism demands a greater degree of judicial intervention in policing these lines of separation.<sup>6</sup>

In legal scholarship, functionalism appears defined most clearly by what it is not.<sup>7</sup> It is not formalism.<sup>8</sup> Much of the work in this area treats both terms as inherently obvious in their meaning and focuses on the applied implications of either theory in contemporary disputes. For example, the lack of definition in the meaning of formalism tends to undermine its strength as an interpretive approach. If normative

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plex structure, functionalists view the Constitution as emphasizing the balance, and not the separation, of powers.

John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1952 (2011) (footnote omitted).

<sup>4</sup> See, e.g., Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1526 (1991) (“An additional consequence of formalism is that it tends to straitjacket the government’s ability to respond to new needs in creative ways, even if those ways pose no threat to whatever might be posited as the basic purposes of the constitutional structure.”); Martin H. Redish & Elizabeth J. Cisar, “*If Angels Were to Govern*”: *The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 491 (1991) (“One important problem with both categories of functionalism is that neither provides any comprehensible standard by which to judge particular incursions on the separation of powers.”).

<sup>5</sup> Formalist analysis has been defined as the view that “[a]ny exercise of governmental power, and any governmental institution exercising that power, must either fit within one of the three formal categories . . . or find explicit constitutional authorization for such deviation.” Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CALIF. L. REV. 853, 858 (1990). See generally Morton J. Horwitz, *The Rise of Legal Formalism*, 19 AM. J. LEGAL HIST. 251 (1975).

<sup>6</sup> Legal formalism has been used with a variety of distinct meanings and applications from contract law to statutory interpretation to constitutional interpretation. On its most general level, it was defined by William Eskridge as an approach emphasizing “bright-line rules that seek to place determinate, readily enforceable limits on public actors.” William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL’Y 21, 21 (1998). This Article solely concerns formalist theories relating to constitutional interpretation and more specifically the separation of powers doctrine. See generally *id.*

<sup>7</sup> Cf. Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 950 (1988) (“Formalism is like a heresy driven underground, whose tenets must be surmised from the derogatory comments of its detractors.”).

<sup>8</sup> The debate over formalism extends more broadly to questions of the foundation of judicial interpretation and the opposition to such theories in the legal realist movement. See, e.g., Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 605–09 (1908) (“[T]he marks of a scientific law are, conformity to reason, uniformity, and certainty. . . . Law is forced to take on this character in order to accomplish its end fully, equally, and exactly.”). This Article looks solely at the role of formalism and functionalism in constitutional interpretation and the treatment of the separation of powers doctrine.

theory provides a moral justification for law, it would seem clear that form cannot be its own normative value. Absent a foundational understanding, formalism becomes the ultimate triumph of form over substance. For those who are critical of functionalism, this critique has been difficult to answer.<sup>9</sup> It represents a type of paradox: form is created for a purpose but it cannot be the purpose itself. Otherwise, the justification of formalism becomes circular: courts must enforce a particular form of government because government requires a particular form. It is that paradox of formalism—that form cannot be its own norm and claim objective legitimacy—which undermines the viability of formalism as a modern interpretive theory.

What is striking about this inherent conflict is that it is the very same conflict explored in architectural literature, which has long struggled with the relationship between form and function.<sup>10</sup> The comparison goes beyond a simple use of the terms “formalism” and “functionalism.” Since the late 1800s, architects have strived for a meaning in the use of functionalism—a body of scholarship that raises probative questions about the (often ill-defined) use of this term.

The primary purpose of this Article is to explore the synergy between legal and architectural theories of interpretation on the role and purpose of structure. A plethora of rivaling theories exist on the interpretation of legal text—both statutory and constitutional—that run the gamut from strict textualist to broad interpretivist approaches. The challenge for these theories is to maintain a single comprehensive basis for the role of courts in a democratic system. Given the rich variety of theories taken from literature,<sup>11</sup> anthropology,<sup>12</sup> economics,<sup>13</sup> and other disciplines, the absence of work on law and architecture is rather surprising in light of the shared interpretive concepts. This absence is equally surprising given the heavy influence of science on the Framers—particularly Madison, who famously worked for the perfection of “the science of politics.”<sup>14</sup> The Framers believed that the

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<sup>9</sup> See Walter J. Walsh, *Redefining Radicalism: A Historical Perspective*, 59 GEO. WASH. L. REV. 636, 641 (1991). But see Pound, *supra* note 8, at 605 (defending formalism as “a means toward the end of law, which is the administration of justice,” and thus “[l]aw is not scientific for the sake of science”).

<sup>10</sup> See *infra* Part II.

<sup>11</sup> See, e.g., JAMES BOYD WHITE, *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* ix–x (1985).

<sup>12</sup> See, e.g., Laura Nader, *The Anthropological Study of Law*, in *LAW AND ANTHROPOLOGY* 3, 3 (Peter Sack & Jonathan Aleck eds., 1992).

<sup>13</sup> See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* xxi–xxii (7th ed. 2007).

<sup>14</sup> THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961); see also THE FEDERALIST NO. 37, *supra*, at 228 (James Madison).

“foundation of superstructures”<sup>15</sup> in both politics and science was based on certain fundamental laws of nature.<sup>16</sup> As shown below, Madison and others often expressed their rationalist theories on the “science of politics.”<sup>17</sup> This interdisciplinary approach offers an alternative way of looking at the role of structure, a view that challenges current approaches in interbranch conflicts in the tripartite constitutional system. Just as physical structures have long been designed to influence human movement and interaction, constitutional structures are designed for the same purpose. Both have elements of a different type of “choice architecture” in shaping the choices in decisionmaking of occupants.<sup>18</sup> This Article does not attempt to create a new unified theory of the judicial role in the interpretation and application of law in our society. Rather, it looks at the meaning of form and function and the role of structure in both methods of interpretation. In particular, these different methods strive not only to direct human choices, but also to avoid “incentive conflicts.”<sup>19</sup> Just as markets are often “replete with incentive conflicts,”<sup>20</sup> both physical and constitutional forms are designed to avoid such inherent conflicts. In the latter, such incentive conflicts increase when the integrity of the structure or form is lost through lack of enforcement or definition.

This Article reflects a separation-based theory of constitutional interpretation.<sup>21</sup> While this theory rests on a single unifying value of

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<sup>15</sup> See *infra* note 52 and accompanying text.

<sup>16</sup> O. Carter Snead, *Science, Public Bioethics, and the Problem of Integration*, 43 U.C. DAVIS L. REV. 1529, 1559 (2010) (“Like other Enlightenment thinkers, the framers held the view that ‘no system of government or of society could be sound and stable if it contravened any of the fundamental principles of nature revealed by science.’” (quoting I. BERNARD COHEN, *SCIENCE AND THE FOUNDING FATHERS* 20, 280 (1995))).

<sup>17</sup> See *infra* Part I.B; see also THE FEDERALIST NO. 47, *supra* note 14, at 301 (James Madison).

<sup>18</sup> Choice architecture often focuses on incentives and structures that encourage efficient or “right” decisionmaking. See RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 83–86 (2008). The discussion of choice architecture in areas like consumer decisionmaking is obviously different from this context of actual structural forms. This scholarship prefers choice architecture in some markets and regulations rather than paternalistic lawmaking. See *id.* at 82–83.

<sup>19</sup> *Id.* at 98.

<sup>20</sup> *Id.*

<sup>21</sup> I have previously testified in favor of Congress seeking judicial intervention over some separation of powers conflicts. See *Authorization to Initiate Litigation for Actions by the President Inconsistent with His Duties Under the Constitution of the United States: Hearing Before the H. Comm. on Rules*, 113th Cong. (2014) [hereinafter *Authorization to Initiate Litigation Hearing*] (prepared statement of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School), available at <http://docs.house.gov/meetings/RU/RU00/20140716/102507/HMTG-113-RU00-Wstate-TurleyJ-20140716.pdf>; *Enforcing the President's*

liberty, it posits that the single function behind the Madisonian system is an anti-aggregation policy. This view differs in two important respects from more sweeping theories of constitutional interpretation, like Ronald Dworkin's view of equality as the basis for a moral reading of its text.<sup>22</sup> First, anti-aggregation is offered solely in cases of conflict between the branches and not more broadly as a theory of the judicial role in society. Second, this narrower function of the constitutional structure is offered as its only consistent and "true" reflection, what I will refer to as *Baukunst* values, or the art of building.<sup>23</sup>

As discussed below, "form follows function" is the very epigraph affixed to modern architecture, particularly the work of Ludwig Mies van der Rohe ("Mies").<sup>24</sup> As a concept, the saying ties architectural

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*Constitutional Duty to Faithfully Execute the Laws: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. 30–47 (2014) [hereinafter *Duty to Faithfully Execute Hearing*] (testimony and prepared statement of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School) (discussing nonenforcement issues and the rise of the fourth branch); *Executive Overreach: The President's Unprecedented "Recess" Appointments: Hearing Before the H. Comm. on the Judiciary*, 112th Cong. 35–57 (2012) [hereinafter *Recess Appointments Hearing*] (prepared statement of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School); see also *Confirmation Hearing for Attorney General Nominee Loretta Lynch: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. (2015) [hereinafter *Lynch Confirmation Hearing*] (prepared statement of Jonathan Turley, Shapiro Professor of Public Interest Law, The George Washington University Law School) (discussing the loss of legislative power and the role of confirmation hearings to address separation of powers issues). This testimony was based on prior scholarship over the loss of legislative authority in the tripartite system. See Turley, *Constitutional Adverse Possession*, *supra* note 2, at 965–72; Turley, *Recess Appointments*, *supra* note 2, at 1524–25. In late 2014, I agreed to serve as the lead counsel in *United States House of Representatives v. Burwell*. Michael R. Crittenden, *House Republicans Hire Jonathan Turley to Pursue Obama Lawsuit*, WALL ST. J. (Nov. 18, 2014, 12:49 PM), <http://blogs.wsj.com/washwire/2014/11/18/house-republicans-hire-jonathan-turley-to-pursue-obama-lawsuit/>.

<sup>22</sup> See RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 7–8 (1996).

<sup>23</sup> WERNER BLASER & MIES VAN DER ROHE: *THE ART OF STRUCTURE* 28 (1993) ("‘Bau’ (building) is the static and law-conforming element based on a strict intellectual order, and ‘Kunst’ (art) is the free and creative element which can operate within a clear structure.’").

<sup>24</sup> It was also the mantra that shaped my childhood and that of my four siblings in Chicago. As the children of one of the most loyal students (and later associate) of Mies van der Rohe, we learned this concept in our earliest years from our father, Jack Turley. My father worked as one of Mies's handful of protégés, first studying under him at the Illinois Institute of Technology and then working for him in his studio. He worked for Mies until Mies's death and then continued his work as an architect and later partner at Skidmore, Owings & Merrill. A recent book on Mies actually shows that studio and my father working with his mentor. FRANZ SCHULZE & EDWARD WINDHORST, *MIES VAN DER ROHE: A CRITICAL BIOGRAPHY* 274 (rev. ed. 2012). My father is now buried close to his mentor, as well as other Chicago visionaries like Louis Sullivan, John Root, William Holabird, Howard Van Doren Shaw, William LeBaron Jenny, and others, at Graceland Cemetery in Chicago. It is easy to pick out their resting places; they have the simplest granite headstones—their final statement of form following function.

design to a modern view of human existence—dispensing with the over-stylized and pretentious concepts of the past. Notably, Mies studied philosophers as much as other architects.<sup>25</sup> When reading his writings and those of other modernists of that period, the similarity of their outlook to the Framers' is strikingly profound, and is based on the same inquiry into the needs and tastes of human beings.<sup>26</sup> Architects like Mies rejected form in its own right, and in that sense would appear to support a functionalist approach.<sup>27</sup> On a deeper level, however, there rests a particularly profound meaning. Mies did view function as following form when form is considered a defining or essential part of a building.<sup>28</sup> Put differently, form can be the truth of the building. In that sense, it does have a stand-alone or normative meaning. Indeed, Mies said function can follow form—though he is often cited for the countervailing principle that was actually stated by Louis Sullivan.<sup>29</sup>

In the same fashion, form in the Constitution has a normative element. The “truth” in form lies in the Framers’ view of the essential man—a form that is designed to harness and funnel the passions and interests of man while protecting him from tyranny.<sup>30</sup> A review of architectural theory, particularly related to the modernist movement, shows not only the same debate over functionality in design, but a reliance on many of the philosophers and writers often cited in legal studies, from Plato to Aristotle to Kant to Nietzsche.<sup>31</sup> Just as law is based on foundational views of the necessities and rights of man, architecture has long been viewed as an expression of the same underlying values.

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<sup>25</sup> See SCHULZE & WINDHORST, *supra* note 24, at 384–85.

<sup>26</sup> Indeed, architectural theory has been more receptive to interdisciplinary scholarship than the inverse (at least when it comes to legal scholarship). See INGEBORG HOESTEREY, *ZEITGEIST IN BABEL: THE POSTMODERNIST CONTROVERSY* 148 (1991) (“The critique of functionalism in architecture converges today with a critique of functionalism in the social and human sciences. The dogmas of functionalism—that function determines form and that function alone, not the means of its achievement, matters—have lost their emancipatory potential in aesthetics.”).

<sup>27</sup> This impression is reinforced by statements from Mies that “[w]e reject every aesthetic speculation, every doctrine, and every formalism.” See SCHULZE & WINDHORST, *supra* note 24, at 75 (quoting Mies). However, Mies is referring specifically to the formalism of aesthetic expression.

<sup>28</sup> See *id.* (“We know no formal problems, only building problems. Form is not the goal but the result of our work.” (internal quotation marks omitted)).

<sup>29</sup> Sullivan, *supra* note 1, at 408.

<sup>30</sup> See generally THE FEDERALIST NO. 10, *supra* note 14, at 77–84 (James Madison).

<sup>31</sup> See SCHULZE & WINDHORST, *supra* note 24, at 384–85.



Like the modernist architects, the Framers sought to depart from traditional approaches to government—stripping away the nonessentials of prior governmental structures and building a government based on a practical understanding of the human condition. For them, form followed the function of government. This included a concept of separation of powers, which is not mentioned in the text but permeates the constitutional structure as an architectural theme. Indeed, the famous quote of Mies on functionalism in architecture could easily have come from Madison on government: “The long path from material through function to creative work has only one goal: to create order out of the desperate confusion of our time. We must have order, allocating to each thing its proper place and giving to each thing its due according to its nature.”<sup>32</sup> Like Mies, Madison first focused on the nature of the thing that he dealt with in government: human nature.<sup>33</sup> He based his view of government on his understanding of the tendencies of humans toward factional and divided interests:

It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.<sup>34</sup>

The history of the Constitution’s vesting clauses reflects a function of separation, and the drafting reflects the form necessary to achieve that function. The record of functionalist interpretation, more importantly, shows how the lack of bright-line rules has produced the very type of dysfunctionality that the Framers sought to avoid with conflicts left to fester between the branches—expressed in continued tit-for-tat politics.<sup>35</sup> The form of the Constitution, particularly the vesting clauses, reflects the separation of powers function—a function discussed not only by the Framers, but also by leading intellectuals of the period.<sup>36</sup>

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<sup>32</sup> ARCHITECTURE: CELEBRATING THE PAST, DESIGNING THE FUTURE 152 (Nancy B. Solomon ed., 2008).

<sup>33</sup> THE FEDERALIST NO. 5, *supra* note 14, at 322 (James Madison).

<sup>34</sup> *Id.*

<sup>35</sup> See *Duty to Faithfully Execute Hearing*, *supra* note 21, at 30–31.

<sup>36</sup> See *infra* Part I.

The weakness of functionalism in constitutional interpretation is in the definition of the relevant function. The separation of powers can be seen as an arch where three keystones hold each other in place by way of the gravitational forces that they exert on each other.<sup>37</sup> Increasing the size of one stone can create imbalance and ultimately the collapse of the arch. For the Madisonian system, the growth of executive power represents precisely that type of overloading of an arch, with the resulting imbalance and instability robbing the structure of its function of distributing power. As discussed below, the purpose of the tripartite superstructure is liberty, and the function of the design is to avoid the greatest threat to liberty: aggregation of power.<sup>38</sup> Power is to legal structures what gravity is to architectural structures. They are both destructive and, at the same time, positive elements. Gravity is what pulls down a physical structure. Yet, its force can also be used to support elements of a structure, like an arch. In the same way, power can destabilize a constitutional system. Yet, in the Madisonian system, ambition for power is used to maintain the integrity of the tripartite superstructure.<sup>39</sup> Both structures are designed to carefully channel the very elements that simultaneously threaten and sustain them.

Putting aside the uncertainty of what a given function means in a constitutional dispute, there remains the meaning and essence of form. In both modern architectural and legal work, form for its own right seems archaic and superficial. This is particularly the case with many of the writings of Mies. It may seem inherently antithetical to cite Mies to support the “formalist” view of law—a revolutionary architect supporting what some view as a traditional and outdated approach to constitutional interpretation. After all, it was Mies who insisted that “means must be subsidiary to ends and to our desire for dignity and value.”<sup>40</sup> That could be viewed as supporting a functionalist approach that looks not at strict lines of demarcation, but how the system functions in light of the shared powers. While Mies would be the last architectural theorist to be called a “formalist,” and on the surface would appear to be best described in “functionalist” terms, his writings focus on the core functionality of structures—and the beauty that such a structure offers in its own right. Mies’s writings often fo-

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<sup>37</sup> See *infra* note 149 and accompanying text.

<sup>38</sup> See *Duty to Faithfully Execute Hearing*, *supra* note 21, at 3.

<sup>39</sup> See THE FEDERALIST NO. 51, *supra* note 14, at 322 (James Madison) (“Ambition must be made to counteract ambition.”).

<sup>40</sup> Mies van der Rohe, Inaugural Address as Director of Architecture at Armour Institute of Technology (1938), *reprinted in* PHILIP JOHNSON, MIES VAN DER ROHE 196–200 (3d ed. 1978).

cus on the convergent point of form and function where the distinction between them fades and structure is expressed in normative terms. Conversely, in legal work, form and function are often expressed as separate and distinct by those arguing for changes in the interrelationship of the branches of government.<sup>41</sup>

This Article is an effort to start a dialogue between the two fields of architecture and the law on shared concepts regarding the role of structure and form in interpretation. It suggests that form does have a separate and discernible normative value. Indeed, the line between function and form fades when one looks at the role of structure in decisionmaking. The Article first looks at the treatment of form in government by early philosophers like Montesquieu and Framers like Madison. Part I of the Article explores the scientific and philosophical influences on Madison, how these influences led to the development of separation theory, and how the tripartite system reflected an understanding of factional and institutional threats to a governmental structure. The purpose of this system was to ensure liberty by preventing the aggregation of power that leads to tyranny. Part II looks at the parallel inquiry made by modernist architects from Louis Sullivan to Mies van der Rohe. It challenges the rote understanding of “form follows function” and shows how designers like Mies believed that there is an essential truth to form that could dictate functions. Part III then looks at how form or structure in the law, like architecture, can have normative and “spiritual” meaning. Miesian designs reflect a deeper understanding of form as function, erasing the distinction often recognized by legal scholarship. There is a Madisonian tectonics that is similar to that of Miesian tectonics that expresses the “truth” of the tripartite structure. In Part IV, the discussion then turns to how structural norms express such a “truth” in constitutional systems. The deontological aspect of structure is in contrast to the common treatment of structure as purely instrumental for achieving specific objectives in constitutional theory. The structural design is meant to not just funnel and shape conduct (as in architectural deterministic designs) but also to reflect core democratic and individual values. In partitioning government, the system framed the horizon of action and decisionmaking in a way that amplified those values and protected them from aggrandizing behavior. To borrow another term, the Madisonian system is an example of deterministic architecture—a design intended to influence those within the struc-

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<sup>41</sup> See generally, e.g., Brown, *supra* note 4.

ture. Applying Mies's *Baukunst* principles, the structure or "tectonics" of the tripartite structure demands greater definition and reinforcement in the modern context.<sup>42</sup> There are times when functions must yield to form, even in a Miesian world. The instability created by expanding executive powers represents such a circumstance where the form is the function or the "truth" behind the design of the tripartite structure. Madisonian tectonics blur the classic legal distinction between form and function, as did Miesian tectonics. Under the "conarchitectural" view, the structure is not simply the vehicle to achieve various concepts in government but the very conception itself in constitutional design.<sup>43</sup> There are both instrumental and deontological elements in limiting the context for decisionmaking while assuming a form tied to core philosophical values. It is the tectonic paradox of structure and of "form as function" and "function as form." It is in the understanding of form that architectural theory can offer greater clarity and coherence to constitutional structure.

## I. FROM MONTESQUIEU TO MADISON: THE FRAMERS AND THE NEW ARCHITECTURE OF GOVERNMENT

### A. *Madison and the Laws of Nature*

While the philosophical influences of writers like Locke and Hume are often explored in relation to Madison and his contemporaries, scientific theories also played a significant role in shaping founding principles.<sup>44</sup> In our scientifically and technologically saturated time, it may be difficult to appreciate the impact of discoveries like those of Sir Isaac Newton—not just on science, but also on how his contemporaries looked at the world at large. The basic elements of these discoveries made it possible to not just understand scientific principles, but to actually experiment with them—as shown most famously by Benjamin Franklin.<sup>45</sup> Thomas Jefferson, Benjamin Franklin, John Adams, Benjamin Rush, James Madison, and others actively

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<sup>42</sup> The application of these principles in various areas of conflict is pursued in Jonathan Turley, *Form Follows Function: The Application of Tectonic Principles in a Tripartite System* (unpublished manuscript) (on file with author).

<sup>43</sup> See *infra* Part IV.

<sup>44</sup> See *supra* notes 14–17 and accompanying text.

