Combating the Ramifications of the USA PATRIOT ACT: The Standing Doctrine and the Judiciary's True Role in The Separation of Powers Scheme.

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"When the government fears the people, there is liberty;
When the people fear the government, there is tyranny."
- Thomas Jefferson

I. INTRODUCTION

On October 26, 2001, over a month after the terrorist attacks of September 11th, 2001, the USA PATRIOT Act was enacted.[1] The Act was adopted as an effort to strengthen nation security in the wake of the tragic attacks of September 11th; however, it has done this by forcing Americans to sacrifice many individual liberties protected by the United States Constitution.[2] More importantly, it was not the intent of the Framers to allow the Federal Government such unfettered control to contravene the individual liberty interest of United States Citizens found in

1. Robert N. Davis, *Striking the Balance: National Security vs. Civil Liberties,* 29 BROOK. J. INT'L L. 175, 176 (2003).

2. *See id.* ("The USA Patriot Act was adopted as an effort to strengthen national security but some believe it overreaches by sacrificing civil liberties for the benefit of national security.").

the United States Constitution, even in times of war.[3] Especially where government actions blatantly "disregard the parameters clearly enumerated in the Bill of Rights."[4]

History has told that when the United States is in a state of war, laws—especially laws pertaining to individual liberty interests—will bend.[5] During the Civil War, President Abraham Lincoln ordered a blockade of the southern ports and suspended the right of *habeus corpus*.[6] Then again, during World War II, the United States Government sacrificed the freedom of many American citizens by ordering the internment of Japanese Americans on the West Coast.[7] And most recently, during the war on terrorism, several American citizens were indefinitely detained by the military as "enemy combatants" without due process of the law.[8]

However, national security and individual liberty interests are not mutually exclusive.[9] The United States must balance both individual liberty interest and security interest appropriately.[10] It is a well-founded proposition that if the Federal Government cannot secure our nation, our individual liberties will mean very little; however, the preservation of the individual liberties of all United States citizens is vital to having a nation worth securing.[11]

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3. *See* ACLU v. NSA, No. 06-CV-10204, slip op. at 23–24 (E. D. Mich. Aug. 17, 2006), *available at* http://www.aclu.org/images/nsaspying/asset_upload_file689_26477.pdf. (stating that "[i[t] was never the intent of the Framers to give the President such unfettered control . . . [to] blantantly disregard the parameters of the Bill of Rights").

4. *Id.*

5. *See* Davis, *supra* note 1, at 178 ("History demonstrates that when the nation is *in extremis*, laws bend.").

6. *See generally Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866) (involving a case where the executive branch suspend *habeus corpus* for seditious acts toward the Union during the Civil War).

7. *See generally* Korematsu v. United States, 324 U.S. 885 (1945) (involving the internment of Japanese Americans during World War II for security purposes).

8. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 553–54 (plurality opinion) (determining that the United States citizen-detainee, seeking to challenge his classification as an enemy combatant, was entitled to receive notice of the factual basis for his classification and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker).

9. *See ACLU,* No. 06-CV-10204, slip op. at 41 ("'Constitution of the United States is a law for rulers and people, equally in war and in peace . . . .'" (quoting *Milligan,* 71 U.S. (4 Wall.) at 120)).

10. *Id.*

11. *See Hamdi*, 542 U.S. at 532 ("It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.") (citing Kennedy v. Mendoza-Martinez, 372 U.S.

The three separate branches of government were developed as a check and balance for one another so that individual interests of Americans are not sacrificed by the actions of any one individual branch.[12] And it is within the judiciary's duty to ensure that federal power is never "'condense[d] . . . into a single branch of government.'"[13] This Article contends that, in light of the recent actions of the Federal Government in the post-9/11 era, it is the duty of the judiciary—as vested within their constitutional powers—to serve as the necessary check on the executive and legislative branch when these two branches enact legislation, like the USA PATRIOT Act, that infringes on Americans' individual liberty interest found in the Bill of Rights. This is because it is within the judiciary's power to bring a balance as to what is necessary for national security, and also to protect the individual liberty interest of Americans against an overreaching Federal Government.[14]

Part II of this article will outline the United States Separation of Powers Scheme as set forth by the Framers; and will examine the nature of the judiciary's power within that scheme and the standing requirement which must be met in order for the judiciary to hear a "case" or "controversy" concerning a constitutional issue. Part III will examine the nature of a "new" concrete injury that is manifested by way of certain legislation, specifically the USA PATRIOT Act. Part IV will examine why this "new" injury is grounds enough for standing; discussing the

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144, 164–65 (1963)); *see also* United States v. Robel 389 U.S. 258, 264 (1967) ("Implicit in the term 'national defense' is the notion of defending those values and ideas which set this Nation apart . . . . [and] [i]t would indeed be ironic if, in the name of national defense, we would sanction the subversion of . . . those liberties . . . which makes the defense of the Nation worthwhile."); *Kennedy,* 372 U.S. 144, 164–65 ("The imperative necessity for safeguarding these [individual] . . . rights under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with fundamental constitutional guarantees which, it is feared, will inhibit government action.").

12. *See ACLU,* No. 06-CV-10204, slip op. at 24 ("The three separate branches of government were developed as a check and balance for one another.").

13. *Id.* (quoting *Hamdi*, 542 U.S. at 536). "It remains one of the most vital functions of this Court to police with care the separation of the governing powers . . . . When structure fails, liberty always is in peril." Public Citizen v. U.S. Dept. of Justice, 491 U.S. 440, 468 (1980) (Kennedy, J. concurring).

14. *See ACLU,* No. 06-CV-10204, slip op. at 24. "'We must always be mindful that '[w]hen the President takes official action, the [United States Supreme] Court has the authority to determine whether he has acted within the law.'" *Id.* (quoting Clinton v. Jones, 520 U.S. 681, 703 (1997)).