<sup>45</sup> PETER GAY, *THE ENLIGHTENMENT: AN INTERPRETATION: VOLUME II: THE SCIENCE OF FREEDOM* 557–58 (1969). Benjamin Franklin was a particularly loyal follower of Newton, whom he tried to meet as a young man visiting London. He cited Newton's *Principia* as one of the influential books in his life. COHEN, *supra* note 16, at 20. Whereas Franklin was a scientist and inventor of global fame, Madison was "a devoted amateur." *Id.* at 267.

explored scientific questions while articulating principles of politics.<sup>46</sup> The Constitution was written at a time of scientific exploration and veneration of the unfolding logic of the laws of nature.<sup>47</sup> Scientific concepts were the very language of modernity for educated persons during the Enlightenment.<sup>48</sup> Not only were political theories tied to scientific theories, but the Framers also believed that politics had to follow the same objective and rational principles.<sup>49</sup> Where Newton described universal laws of nature, Sir William Blackstone believed that those objective and rational principles governed both nature and man:

Law, in it's [sic] most general and comprehensive sense, signifies a rule of action; and is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational. Thus we say, the laws of motion, of gravitation, of optics, or mechanics, as well as the laws of nature and of nations. And it is that rule of action, which is prescribed by some superior, and which the inferior is bound to obey.

Thus when the supreme being formed the universe, and created matter out of nothing, he impressed certain principles upon that matter, from which it can never depart, and without which it would cease to be. When he put that matter

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<sup>46</sup> This influence also includes figure like Alexis de Tocqueville. See generally I. BERNARD COHEN, *FRANKLIN AND NEWTON: AN INQUIRY INTO SPECULATIVE NEWTONIAN EXPERIMENTAL SCIENCE AND FRANKLIN'S WORK IN ELECTRICITY AS AN EXAMPLE THEREOF* 36–37 (1956) [hereinafter COHEN, *FRANKLIN AND NEWTON*]; COHEN, *supra* note 16, at 20; EDWARD T. MARTIN, *THOMAS JEFFERSON: SCIENTIST* 4–7 (1952); David Guston, *The Essential Tension in Science and Democracy*, 7 SOC. EPISTEMOLOGY 3, 3 (1993). Benjamin Rush notably wrote:

It is one thing to understand the *principles*, and another to understand the *forms* of government. . . . There is the same difference between principles and forms in all other sciences. Who understood the principles of mechanics and optics better than Sir Isaac Newton? and yet Sir Isaac could not for his life have made a watch or a microscope. Mr. Locke is an oracle as to the *principles*, Harrington and Montesquieu are oracles as to the *forms* of government.

Benjamin Rush, *Letter III*, in 6 OBSERVATIONS UPON THE PRESENT GOVERNMENT OF PENNSYLVANIA IN FOUR LETTERS TO THE PEOPLE OF PENNSYLVANIA 13, 20 (Styner & Cist 1777).

<sup>47</sup> See generally Roland Bainton, *The Appeal to Reason and the American Constitution*, in *THE CONSTITUTION RECONSIDERED* 121, 123 (Conyers Read ed., 1938) (discussing how the “Age of Reason” was shaped for the Framers by “the method of Newton”).

<sup>48</sup> Indeed, this was called the “Age of Newton” by some to reflect its characteristics of being “empirical, characterized by the rapid accumulation of knowledge.” COHEN, *FRANKLIN AND NEWTON*, *supra* note 46, at 17–18.

<sup>49</sup> See generally STEVEN GOLDBERG, *CULTURE CLASH: LAW AND SCIENCE IN AMERICA* 26–27 (1994). Notably, Newton was himself a member of Parliament, but his views had far greater impact on the political system in the United States. See MICHAEL FOLEY, *LAWS, MEN AND MACHINES: MODERN AMERICAN GOVERNMENT AND THE APPEAL OF NEWTONIAN MECHANICS* 5 (1990).

into motion, he established certain laws of motion, to which all movable bodies must conform.<sup>50</sup>

The Framers' references to Newtonian principles and other scientific principles tie directly to the same principles used by architects in creating stable structures.<sup>51</sup> Thomas Jefferson cited both Locke and Newton as having "laid the foundation of those superstructures which have been raised in the Physical & Moral sciences."<sup>52</sup> By describing an inherent order to the universe, Newton provided for a paradigm shift for contemporary political thinking.<sup>53</sup> As James Wilson stressed: "Order, proportion, and fitness pervade the universe. Around us, we see; within us, we feel; above us, we admire a rule, from which a deviation cannot, or should not, or will not be made."<sup>54</sup>

Madison found particular fascination in Newtonian principles, which he studied at Princeton.<sup>55</sup> Just a few years after the adoption of the Constitution, Madison wrote that Newton and Locke "established immortal systems, the one in matter, the other in mind."<sup>56</sup> Newton's writing represented a revolutionary new conception of nature that translated easily to other subjects as a scientific approach, as Madison famously did with politics. Indeed, Madison cited both Locke and Newton as the greatest thinkers of his generation.<sup>57</sup> Madison saw

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<sup>50</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES \*38.

<sup>51</sup> See COHEN, *supra* note 16, at 279. According to historian of science I. Bernard Cohen, "[t]he Founding Fathers used science as a source of metaphors because they believed science to be a supreme expression of human reason." *Id.*

<sup>52</sup> Letter from Thomas Jefferson to John Trumbull (Feb. 15, 1789), reprinted in THOMAS JEFFERSON: WRITINGS 939, 939–40 (Merrill D. Peterson ed., 1984) (also citing Francis Bacon as one of "the three greatest men that have ever lived").

<sup>53</sup> Ralph Henry Gabriel, *Constitutional Democracy: A Nineteenth-Century Faith*, in THE CONSTITUTION RECONSIDERED, *supra* note 47, at 247, 247 ("The group of anxious men who assembled at Philadelphia in 1787 to frame a constitution for the new United States had almost universally that confidence in human reason which stemmed from Newton's scientific achievements of the century before . . .").

<sup>54</sup> James Wilson, *Of the General Principles of Law and Obligation*, in 1 THE WORKS OF JAMES WILSON 97, 97 (Robert Green McCloskey ed., 1967); see also D. Arthur Kelsey, *The Law of Physics & the Physics of Law*, 25 REGENT U. L. REV. 89, 89–90 (2012).

<sup>55</sup> Madison actually wrote an undergraduate paper on Newtonian principles at Princeton. COHEN, *supra* note 16, at 20. John Adams also studied Newton in his undergraduate work at Harvard. *Id.* In an article in the *Boston Patriot* in 1811, Adams referred to Newton as "perhaps the greatest man that ever lived." J.G. CROWTHER, FAMOUS AMERICAN MEN OF SCIENCE 150 (1937). Since the article was on Benjamin Franklin, that is a singular praise.

<sup>56</sup> James Madison, *Spirit of Governments*, NAT'L GAZETTE, Feb. 20, 1792, at 130, available at [http://www.constitution.org/jm/17920220\\_spirit.htm](http://www.constitution.org/jm/17920220_spirit.htm).

<sup>57</sup> *Id.* Locke's influence on Madison has been widely discussed in prior work. See, e.g., John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49, 64 (1996). The synergy between Locke and Newton was especially interesting because "John Locke was not only the author of the influential *Two Treatises of Government*; he

Newtonian principles as creating a “parallelism between the world of nature and the world of human affairs.”<sup>58</sup>

The parallelism between nature and politics can be found in the interrelationships of objects described by Newton.<sup>59</sup> As Woodrow Wilson noted in his own venerated study of government, the Framers “sought to balance the executive, legislature, and judiciary off against one another by a series of checks and counterpoises, which Newton might readily have recognized as suggestive of the mechanism of the heavens.”<sup>60</sup> The Framers viewed governmental branches much like the bodies that move or remain stationary according to observable forces. While Newton referred to “forces impressed” in his First Law,<sup>61</sup> the Framers, and particularly Madison, looked at the movement of factions and their effect on the government.<sup>62</sup> Likewise, Newton’s Second Law on proportional movement expressed a notion that forces produce a variety of motion depending on whether they are expressed fully or by degrees.<sup>63</sup> These principles illustrate conceptually how branches influence each other. They are not objects that will remain at rest, but are in motion through “forces impressed” that are inherent to the system. Indeed, such forces compel movement in government—an ideal of any representative government. For a government, an object at rest is not its preferred state. Government, like society, must respond to changes, and the question then focuses on how the parts of that government should move to accommodate those changes. Perhaps the most applicable Newtonian law is the Third Law, that for each action there is “an opposite and equal reaction.”<sup>64</sup> Madison and others often described the branches as exerting force upon each other.<sup>65</sup> Indeed, John Adams used this principle against another Newtonian with impeccable scientific credentials: Benjamin

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was also the first philosopher (in our modern sense of the word) to become a Newtonian.” COHEN, *supra* note 16, at 59–60.

<sup>58</sup> COHEN, *supra* note 16, at 20. George Berkeley, a popular writer and later Bishop of Cloyne, wrote a well-regarded essay in 1713 on the extension of Newtonian principles to social and political systems. *Id.* at 31.

<sup>59</sup> See generally FOLEY, *supra* note 49, at 3–6.

<sup>60</sup> WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 56 (1908).

<sup>61</sup> ISAAC NEWTON, THE PRINCIPIA: MATHEMATICAL PRINCIPLES OF NATURAL PHILOSOPHY 416 (I. Bernard Cohen & Anne Whitman trans., Univ. of Cal. Press 1999) (1687) (“Every body perseveres in its state of being at rest or of moving uniformly straight forward, except insofar as it is compelled to change its state by forces impressed.” (footnotes omitted)).

<sup>62</sup> See generally THE FEDERALIST NO. 51, *supra* note 14, at 324–25 (James Madison).

<sup>63</sup> NEWTON, *supra* note 61, at 416 (“A change in motion is proportional to the motive force impressed . . . whether the force is impressed all at once or successively by degrees.”).

<sup>64</sup> *Id.* at 417.

<sup>65</sup> See THE FEDERALIST NO. 51, *supra* note 14, at 322–23 (James Madison).

Franklin. Adams cited the gravitational pull of orbiting bodies and Newton's Third Law to argue for a bicameral legislature over Franklin's suggestion of a unicameral legislature.<sup>66</sup> By balancing such forces, the three parts can be held in rough equipoise. Newtonian images found their way into specific jurisdictional conflicts. For example, in addressing the question of federalism, the power of the federal government to preempt state laws was described as the "attractive principle which would retain . . . the centrifugal force [without which] . . . planets will fly from their orbits."<sup>67</sup> However, the separation of powers often gets cited as the most direct expression of Newtonian principles.<sup>68</sup> As Wilson noted:

[The Federalist Papers] speak of the "checks and balances" of the Constitution and use to express their idea the simile of the organization of the universe, and particularly of the solar system—how by the attraction of gravitation the various parts are held in their orbits, and represent Congress, the judiciary, and the President as a sort of imitation of the solar system.<sup>69</sup>

Forces are expressed within the system without causing instability. In this way, a system can allow pressure or forces to be expressed without causing one component to move dangerously out of sync with the others. The discussion of checks and balances in early writings seems particularly Newtonian, as does the overall system of separation of powers.<sup>70</sup> Science supplied the metaphors for the vision, and specifically the challenges, of government.<sup>71</sup> As Cohen has noted in his study of science and the founding fathers, Newton's work had a greater emphasis on instability in forces and motions—a concern that weighed heavily in Madisonian writings on government.<sup>72</sup>

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<sup>66</sup> COHEN, *supra* note 16, at 203.

<sup>67</sup> *Id.* at 258.

<sup>68</sup> *See id.*

<sup>69</sup> 24 THE PAPERS OF WOODROW WILSON 416 (Arthur S. Link et al. eds., 1977).

<sup>70</sup> *See* Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 52–58 (describing the constitutional system as a "Newtonian structure of attractive and repulsive political forces").

<sup>71</sup> *See* COHEN, *supra* note 16, at 24–25.

<sup>72</sup> Cohen argues that

[t]he fundamental working principle in Newtonian rational mechanics, as developed in the *Principia*, is that orbital motion is the result of an *unbalanced* force and is in no sense a case of equilibrium or balanced forces. The Newtonian natural philosophy is concerned almost entirely with problems of dynamics, with the science of unbalanced forces and motions or—more exactly—forces (that is, unbalanced forces) and the motions they generate, the changes in motions they produce.

*Id.* at 284.



The publication of Adam Smith's *The Wealth of Nations* in 1776<sup>73</sup> also provides a reflection of the age and influences found in Madison's writings.<sup>74</sup> Madison was exposed to the philosophical work of Hume and Smith during his education at Princeton.<sup>75</sup> Smith's belief in the invisible hand of the market obviously appealed to Madison and others.<sup>76</sup> Smith did not rely on virtue as the basis for wealth creation in an economic system—just as Madison would reject any assumption of virtue as a protection of liberty.<sup>77</sup> Instead, Smith recognized self-interest as creating efficient and logical forces in the market.<sup>78</sup> The integrity and efficiency of the market could be powered by competing forces—propelling it forward as opposed to tearing it apart—much like the tripartite political system. Individual choices could produce a collective positive result in the market, as it does in the political system. Like other leading writers of the period, Smith based his theories on a broader understanding of philosophical and social observations.<sup>79</sup> The empiricist foundation of such views is consistent with Madison's other influences, like Newton in science and Hume in philosophy.

Newtonian physics had a profound impact on architects and the science of building.<sup>80</sup> Indeed, the distinction between physics and fields like architecture was not obvious at the time. There was no formal school of architecture, and actual architects were rare as opposed to “builders.”<sup>81</sup> Indeed, the early “builders guild” in the eighteenth century was dedicated to “obtain[ing] instruction in the science of ar-

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73 ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (Edwin Cannan ed., Univ. of Chi. Press 1976) (1776).

74 See FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 128 (1985); Samuel Fleischacker, *Adam Smith's Reception Among the American Founders, 1776–1790*, 59 WM. & MARY Q. 897, 901 (2002).

75 See JACK N. RAKOVE, *JAMES MADISON AND THE CREATION OF THE AMERICAN REPUBLIC* 3 (Oscar Handlin ed., 1990).

76 See Adrian Vermeule, *The Invisible Hand in Legal and Political Theory*, 96 VA. L. REV. 1417, 1419–20 (2010).

77 This influence includes Smith's discussion of religious groups or factions competing with each other—a precursor to Madison's faction theories. SMITH, *supra* note 73, at 314–17. That influence was partly apparent in Madison's writing on the official support for religious groups. See, e.g., James Madison, *A Memorial and Remonstrance Against Religious Assessments: Petition Addressed to Virginia General Assembly (June 20, 1785)*, reprinted in *SELECTED WRITINGS OF JAMES MADISON* 21, 21–27 (Ralph Ketcham ed., 2006).

78 See Fleischacker, *supra* note 74, at 920.

79 See, e.g., David Lieberman, *Adam Smith on Justice, Rights, and Law*, in *THE CAMBRIDGE COMPANION TO ADAM SMITH* 214, 228 (Knud Haakonssen ed., 2006).

80 See CARL J. RICHARD, *THE BATTLE FOR THE AMERICAN MIND: A BRIEF HISTORY OF A NATION'S THOUGHT* 78 (2004).

81 Ironically, the prominence of builders as opposed to architects might have appealed to

chitecture.”<sup>82</sup> In England, there were few architects of reputation,<sup>83</sup> and the only known architect in the late 1730s in the colonies was John James of Greenwich.<sup>84</sup> It is notable, however, that architecture was emerging as a field at the very time of the drafting of the Constitution. At the end of the eighteenth century, architects arrived from Ireland (James Hoban), France (Stephen Hallet), and England (Benjamin Henry Latrobe) and introduced core principles of design to the new country.<sup>85</sup> The Framers would likely have known some of the other amateurs of this period, including Charles Bulfinch,<sup>86</sup> Doctor William Thornton,<sup>87</sup> and of course Pierre Charles L’Enfant.<sup>88</sup> These were men,

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Mies, who preferred, as discussed below, to speak of the “art of building” as opposed to “architecture.” See *infra* note 274 and accompanying text.

<sup>82</sup> HUGH MORRISON, *EARLY AMERICAN ARCHITECTURE* 516 (1952) (quoting Guild founding document).

<sup>83</sup> The earliest English book on architecture was published in 1563 with John Shute’s *First and Chiefe Groundes of Architecture*; however, “works on architecture in England were rare prior to the Restoration.” FISKE KIMBALL, *DOMESTIC ARCHITECTURE OF THE AMERICAN COLONIES AND OF THE EARLY REPUBLIC* 56–57 (2001). Indeed, “employment of an architect” was considered “possible only for the great.” *Id.* at 57.

<sup>84</sup> *Id.* at 55. This paucity of English architects may have actually assisted American architecture to develop greater variety in styles and influences. *Id.* (“Despite traditional statements that a given house was designed by some famous English architect, or was copied from some English building, no authentic instance is known of a house in the Colonial period for which the designs were brought specially from England.”).

<sup>85</sup> *Id.* at 146. Many state offices dealing with architecture continued to reflect an interdisciplinary focus, with few people trained in architecture or art. See CARL R. LOUNSBURY, *ESSAYS IN EARLY AMERICAN ARCHITECTURAL HISTORY* 5 (2011) (“The staffs in the state offices . . . were filled with those who had received their academic education in departments of history, folklore, American Studies, and geography.”).

<sup>86</sup> Bulfinch would serve as the third architect of the United States Capitol Building. *Charles Bulfinch, ARCHITECT OF THE CAPITOL*, <http://www.aoc.gov/architect-of-the-capitol/charles-bulfinch> (last visited March 24, 2015). Notably, Bulfinch’s letters reference Newton in his own calculations and sense of aesthetics. See, e.g., GEORGE C. HAZELTON, JR., *THE NATIONAL CAPITOL: ITS ARCHITECTURE, ART AND HISTORY* app., at 277 (J.F. Taylor & Co. 1914).

<sup>87</sup> Madison lived in a home designed by Thornton, who reflected a similar eclectic background as an inventor, as well as a physician and naturalist. After the burning of the White House in the War of 1812, Madison took up residence in the Octagon House designed by Thornton in 1800, which still stands just off the campus of The George Washington University. Thornton later became the architect of the United States Capitol Building. Thornton reflects what we would now call interdisciplinary influence in architecture. He notably wrote to Benjamin Latrobe about how, as a physician, his designs were influenced by his understanding of science. Charles M. Harris *William Thornton (1759–1828)*, LIBRARY OF CONGRESS: PRINTS & PHOTOGRAPHS READING ROOM, <http://www.loc.gov/rr/print/adecenter/essays/B-Thornton.html> (last updated 2001) (“I do not pretend to any thing great, but must take the liberty of reminding Mr. Latrobe, the physicians study a greater variety of sciences than gentlemen of any other profession . . . . The Louvre in Paris was erected after the architectural designs of a physician, Claude Perrault” (alteration in original) (internal quotation marks omitted)). The Octagon House is fittingly now the headquarters of the American Institute of Architects.

<sup>88</sup> See KIMBALL, *supra* note 83, at 146.

like the Framers, who applied scientific and engineering principles to the nascent American architectural movement.<sup>89</sup> Early American architectural concepts and terminology were borrowed from scientific work, including Newtonian principles.<sup>90</sup> Architecture, like other areas, was influenced by Newtonian principles in concepts of order, structure, and space.<sup>91</sup> The early American style of architecture is commonly described as “functionalist,” reflecting the practicalities of the age.<sup>92</sup> The concept of mechanical equilibrium and balance found interdisciplinary expression.<sup>93</sup> The use of terms like walls, partitions, balanced forces, gravity, pressure, and other mechanical terms derive from the same sources and reflect the same engineering and architectural concepts. Some of the founders, like Thomas Jefferson, were particularly interested in architectural structure and actively designed physical structures, like Jefferson’s famous neoclassical home at Monticello.<sup>94</sup>

However, Newtonian physics were also understood as universal rules of nature beyond the realm of the mechanical or structural.<sup>95</sup> For the Framers, who were delving into the nature of man and government, Newtonian principles likely had a subconscious, if not conscious, influence in conceptualizing the questions.<sup>96</sup> Madison

<sup>89</sup> Such men included craftsmen and builders who served in early architectural roles. *See id.* at 146, 150.

<sup>90</sup> As with modern architecture, structures of the early American period tended to reflect the sense of order and balance found in new understandings of nature and civilization. *See generally* KIMBALL, *supra* note 83; LOUNSBURY, *supra* note 85; MORRISON, *supra* note 82.

<sup>91</sup> Carl Richard discussed the nexus in his work *The Battle for the American Mind*:

In the wake of Newton’s discovery of the physical laws governing the universe there was a massive effort to uncover the laws believed to govern human affairs, such as politics, economics, law, architecture, and literature. If, as Newtonian physics seemed to show, a rational God had created a universe that operated according to mathematical laws, would He not have formulated laws governing human affairs as well?

RICHARD, *supra* note 80, at 78–79.

<sup>92</sup> MORRISON, *supra* note 82, at 97.

<sup>93</sup> The notable repeated references to these Newtonian checks and balances or equilibrium can be found in the writings of “philosophic statesmen and lawyers,” like Madison, but not the leading scientist in the Framers’ midst, Benjamin Franklin. CROWTHER, *supra* note 55, at 140.

<sup>94</sup> *Architecture Is My Delight*, JEFFERSON MONTICELLO, <http://www.monticello.org/site/jefferson/architecture-my-delight> (last visited Mar. 16, 2015).

<sup>95</sup> *See* MORRIS KLINE, *MATHEMATICS AND THE SEARCH FOR KNOWLEDGE* 165 (1985) (“Newtonian scientific thought was based fundamentally on metaphysical assumptions involving God, absolute space, absolute time, and absolute laws.”).

<sup>96</sup> Brian Koukoutchos noted:

After the close of the 16th century, a reaction set in against the mystical tradition in the form of a mechanistic view of the universe. If the former paradigm drew upon Plato, the latter one traced its lineage to Archimedes.

repeatedly described political elements with reference to natural elements, as in *The Federalist No. 10* when he wrote that “[l]iberty is to faction what air is to fire, an ailment without which it instantly expires.”<sup>97</sup> In addition to aiding in the understanding of elements and forces in nature, Newtonian principles reinforced a desire for more scientific and objective treatment of questions like government. Government was often described by Madison<sup>98</sup> in clinical or engineering terms as a “machine” designed for a specific purpose.<sup>99</sup> Notably, as discussed below, modernist architects also described buildings as “machines for living.”<sup>100</sup>

### B. *Madison and the Science of Politics*

Madison’s fascination with science and the laws of nature may have made certain philosophers more appealing to him, such as Hume, Locke, and Montesquieu. These philosophers based much of their work on their views of nature and natural man. Both Hume<sup>101</sup> and Locke<sup>102</sup> relied expressly on Newton in crafting aspects of their work. Indeed, Locke has been referred to as “the first philosopher . . . to become a Newtonian.”<sup>103</sup> This is particularly the case in the articulation of the principle of the separation of powers. Madison was an intellectual grounded in his age—embracing observable and objective truths in both science and politics. He was particularly drawn to David Hume and his reliance on proven experience in the shaping of

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The Framers—an apt sobriquet for a mechanistic age—naturally thought and expressed themselves according to the prevailing paradigm of their time. . . . It was the legacy of Newton’s *Principia* that “[a]ll mechanics acquired, for a while, the charm of complexity controlled.”

Brian Stuart Koukoutchos, *Constitutional Kinetics: The Independent Counsel Case and the Separation of Powers*, 23 WAKE FOREST L. REV. 635, 641–42 (1988) (alteration in original) (quoting GARRY WILLIS, *INVENTING AMERICA: JEFFERSON’S DECLARATION OF INDEPENDENCE* 98 (Vintage paperback ed., 1978)).

<sup>97</sup> THE FEDERALIST NO. 10, *supra* note 14, at 78 (James Madison).

<sup>98</sup> See CROWTHER, *supra* note 55, at 141.

<sup>99</sup> See MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE* 17 (1986) (“[T]he notion of a constitution as some sort of machine or engine, had its origins in Newtonian science.”); see also FOLEY, *supra* note 49, at 2 (“This conception of government represents an integral part of what can be termed a mechanistic tradition in American politics.”).

<sup>100</sup> See *infra* note 262 and accompanying text.

<sup>101</sup> ROY PORTER, *THE ENLIGHTENMENT* 12 (1st ed. 1990); see also COHEN, *supra* note 16, at 253.

<sup>102</sup> R. FREEMAN BUTTS, *A CULTURAL HISTORY OF WESTERN EDUCATION: ITS SOCIAL AND INTELLECTUAL FOUNDATIONS* 282 (1955).

<sup>103</sup> COHEN, *supra* note 16, at 59–60.

political theory.<sup>104</sup> Madison's view that "[e]xperience is the oracle of truth" may reflect this influence.<sup>105</sup> Hume's influence is also obvious in *The Federalist* and its treatment of the role of factions in governmental systems.<sup>106</sup> The radical empiricist views of Hume may have appealed to Madison's scientific orientation, relying on observation and induction in establishing foundational concepts. Hume sought, in work like *A Treatise of Human Nature*, to establish a naturalistic "science of man."<sup>107</sup> Some of these views would be expressed in the tectonics of the Madisonian system—structural elements designed to direct and harness the desires and passions of humans.<sup>108</sup> The empiricist influence may also be reflected in some of Madison's description of the tripartite system of governance. He referred to the system as a "singular and solemn . . . experiment for correcting the errors of a system by which this crisis had been produced."<sup>109</sup>

Notably, Madison was drawn to another empiricist, John Locke, whose theory embraced the concept of divided government. In his *Second Treatise of Government*,<sup>110</sup> Locke based the concept of separation of powers on his view of nature and warned against the concentration of power in the hands of one person, because it "may be too great temptation to humane frailty, apt to grasp at Power, for the same Persons who have the Power of making Laws, to have also . . . the power to execute them."<sup>111</sup> Locke's description of the loose structure of government was also an expression of his view of human beings and the state of nature where "every one has the Executive Power of the Law of Nature."<sup>112</sup> The form and function of the separa-

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<sup>104</sup> Douglass Adair, "That Politics May Be Reduced to a Science": David Hume, James Madison, and the Tenth Federalist, 20 HUNTINGTON LIBR. Q. 343, 348–49 (1957), reprinted in FAME AND THE FOUNDING FATHERS 93, 98 (Trevor Colbourn ed., 1974).

<sup>105</sup> THE FEDERALIST NO. 20, *supra* note 14, at 138 (James Madison with Alexander Hamilton). But see Letter from James Madison to N.P. Trist (Feb. 1830), reprinted in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 58, 58 (1884) (disagreeing with many of Hume's theories).

<sup>106</sup> Alexander Hamilton described Hume as "solid and ingenious" for the skepticism that laid the foundation for Hume's concepts of government. R.M. MacIver, *European Doctrines and the Constitution*, in THE CONSTITUTION RECONSIDERED, *supra* note 47, at 51, 59.

<sup>107</sup> DAVID HUME, A TREATISE OF HUMAN NATURE 273 (Clarendon Press 1888) (1739).

<sup>108</sup> Notably, Christopher Langdell of Harvard Law School was not only an advocate of formalism, but he also advocated for a scientific method of teaching the law, based on principles of natural science. See C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS vi (Gryphon Editions 1983) (1871); see also Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 5 (1983).

<sup>109</sup> THE FEDERALIST NO. 40, *supra* note 14, at 252 (James Madison).

<sup>110</sup> JOHN LOCKE, TWO TREATISES ON GOVERNMENT (Gryphon Editions 1994) (1698).

<sup>111</sup> *Id.* at 277–78.

<sup>112</sup> *Id.* at 174.

tion of powers was the same for Locke. It reflected a fundamental view—albeit a negative one (which he shared with Montesquieu and Madison)—of the nature of man. Locke saw in humanity a tendency toward “[s]elf-love . . . mak[ing] Men partial to themselves and their Friends. And on the other side, [that] Ill Nature, Passion.”<sup>113</sup> That human nature, when in the state of nature, leads to “Confusion and Disorder” so that governmental structure becomes necessary “to restrain the partiality and violence of Men.”<sup>114</sup> While Locke laid the groundwork for separation of powers, his theory was underdeveloped on such points as the role of the judiciary, as opposed to the more developed notion of the relationship between the executive and legislative functions.<sup>115</sup> Thus, Madison viewed Montesquieu as not just the genius behind separation of powers, but also the expression of the scientific and rationalist basis for the structure of government: “[i]f [Montesquieu] be not the author of this invaluable precept [the separation of powers] in the science of politics, he has the merit at least of displaying and recommending it most effectually to the attention of mankind.”<sup>116</sup>

The principle of separation of powers in government obviously predates the United States Constitution. The prior work of writers like Montesquieu<sup>117</sup> was expressly relied on by central figures like Madison.<sup>118</sup> Indeed, to give proper credit (not to mention full allitera-

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> See Donald L. Doernberg, “We the People”: John Locke, *Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 CALIF. L. REV. 52, 58 n.34 (1985).

<sup>116</sup> THE FEDERALIST NO. 47, *supra* note 14, at 301 (James Madison). In *Spirit of Governments* (a title clearly written to parallel Montesquieu’s *The Spirit of the Laws*), Madison wrote:

Montesquieu has resolved the great operative principles of government into fear, honor, and virtue, applying the first to pure despotisms, the second to regular monarchies, and the third to republics. The portion of truth blended with the ingenuity of this system, sufficiently justifies the admiration bestowed on its author. . . . He was in his particular science what Bacon was in universal science. He lifted the veil from the venerable errors which enslaved opinion, and pointed the way to those luminous truths of which he had but a glimpse himself.

Madison, *supra* note 56, at 130.

<sup>117</sup> BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 156–57, 162, 164–67 (Anne Cohler et al. eds., Cambridge Univ. Press 1989) (1748).

<sup>118</sup> Madison’s reliance on Montesquieu has been noted by the Supreme Court. See *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 442 n.5 (1977) (citing THE FEDERALIST NO. 47, *supra* note 14, at 302–03 (James Madison)). However, there are many works that question the reliance on Montesquieu or the underlying principles of separation. See, e.g., JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 250 (1996) (“Americans paid homage to Montesquieu’s principle of separate without allowing his . . . defense of prerogative to outweigh the lessons of their own history.”).

tion), the title of this Article should be *From Montesquieu to Madison to Mies* to reflect the often-ignored influence of Baron de Montesquieu. Montesquieu believed that there can be no liberty “[w]hen legislative power is united with executive power in a single person or in a single body of the magistracy.”<sup>119</sup> Likewise, liberty would be lost “if the power of judging is not separate from legislative power and from executive power.”<sup>120</sup> Montesquieu, however, built on or followed the work of prior thinkers.<sup>121</sup> Notably, Montesquieu articulated the basis for separation of powers in functionalist terms while at times adopting a more formalist take on governmental structure.<sup>122</sup> In this sense, his writings show an early example of how difficult it is to easily divide a notion like separation of powers into a formalist versus a functionalist construct. Indeed, as found in modern scholarship, legal thinkers in the mid-eighteenth century tended to extract different formalist or functionalist meanings from Montesquieu. Montesquieu saw that separation provided a necessary component to achieving and maintaining a good government. He described clear lines of separation that seemed static and fixed as in a formalist construct. That led Antifederalists to conclude that Montesquieu saw a need for absolute separation.<sup>123</sup> Thus, the writer Centinel would cite Montesquieu in concluding that “[t]he chief improvement in government, in modern times, has been the complete separation of the great distinctions of power; placing the *legislative* in different hands from those which hold the *executive*; and again severing the *judicial* part from the ordinary *administrative*.”<sup>124</sup>

In this early work, the separation of powers is not the operative value or purpose behind such structure, but it is more than the form of government. It is the function of government in the protection of liberty. *The Spirit of the Laws*<sup>125</sup> embraced separation to divide power to prevent tyranny. Montesquieu tied the separation of powers to his

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<sup>119</sup> MONTESQUIEU, *supra* note 117, at 157.

<sup>120</sup> *Id.*

<sup>121</sup> Some academics have argued that the Framers’ views on the separation of powers were, at least in part, due to more classical influences from Greece and Rome. *See, e.g.,* DAVID J. BEDERMAN, *THE CLASSICAL FOUNDATIONS OF THE AMERICAN CONSTITUTION: PREVAILING WISDOM* 59–85 (2008).

<sup>122</sup> This view is not original. *See, e.g.,* Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 214 (1989) (discussing Montesquieu’s “functional concept” that “separation [of powers] is a necessary, if not a sufficient, condition of liberty. Its absence promotes tyranny.”).

<sup>123</sup> *See infra* note 152.

<sup>124</sup> THE ANTIFEDERALIST NO. 47, at 136 (Centinel) (Morton Borden ed., 1965).

<sup>125</sup> MONTESQUIEU, *supra* note 117.

belief that “[p]olitical liberty . . . is present only when power is not abused.”<sup>126</sup> Some of his writings speak in more functionalist terms in describing the necessary separation of government—explaining separation as necessary to achieve “a moderate government” by creating a structure to “combine powers, regulate them, temper them, make them act; one must give one power a ballast, so to speak, to put it in a position to resist another.”<sup>127</sup> This functionalist view resonated with Madison, who stressed in *The Federalist No. 47* that Montesquieu did not demand that the branches of government “ought to have no *partial agency* in, or no *control* over the acts of each other . . . [but only] that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted.”<sup>128</sup> Given the still nascent concept of separation during this period, it remains unclear whether Montesquieu viewed separation as necessarily static to guarantee liberty, or allowed for a more flexible approach that maintained sufficient ballast but not necessarily a clear break between the branches.

Regardless of its functionalist or formalist categorization, separation of powers had already widely gained acknowledgement in European circles and writings. For example, Article 16 of the 1789 French *Declaration of the Rights of Man and of the Citizen* stated that “[a] society in which the guarantee of rights is not secured, or the separation of powers not clearly established, has no constitution.”<sup>129</sup> Thus, the importance of the separation of powers doctrine to liberty gained acceptance from many contemporary thinkers by the time of the Constitution. This included Thomas Jefferson, who stressed:

The concentrating [of] these [legislative, executive, and/or judicial powers of government] in the same hands is precisely the definition of despotic government. . . . An elective despotism was not the government we fought for; but one . . . in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others. For this reason that convention, which passed the ordinance of government, laid

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<sup>126</sup> *Id.* at 155.

<sup>127</sup> *Id.* at 63.

<sup>128</sup> THE FEDERALIST NO. 47, *supra* note 14, at 302–03 (James Madison).

<sup>129</sup> DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN art. 16, *reprinted in* THE FRENCH IDEA OF FREEDOM: THE OLD REGIME AND THE DECLARATION OF RIGHTS OF 1789, at 3 (Keith Michael Baker trans., Dale Van Kley ed., 1994).



its foundation on this basis, that the legislative, executive and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time.<sup>130</sup>

Jefferson, like many of his contemporaries, considered the tripartite structure as essential to preventing the aggregation of power and the eventual loss of liberty, a view also reflected in state constitutional drafting at the time. Framers like Madison associated the doctrine with Montesquieu—even referring to him as the “oracle” on such questions in *Federalist No. 47*.<sup>131</sup>

The connection between Montesquieu and Madison is all the more striking given their belief that a government should be designed around an understanding of human nature: “[O]ne must consider a man before the establishment of societies.”<sup>132</sup> Montesquieu premised his view of optimal governmental structure on what has been described as a “rather gloomy view of human nature, in which he saw man as exhibiting a general tendency towards evil, a tendency that manifests itself in selfishness, pride, envy, and the seeking after power. Man, though a reasoning animal, is led by his desires into immoderate acts.”<sup>133</sup> This nature, according to Montesquieu, led man naturally to excess and abuse when given authority of government.<sup>134</sup> The separation of powers under Montesquieu was therefore meant to diffuse the power of such individuals in seeking their own interests:

When legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty . . . .

Nor is there liberty if the power of judging is not separate from legislative power and from executive power. If it were joined to legislative power, the power over the life and liberty of the citizens would be arbitrary, for the judge would be the legislator. If it were joined to executive power, the judge could have the force of an oppressor.

All would be lost if the same man or the same body of principal men, either of nobles, or of the people, exercised these three powers: that of making the laws, that of execut-

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<sup>130</sup> THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA (1787), reprinted in THOMAS JEFFERSON: WRITINGS, *supra* note 52, at 123, 245 (emphasis omitted).

<sup>131</sup> THE FEDERALIST NO. 47, *supra* note 14, at 301 (James Madison).

<sup>132</sup> MONTESQUIEU, *supra* note 117, at 6.

<sup>133</sup> M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 85 (2d ed. 1998).

<sup>134</sup> See *id.* (noting that Montesquieu “saw man as exhibiting a general tendency towards evil”).

ing public resolutions, and that of judging the crimes or the disputes of individuals.<sup>135</sup>

Montesquieu viewed the separation of powers as a protection not against the abuses of government as much as the abuses of man.<sup>136</sup> He warned that “it has eternally been observed that any man who has power is led to abuse it; he continues until he finds limits.”<sup>137</sup> Montesquieu saw the first necessity of government as preventing it from being captured by the petty or corrupting impulses of man.<sup>138</sup> This view came from Montesquieu’s belief that men have a conflicted duality between nature and intelligence—a “feeling creature” with “finite intelligence[ ].”<sup>139</sup> This leaves man’s intelligence victim to “the laws of nature” that ultimately rule individuals.<sup>140</sup> Accordingly, government structure does not perfect human nature but protects the public from its inherent imperfections. In *The Spirit of the Laws*, Montesquieu stressed that “[l]aws, taken in the broadest meaning, are the necessary relations deriving from the nature of things; and in this sense, all beings have their laws . . . the material world has its laws.”<sup>141</sup>

Madison set out to create a governmental structure that was based on a similarly frank—and at points equally pessimistic—understanding of human nature. In particular, Madison cared about what divided rather than what united citizens.<sup>142</sup> One of the failings of contemporary efforts to draft constitutions is that they were often based on aspirational values, celebrating the hopes and dreams of humanity. The early French constitutions reflected this tendency in the absence of structural guarantees of rights and process—allowing divisional impulses to fester and explode in the streets of Paris.<sup>143</sup> In contrast,

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<sup>135</sup> MONTESQUIEU, *supra* note 117, at 157.

<sup>136</sup> Montesquieu analogized the conditions of the state with that of man: “The life of states is like that of men. Men have the right to kill in the case of natural defense; states have the right to wage war for their own preservation.” *Id.* at 138.

<sup>137</sup> *Id.* at 155.

<sup>138</sup> See David Wallace Carrithers, *Introduction* to MONTESQUIEU, *THE SPIRIT OF LAWS: A COMPENDIUM OF THE FIRST ENGLISH EDITION* 1, 72 (David Wallace Carrithers ed., 1977).

<sup>139</sup> MONTESQUIEU, *supra* note 117, at 5. “Besides feelings, which belong to men from the outset, they also succeed in gaining knowledge; thus they have a second bond, which other animals do not have.” *Id.* at 7.

<sup>140</sup> *Id.* at 6.

<sup>141</sup> *Id.* at 3.

<sup>142</sup> See, e.g., THE FEDERALIST NO. 10, *supra* note 14, at 77–84 (James Madison).

<sup>143</sup> Louis Henkin put the difference in approach—and success—between the two countries in the sharpest terms:

From 1793 to 1945, the political histories of the two countries diverged sharply. During those 150 years, the United States knew only one republic. During the same 150 years, France, beginning with an absolute monarchy, had three constitu-

Madison had no illusions about the petty impulses and interests of individuals, particularly in the formation of factions.<sup>144</sup> This fundamental understanding of human impulses led to Madison's structural design for the system. After all, Madison asked, "what is government itself but the greatest of all reflections on human nature?"<sup>145</sup> Thus, the form of the structure reflected its function:

[S]eparate and distinct exercise of the different powers of government . . . is admitted on all hands to be essential to the preservation of liberty . . . .

. . .

But the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. . . . Ambition must be made to counteract ambition. . . . It may be a reflection on human nature that such devices should be necessary to control the abuses of government.<sup>146</sup>

Madison obviously did not view "men [as] angels" in laying the foundation of this structure.<sup>147</sup> Instead, he built a structure designed to accommodate man's petty and insular flaws—to channel not just positive but also negative energy in the political system. The expression of that negative energy in the form of factions concerned Madison the most. Madison believed that factional interests were inevitable and sought to allow those interests to be expressed and addressed in the governmental system.<sup>148</sup> The separation of powers used the ambitions of individuals to produce balance—producing a stronger structure of three parts rather than of one. The Madisonian system in this way resembled the architectural mechanics of the Roman arch.

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tional monarchies, two empires, three republics, and the Vichy government. To date, while the United States has had one constitution, or at most two (some call the Civil War Amendments a "second constitution"), France has had sixteen constitutions and draft constitutions. It has been called the greatest producer—and consumer—of constitutions in the Western world, perhaps in the whole world, perhaps in all history.

Louis Henkin, *Revolutions and Constitutions*, 49 LA. L. REV. 1023, 1024–25 (1989).

<sup>144</sup> See THE FEDERALIST NO. 10, *supra* note 14, at 77–84 (James Madison).

<sup>145</sup> THE FEDERALIST NO. 51, *supra* note 14, at 322 (James Madison).

<sup>146</sup> *Id.* at 321–22.

<sup>147</sup> See *id.* at 322 ("If men were angels, no government would be necessary.").

<sup>148</sup> See THE FEDERALIST NO. 10, *supra* note 14, at 77–84 (James Madison).

The Roman arches stood for centuries because they were able to use the pressures that normally destroy a structure to strengthen it. By balancing the separate pieces of the arch, or “voussoirs,” and inserting the keystone, Roman architects converted vertical pressure from above into lateral pressure.<sup>149</sup> In the same fashion, Madison used the lateral pressures of the three equal branches to hold the system together. The separation of powers is the very thing that gives the overall system its strength and integrity. Without converting or directing those pressures, factional interests would tear the structure apart.

The “form” of the tripartite system followed this function to control the individual and factional ambitions that could tear apart the political system. In this sense, the separation of powers doctrine is the expression of Madison’s vision of a government designed to address the basic realities of human action. The separation of powers could check, for example, majoritarian terror and abuse because “the majority, having such coexistent passion or interest, must be rendered, by their number and local situation, unable to concert and carry into effect schemes of oppression.”<sup>150</sup>

Like Montesquieu, Madison saw the doctrine of separation of powers as preventing unilateral authority by any one branch or individual. He understood Montesquieu as calling for a separation that requires an interdependence of the branches. Thus, “unless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained.”<sup>151</sup> In this way, Madison was drawn to Montesquieu’s anti-aggrandizement views of power being “exercised by the same hands” in “a free constitution.”<sup>152</sup>

Many states, as noted by Madison, sought to avoid overlapping powers under strong separation principles.<sup>153</sup> Yet, even Madison’s more nuanced view of Montesquieu saw the need for bright lines in allowing each branch the ability to counteract the other branch. The separation of powers frames Madison’s vision of the tripartite system.

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<sup>149</sup> For a depiction of the structure and mechanics of a Roman arch, see *EMPIRES ASCENDANT: TIME FRAME 400 BC–AD 200*, at 91 (Time Life Books ed., 1987).

<sup>150</sup> *THE FEDERALIST* No. 10, *supra* note 14, at 81 (James Madison).

<sup>151</sup> *THE FEDERALIST* No. 48, *supra* note 14, at 308 (James Madison).

<sup>152</sup> *THE FEDERALIST* No. 47, *supra* note 14, at 325–26 (James Madison). Others saw Montesquieu as calling for a complete separation of the branches, as reflected by the Antifederalist Centinel. *THE ANTIFEDERALIST* No. 47, *supra* note 124, at 136 (Centinel).

<sup>153</sup> See *THE FEDERALIST* No. 48, *supra* note 14, at 310–12 (James Madison).

While scholars like John Manning have noted that the separation of powers was not mentioned in the text of the Constitution and details of the Constitution were the result of standard legislative compromise,<sup>154</sup> the absence of an explicit reference to separation of powers is not as surprising when placed in the context of the contemporary views of the time. The relative influence of John Locke and Montesquieu in the formation of the doctrine of separation of powers is certainly debatable. However, the concept of divided governmental branches as a protection of liberty was all the rage in the period.<sup>155</sup> Montesquieu held particular influence with many Framers, including Madison and Hamilton.<sup>156</sup> As the most cited authority by the Framers after the Bible in the 1780s,<sup>157</sup> Montesquieu was considered a formalist in his view of the separation of powers.<sup>158</sup> His formalist view reflected his image of man as inherently susceptible to abuses and corruption—requiring clearly defined and divided government to protect the welfare of the whole.<sup>159</sup> The Framers saw their experience under English rule as the embodiment of the flaws of a system that allowed individuals to undermine the general welfare—associating the division of government with combating such individual dominance.<sup>160</sup> It was this “despotic conspiracy”<sup>161</sup> of corrupted individuals that the Framers recognized as the object to be avoided by the optimal governmental

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<sup>154</sup> Manning, *supra* note 3, at 1944.

<sup>155</sup> See VILE, *supra* note 133, at 63–64 (discussing controversy “as to whether Locke or Montesquieu was the founder of the doctrine,” and concluding that “neither of these great thinkers can claim to be the source of the doctrine”). Notably, in the 1780s, Montesquieu had overtaken Locke as the most cited secular authority in that decade. DONALD S. LUTZ, *THE ORIGINS OF AMERICAN CONSTITUTIONALISM* 143 (1988). He tied with Locke in the decade of 1770 and was behind Locke in the decade of 1760. *Id.* The citations almost certainly reflect the penetration of Montesquieu’s idea among the Framers at the time of the drafting of the Constitution.

<sup>156</sup> See, e.g., THE FEDERALIST NO. 47, *supra* note 14, at 301 (James Madison) (discussing “the celebrated Montesquieu”); THE FEDERALIST NO. 78, *supra* note 14, at 466 n.\* (Alexander Hamilton) (citing Montesquieu’s *The Spirit of the Laws* in relation to the judicial branch).

<sup>157</sup> Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 AM. POL. SCI. REV. 189, 192 (1984).

<sup>158</sup> See Michael Edmund O’Neill, *The Fifth Amendment in Congress: Revisiting the Privilege Against Compelled Self-Incrimination*, 90 GEO. L.J. 2445, 2546 (2002) (“Montesquieu essentially described what has been come to be understood as the formalist doctrine of separation of powers . . .”).

<sup>159</sup> See *supra* note 136.

<sup>160</sup> Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 489 (1989) (“The ‘pure’ doctrine captivated Americans at the time of the Revolution, as they traced the abuses of British rule to an overweening executive (the King) who had become tyrannical by subverting the independence of the legislature (Parliament or, more precisely, the House of Commons).”); see also O’Neill, *supra* note 158, at 2546.

<sup>161</sup> GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 42 (1969).

structure. This view of the natural corruption and cronyism of individuals in power was reinforced for the Framers in their experience with the Articles of Confederation, under which states tore at the unity of the Republic through opportunistic and often unfair practices.<sup>162</sup> The Framers sought a “scientific” approach to government, and the leading scientific theory of the time was Montesquieu’s concept of government as diffusing and channeling inherent human impulses and interests.<sup>163</sup>

The “science of politics” advocated by Madison was often expressed in quasi-Newtonian terms and would allude to architectural shapes governed by the law of nature.<sup>164</sup> Hamilton shared this vision (and terminology) of the new constitutional structure as based on proven scientific principles that were shown to work in an objective, trial-by-error analysis:

The science of politics . . . like most other sciences has received great improvement. The efficacy of various principles is now well understood . . . . The regular distribution of power into distinct departments; the introduction of legislative balances and checks—the institution of courts composed of judges, holding their offices during good behavior; the representation of the people in the legislature by deputies of their own election: these are wholly new discoveries, or have made their principal progress towards perfection in modern times. They are . . . powerful means, by which the excellencies of republican government may be retained and its imperfections lessened or avoided.<sup>165</sup>

Madison believed that the separation of powers, as a structure, could defeat the elements of nature that produced tyranny and oppression. In Madison’s view, “the interior structure of the government”<sup>166</sup> distributed the pressures and destabilizing elements of nature in the form of factions<sup>167</sup> and unjust concentration of power.<sup>168</sup> He envisioned what he described as a “compound,” rather than “single,”

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<sup>162</sup> Farina, *supra* note 160, at 488 n.157 (“Even though the Confederation period wrought significant changes in the political theory of the Revolution, this suspicion and fear of power survived.”).

<sup>163</sup> See *id.* at 488 n.156.

<sup>164</sup> See *supra* notes 14–17 and accompanying text.

<sup>165</sup> THE FEDERALIST NO. 9, *supra* note 14, at 72–73 (Alexander Hamilton).

<sup>166</sup> THE FEDERALIST NO. 51, *supra* note 14, at 320 (James Madison).

<sup>167</sup> See THE FEDERALIST NO. 10, *supra* note 14, at 79 (James Madison) (noting that the “causes of faction” are “sown in the nature of man”).

<sup>168</sup> See THE FEDERALIST NO. 51, *supra* note 14, at 320 (James Madison); see also Adair, *supra* note 104, at 348–57.

structure republic and suggested it was superior because, to use a modern architectural term, of its unique politically load-bearing capacities.<sup>169</sup> Even though Madison and Montesquieu sometimes referenced separation in functionalist terms, they both viewed the structure or form of government as requiring clear lines of authority to diffuse power.<sup>170</sup> Indeed, the form of government was a reflection of their views of human action—blending the function and the form in the chosen structure. It was a different type of “choice architecture” that created pathways for choice while actions to avoid what a behaviorist might call “incentive conflicts” increased with undefined lines of authority. Madison’s scientific influence made him more inclined to think of threats to stability in government in terms of the rationalist form or structure of government. In Miesian terms, they were describing a function in the design of the structure—a function revealing an inherent truth of their view of human nature and government.<sup>171</sup> As will be discussed further below, Madison’s underlying views on human nature and the concentration of power reveal how the form of tripartite government advances its function.

## II. FROM MADISON TO MIES: THE MODERNIST ARCHITECTURAL MOVEMENT AND THE RISE OF FUNCTIONALISM IN DESIGN

On March 5, 1887, an extraordinary meeting occurred in Illinois. Louis Sullivan met with John Root, Dankmar Adler, Clarence Styles, and William Boyington to reach a consensus on a new American vision of architectural design.<sup>172</sup> The meeting occurred one hundred years after the Constitutional Convention in 1787, and the parallels with the Framers in Philadelphia are remarkable. Where the Framers sought to express a new American vision of government, these architects sought the same transformative expression in architecture.<sup>173</sup>

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<sup>169</sup> See THE FEDERALIST NO. 51, *supra* note 14, at 323 (James Madison). Hamilton spoke in the same terms, noting that the superstructure of a tripartite system allowed for the “distribution of power into distinct departments” and for the republican government to function in a stable and optimal fashion. THE FEDERALIST NO. 9, *supra* note 14, at 72 (Alexander Hamilton).

<sup>170</sup> See Redish & Cisar, *supra* note 4, at 451 (“[T]he Framers were virtually obsessed with a fear—bordering on what some might uncharitably describe as paranoia—of the concentration of political power.”).

<sup>171</sup> See *infra* Part II.

<sup>172</sup> 2 ARCHITECTURAL THEORY: AN ANTHOLOGY FROM 1871–2005 52 (Harry Francis Mallgrave & Christina Contandriopoulos eds. 2008).

<sup>173</sup> LOUIS SULLIVAN, THE PUBLIC PAPERS 28–29 (Robert Twombly ed., Univ. of Chi. 1988) (“[T]he eventual outcome of our American architecture will be the emanation of what is going inside of us at present . . . I should search for it by the study of my own generation; not by studying the architecture of the past.”).

American architecture remained largely undistinguished for the first hundred years of the Republic.<sup>174</sup> Like the pre-Republic experience in government, the American expression in architecture up to that point was largely undistinguished and conventional.<sup>175</sup> Sullivan, who some would call the “father of architectural modernism,”<sup>176</sup> argued for architectural expression that reflected the American “spirit of liberty.”<sup>177</sup> This extraordinary meeting sought to give expression to what would eventually evolve into the American modernist movement, despite the disagreement of later figures, like Mies, with the work of Sullivan.<sup>178</sup> While modernist architecture by figures like Mies is often referred to as the “International Style,” it is, as noted by Martin Filler, “as American as apple pie.”<sup>179</sup>

The rule that “form follows function” is more accurately attributed in the United States to Louis Sullivan, who seemed to develop this concept in part from his interest in the work of Herbert Spencer and Charles Darwin.<sup>180</sup> Indeed, Mies would later challenge Sullivan’s assumptions behind this rule.<sup>181</sup> However, Sullivan was in his own right a pioneer in modernist architectural theory. Notably, like Mies,<sup>182</sup> Sullivan connected his architectural views to a much broader literature encompassing economic, philosophical, and religious works. He was particularly drawn by the close connection between architec-

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<sup>174</sup> See, e.g., KIMBALL, *supra* note 83, at 53.

<sup>175</sup> See *id.*

<sup>176</sup> Benjamin Schwarz, *The Architect of the City: Louis Sullivan, the Author of the Modernist Skyline, Is Finally Getting the Recognition He Deserves*, ATLANTIC (Feb. 9, 2011, 9:30 AM), <http://www.theatlantic.com/magazine/archive/2011/03/the-architect-of-the-city/308389/>.

<sup>177</sup> ROBERT TWOMBLY & NARCISO G. MENOCAL, *LOUIS SULLIVAN: THE POETRY OF ARCHITECTURE* 110 (2000).

<sup>178</sup> See MARTIN FILLER, *MAKERS OF MODERN ARCHITECTURE* xiv–xv (2007).

<sup>179</sup> See *id.* at xv.

<sup>180</sup> MARIO MANIERI ELIA, *LOUIS HENRY SULLIVAN* 17 (1996).

<sup>181</sup> While Sullivan saw a need for a building to be connected to its purpose in following function, he believed in and employed a great deal of ornamentation in his aesthetic expression. Mies, on the other hand, saw the truth of the design in its function:

“Only in the course of their construction do skyscrapers show their bold, structural character, and then the impression made by their soaring skeletal frames is overwhelming. On the other hand, when the facades are later covered with masonry this impression is destroyed and the constructive character denied, along with the very principle fundamental to artistic conceptualization.”

SCHULZE & WINDHORST, *supra* note 24, at 65 (quoting Mies).

<sup>182</sup> See generally Fritz Neumeyer, *Mies as Self-Educator*, in MIES VAN DER ROHE: ARCHITECT AS EDUCATOR 27, 31–33 (Rolf Achilles et al. eds., 1986) [hereinafter ARCHITECT AS EDUCATOR].



tural and democratic principles.<sup>183</sup> Sullivan believed that “esthetic surroundings shape human behavior importantly and that democracy would finally come into being when all buildings were designed according to his ideas.”<sup>184</sup>

In his essay *The Tall Office Building Artistically Considered*,<sup>185</sup> Sullivan expressed the axiom of “form ever follows function,”<sup>186</sup> tying together his view of architecture as an expression of the needs and aspirations of the age. According to Sullivan, buildings must get taller because they reflect the literal and symbolic rise of man.<sup>187</sup> More importantly, Sullivan believed that there was an inherent truth to the structure of buildings, as well as an essential shape and quality:

“All things in nature have a shape, that is to say, a form, an outward semblance, that tells us what they are, . . . Unfailingly, in nature these shapes express their inner life, the native quality of the animal, trees, birds, fish, that they present to us; they are so characteristic, so recognizable, that we say, simply, it is ‘natural’ it should be so.”<sup>188</sup>

Sullivan’s focus on nature would mirror Mies’s own incorporation of natural shapes and organic structures in his own designs.<sup>189</sup> Notably, it is the same reference to nature that philosophers like Locke used as the foundation for their own separation structures.<sup>190</sup>

Sullivan found particular fascination in the work of Rousseau and Froebel.<sup>191</sup> The former’s writing fit neatly with Sullivan’s view of architecture as expressing and uniting man’s relationship with nature.<sup>192</sup> In his book *The Autobiography of an Idea*,<sup>193</sup> Sullivan tied architectural expression to the vision of man in Rousseau’s writings.<sup>194</sup> While Sullivan’s philosophical influences included American transcendental-

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<sup>183</sup> NARCISO G. MENOCAL, *ARCHITECTURE AS NATURE: THE TRANSCENDENTALIST IDEA OF LOUIS SULLIVAN* 3 (1981).

<sup>184</sup> *Id.*

<sup>185</sup> Sullivan, *supra* note 1.

<sup>186</sup> *Id.* at 408.

<sup>187</sup> *Id.* at 403 (“The architects of this land and generation are now brought face to face with something new under the sun,—namely, that evolution and integration of social conditions, that special grouping of them, that results in a demand for the erection of tall office buildings.”).

<sup>188</sup> ELIA, *supra* note 180, at 124 (omission in original) (quoting Sullivan).

<sup>189</sup> See JEAN-LOUIS COHEN, *MIES VAN DER ROHE* 38 (1996) (noting Mies’s interest in “botany and natural harmony”).

<sup>190</sup> See COHEN, *supra* note 16, at 112.

<sup>191</sup> TWOMBLY & MENOCAL, *supra* note 177, at 101.

<sup>192</sup> See *id.* at 101–07.

<sup>193</sup> LOUIS H. SULLIVAN, *THE AUTOBIOGRAPHY OF AN IDEA* (1924).

<sup>194</sup> See TWOMBLY & MENOCAL, *supra* note 177, at 101.

ism and Darwinistic theory,<sup>195</sup> he shared the romanticism of Rousseau in design—allowing man to assume almost divine shape in emulating Yahweh of the Book of Genesis.<sup>196</sup> Notably, his designs were anthropomorphic.<sup>197</sup> Just as Montesquieu and Madison based their visions of government on their views of man, Sullivan’s designs shared the same emphasis.<sup>198</sup> Sullivan’s view, however, was decidedly more optimistic than that of Montesquieu (and perhaps Madison) as to the nature and potential of man.

Sullivan’s “democratic” structures would bear little resemblance to the work of Mies, who took the logical and ultimate leap from the hold of the overdesigned ornamentation of his predecessors. Like Walter Gropius, the founder of the Bauhaus School, Mies (who later took over the Bauhaus or “house of construction”) turned away from expressionism and toward a rational objectivity in building designs.<sup>199</sup> Indeed, his “organic system of ornamentation” rejected unconnected, pretentious designs of the prior hundred years, but it still embraced the notion of ornamentation as a critical element in these structures.<sup>200</sup> However, it is often overlooked that Sullivan’s commitment to functionalism sometimes led him to downplay the type of facades with which he is so famously associated. Indeed, in 1892 Sullivan wrote, “I take it as self-evident that a building, quite devoid of ornament, may convey a noble and dignified sentiment by virtue of mass and proportion.”<sup>201</sup> Sullivan praised the “great value of unadorned masses”<sup>202</sup>—a sentiment that could be viewed as foreshadowing the work of modernists like Mies. Though Mies attributed the concept of “less is more” to Peter Behrens,<sup>203</sup> his work would come to capture this principle and

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<sup>195</sup> See ELIA, *supra* note 180, at 121 (“Sullivan navigated between the individualistic vitality of American transcendentalism, especially that of Whitman, and the Spencerian evolutionary organicism of Greenough, with allusions to Nietzschean heroism and romanticism.”).

<sup>196</sup> MENOCAL, *supra* note 183, at 7.

<sup>197</sup> *Id.* at 66.

<sup>198</sup> See *id.* at 62–63.

<sup>199</sup> See NICHOLAS FOX WEBER, THE BAUHAUS GROUP 419–21 (2009). Mies’s relationship to Gropius is a curious one. As director of the Bauhaus, Mies appeared outraged by how Gropius left Bauhaus in financial duress. *Id.* at 416. Mies would later say that “[t]he best thing Gropius has done was to invent the name Bauhaus.” *Id.*

<sup>200</sup> SULLIVAN, *supra* note 173, at 83 (“[B]y this method we make a species of contact, and the spirit that animates the mass is free to flow into the ornament—they are no longer two things but one thing.”).

<sup>201</sup> ELIA, *supra* note 180, at 100.

<sup>202</sup> *Id.*

<sup>203</sup> SCHULZE & WINDHORST, *supra* note 24, at 25 (quoting Mies as saying, “I heard [‘less is more’] first from Peter Behrens.”). Behrens was a critical figure in the development of modern-

attracted the early support of greats like Frank Lloyd Wright.<sup>204</sup> Wright's work had been shown in Berlin in 1911 in an exhibition connected to a publication of his work.<sup>205</sup> Modernists like Mies were enthralled even though Wright's work was fundamentally different from their emerging vision.<sup>206</sup>

Like the Framers and their view of government, Mies was a man of his time with a view of architecture that reflected the changes occurring around him.<sup>207</sup> He began his career in Germany amid sweeping and often disturbing political and social changes.<sup>208</sup> Though he would come to personify American modernism, Mies was the product of a modernist movement forged in the years leading up to World War

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ist architecture and like Mies would heavily influence a new generation of architects. His students and assistants included Mies, Le Corbusier, and Walter Gropius. *See id.* at 26–27.

<sup>204</sup> Indeed, in arranging for Mies to come and teach in Chicago, Wright introduced him by saying, “Ladies and gentlemen, I give you Mies van der Rohe. But for me there would have been no Mies.” *Id.* at 189 (internal quotation marks omitted). Wright embraced Mies even though he would not entirely embrace much of the work of modernists.

<sup>205</sup> PETER BLAKE, *THE MASTER BUILDERS* 20 (1996).

<sup>206</sup> *Id.* Mies was particularly drawn to Wright's simple brick villa and wrote later that “[t]he dynamic impulse emanating from Wright's work invigorated a whole generation.” *Id.* at 190 (internal quotation marks omitted). This relationship would prove fascinating since Wright was critical to the arrival of Mies in the United States, ultimately rejecting the “International Style.” Indeed, Wright would later unleash a tirade against modernists from the Bauhaus tradition:

“The ‘International Style’ . . . is totalitarianism.” . . . “These Bauhaus architects ran from political totalitarianism in Germany to what is now made by specious promotion to seem their own totalitarianism in art here in America. . . . Why do I distrust and defy such ‘internationalism’ as I do communism? Because both must by their nature do this very leveling in the name of civilization. . . . [The internationalists] are not a wholesome people. . . .”

*Id.* at 248–49 (some omissions in original) (quoting Wright).

<sup>207</sup> *See* Mies v.d. Rohe, *Industrial Building*, G, June 1924, reprinted in G: AN AVANT-GARDE JOURNAL OF ART, ARCHITECTURE, DESIGN, AND FILM, 1923–1926, at 120, 120 (Detlef Mertins & Michael W. Jennings eds., Steven Lindberg & Margareta Ingrid Christian trans., 2010) [hereinafter *Industrial Building*] (“I view the industrialization of the building trade as the key problem of building in our time. If we achieve this industrialization, then the social, economic, technical, and even artistic questions can be resolved easily.”).

<sup>208</sup> Walter Gropius, the founder of Bauhaus (which Mies later took over as director) recounted with particular detail and pain his memories of the trenches of World War I, writing to his mother after the defeat at Verdun that “I am livid with rage, sitting here in chains through this mad war which kills any meaning of life. . . . My nerves are shattered and my mind darkened.” WEBER, *supra* note 199, at 33 (omission in original) (internal quotation marks omitted). The blood and mud and chaos of such experiences likely add to the clean and organized lines of the later modernists' designs of glass and steel. *Id.* (“The emotional anxieties generated by militarism and inflation formed a compost that nourished a passion for a stability derived from visual harmony.”).

II.<sup>209</sup> His search for truth in architecture extended from World War I to the Nazi takeover to the horrific losses of World War II. In 1938, Mies told his students that “[t]he long road from material through function to creative work has but one goal: to create order from the desperate confusion of the present time.”<sup>210</sup> Starting with his earliest designs, Mies gained recognition as one of the emerging visionaries of modernist architecture.<sup>211</sup>

Mies based his architectural vision on the “philosophy of opposites,” taking from such writers as Romano Guardini, Georg Simmel, Henri Bergson, and others.<sup>212</sup> These influences produced a “totality of opposites [upon which] the premise of *Baukunst* is derived.”<sup>213</sup> Indeed, Mies, who disliked the term “architecture,” used *Baukunst* to capture the art (*Kunst*) of building (*Bau*).<sup>214</sup> This “art of building” for Mies was revealed through the tectonics of structural form expressing the truth of the building and the space. Mies believed in a natural order in design. As with Madison, he saw the natural propensity toward chaos but believed that proper design would produce balance and order between competing forms or materials:

“[W]e want an order which allows each thing its place. . . . [And] we want to do so completely that the world of our creations begins to blossom from within. More we do not want. More we cannot do. Through nothing the sense and goal of our work is made more manifest than the profound words of St. Augustine: ‘Beauty is the splendor of truth.’”<sup>215</sup>

Mies viewed Augustine as the visionary who saw the achievement of order from chaos as the purpose of true life. Nature often achieved such balance and order for Mies by stripping away design to essential forms and functions. Yet, in human life, Mies (like Madison) saw con-

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<sup>209</sup> See Sandra Honey, *Mies van der Rohe: Architect and Teacher in Germany*, in ARCHITECT AS EDUCATOR, *supra* note 182, at 37, 47–48.

<sup>210</sup> See SCHULZE & WINDHORST, *supra* note 24, at 189 (quoting Mies).

<sup>211</sup> See *supra* note 204 and accompanying text. Notably, it was the great Frank Lloyd Wright who recognized Mies as a new vision in architecture and personally introduced him at the Armour Institute’s School of Architecture (later renamed IIT). FRANK LLOYD WRIGHT: AN AUTOBIOGRAPHY 429 (1943) (“I give you Mies Van der Rohe. But for me there would have been no Mies—certainly none here tonight. I admire him as an architect and respect and love him as a man. . . . You treat him well and love him as I do.”)

<sup>212</sup> Neumeyer, *supra* note 182, at 33.

<sup>213</sup> *Id.*

<sup>214</sup> Peter Carter, *Mies van der Rohe: An Appreciation on the Occasion, This Month, of His 75th Birthday*, ARCHITECTURAL DESIGN, Mar. 1961, at 95, 96. “*Baukunst*” (the art of building) conveys the clear idea of Mies’s philosophy of architecture: “the ‘bau’ being the construction and the ‘kunst’ just a refinement of that and nothing more.” *Id.*

<sup>215</sup> Neumeyer, *supra* note 182, at 35 (quoting Mies).

flict and chaos that had to be organized by design: “The long path from material through function to creative work has only one goal: to create order out of the desperate confusion of our time. We must have order, allocating to each thing its proper place and giving to each thing its due according to its nature.”<sup>216</sup> Also like Madison, Mies recognized the need for new forms to address new demands and expectations of the time. Bauhaus reflected this revolutionary vision of Mies and his contemporaries. Just as Madison moved beyond Greek democratic states, Mies moved beyond Greek design to achieve a new form of balance out of the chaos of competing materials. In 1924, Mies noted that Greek temples and Roman basilicas are “pure expressions of their time . . . [and] symbols of their epoch. Architecture is the will of the epoch translated into space.”<sup>217</sup> For Mies, the design was utilitarian and functionalist: “Our utilitarian buildings can become worthy of the name of architecture only if they truly interpret their time by their perfect functional expression.”<sup>218</sup>

Ironically, while Madison founded his study of government in an understanding of ancient Greek states, Mies founded his study of architecture in an understanding of ancient Greek structures.<sup>219</sup> Neither man sought to replicate the Greek models but rather to understand them to help realize a new vision of constitutional or architectural structure. Where Madison sought to strip away the pretense of government by acknowledging human tendencies toward division and factions, Mies sought to strip away the pretense of design. As Jean-Louis Cohen wrote, Mies sought to “to free *Bauerei*—‘buildery’ . . . from aesthetic fancy.”<sup>220</sup> In other words, the beauty of a building is found in its truth as a structure. This concept is also familiar to many constitutional scholars. The Constitution that Madison and his colleagues

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<sup>216</sup> See BLAKE, *supra* note 205, at 232 (quoting Mies).

<sup>217</sup> Mies van der Rohe, *Architecture and the Times* (1924) [hereinafter Mies, *Architecture and the Times*], *reprinted in* Johnson, *supra* note 40, at 191, 191. Mies described construction in the same terms:

Skyscrapers reveal their bold structural pattern during construction. Only then does the gigantic steel web seem impressive. When the outer walls are put in place, the structural system which is the basis of all artistic design, is hidden by a chaos of meaningless and trivial forms. When finished, these buildings are impressive only because of their size; yet they could surely be more than mere examples of our technical ability. Instead of trying to solve the new problems with old forms, we should develop the new forms from the very nature of the new problems.

Mies van der Rohe, *Two Glass Skyscrapers* (1922), *reprinted in* Johnson, *supra* note 40, at 187, 187.

<sup>218</sup> Mies, *Architecture and the Times*, *supra* note 217, at 192.

<sup>219</sup> See COHEN, *supra* note 189, at 8.

<sup>220</sup> See *id.* at 9.

created lacked the flourishes and finesse of other constitutions, particularly French works, but it offered a certain beauty in its honesty and simplicity.

This new form was based on an inherent understanding of the components of a building and its materials. Just as Madison looked at the nature of man, Mies looked at the nature of materials—and more interestingly, the nature of function. He believed that there was a natural use tied to the nature of material: “‘We want to know what it can be, what it must be, and what it may not be. We want to know its essence.’”<sup>221</sup> The emphasis was overtly functionalist. Indeed, Mies insisted that “[m]eans must be subsidiary to ends and to our desire for dignity and value.”<sup>222</sup> It has a Montesquiean sound to it—much like government structure securing liberty. However, like Montesquieu’s view of government, it is often difficult to separate the form from the function in architecture. The functionality of the design is the truth sought by the architect. Mies viewed decades of overdesign as hiding the beauty of the original structure and lines. Mies warned that “[w]e must be as familiar with the functions of our building as with our materials,” and that “[w]e must learn what a building can be, what it should be, *and also what it must not be*. . . .”<sup>223</sup> Thus, Mies advocated for the dominance of function over form but diminished the distinction between the two. While form did follow function in Mies’s modernist approach, Mies challenged Sullivan’s aphorism as the principle purpose of the architect<sup>224</sup>:

“We do the opposite. We reverse this, and make a practical and satisfying shape, and then fit the functions into it. Today this is the only practical way to build, because the functions of most buildings are continually changing, but economically the buildings cannot change.”<sup>225</sup>

Mies’s belief in the inherent beauty and truth of functional design came through not only in his buildings, but also in his designs of such iconic objects as the Barcelona Chair and the MR chair.<sup>226</sup> The beauty

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221 Neumeyer, *supra* note 182, at 34 (quoting Mies).

222 See BLAKE, *supra* note 205, at 232 (quoting Mies).

223 *Id.* (omission in original) (quoting Mies).

224 In fairness to Sullivan, he recognized that form and function can become interchangeable depending on how they are used. As Elia notes, “[i]t was . . . quite clear to him that the terms ‘form’ and ‘function’ referred back to many possible meanings that could be used on different occasions, thus confirming the constant validity of an aphorism that would otherwise be applicable only in a biological and evolutionary context.” ELIA, *supra* note 180, at 124.

225 See Mies van der Rohe, ARCHITECTURAL F., Nov. 1952, at 93, 94 (quoting Mies).

226 The preference for Miesian simplicity became a joke among the children of his associ-

of the form is its function.<sup>227</sup> Mies broke down the chair to its essential components and then expressed those structuring elements in the design of an elegant cantilever form.<sup>228</sup> The MR chair shows the supporting minimal metal structure as a point of beauty and truth in design.<sup>229</sup> The smooth metal structure of these chairs, as displayed in Figure 1, both informs the viewer of its function and gives the objects a powerful aesthetic appeal.<sup>230</sup>

FIGURE 1. MR CHAIR<sup>231</sup>



Through Mies's view of *Baukunst*, there remains a close relation between form and function in building design. Mies stressed that the building is not captive to the insular function of its occupants.<sup>232</sup> The building itself structures the activities and uses within it. Indeed, Mies

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ates like my father that visiting each other's homes was like never leaving home with glass tables, Barcelona chairs, MR chairs, and white walls.

<sup>227</sup> Indeed, the chair is now part of museum collections including the Metropolitan Museum of Art.

<sup>228</sup> Mies admitted that his design came shortly after Dutch designer Mart Stam produced his own cantilevered chair in 1926. SCHULZE & WINDHORST, *supra* note 24, at 104–05. The MR Chair was revealed in Stuttgart, Germany later that year, but was a vastly superior design to that of Stam. *Id.*

<sup>229</sup> *Id.* at 140–41.

<sup>230</sup> Figure 1 is an MR chair that elegantly captures Miesian design. Indeed, growing up with Barcelona chairs, MR chairs, and other Miesian elements, I came to distrust ornament in design from an aesthetic standpoint.

<sup>231</sup> Source: Knoll, Inc. (used with permission).

<sup>232</sup> Honey, *supra* note 209, at 41.

was not opposed to form as a value. There is an interesting 1927 exchange Mies had with the editor of *Die Form*, an architecture and design magazine, which was published by *Deutscher Werkbund*:

Dear Dr. Riezler:

I do not oppose form, but only form as an end in itself. And I do this as the result of a number of experiences and the insight I have gained from them. Form as an end inevitably results in formalism. For the effort is directed only to the exterior. But only what has life on the inside has a living exterior.<sup>233</sup>

Mies focused on the functionalism of the structure itself.<sup>234</sup> Form itself could not dictate the design—as is too often the case in premodernist architecture. The Riezler letter also captures the difference in meaning of “formalism” in law and architecture. “Formalism,” as opposed to “form,” had a distinctly different meaning for architectural modernists than it does in the law. Formalism generally referred to the use of facades and exterior decorative or artistic expressions unconnected to the structure.<sup>235</sup> Mies insisted that “[w]e reject all esthetic speculation, all doctrine, all formalism” and that “[t]o create form out of the nature of our tasks with the methods of our time—*this is our task.*”<sup>236</sup> This included the so-called “expressionist” school associated with such architects as Hans Scharoun. Mies and other modernists like Walter Gropius and Hans Poelzig moved instead to a new objectivity in architecture in the meaning of form.<sup>237</sup> Instead, modernists embraced “functionalism” over “formalism.” With this new understanding of form came a new understanding of the function of the building. In

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<sup>233</sup> See *id.*

<sup>234</sup> See Mies v.d. Rohe, *Building*, G, Sept. 1923, reprinted in G: AN AVANT-GARDE JOURNAL OF ART, ARCHITECTURE, DESIGN, AND FILM, 1923–1926, *supra* note 207, at 105.

We know no formal problems, only building problems. Form is not the goal but the result of our work. There is no form in itself [*an sich*]. The truly formed thing is conditioned, grown together with the task. Indeed, it is the most elemental expression of the solution of that task. Form as goal is formalism; and we reject that. Nor do we strive for a style. The will to style is also formalistic. We have other concerns. Our task is precisely to liberate building activity from the aesthetic speculation of developers and to make it once again the only thing it should be, namely, building.

*Id.*

<sup>235</sup> See, e.g., Honey, *supra* note 209, at 41.

<sup>236</sup> BLAKE, *supra* note 205, at 190 (quoting Mies).

<sup>237</sup> See *id.* at 191.



translating function to form in building design, architects had to understand the essence and the limits of function.<sup>238</sup>

The truth in architecture was found in what Mies referred to as “the eternal laws of architecture”: order, space, and proportion.<sup>239</sup> It is precisely these elements that offer an insight into the legitimacy of postformalist approaches to interpretation. Thus, for Mies, the functionality of the building is expressed in its tectonic form, as with the iconic structures at the Illinois Institute of Technology (“IIT”). The embodiment of this modernist approach can be found in the corners of the Navy building, pictured in Figure 2, where the frame is expressed with the masonry—both form and function.

FIGURE 2. NAVY BUILDING<sup>240</sup>



<sup>238</sup> See *id.* at 232 (“Each material is only what we make it.” (internal quotation marks omitted)).

<sup>239</sup> In the 1950s, when my father was one of his students, Mies explained how this concept was both “radical and conservative at once”:

“It is radical in accepting the driving and sustaining forces of our time . . . . As it is not only concerned with a purpose but also with a meaning, as it is not only concerned with a function but also with an expression. It is conservative as it is based on the eternal laws of architecture: ORDER, SPACE and PROPORTION.”

See Kevin Harrington, *Order, Space, Proportion, in ARCHITECT AS EDUCATOR*, *supra* note 182, at 49, 65 (omission in original) (quoting Mies).

<sup>240</sup> Source: Christopher Turley (used with permission).

Mies's observation that form can follow function is particularly interesting when compared with constitutional expression and interpretation. Madison appears to have been working from the same precept as Mies. The Constitution is an example of form following function. Its core provisions were designed as a superstructure for the separation of powers in a tripartite government.<sup>241</sup> However, the brilliance of this rule is the emphasis of the relation between form and function—not its inviolate demand. Indeed, as suggested by Mies, sometimes function follows form. The architect's task consists of creating a structure that is viewed as ideally situated to its space—a "true" structure. While its function does shape its form, it is also designed to be an economical structure regardless of its changing function. The constitutional structure shares the same characteristics of what Mies called a "practical and satisfying shape"<sup>242</sup> that brings order to government by defining space for the dynamic movements of a tripartite system.

While Mies referred to circumstances where function follows form, it may be more accurate to say that some structures demand an essential design where function and form merge.<sup>243</sup> Ironically, Louis Sullivan may have captured this paradox in his *Twelfth Chat*—part of his series *Kindergarten Chats*.<sup>244</sup> Sullivan describes the form and function of natural objects like a lake and notes:

[A]nd so on, and on, and on, and on—unceasingly, endlessly, constantly, eternally—through the range of the physical world . . . that world of the silent, immeasurable, creative spirit, of whose infinite function all these things are but the varied manifestations in form, in form more or less tangible, more or less imponderable . . .

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<sup>241</sup> See *supra* Part I.

<sup>242</sup> COHEN, *supra* note 189, at 100.

<sup>243</sup> Mies wrote:

We refuse to recognize problems of form, but only problems of building. Form is not the aim of our work, but only the result. Form, by itself, does not exist. Form as an aim is formalism; and that we reject. Essentially our task is to free the practice of building from the control of aesthetic speculators and restore it to what it should exclusively be: building.

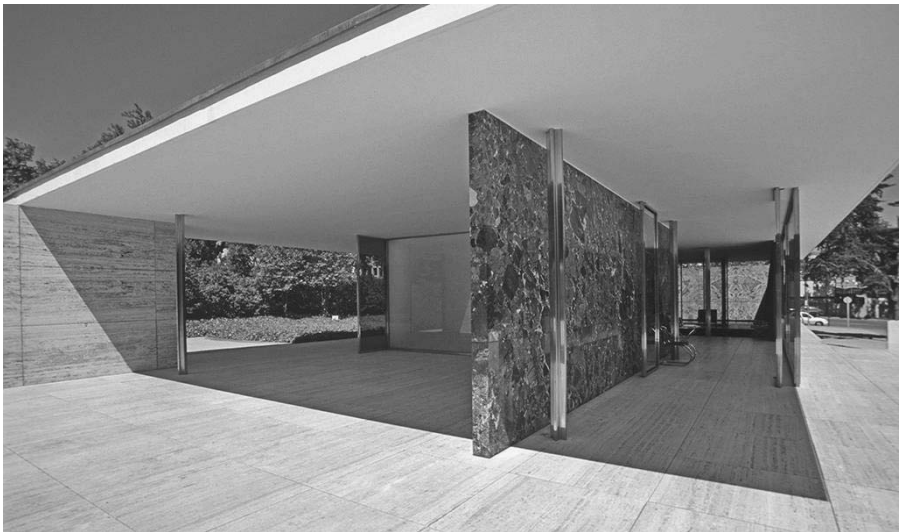
Mies van der Rohe, *Aphorisms on Architecture and Form* (1923), reprinted in JOHNSON, *supra* note 40, at 188, 189.

<sup>244</sup> LOUIS H. SULLIVAN, *XII: Function and Form (I)*, in *KINDERGARTEN CHATS AND OTHER WRITINGS* 42 (1947).

All is function, all is form, but the fragrance of them is rhythm, the language of them is rhythm . . .<sup>245</sup>

Where Mies described a transcendent form, Sullivan saw a natural “rhythm” that dictates forms in nature—and architecture. As Elia noted, “both function and form converged onto a single cognitive terrain, exchanging roles in the process of shaping and transforming the environment.”<sup>246</sup> Whether it is function following form or function merging with form, modernists believed that there was an essential truth of a structure—a necessary structure that fit space and circumstance.<sup>247</sup> In the same way, Madison’s form reflects the function of the tripartite system—allowing flexibility within static structural limits of the three branches. Definition of space does occur even in open Miesian designs like the Barcelona Pavilion pictured in Figure 3:

FIGURE 3. BARCELONA PAVILION<sup>248</sup>



The walls of the Barcelona Pavilion appear to float. Mies placed a nonbearing wall between two bearing walls and succeeded in establishing the foundation for the “open plan” that would characterize much of his work.<sup>249</sup> The walls define space within an open and honest expression of structure. Mies used walls as a device to define

<sup>245</sup> *Id.* at 44–45.

<sup>246</sup> ELIA, *supra* note 180, at 143.

<sup>247</sup> *See id.*

<sup>248</sup> Source: [http://commons.wikimedia.org/wiki/File:Barcelona\\_mies\\_v\\_d\\_rohe\\_pavillon\\_weltausstellung1999\\_03.jpg](http://commons.wikimedia.org/wiki/File:Barcelona_mies_v_d_rohe_pavillon_weltausstellung1999_03.jpg).

<sup>249</sup> As with much genius, such a design may appear unremarkable today, but at the time it was revolutionary. Mies himself said that he “got a shock” when he first drew the design for the nonbearing wall and realized it was a “new principle.” WEBER, *supra* note 199, at 436.

space and direct the view. In that sense, the interior walls were not load-bearing in many cases but rather defined the space.<sup>250</sup> As with the earlier Madisonian discussion, they serve to influence the viewer in making choices through visual and physical pathways.

Mies's functionalist form captured the beauty that he saw in the modernist age in which he was living. He rejected the perspectival illusionism of neoclassical work as not just architecturally false but also socially anachronistic.<sup>251</sup> The Miesian tectonics reflected the modern age and ultimately modern man. The structures are ideally an expression of the values and beliefs of the people within it. As the nineteenth-century art critic John Ruskin put it, "[t]ell me what you like, and I'll tell you what you are."<sup>252</sup> For those who liked the Miesian design (and, given its revolutionary impact on architecture, many did), they saw a beauty that transcended the structure and spoke to the modernist age. It speaks to a law of structure, gravity, and material that governs life like a geometric expression of the law of nature. In this sense, it moves architecture from "taste" to truth as the foundation for beauty.<sup>253</sup>

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<sup>250</sup> See *id.* at 436–37.

<sup>251</sup> See COHEN, *supra* note 189, at 8–9.

<sup>252</sup> JOHN RUSKIN, *Traffic, in THE CROWN OF WILD OLIVE AND THE CESTUS OF AGLAIA* 49, 52 (J.M. Dent & Co. 1908) (1866). Notably, Ruskin's full quotation reveals a symbiotic relationship between education and appetite—a notion that might appeal to modernists who awaken feelings of people exposed to (and educated about) the art of building:

Taste is not only a part and an index of morality;—it is the ONLY morality. The first, and last, and closest trial question to any living creature is, "What do you like?" Tell me what you like, and I'll tell you what you are.

. . .

[T]he entire object of true education is to make people not merely *do* the right things, but *enjoy* the right things—not merely industrious, but to love industry—not merely learned, but to love knowledge—not merely pure, but to love purity—not merely just, but to hunger and thirst after justice.

*Id.* at 52–53. The Ruskin quote also raises a secondary value to the separation of powers as a structure. As noted above, this is a structure based on the view of human flaws in the state of nature—a structure that controls and directs human impulse to a more productive end.

<sup>253</sup> Mies once responded to a question of the "image" that he was trying to create with such buildings by saying, "I never make an image when I want to build a house." Lutz Robbers, *Modern Architecture in the Age of Cinema: Mies van der Rohe and the Moving Image 1* (Jan. 2012) (unpublished Ph.D. dissertation, Princeton University) (internal quotation marks omitted), *available at* [http://dataspace.princeton.edu/jspui/bitstream/88435/dsp01k930bx05g/1/Robbers\\_princeton\\_0181D\\_10096.pdf](http://dataspace.princeton.edu/jspui/bitstream/88435/dsp01k930bx05g/1/Robbers_princeton_0181D_10096.pdf).

### III. “STRUCTURE IS SPIRITUAL”: *BAUKUNST* AND THE NORMATIVE PARADOX OF FORM AS FUNCTION

The contribution of architectural theory to the law is in its understanding of “form” rather than “formalism,” which as noted earlier carries different meanings in the two fields. Formalism in constitutional interpretation references an approach that places the greatest emphasis on the structural separation of the branches—it is formalistic in that it resists fluidity in the distribution of power between the branches.<sup>254</sup> Formalism for Mies in architecture meant design without purpose—buildings “‘overpowered by a senseless and trivial chaos of forms.’”<sup>255</sup> It is Mies’s understanding of the relationship of form to function that carries the greater meaning for the law. In 1922, Mies insisted that architects “develop the new forms from the very nature of the new problems” of his generation.<sup>256</sup> Both Madison and Mies “designed” structures without ornamentation. Unlike his European contemporaries who tended to emphasize the aspirational values of the people in constitutional drafting, Madison and his colleagues wrote in stark functionalist terms.<sup>257</sup> Indeed, the Constitution is notable in its strikingly clinical language and structure. Madison actually conceived of the interrelation of the branches as based not on the collective aspirations, but rather on the factional weaknesses of man.<sup>258</sup> Thus, the ornamentation disappeared, and in its place was a type of functionalist beauty—a simple tripartite system that reflected its primary goal: liberty. Madison and Mies were in a word realists, who sought objective structures in government and architecture.<sup>259</sup> They broke “away from the aesthetic to the organic, from the formal to the constructive”<sup>260</sup> in their writings and work, though for Mies this was a more expressed and deliberate effort.

At the time of the Enlightenment, as noted above, the Framers tended to view government in scientific or mechanical terms, even referring to government as a “machine” designed to achieve balance

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<sup>254</sup> See *supra* Part I.

<sup>255</sup> SCHULZE & WINDHORST, *supra* note 24, at 65 (quoting Mies).

<sup>256</sup> See BLAKE, *supra* note 205, at 264 (internal quotation marks omitted).

<sup>257</sup> See *supra* text accompanying note 117.

<sup>258</sup> See *supra* text accompanying notes 132–135.

<sup>259</sup> Mies distinguished painting from architecture on this basis: “In painting you can express the slightest emotion, but with a beam of wood or a piece of stone you cannot do much about it. If you try to do much about it, then you lose the character of your material. I think architecture is an objective art.” CONVERSATIONS WITH MIES VAN DER ROHE 61 (Moisés Puente ed., 2008).

<sup>260</sup> Ransoo Kim, The “Art of Building” (*Baukunst*) of Mies van der Rohe 54 (Aug. 2006) (unpublished Ph.D. dissertation, Georgia Institute of Technology) (internal quotation marks omitted), available at <http://hdl.handle.net/1853/11465>.

and good government.<sup>261</sup> In the same way, modernists in architecture, like Le Corbusier (a close contemporary of Mies), described buildings as “machines for living in.”<sup>262</sup> Both of these legal and architectural movements shaped form to fit functions. Mies did not so much distinguish form and function as he erased the distinction between the two. Where his predecessors expressed social and spiritual values on the exterior of buildings, Mies insisted that “[s]tructure is spiritual.”<sup>263</sup> It is the ultimate statement of the value-laden form. Mies embraced the notion that a truth could be found in the structure when the building itself—rather than just those activities within it—articulated function. Indeed, Mies was fond of quoting St. Augustine in saying that “Beauty is the splendor of Truth.”<sup>264</sup> To put it another way, for Mies, the truth expressed by the structure was its beauty. Perhaps the most interesting example of this expression of truth—and the most theoretically challenging—is the use of I-beams in Mies’s Chicago buildings.<sup>265</sup> Postmodernist critics often dismiss Mies’s designs as lacking design or meaning—just the exposure of superstructure in what architect Robert Venturi mocked as “[l]ess is a bore.”<sup>266</sup> The use of the I-beams in Chicago shows how this criticism misses the point of the Miesian design. The superstructural appearance of Chicago buildings is actually form not function. When Mies arrived in Chicago, he faced a building code that required fire-retardant concrete to cover the internal framing of a building.<sup>267</sup> That presented a serious problem to allowing the superstructure to be expressed as the form, which Mies solved by superimposing the form of the structure on the exterior over the concrete and over the true superstructure of the building.<sup>268</sup> Accordingly, in buildings like the two Lake Shore towers, Mies used I-beams superimposed over the concrete to show the building’s struc-

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<sup>261</sup> See *supra* text accompanying notes 98–100.

<sup>262</sup> GEORGE H. MARCUS, *LE CORBUSIER: INSIDE THE MACHINE FOR LIVING* 8 (2000). Le Corbusier thrilled at the emergence of what was sometimes called “Machine Art,” which allowed “[t]he discovery of a new world of geometric forms” to be explored. BLAKE, *supra* note 205, at 17.

<sup>263</sup> See ERIC P. NASH, *MANHATTAN SKYSCRAPERS* 105 (rev. and expanded ed. 2005) (quoting Mies).

<sup>264</sup> See BLAKE, *supra* note 205, at 169–70. Mies also commonly relied on the writings of Aquinas. See, e.g., FILLER, *supra* note 178, at 53.

<sup>265</sup> The imposing steel I-beams are so named because their parallel flanges form the shape of a capital “I.”

<sup>266</sup> See, e.g., ROBERT VENTURI, *COMPLEXITY AND CONTRADICTION IN ARCHITECTURE* 24–25 (1966).

<sup>267</sup> BLAKE, *supra* note 205, at 258.

<sup>268</sup> *Id.* at 258–61.

ture beneath.<sup>269</sup> Mies fireproofed the underlying steel frame with concrete and then welded an I-beam to the column.<sup>270</sup> Thus, the exterior was a lie to express the truth of the structure as shown below.

The “skin” of these buildings therefore gives the illusion of pure function, but actually it is form expressing the function. This illusion presents the ultimate example of the normative value of form—the building’s I-beam framing speaks to the truth of the building.<sup>271</sup> This aspect of form in Mies’s work was described by Franz Schulze in relation to Mies’s Alumni Memorial Hall at IIT:

[T]he real structure . . . , though suppressed, is expressed: what one knows is there is not what one sees, but is made evident by what one sees. Mies’s reasoning is tortuous, but ever so much his own: to demonstrate that the supporting steel frame is the basis, or essence, of the building, it is indicated, rather than shown, externally; to acknowledge that what shows, moreover, is not fact but symbol of fact.<sup>272</sup>

This was not the perspectival illusionism of neoclassical work but a facade that directly reflected the *Baukunst*.

This concept of *Baukunst* and Miesian tectonics emphasizes structurally supportive forms and the material construction. According to Mies, “[t]he structure is the backbone of the whole and makes the free plan possible. Without that backbone the plan would not be free, but chaotic and therefore constipated.”<sup>273</sup> Thus, even with Mies’s famous effort to create free and open space within the structure, it is the structure itself that allows this free flow to occur within the space. Cosmin Caciuc explained the importance of structure in creating this open space that is so characteristic of Miesian tectonics:

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<sup>269</sup> See *id.*; BLASER, *supra* note 23, at 124.

<sup>270</sup> BLASER, *supra* note 23, at 124.

<sup>271</sup> Mies admitted that the primary reason for the use of I-beams was aesthetic, though he did suggest a secondary functional purpose:

“We looked at it on the model without the steel I-beams attached to the corner columns and *it did not look right*. That is the *real* reason. Now, the other reason is that the steel I-beams were needed to stiffen the plates which cover the columns so these plates would not ripple, and also we needed the I-beams for strength when the sections were hoisted into place. Now, of course, that’s a very *good* reason—but the other one is the *real* reason.”

BLAKE, *supra* note 205, at 258–59 (quoting Mies).

<sup>272</sup> FRANZ SCHULZE, *MIES VAN DER ROHE: A CRITICAL BIOGRAPHY* 226 (1985).

<sup>273</sup> CHRISTIAN NORBERG-SCHULZ, *INTENTIONS IN ARCHITECTURE* 152 n.89 (1968) (quoting Christian Norberg-Schulz, *Talks with Mies van der Rohe*, *L’ARCHITECTURE D’AUJOURD’HUI*, Sept. 1958, at 100 (Fr.)).

“The art of building” means a capacity of articulating the constructive laws, the strict intellectual order and the pursuit of the law of gravity—characteristic of the structure—and the free interpretation of nonstructural elements that can set the space in order quite independently. This is the expressive manner in which Mies understood “the truth” or the genuine idea of architecture.<sup>274</sup>

This law of gravity dictated not just the structural elements, but also the aesthetic form of the building. In the same way, Madison sought to design a structure based on the “elements” and material realities of politics. The “gravity” of the Madisonian system can be found in his discussions of ambition and factions.<sup>275</sup> He used these stresses as a part of the tripartite structure—using ambition to counteract ambition to produce a type of strengthening outward tension like that found in the Roman arch. Countervailing pressures actually held the structure together and allowed for fewer internal walls or supports for the open space left to the legislative and executive branches.<sup>276</sup>

Where architectural theory tends to outstrip legal theory is in the attention to the “function” behind a structure. The bifurcation of form and function in legal interpretation creates an artificial division and ignores Madison and Mies’s view of form as an expression of function. The “truth” of a Miesian structure was to reveal the function of the superstructure as with the steel “moment-resisting” frame construction moved to the exterior of a building.<sup>277</sup> What is the function behind the Madisonian tectonics? This Article suggests that the purpose motivating the Madisonian design is liberty. As noted earlier, Madison pursued the purpose of liberty with a superstructure that functioned to avoid concentrations of power and the resulting instability that comes with such loads.<sup>278</sup> This view is by no means universally accepted. Functionalists tend to downplay the aggregation of power as the motivating danger in separation analysis.<sup>279</sup> Thus, the relative power of the branches—and the shifting of this power over time—is of little consequence. Rather, in the words of Kathleen Sullivan, the

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<sup>274</sup> Cosmin Caciuc, *Synerurgic and Semiurgic: Mies and OMA in the IIT Campus of Chicago*, ZEPPELIN MAG., Apr. 2009 (Rom.), available at <http://e-zeppelin.ro/en/synerurgic-and-semiurgic-mies-and-oma-in-the-iit-campus-of-chicago-cosmin-caciuc/>.

<sup>275</sup> See *supra* text accompanying notes 148–150.

<sup>276</sup> See *supra* note 146 and accompanying text.

<sup>277</sup> BLAKE, *supra* note 205, at 258–59.

<sup>278</sup> See *supra* Part I.

<sup>279</sup> See *supra* Part I.



ability of the political system to deliver “demonstrated social benefits” should be the focus of the analysis, as opposed to structural concerns.<sup>280</sup> Putting aside this disagreement over the purpose of the design, neither liberty nor “social benefits” is the actual function of the superstructure of the system. That function concerns its distribution of loads and channeling of pressures of the superstructure. By comparison, the purpose of the IIT Common Building was to allow for the education and productive interaction of young architects and students. However, the function of Miesian structure was to distribute the forces of gravity and other elements. The function of the tripartite system, from an architectural perspective, is its division of political pressures and passions. The function of Madisonian tectonics is to distribute the forces of political factions and passions within the structure.<sup>281</sup> Form in this sense does not merely reflect value but it also expresses function (and underlying purpose). It is a normative as well as a structural expression.<sup>282</sup>

This concept of form as function is in sharp contrast to the dichotomy drawn in many opinions and academic works. While the terms “formalism” and “functionalism” take on different meanings in different contexts, they are commonly defined as opposites. What is clear is that, in many of these theories, the form cannot be the function. One view, as expressed in the broader debate over formalism by legal realists, observes that formalism is akin to “scien[ce] for the sake of science.”<sup>283</sup> However, in architectural theory, this paradox was overcome by reconsidering the meaning of form and function by core theorists like Mies, Le Corbusier, and Sullivan, who ultimately questioned the objective meaning of these terms. In some ways, Miesian design made function the form. Mies’s iconic corners on the Navy Building<sup>284</sup> exemplify how form and function can merge in a structure. The supporting structure is the expressed aesthetic—it is both the function and the form of the building. For legal theorists, form in constitutional or statutory creation is the articulation of a greater value—the form is the means to achieve a purpose. This purpose then guides interpretation of the form, which is then applied in different and

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<sup>280</sup> See Kathleen M. Sullivan, *Dueling Sovereignities*: U.S. Term Limits, Inc. v. Thornton, 109 HARV. L. REV. 78, 94 (1995).

<sup>281</sup> See *supra* Part I.

<sup>282</sup> See Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 823 (1935) (discussing the interrelationship of form and function).

<sup>283</sup> See Pound, *supra* note 8, at 605 (criticizing the fascination with “the niceties of [law’s] internal structure . . . [and] the beauty of its logical processes”).

<sup>284</sup> See *supra* Figure 2.

changing circumstances. This view gained reinforcement when the drafters first established a concept like liberty, and then developed a means or form by which to maintain that value or purpose. For the Framers, form and function were thus inherently separate and dichotomous. This view is further reinforced by writings in which Madison and others referred to liberty and then translated such values into the form of a tripartite system.<sup>285</sup> However, the Madisonian system's tripartite tectonics also act as the function—distributing loads and stress in the system to prevent the concentration of power.<sup>286</sup>

The conceptualization of the Constitution as an example of form as function can be seen in the anti-aggrandizement or anti-aggregation function that underlies much of the work of the Framers. This is a narrower concept than many of the broader theories of interpretation advanced by writers like Ronald Dworkin, Bruce Ackerman, and others. Although this Article is primarily an effort to show how architectural theories can be translated into useful legal concepts, there are some distinctions that can be drawn with dominant legal theories on the interpretive role of courts. Some of these theories necessarily involve enhanced judicial roles with the system even if they do not directly challenge structural elements of the constitutional system. For example, Ronald Dworkin believed that constitutional provisions were the expression of a morality principle underlying the work of the Framers.<sup>287</sup> As such, he believed that judges should strive for morally correct decisions—a standard that allowed for the meaning of the text to evolve where each new generation effectively defined the space of a provision.<sup>288</sup> Dworkin's vision of the adjudication of rights allowed for enhanced roles of courts in reaching the best moral answer in their interpretations. This approach would necessarily threaten the structural divisions of the system. Even with Mies's open space designs, walls were designed to direct and define the space. There was a sense of proportionality—it is “the proportions *between* the things that are important.”<sup>289</sup> Mies's use of non-load-bearing walls carries a certain crossover appeal. Mies wanted open space but also actively defined and directed the viewer through the use of walls. In the same way,

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<sup>285</sup> See THE FEDERALIST NO. 51, *supra* note 14, at 321 (James Madison).

<sup>286</sup> Those stress points are evident in many places within the system, but most recently signify (in my view) a type of failure that comes with overloading the original design or division of the tripartite system. See *Duty to Faithfully Execute Hearing*, *supra* note 21, at 30; *Recess Appointments Hearing*, *supra* note 21, at 35–57.

<sup>287</sup> See DWORKIN, *supra* note 22, at 7–8.

<sup>288</sup> See RONALD DWORKIN, *LAW'S EMPIRE* 225–27 (1986).

<sup>289</sup> FILLER, *supra* note 178, at 54.

Madison and his contemporaries created a superstructure based on separation principles, but which had shared internal walls that defined the space within the system. Thus, the vesting clauses created the functional form of the design, but some areas were defined dynamically, like the legislative process that allowed for countervailing votes with the bicameral system and veto authority.

While Dworkin had less to say about the general constitutional structure than specific constitutional rights, his view would go further in subordinating the functional form to the optimally moral use of the space. In this view, the occupants are the architects in an ever-changing design, so that judges “must regard themselves as partners with other officials, past and future, who together elaborate a coherent constitutional morality, and they must take care to see that what they contribute fits with the rest.”<sup>290</sup> Dworkin’s emphasis on equality as the motivating purpose of the Constitution leads inevitably to tension with the structural limitations of the Madisonian system. This emphasis does not mean that anti-aggregation is not important to maintaining morality and equality. Indeed, Dworkin saw limits on government as serving those ends.<sup>291</sup> However, equality as a motivating purpose will more likely push courts to transcend structural limits than will liberty, which is more closely tied to the tectonics of a tripartite system. Madison and others viewed the anti-aggregation function of separation to be the primary guarantee of liberty for individuals.<sup>292</sup> Thus, the form becomes the function. The same cannot be said of equality. Although the Fourteenth Amendment could certainly be read as altering the focus of the Constitution, the debates and writings of Framers like Madison spoke more clearly to the concept of liberty than equality in the establishment of a tripartite system.<sup>293</sup> The Framers’ references to science were linked to the law of nature and the nature of man. This natural state gravitated toward unjust concentration of power.<sup>294</sup> The difference between equality and liberty could be resolved from a tectonic standpoint as the difference between superstructure and space. Liberty finds protection in the superstructure of the tripartite system, and thus separation principles tend to be more static and fixed in interpretation. Equality relates to the space within that structure where walls define the space. There is more fluidity in

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<sup>290</sup> DWORKIN, *supra* note 22, at 10.

<sup>291</sup> *See id.*

<sup>292</sup> *See supra* Part I.

<sup>293</sup> *See id.*

<sup>294</sup> *See* THE FEDERALIST NO. 51, *supra* note 14, at 322–24 (James Madison); *see also* Adair, *supra* note 104, at 98–104.

achieving that purpose in judicial interpretation in a Dworkian sense so long as the court remains faithful to the superstructure's anti-aggregation function.

The view of anti-aggrandizement as the defining function for constitutional interpretation also runs against the grain of evolutionary theories like that of Bruce Ackerman. Ackerman views the Constitution as being informally amended over time through practices that can expand the role of the federal government and other powers.<sup>295</sup> For Ackerman, "the Constitution is best understood as a historically rooted tradition of theory and practice."<sup>296</sup> Even though Ackerman recognizes the danger of the aggrandizement of executive authority<sup>297</sup> and accepts the role of the separation of powers as protecting individual rights,<sup>298</sup> Ackerman's view rejects the notion of tectonic values suggested by a conarchitectural theory. Following Ackerman's logic, he would allow not just the space within the constitutional structure, but the superstructure itself to change over time along functionalist lines. This view, however, is fundamentally at odds with the notion of Madisonian tectonic form, as discussed below.

#### IV. CONARCHITECTURALISM: CONSTITUTIONAL STRUCTURE AS A MADISONIAN TECTONIC FORM

This Article suggests that a commonality exists between architectural and constitutional expression, particularly in the notion that "economically the building[ ] cannot change" in its essential structural elements.<sup>299</sup> Like a Miesian structure, a Madisonian system is designed to be a functional but also fixed form—regardless of changes in political behavior. The design of the structure both reflects and directs the action within it. Just as Mies derived his style from an understanding of the nature of man, the constitutional system reflected Madison's (and others') understanding of these concepts.<sup>300</sup> The separation of powers forces a greater array of participating actors, and therefore interests, to be considered in the shaping of laws. To use more classic Dworkian terms, separation of powers represents a specific "conception" rather than a more general "concept" like due pro-

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<sup>295</sup> See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 22 (1991).

<sup>296</sup> *Id.*

<sup>297</sup> See BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 4–5 (2010).

<sup>298</sup> Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 640, 715–27 (2000).

<sup>299</sup> *Mies van der Rohe*, *supra* note 225, at 94.

<sup>300</sup> See *supra* notes 96, 221–22 and accompanying text.

cess.<sup>301</sup> Thus, although insular interests of equality or morality may make certain judicial decisions superior in a Dworkian world, they would not be superior results if they circumvent or undermine the anti-aggregation principles of the structure.<sup>302</sup> Under a constitutional architectural (or “conarchitectural”) view, the structure of the separation of powers (like federalism) represents more than concepts evolving within a system but the very essence or truth of the system. Rather than view constitutional divisions along consequentialist lines, this view treats the structure itself as the expression of the Framers’ vision of human nature and the optimal space for political deliberations.<sup>303</sup> In that sense, constitutional structure has both instrumental and deontological elements: it functions as a limiting context for decisionmaking while assuming a form tied to core philosophical values. The oft-stated line between formalism and functionalism proves more artificial when constitutional structure is viewed through the lens of tectonic principles. This is why it has Miesian-paradoxical-character aspects supporting both “form as function” and “function as form.”

#### A. *Form as Function: The Instrumental Role of Constitutional Structure*

The common architectural expression of “form follows function” generally refers to the design of buildings that reflects their structural components. As modernist Walter Gropius stated: “A thing is defined by its essence. In order to design it so that it functions well—a receptacle, a chair, a house—its essence must first be explored; it should serve its purpose perfectly.”<sup>304</sup> The functionality expressed in modern forms of architecture was certainly revolutionary in terms of the superstructure and aesthetics. However, the role of function in design goes back for centuries. Some classic forms reflect such functions and are designed to further the function of the structure. From cathedrals to courtrooms, structural designs are intended to direct the attention and flow of occupants, as well as to influence their choices.<sup>305</sup> They

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<sup>301</sup> See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 133–36 (1978).

<sup>302</sup> Dworkin’s own writings interject an indeterminacy to the enforcement of the separation principle as a concept that runs counter to the notion of form as function. See DWORKIN, *supra* note 288, at 70–72.

<sup>303</sup> This notion of constitutional structure can present classic “soft variable” issues for theories incorporating economic or risk elements into the analysis. See generally Turley, *A Fox in the Hedges*, *supra* note 2.

<sup>304</sup> JENNY PYNT & JOY HIGGS, *A HISTORY OF SEATING, 3000 BC TO 2000 AD: FUNCTION VERSUS AESTHETICS* 281 (2010).

<sup>305</sup> Churches are a particularly interesting example of spatial determinism and the influence of architecture on the perceptions of those within the structure. Albert and William Dod wrote

are impactful designs that direct not just movement but perspective and choices. They reflect a long realization that we are shaped by our environment, including our buildings. Some designs go even further to reflect a type of “architectural determinism” where architects seek to influence the movement and choices of those within a structure.<sup>306</sup>

Constitutional structure plays the same determinist role in shaping perspective and choice. In a conarchitectural view, the structural lines and spaces created by the Framers are best seen as a recognition of the need to frame not just the inherent powers but the perception of power within a system. By structuring political decisionmaking, constitutional structure funnels decisionmaking and political dialogue along particular pathways. Another comparison can be drawn to the concept of “choice architecture” in the use of structure and other elements to guide voluntary choices by decisionmakers.<sup>307</sup> In what has been called “libertarian paternalism,” the structuring of an environment can increase “right” choices while leaving the decision to the

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an article in 1855 discussing how “the vaulted spaces of the cathedral not only catered to liturgical worship but also posited a mysterious, transcendental God approachable only through ecclesiastical hierarchies.” JEANNE HALGREN KILDE, *WHEN CHURCH BECAME THEATRE: THE TRANSFORMATION OF EVANGELICAL ARCHITECTURE AND WORSHIP IN NINETEENTH-CENTURY AMERICA* 71 (2002); cf. VASILEIOS MARINIS, *ARCHITECTURE AND RITUAL IN THE CHURCHES OF CONSTANTINOPLE* 1–7, 114–18 (2014) (challenging the notion of functional determinism in churches and suggesting more evolutionary uses in space).

<sup>306</sup> Architectural determinism is often used to distinguish those designs that intentionally try to influence behavior. See Alexi Marmot, *Architectural Determinism: Does Design Change Behaviour?*, 52 *BRIT. J. GEN. PRAC.* 252, 252–53 (2002). The term was actually coined by a critic of the theory, Maurice Broady, who objected to the notion of architecture as “a one-way process in which the physical environment is the independent, and human behavior the dependent variable.” See Maurice Broady, *Social Theory in Architectural Design*, in *PEOPLE AND BUILDINGS* 170, 174 (Robert Gutman ed., 2009). Just as there are limits to architectural determinism, no constitutional structure can truly dictate the actions and choices of decisionmakers without becoming authoritarian. The notion of structural determinism, however, is reflected in the design of the Constitution in seeking to funnel certain types of decisions through a tripartite system. The description of the role of space on behavior would clearly resonate with some constitutional framers:

All buildings imply at least some form of social activity stemming from both their intended function and the random encounters they may generate. The arrangement of partitions, rooms, doors, windows, and hallways serves to encourage or hinder communication and, to this extent, affect social interaction. This can occur at any number of levels and the designer is clearly in control to the degree that he plans the contact points and lanes of access where people come together. He might also, although with perhaps less assurance, decide on the desirability of such contact.

WILLIAM H. ITTELSON ET AL., *AN INTRODUCTION TO ENVIRONMENTAL PSYCHOLOGY* 358 (1974).

<sup>307</sup> See *supra* note 18 and accompanying text.

individual.<sup>308</sup> The confines of the tripartite system serve much of the same function as choice architecture in funneling political energies and actions. By maintaining separation, the Framers likely sought to achieve stability even within the dynamic and divisive political environment. The guarantees of separation ideally discouraged dysfunctional choices that Congress or a President might make in an effort to circumvent one another or “go it alone” through unilateral action.<sup>309</sup> The structure was not just shaped by human realities (as the Framers sought for it to be<sup>310</sup>), but the structure also would shape those realities. The limitations on executive, legislative, and judicial powers were meant to limit the horizons of power; to influence the range of choices and expectations within the system. A constitutional system faces an array of dangers from poor decisionmaking due to a variety of influences. Structural limits can both frame decisionmaking and protect against the constitutional version of “bounded rationality” problems in decisionmaking.<sup>311</sup> Bounded rationality reflects how decisionmaking is highly contextual and often irrational under strict economic models.<sup>312</sup> Economic models were criticized in using the abstraction of a rational profit-maximizer that did not, according to behavioral economics critics, comport with reality.<sup>313</sup> Decisionmaking does not occur in a vacuum but is framed or bounded by the context and perceptions of the actor.<sup>314</sup>

My interest in the bounded rationality concept reflects its original meaning articulated by Herbert A. Simon as explaining the cognitive limitations of the human mind.<sup>315</sup> Simon saw flawed humans as “a

<sup>308</sup> See THALER & SUNSTEIN, *supra* note 18, at 4–6.

<sup>309</sup> The controversy over the nonenforcement of federal law is a direct result of “bad choices” made in the absence of clear lines of separation, as I have previously discussed before Congress. See *Duty to Faithfully Execute Hearing*, *supra* note 21, at 113–63; see also Jonathan Turley, Op-Ed., *The President’s Power Grab*, L.A. TIMES, Mar. 9, 2014, at A28.

<sup>310</sup> See *supra* Part I.

<sup>311</sup> What follows is the analogous use of some concepts that originated in the “prospect theory” of the psychology of decisionmaking. See PAUL BREST & LINDA HAMILTON KREIGER, PROBLEM SOLVING, DECISION MAKING, AND PROFESSIONAL JUDGMENT 419–28 (2010). I recognize that this work focuses on influences on individual decisionmaking, but I believe it can be used to highlight aspects of structure on a more macro scale in a constitutional system.

<sup>312</sup> See *id.*

<sup>313</sup> See *id.*

<sup>314</sup> In later applications, by Christine Jolls and others, “bounded rationality” became one of three “bounds” that showed the difference between actual human behavior and the classic rational actor mode. Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1476 (1998). The other two are “bounded self-interest” and “bounded will-power.” *Id.*

<sup>315</sup> Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q.J. ECON. 99, 101 (1955).

choosing organism of limited knowledge and ability”—framed and influenced by their context and experience.<sup>316</sup> Humans incorporate a variety of cognitive heuristics and biases in making judgments that can lead to “systematic and predictable errors.”<sup>317</sup> Constitutional structure can reduce the problems of bounded rationality through ordering and limiting rules. Where Simon explored the psycho-neurological limits of the human mind in processing information and making decisions, the Framers were more interested in confining decisionmakers’ range of choices within a structure that allowed for multiple layers of deliberation and moderation.<sup>318</sup> Although such choices are still made (and can be made inefficiently), the system as a whole is protected from the most serious forms of wrong decisionmaking and, more importantly, shapes the choices available to institutions and actors. Bounded rationality also shows how structure and labeling or anchoring can influence human perception and conduct. In behavioral economics studies, these responses are viewed as generally negative in governing or market decisions. The focus of this literature is often on how to give “gentle nudges” or “hard shoves” to individuals to make the right choices.<sup>319</sup> When applied to the broader context of constitutional structure, different bounded rationality issues may emerge among decisionmakers and play out differently with actors within the system. The function of constitutional tectonic designs is in part to control and condition political responses. The Framers sought to create lines of separation in certain functions in the political system to regulate the conduct of political actors and, as a result, to label conduct that threatened the integrity (and stability) of the system. If properly enforced, this system affects how presidents, congressional members, and judges are perceived, and how they perceive themselves in the permissible scope of their actions.

Recognizing the imperfection of human decisionmaking does not necessarily militate in favor of a more formalist approach to constitutional law or other legal areas. Cass Sunstein has discussed the function of rules to address bounded rationality issues, though he has been highly functionalist in his treatment of the separation of powers, and particularly his view of the role of federal agencies. In his work with

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<sup>316</sup> *Id.* at 114; see also Herbert A. Simon, *Rationality as Process and as Product of Thought*, AM. ECON. REV., May 1978, at 1, 10.

<sup>317</sup> Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1131 (1974).

<sup>318</sup> See *supra* Part I.

<sup>319</sup> See generally Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607 (2000).



Christine Jolls, Sunstein noted, “rules and institutions might be, and frequently are, designed to curtail or even entirely block choice in the hope that legal outcomes will not fall prey to problems of bounded rationality.”<sup>320</sup> Yet, Sunstein and Jolls were critical of the view that “[b]oundedly rational behavior might be, and often is, taken to justify a strategy of insulation, attempting to protect legal outcomes from people’s bounded rationality.”<sup>321</sup> Rules seek instead to “reduce people’s level of bias rather than to insulate outcomes from [their] effects.”<sup>322</sup> Such bounded rationality questions are usually analyzed in a more micro context of such illustrative decisions as wearing motorcycle helmets or saving for retirement.<sup>323</sup> However, the ongoing discussion of how to factor in heuristics or biases would not be entirely foreign for the Framers, particularly Madison, who saw constitutional theory as based on a deeper understanding of human impulse and decisionmaking.<sup>324</sup> Although much of this scholarship focuses on agency or individual decisionmaking, a broader analogy can be drawn to a constitutional system as a whole. The Madisonian system does have its own version of insulating institutional rules (which Sunstein and Jolls criticize) based on a view of human imperfections that are “designed to curtail or even entirely block choice” in political decisionmaking.<sup>325</sup> That structure funnels political choices and deliberative actions into fixed spaces designed to force compromise and additional layers of review. It can deter the worst forms of decisionmaking and shape the views of individuals on the scope of the permissible actions.

The priority given to the structural form in a conarchitectural theory obviously does not allow for more evolutionary constitutional approaches, including some theories based on scientific theories. For example, Michael Dorf has suggested that one way of looking at constitutional conflicts is through the lens of biology and the process of exaptation.<sup>326</sup> Exaptation is the theory of evolutionary biologists Ste-

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<sup>320</sup> Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199, 200 (2006) (“To the extent that legal rules are designed on the basis of their anticipated effects on behavior, bounded rationality is obviously relevant to the formulation of legal policy.”).

<sup>321</sup> *Id.*

<sup>322</sup> Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 977 (2006).

<sup>323</sup> See generally Jeffrey J. Rachlinski, *The Uncertain Psychological Case for Paternalism*, 97 NW. U. L. REV. 1165 (2003).

<sup>324</sup> See *supra* note 145 and accompanying text.

<sup>325</sup> See Jolls & Sunstein, *supra* note 320, at 200.

<sup>326</sup> Michael C. Dorf, *Spandrel or Frankenstein’s Monster? The Vices and Virtues of Retrofitting in American Law*, 54 WM. & MARY L. REV. 339, 339–41 (2012).

phen Jay Gould and Elisabeth Vrba of how anatomical structures change to a different function from their original use or purpose.<sup>327</sup> While Dorf's theory was offered as "chiefly descriptive," he suggested that the same "spandrels in architecture" discussed in biological studies could be viewed as a natural evolutionary process in constitutional law.<sup>328</sup> The theory of constitutional exaptation is clearly the inverse of the conarchitectural view advanced in this Article. Gould and Vrba insisted that "such characters, evolved for other usages (or for no function at all), and later 'coopted' for their current role, be called *exaptations*."<sup>329</sup> Such evolution or exaptation clearly resonates with many constitutional scholars and rulemakers who hold a more functionalist view of the law. It rejects, however, the notion of structure as a fixed conception tied to a vision of the optimal form for political discourse and deliberation. Indeed, what Dorf may view as simply "retrofitting"<sup>330</sup> of an old system with new rules is really a change in the structural lines and spaces laid out in the Constitution. Those lines and spaces were tied directly to a view of human action that has not changed. Whether called retrofitting or exaptation, these changes are at base an effort to establish more convenient or power maximizing avenues for change. As such, they are inimical to the determinative design of the Framers. Despite the choices allowed in the structures of constitutional law, there remains an inherent truth to the spaces laid out in the separation of powers.

An example of the danger of exaptation theories can be seen in the recent decision in *Noel Canning v. NLRB*.<sup>331</sup> The D.C. Circuit decision was a badly needed departure from past cases in finding that

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<sup>327</sup> Stephen Jay Gould & Elisabeth S. Vrba, *Exaptation—A Missing Term in the Science of Form*, 8 PALEO BIOLOGY 4, 6 (1982); see also S.J. Gould & R.C. Lewontin, *The Spandrels of San Marco and the Panglossian Paradigm: A Critique of the Adaptationist Programme*, B205 PROC. ROYAL SOC'Y LONDON 581, 581–83 (1979). For another legal application of this theory, see Jay Wexler, *Constitutional Exaptation, Political Dysfunction, and the Recess Appointments Clause*, 94 B.U. L. REV. 807, 810–11 (2014).

<sup>328</sup> Dorf, *supra* note 326, at 341–42. The use of "spandrels" in Dorf's description is itself ironic since that term has a different meaning in architecture than in biological science, where it simply refers to a phenotypic characteristic that evolves in a structure that is not the direct product of adaptive selection. See *id.* In architecture, however, a spandrel or spandril is an area (often triangular) above and on either side of an arch. In modern steel or reinforced concrete structures, it can also be the beam extending horizontally from one column to another and supporting a section of a wall. See, e.g., DAVID GUISE, *DESIGN AND TECHNOLOGY IN ARCHITECTURE* 113 (rev. ed. 1991). Particularly in modern design, a spandrel can have a fixed and structural meaning that is relevant to a conarchitectural view.

<sup>329</sup> Gould & Vrba, *supra* note 327, at 6.

<sup>330</sup> Dorf, *supra* note 326, at 341–42.

<sup>331</sup> *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *aff'd*, 134 S. Ct. 2550 (2014).

President Obama had violated the separation of powers in his recess appointment of various officials, including Richard Corday to serve as the first Director of the Consumer Financial Protection Bureau.<sup>332</sup> It was a long overdue opinion reinforcing the constitutional lines of separation between the executive and legislative branches on the appointment of federal officers.<sup>333</sup> The Senate has increasingly used confirmations as a vehicle for influencing the direction and policies of agencies—at a time when federal agencies are growing more independent from Congress.<sup>334</sup> The block on the Cordray nomination was directly linked to areas of disagreement on the function and funding of the bureau.<sup>335</sup> The strength of the decision, however, was drained away by Justice Breyer, who upheld the result on narrower grounds.<sup>336</sup> Although the Court was unanimous in rejecting the recess appointments, it split 5-4 on the rationale. Writing for the majority, Breyer embraced the notion of the historical practice as an interpretative device<sup>337</sup> and created a fluid ad hoc rule on the use of recess appointments. Using a mix of the Adjournments Clause and historical practice, the majority held that a recess of less than ten days was presumptively too short but also said that this presumption could be overcome in “some very unusual circumstance.”<sup>338</sup> Such historical practice arguments are often based on the same type of evolutionary principles reflected in constitutional exaptation arguments—the notion that rules can be retrofitted over time to meet new demands. What is lost, however, is tectonic value in the clear line between intersession and intrasession recess appointments. The Court, once again, simply de-

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<sup>332</sup> See *id.* at 503–04 (“To adopt the [government’s] proffered intrasession interpretation of ‘the Recess’ would wholly defeat the purpose of the Framers in the careful separation of powers structure . . . . Allowing the President to define the scope of his own appointments power would eviscerate the Constitution’s separation of powers.”).

<sup>333</sup> See generally *Recess Appointments Hearing*, *supra* note 21; Turley, *Recess Appointments*, *supra* note 2.

<sup>334</sup> See generally Jonathan Turley, Op-Ed., *The Rise of the Fourth Branch of Government*, WASH. POST, May 26, 2013, at B1.

<sup>335</sup> See generally Turley, *Recess Appointments*, *supra* note 2.

<sup>336</sup> *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2552–56 (2014).

<sup>337</sup> *Id.* at 2555–56. I have been critical of the use of historical practice as a constitutional interpretive device—or a type of “constitutional adverse possession.” See generally Turley, *Constitutional Adverse Possession*, *supra* note 2. Justice Scalia used this phrase on behalf of the four concurring justices. *Noel Canning*, 134 S. Ct. at 2617 (Scalia, J., concurring in the judgment) (“What the majority needs to sustain its judgment is an ambiguous text and a clear historical practice. What it has is a clear text and an at-best-ambiguous historical practice. Even if the Executive could accumulate power through adverse possession by engaging in a *consistent* and *unchallenged* practice over a long period of time, the oft-disputed practices at issue here would not meet that standard.”).

<sup>338</sup> *Noel Canning*, 134 S. Ct. at 2567.

vised a new rule that blurred the line of what should have been a structural element to the separation of powers. While there is an ever-present temptation among presidents to circumvent opponents in Congress, the Recess Clause is a key boundary for the exercise of appointment powers. *Noel Canning* was an opportunity to reaffirm that structure—and restore clarity to interbranch relations—but the Court elected to partially undermine that barrier. In so doing, it guaranteed continued fights and opportunistic claims over nominees in the future, rather than reinforce a clear line of demarcation that serves to force continued deliberation and compromise between the branches. Appointments represent a shared space of forced interaction between the branches. Although recess appointments were allowed to be made unilaterally, this exception was tied directly to the realities of long recesses of the early Congresses.<sup>339</sup> Conversely, intrasession disputes were left to the negotiations and interactions of the two branches within this determinative structure. The majority opinion reflected a fluid understanding of an insular, nonstructural function (filling executive positions) but also reflected little understanding of the structural norms undermined by such ad hoc tests.

*B. Function as Form: The Deontological Role of Constitutional Structure*

While a structure's form often reflects its function, it is also true, as discussed earlier, that even Mies viewed some forms as shaping functions.<sup>340</sup> This concept is more pronounced in constitutional structures where the function can be the maintenance of the form. The analogy to bounded rationality issues is meant to highlight the role of the Framers' view of human nature in the creation of a constitutional structure. It is not meant to suggest, however, that a view of Madisonian tectonics is based on consequentialist or teleological rationales.<sup>341</sup> The constitutional structure was created with the risks of bad decisionmaking and issues like self-dealing in mind. To that extent, there is no question that constitutional structures and rules were based in part on combating anticipated risks and corruptions within the system. The structure, however, also reflects a deeper philosophical view of the role and functioning of a democratic system. It is artificial to treat the entire constitutional system as having a single,

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<sup>339</sup> Turley, *Constitutional Adverse Possession*, *supra* note 2, at 975–77.

<sup>340</sup> See *supra* Part II.

<sup>341</sup> This includes a view of these rules as what Vermeule has called “precautionary” devices. Turley, *A Fox in the Hedges*, *supra* note 2.

univocal purpose. The discussion of the dangers inherent in governing also reflected more normative judgments on the role of individuals in such a system. In the same way, it would be bizarre to treat Hobbes's *Leviathan* as a giant precautionary system because he speaks of avoiding the dangers inherent in nature and brutish human impulse.<sup>342</sup> His view of the power of a dominant ruler is based on natural law.<sup>343</sup> Atomistic theories often identify specific risks or dangers, but they are not merely the expression of precautionary rules.

In the Madisonian context, the division of the system into separated (and shared) spaces manifests more than the limiting of human irrationality. It reflects a view of how to protect democratic values and individual rights within a representative system while maintaining stability as a whole.<sup>344</sup> For example, requiring a President to secure approval for federal offices does more than protect against bad choices; rather, it incorporates the political judgment of different constituencies in the direction of government. The anti-aggrandizement structure further reflects core notions of the limits of power over other citizens and the theory that “the participatory process ensures that although no man, or group, is master of another, all are equally dependent on each other and equally subject to the law.”<sup>345</sup> While some critics have questioned Madison's “puzzling . . . personification of political institutions,”<sup>346</sup> it reflects his view of the division of power in terms of aggrandizement and the threat to liberty.<sup>347</sup> He personified institutions much like individuals within a physical structure and saw constitutional structure as what architects would recognize as determinative design. The forced and controlled interaction of multiple and sometimes antagonistic institutions and constituencies fits within this vision. He saw the interaction of these institutions and constituencies as a type of determinative design for democratic deliberation. The

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<sup>342</sup> THOMAS HOBBS, *LEVIATHAN* 13–14 (Richard Tuck ed., Cambridge Univ. Press 1996) (1651).

<sup>343</sup> *Id.* at 91–99.

<sup>344</sup> The Supreme Court has long discussed the separation of powers as a protection of individual liberty. See, e.g., *Clinton v. City of New York*, 524 U.S. 417, 449–50 (1998) (Kennedy, J., concurring).

<sup>345</sup> See CAROLE PATEMAN, *PARTICIPATION AND DEMOCRATIC THEORY* 27 (1970) (discussing the views of Jean-Jacques Rousseau).

<sup>346</sup> Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2317 (2006).

<sup>347</sup> THE FEDERALIST NO. 47, *supra* note 14, at 301 (James Madison). Indeed, this was the problem James Madison feared. *Id.* (“The accumulation of all powers . . . 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.”).

point is that there is no easy separation between the form and the function. The form reflects the relative powers of the “persons” within Madison’s structure.<sup>348</sup>

This more deontological notion of structure runs contrary to the treatment of structure in many constitutional theories where the focus is on the outcome or consequences of constitutional rules. Indeed, many constitutional theorists have questioned the assumptions of the Framers in developing the constitutional system. This criticism has ranged from functionalist critics discussed above to public choice critics<sup>349</sup> to more recent novel theories like Adrian Vermeule’s risk-centric view of constitutional law.<sup>350</sup> Many such critiques identify inefficient—over precautionary—or simply out-of-date constitutional rules.<sup>351</sup> The analysis, however, often focuses on specific outcomes or openly adopts consequentialist approaches in evaluating constitutional rules. Structure is treated as a purely instrumentalist rather than normative question. In this sense, a conarchitectural approach requires something of a paradigm shift in looking at structure not as a vehicle for insular objectives but as the objective of the Framers. Of course, every theoretical school tends to view specific words or arguments as early references to their perspectives, whether it is efficiency, risk, or some other value.<sup>352</sup> The premise of this Article is not to suggest that architectural theory was knowingly incorporated or referenced by the Framers. Rather, it is to argue that the structure of the Constitution itself held more than an instrumentalist value and that it

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348 Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 Nw. U. L. REV. 1239, 1246 (2002) (“The Constitution promotes a particular kind of governmental accountability and a particular kind of democratic deliberation by distributing legislative authority over designated officials in the legislative and executive branches who are accountable to different political constituencies.”).

349 See generally William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275 (1988); Jonathan Turley, *Transnational Discrimination and the Economics of Extraterritorial Regulation*, 70 B.U. L. REV. 339 (1990).

350 See generally ADRIAN VERMEULE, *THE CONSTITUTION OF RISK* (2013).

351 For example, Vermeule has suggested that the desire to legally limit the President has become facially naïve and practically unattainable: “We live in a regime of executive-centered government, in an age after the separation of powers, and the legally constrained executive is now a historical curiosity.” See ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 4 (2010).

352 See, e.g., *Book Talk: Adrian Vermeule on The Constitution of Risk*, YOUTUBE (Apr. 29, 2014), [https://www.youtube.com/watch?v=LS3uclq6u\\_Q](https://www.youtube.com/watch?v=LS3uclq6u_Q) (arguing that Publius understood risk regulation as well as modern writers and simply used “a different vocabulary” and that “historically speaking the constitutional discourse of risk regulation precedes the modern economic theory of risk regulation by centuries”). See generally Turley, *A Fox in the Hedges*, *supra* note 2.

was connected to a type of Miesian “truth” in its design for constitutional order.

The structural constitutional norms can also play a critical role in helping both decisionmakers and citizens identify conduct that is inimical to anti-aggrandizement values. As Dan Kahan has observed:

Individuals are also more likely to view conduct as worthy of condemnation when they know that others condemn it. Indeed, studies suggest that the opinions of one’s peers more significantly influence one’s moral attitudes toward various forms of conduct than does the status of those forms of conduct under the law. . . . They are likely to form that impression only if they observe their associates complying with, enforcing, or speaking well of the law.<sup>353</sup>

The benefit of clear (and enforceable) lines of separation is that circumventing or aggrandizing conduct is more easily labeled as a violation and subject to corrective political pressure. One criticism of functionalism is that it has served to blur lines of authority and turn many questions into simple debates over politics.<sup>354</sup> The result is a creeping relativism that is apparent in today’s debate over the increasing powers of the American presidency at the cost of both the legislative and judicial branches. While many lament the growing imbalance in favor of a type of uber-presidency, the response is often a shrug or sense of inevitability.<sup>355</sup> The structural norms inherent in the tripartite system serve to not only limit the horizon of options for decisionmakers, but when violated, to anchor the meaning of such conduct as a moral wrong through judicial review. This is why a conarchitectural view of constitutionalism requires not only the maintenance of the essential structural norms but active enforcement by the courts.<sup>356</sup>

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<sup>353</sup> Kahan, *supra* note 319, at 614 (footnote omitted).

<sup>354</sup> See generally Turley, *A Fox in the Hedges*, *supra* note 2 (discussing Professor Vermeule’s approach to constitutional interpretation as an exercise of risk management and policy).

<sup>355</sup> This sense of inevitability is particularly prominent in the work of Eric Posner and Adrian Vermeule. See POSNER & VERMEULE, *supra* note 351, at 16. It was also evident in a recent hearing on the confirmation of Loretta Lynch as Attorney General, where many senators balked at the use of confirmation to respond to separation conflicts—even with an agency that had forced Congress to go to court over allegations of obstruction and contempt. See generally *Lynch Confirmation Hearing*, *supra* note 21.

<sup>356</sup> Obviously, this requires a commitment from the courts that has been missing in national security cases. The failure of judges to force adherence of these principles during periods of national crisis or war is relied upon by Vermeule to suggest that a re-balancing of the branches is simply naïve. See VERMEULE, *supra* note 350, at 57 (“[T]he judges’ track record has been extremely forgiving; judges have frequently found ‘clear’ authorization under statutes whose terms were hardly pellucid.”). Clearly, any constitutional theory can face individual failures from lack of integrity or commitment during periods of crisis. The erosion of lines of separation, however,

Both the Miesian and Madisonian designs sought to construct around an understanding of human needs and expectations—structures that would work in the real world. As Mies stated toward the end of his life, he did “‘not want[ ] to change the world, but to express it.’”<sup>357</sup> In the context of constitutional structure, the question becomes whether a similar “truth” or “rhythm” exists that transcends changes in the function of the branches. While functionalists often examine conflicts in terms of the maintenance of a rough balance between the branches, the result has been to fundamentally alter both the form and function of system. Functionalist theory can create an outcome-determinative construct by focusing on the “function” of insular powers, like federal appointments, rather than the superstructure itself. Such power, however, is but a single component of a larger design—not its function. If the function of the Madisonian system is to distribute stresses across a tripartite superstructure, the ability of two branches to continue to “function” with a change to that component does not answer the operative question—even assuming that excessive use of recess appointments meets a definition of a functioning system. Rather, the critical analysis focuses on how such a shift affects the superstructure as a whole. That requires a greater rigidity to the interpretation of many provisions found in areas like war powers and executive privilege. The antithesis of this view is found in the jurisprudence of Justice Felix Frankfurter, who seemed almost genetically resistant to the concept of limiting executive power in many of these areas. In his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>358</sup> Frankfurter opined that “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution . . . may be treated as a gloss on ‘executive Power’ vested in the President.”<sup>359</sup> This gloss, it would seem, could allow a President to venture beyond the limiting language of the first three articles. It is a staunchly functionalist approach to suggest that the structural lines of the vesting clauses are not controlling and that the relative powers of the branches can change over time through the “gloss” of history.<sup>360</sup>

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seems to have accelerated with the rise of functionalism, which affords courts more flexibility in such decisions. Such departures would be more difficult to justify under a conarchitectural approach.

<sup>357</sup> COHEN, *supra* note 189, at 129 (quoting Mies).

<sup>358</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

<sup>359</sup> *Id.* at 610–11 (Frankfurter, J., concurring).

<sup>360</sup> *See United States v. Allocco*, 305 F.2d 704, 712–13 (2d Cir. 1962).



The problem with the functionalist view of constitutional structure is not only that it lacks the normative aspects of the Madisonian form but also that it allows for greater “incentive conflicts” as judicial enforcement of the lines of separation recede. Indeed, the lack of judicial review over the last couple decades has seen a comparable rise in the level of dysfunctional politics as both the executive and legislative branches engage in tit-for-tat measures.<sup>361</sup> Clearly, the stagnation in Washington reflects the deep division of our time. However, many of these disputes could have been avoided or certainly reduced with judicial review and the reinforcement of the constitutional form. The Madisonian system allows for a wide range of choices within its design, but confines those choices in critical ways. In doing so, the structure itself shapes the expectations and perspective of the two political branches. Of course, like the space within a large Miesian building or factory, the government within the Madisonian structure has changed with time. The executive branch has grown in both size and function.<sup>362</sup> The new functions and powers associated with the “age of regulation” have shifted the center of gravity in the tripartite system toward the executive branch. By minimizing (and not enforcing) the structural guarantees of the separation of powers doctrine in the myriad of conflicts between the executive and legislative branches, courts have allowed this imbalance to occur.

### C. *Madisonian Tectonics and the Functionality of Form*

Miesian design helped blur the distinction between form and function. Much like modern architectural theorists, Madison and other Framers tended to elevate function over form in their view of government. As with the steel frame structures of Mies,<sup>363</sup> there was a beauty in the simple, straightforward tripartite structure of government. It was government without ornamentation. While function tends to blend with form in such a system, the common expression of “form follows function” still resonates the most in Madisonian structure, as it has in Miesian structure. In that sense, there is an undeniable affinity toward constitutional formalism in a conarchitectural approach, just as a risk-centric approach tends to prefer functionalism in constitutional interpretations.<sup>364</sup> It is the structure of the Madis-

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<sup>361</sup> See *Duty to Faithfully Execute Hearing*, *supra* note 21, at 30–31.

<sup>362</sup> See, e.g., *supra* notes 331–32 and accompanying text.

<sup>363</sup> See *supra* notes 270–72 and accompanying text.

<sup>364</sup> See generally Turley, *A Fox in the Hedges*, *supra* note 2.

onian system itself that is the manifestation of its core functions—an inextricable link between form and function.

Miesian tectonics allowed for free flow in the open space of the structure: “‘The structure is the backbone of the whole and makes the free plan possible. Without that backbone the plan would not be free, but chaotic and therefore constipated.’”<sup>365</sup> The problem with functionalist theories is that they often overwhelm the structure by allowing functions to transcend the inherent law of order, space, and proportion. The approach of Jesse Choper and his judicial abdication model provides but one example.<sup>366</sup> Choper believes that “the ultimate constitutional issues of whether executive action (or inaction) violates the prerogatives of Congress or whether legislative action (or inaction) transgresses the realm of the President should be held to be nonjusticiable, their final resolution to be remitted to the interplay of the national political process.”<sup>367</sup> This approach allows function to transcend the form of the building—allowing the impulse of politics to shift the balance between the rooms and essentially expand one room to the reduction of another. It leaves the space within a structure as largely indeterminate with little reference to the tectonics of the structure itself. The danger of such an approach could manifest itself in the emergence of an imperial presidency where political convenience and passivity combine to allow one branch to occupy much of the space within the structure. The result is precisely what Madison stated that he hoped to avoid.<sup>368</sup> The relative relationship between the executive and legislative branches was quite different in Madison’s mind from what exists today. The Madisonian tectonics included certain load-bearing elements that were designed for a distribution of power. Although the value often referenced in these writings is liberty, the actual “function” of the tripartite system was to prevent the concentration of power that results in the loss of liberty. The form is the function when one reads Madison’s writings—a structure designed to create not only mutual checks but also mutual dependency:

On the other side, the executive power being restrained within a narrower compass and being more simple in its nature, and the judiciary being described by landmarks still less uncertain, projects of usurpation by either of these depart-

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<sup>365</sup> NORBERG-SCHULZ, *supra* note 273, at 152 n.89 (quoting Mies).

<sup>366</sup> See JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 260–61 (1980). For a discussion, see Turley, *Recess Appointments*, *supra* note 2.

<sup>367</sup> CHOPER, *supra* note 366, at 263.

<sup>368</sup> See *supra* Part I.

ments would immediately betray and defeat themselves. Nor is this all: as the legislative department alone has access to the pockets of the people, and has in some constitutions full discretion, and in all a prevailing influence, over the pecuniary rewards of those who fill the other departments, a dependence is thus created in the latter, which gives still greater facility to encroachments of the former.<sup>369</sup>

The functionality of the separation of powers repeatedly speaks to diffusing power and preventing its concentration.<sup>370</sup> That separation is not viewed as discretionary but essential to the system's integrity as a whole:

It is agreed on all sides that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident that none of them ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers. It will not be denied that power is of an encroaching nature and that it ought to be effectually restrained from passing the limits assigned to it. After discriminating, therefore, in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary, the next and most difficult task is to provide some practical security for each, against the invasion of the others.<sup>371</sup>

The vision described by Madison was not fluid in this key functional component. It was not, as is often suggested in functionalist writings like that of Choper,<sup>372</sup> that the lines are merely the starting place of power allocation—subject to the vicissitudes and necessities of politics. Madison wrote against the view that such separation was “a mere demarcation on parchment of the constitutional limits of the several departments.”<sup>373</sup> Such “demarcation on parchment . . . is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same

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369 THE FEDERALIST NO. 48, *supra* note 14, at 310 (James Madison).

370 The anti-aggregation function of the separation of powers has been repeatedly cited by the Supreme Court, and particularly Justice Kennedy. *See, e.g.,* Clinton v. City of New York, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) (“Separation of powers was designed to implement a fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty.”).

371 THE FEDERALIST NO. 48, *supra* note 14, at 308 (James Madison).

372 *See supra* notes 366–67 and accompanying text.

373 THE FEDERALIST NO. 48, *supra* note 14, at 313 (James Madison).

hands.”<sup>374</sup> Madison designed a system with a function in mind—a function likely conceived and often described in Newtonian as well as architectural terms. The form that emerged was the same true structure described in Miesian *Baukunst* theory.

### CONCLUSION

In growing up in Chicago, I (like many children my age) would regularly go to the Chicago Zoo to see my favorite animal: Mike the polar bear. “Big Mike” was a magnificent animal who would pace back and forth in a containment area that was manifestly too small. Years later, popular outcry led to the building of a much bigger and nicer area.<sup>375</sup> People gathered to watch Mike’s reaction to his new roomy cage, but zoo keepers were surprised when Mike proceeded to pace out exactly the same number of steps in the cage and then turn around precisely as it had done in the small cage.<sup>376</sup> The prior structure had changed Mike’s habits and conduct. It was a sad exhibition of the negative influence of structure on perception and habit. However, it vividly demonstrated how animals, and particularly humans, are conditioned and influenced by structure. It shapes our horizons and directs our actions. It can even, in the case of Mike the polar bear, create habitualized pathways of expression and movement. While structure is often treated as shaped to fit human demands, it also shapes those demands. Thus, Peter-Paul Verbeek noted that “technology does much more than realize the goal toward which it is put; it always helps to shape the context in which it functions, altering the actions of human beings and the relation between them and their environment.”<sup>377</sup> Designers have long viewed themselves as shaping human choices through the spaces that they create.<sup>378</sup>

In contrast to Mike’s habitualized pacing, clear lines in a tripartite system limit the range of choice and behavior in a positive way. They bring greater stability to the system in recognized pathways while dis-

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<sup>374</sup> *Id.*

<sup>375</sup> The zoo now changes the physical environment of containment areas to change the behavior of bears in avoiding repetition or stagnation. John Yates, *Zoos on Mission to Find Why Bears Lost in Pace*, CHI. TRIB., Nov. 30, 2003, at A1.

<sup>376</sup> This bizarre manifestation was shared by a zookeeper with my brother Christopher Turley, also a Chicago architect and adjunct professor of architecture at IIT, who immediately recognized the same phenomenon in human structures in the hope that they shape movement and expectations.

<sup>377</sup> PETER-PAUL VERBEEK, *WHAT THINGS DO: PHILOSOPHICAL REFLECTIONS ON TECHNOLOGY, AGENCY, AND DESIGN* 43 (Robert P. Crease trans., 2005).

<sup>378</sup> JON KOLKO, *THOUGHTS ON INTERACTION DESIGN* 12 (2007) (“[T]he purpose of the [interaction design] profession [is] to change the way people behave.”).

couraging efforts to circumvent or transcend the space created for each branch. That does not mean that people within the structure will not try to acquire more space or seek exaptations based on claims of evolving needs or functions. If constitutional structure has a deontological meaning, such changes should be resisted as presumptively destabilizing and inimical to the system as a whole. The role of maintaining the superstructure obviously lies with the courts, which undermine the system in some rules of judicial avoidance.<sup>379</sup> It also requires a more active level of defense from institutional players, particularly from Congress, in the shifting of constitutional functions and authority.<sup>380</sup> Such a conarchitectural approach is admittedly rigid in the resistance to arguments of functionalist evolution or constitutional exaptations. The structure itself contains a normative component that is lost through the type of ad hoc tests created in cases like *Noel Canning*.<sup>381</sup> The violation of these structural norms labels or “anchors” the meaning of political conduct, as the bounded rationality theories discussed earlier,<sup>382</sup> particularly in cases of aggrandizement. Of course, the question of enforcement of structural norms lays bare the critical difference between law and architecture. As Alain de Botton stated, “[a]rchitecture may well possess moral messages; it simply has no power to enforce them.”<sup>383</sup> Conarchitectural values cannot be purely aspirational or aesthetic to function. The form itself must be reinforced and maintained to serve its function.

One of Mies’s favorite admonitions for his students was that “‘God’ . . . ‘is in the details.’”<sup>384</sup> The same can be easily said for con-

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<sup>379</sup> See Turley, *Recess Appointments*, *supra* note 2, at 1583–92. The core responsibility of the courts to mind the lines of separation has been recognized since the earliest opinions from the Supreme Court. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2552–56 (2014) (stating that “it is the ‘duty of the judicial department’—in a separation-of-powers case as in any other—to say what the law is” (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803))).

<sup>380</sup> My longstanding concerns over the shifting of power toward a more powerful presidency led to my testimony on the question of whether the House of Representatives should seek judicial review over unilateral actions taken by President Obama. See *Authorization to Initiate Litigation Hearing*, *supra* note 21. While standing barriers remain, I have long criticized the standing cases as too restrictive, particularly with regard to legislative standing. The removal of the courts from these separation conflicts, in my view, has undermined the integrity of the system and contributed greatly to the dysfunctional political environment in Washington.

<sup>381</sup> *Noel Canning*, 134 S. Ct. at 2555–56.

<sup>382</sup> See *supra* notes 311–21 and accompanying text.

<sup>383</sup> ALAIN DE BOTTON, *THE ARCHITECTURE OF HAPPINESS* 20 (2008) (“[Architecture] offers suggestions instead of making laws. It invites, rather than orders, us to emulate its spirit and cannot prevent its own abuse.”).

<sup>384</sup> BLAKE, *supra* note 205, at 188 (quoting Mies). This was a variation of the German proverb “the Devil rests in the detail”—the notion that lack of care in execution of a plan or design can prove your undoing. See COHEN, *supra* note 189, at 128.

stitutional interpretation where there is general agreement on the separation of powers, but sharp disagreement as to the details on where such lines are drawn. The parallels between the evolution of legal and architectural theory present some telling points of commonality. Both Madison and Mies developed their respective theories based on their understanding of human needs, including common philosophical influences. Notably, after modernist architects were beginning to explore the difference between form and function, legal theorists were exploring the dichotomy in constitutional interpretation. In the 1930s and 1940s, jurists like Frankfurter were breaking away from more static concepts of separation theory and embracing more functionalist approaches.<sup>385</sup> Yet the two fields diverged in a critical respect. On the surface, it would appear that both focused on functionalist elements over form. However, the *Baukunst* approach of Mies merged the concept of form and function.<sup>386</sup> The form was the function in the art of the building. The same can be true of the Madisonian system and the tectonics of the tripartite system. The rich literature on *Baukunst* theory contradicts many assumptions about “form follows function.” Mies actually believed that there was an inherent truth to a building and that occasionally the function within a building had to yield to its form.<sup>387</sup>

Viewing the issue of form and function through the lens of architectural theory puts much of our jurisprudence in a different and less flattering light. Many decisions simply fail to tie structural principles to the interpretation of provisions governing war powers, recess appointments, or other interbranch conflicts. Other decisions get the result right, but seem to focus on insular rooms rather than the structure itself as driving the analysis.<sup>388</sup> What is most striking about this comparison is that the Framers themselves were heavily influenced by what we would today call interdisciplinary analysis, particularly the Newtonian and scientific theory of the Enlightenment. They often discussed their vision of government in scientific and architectural terms.<sup>389</sup> Those writings share a certain force and clarity that escapes

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<sup>385</sup> See *supra* notes 358–60 and accompanying text.

<sup>386</sup> See *supra* Part II.

<sup>387</sup> See *supra* notes 271–74 and accompanying text.

<sup>388</sup> An example of this type of misplaced emphasis can be found in the decision of the D.C. Circuit in *Noel Canning*, where the D.C. Circuit had the opportunity to tie its decision to a broad separation of powers principle but chose a much narrower emphasis on recess appointment provisions. See *Noel Canning v. NLRB*, 705 F.3d 490, 506–07 (D.C. Cir. 2013), *aff'd*, 134 S. Ct. 2550 (2014); Turley, *Recess Appointments*, *supra* note 2, at 1589–94.

<sup>389</sup> See *supra* Part I.

much scholarship and jurisprudence today. Indeed, many originalist works focus on terms like privacy rather than the more relevant originalist intent behind the superstructure itself. A strong argument can be made for the evolution of such terms—like the open space of a Miesian structure—while the intent of the tectonics of the system should be the controlling element in judicial interpretation. It is a distinction that finds greater expression in modernist architectural theory.

The absence of shared work between the architectural and legal disciplines is particularly remarkable given the widening array of interdisciplinary schools from “Law and Literature” to “Law and Society” to “Law and Economics.” Some of these interdisciplinary fields, like “Law and Literature,” struggle with the same concepts of formalism and functionalism.<sup>390</sup> For those who focus on legal language, like Professor Frederick Schauer, constitutional language necessarily changes in meaning—“[i]n some ways, the Constitution is a metaphor.”<sup>391</sup> The absence of architectural or engineering sciences from these interdisciplinary schools is telling. In constitutional interpretation, it reflects a general preference for functionalist approaches and a more fluid concept of interbranch powers. In that sense, “Law and Architecture” offers an alternative, and at times discordant, perspective of interpreting constitutional forms and functions. The focus of the Constitution as a structural form rather than a narrative or metaphor means that, at least in terms of tectonic concepts like the separation of powers or federalism, it is not possible to have, as Professor Sanford Levinson would argue, “as many plausible readings of the United States Constitution as there are versions of *Hamlet*.”<sup>392</sup> The Constitution is tied more to the superstructure or tectonics of the system as opposed to the evolving meaning of its language or relations.<sup>393</sup> What is most compelling, however, is the modernist conception of a

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<sup>390</sup> See Daniel Barbiero, *Agreeing to Disagree: Interpretation After the End of Consensus*, 78 GEO. L.J. 447, 449 (1989) (reviewing INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER (Sanford Levinson & Steven Mailloux eds., 1988)).

<sup>391</sup> Frederick Schauer, *An Essay on Constitutional Language*, in INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER, *supra* note 390, at 133, 135 (“[T]o construe [the Constitution’s] language too literally or too much like the language in a conventional statute would be both unrealistic and inconsistent with its deeper purposes.”).

<sup>392</sup> Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373, 391 (1982).

<sup>393</sup> A conarchitectural approach is not meant to suggest that insular rights within this superstructure do not change any more than relationship and movement of individuals change within a building. Some rights clearly change with society. Yet, some rights can reflect microstructural elements and have the same static character, such as limiting government regulation of consensual relations to direct and concrete showings of harm. See Jonathan Turley, *The Loadstone*

truth in structure and the relationship between form and function. It is remarkable, given the shared foundational concepts, that both fields have been speaking of form and function but never speaking to each other on this common dichotomy.

The commonalities between architectural and legal theory are not meant to suggest that Miesian tectonics can be applied directly to resolve long-standing debates over formalism versus functionalism in constitutional interpretation. Rather, the comparison highlights the relative lack of development of these core concepts in constitutional interpretation. A constitutional system shares many elements with an architectural structure in creating a superstructure reflecting a core function. While the purpose of the Madisonian system is liberty, the actual function of the tripartite structure is to prevent the aggregation of power that threatens liberty. In that sense, the normative paradox that form cannot be its own function is a false paradox. The form of the Madisonian system is its function. Of course, the chilling aspect of a comparison to architectural theory is the consequences of overloading a superstructure in architecture: the building collapses. Catastrophic failure is what all architects of either physical or legal structures fear most.

The rapid aggregation of power in the executive branch, particularly after 9/11, should raise concerns over such a collapse. If the purpose of the tripartite system is the protection of liberty through an anti-aggregation function, both the system and liberty are threatened by decades of functionalist legal theory. Assuming that the function of the Madisonian system is its form of separation of powers, the question turns to how such a conclusion affects the interpretation of the Constitution in actual disputes between the branches. While this Article primarily seeks to bridge the gap between legal and architectural theories, the application of *Baukunst* principles to common inter-branch conflicts reinforces certain separation-based interpretations. It would suggest that the system has to force the activities within the designed space to yield to its expressed function. In concrete terms, it means that courts must actively correct shifts of power within the structure to prevent the concentration of the powers that the design was meant to dissipate. That degree of judicial correction is all the more important when external changes have reduced the structure's inherent ability to self-correct. The activities within the Madisonian structure have changed dramatically with the emergence of a domi-



nant federal government and the relative expansion of executive power vis-à-vis legislative and judicial power. The structure itself, however, specifically allows for a distribution of such powers, and such distribution is central to its function and stability.<sup>394</sup> The Madisonian system operates much like a three-room structure with openings allowing a free flow of activity. However, the walls dictate internal spaces that are fixed within a structure, thus reflecting Mies's view of "eternal laws" of order, space, and proportion.<sup>395</sup> This is precisely Mies's challenge to Sullivan when confronted with changing functions within a fixed structure. The form of the structure itself can dictate functions: "economically the buildings cannot change."<sup>396</sup> Exploring some of the contemporary separation controversies can show how the insular questions are viewed from this type of tectonic perspective. The change in emphasis from the insular "rooms" of the Constitution to its superstructure often produces the inverse presumption from the one used in questions ranging from war powers to standing.

This concept of form as function in the Madisonian system expresses the concern over the rising power of the Chief Executive in our system, as well as the increasing passivity or avoidance of the courts in such controversies. Presidents have historically resisted sharing power with Congress. The suggestion that modern government requires the circumvention of Congress did not begin with either George W. Bush or Barack Obama. Franklin Delano Roosevelt declared to his staff that "the only way to do anything in the American government is to bypass the Senate."<sup>397</sup> Nixon was of course infamous for his avoidance of Congress.<sup>398</sup> Particularly under George W. Bush and Barack Obama, the presidency has become increasingly independent and unchecked in its operation. The result has been the realization of something Richard Nixon spoke only wistfully of in office: an imperial presidency.<sup>399</sup> It is a record that put into sharp relief the difference in "functions" often described by academics. For those who

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<sup>394</sup> This structure does not simply include the vesting powers that form the foundation for the separation of powers, but also the diffusion of powers of the federal government generally vis-à-vis citizens or states, such as the protections in the Second Amendment, Fourth Amendment, and Tenth Amendment.

<sup>395</sup> See *supra* note 239 and accompanying text. Clearly, there appears to be a fourth room constructively added to the design in the form of federal agencies, a development that brings its own risks to a tripartite system. See Turley, *supra* note 334.

<sup>396</sup> *Mies van der Rohe*, *supra* 225, at 94.

<sup>397</sup> FOLEY, *supra* note 49, at 140 (internal quotation marks omitted).

<sup>398</sup> See *id.*

<sup>399</sup> See Jonathan Turley, Op-Ed., *Hope in Obama Trumps Experience*, USA TODAY, Jan. 23, 2013, at 6A.

view separation as achieving the function of diffusion of power, the current system has fallen dangerously out of balance, as revealed by the increasing presidential authority in areas ranging from war powers to recess appointments to the regulatory state. If the separation of powers is an example of form as function, the current aggregation of power in the executive is not just destabilizing but dangerous to the system as a whole.

*Baukunst* concepts strongly favor the sense of an inner “truth” to a structure in expressing its function in its form. For those who view this as an interdisciplinary justification of formalism, it is certainly true that this Article would reinforce some neoformalist views on maintaining lines of separation.<sup>400</sup> However, the purpose of the comparison to modernist architectural theory is to consider the false dichotomy of form and function. Within a Miesian structure, like the Madisonian structure, there remains considerable room for free flow in the open spaces shared by branches. However, the attention to tectonic truths in design is meant to distinguish between areas of movement and more static structural components. Rather than being fundamentally different in the focus of their respective work, the architectural and legal academies have been working for decades on very similar concepts underlying the essence of structure. To put it bluntly, we may have something valuable to learn about form and function from our counterparts in the architectural world. Ideally, that search leads to a resolution where the distinction fades and, to quote Louis Sullivan, “all is form, all is function.”<sup>401</sup>

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<sup>400</sup> To the extent that this theory would tend to support the conclusions of some formalist opinions, I can only quote Mies that “‘it is much better to be good than to be original.’” PHILIP JOHNSON, WRITINGS 140 (1979) (quoting Mies).

<sup>401</sup> SULLIVAN, *supra* note 244, at 44.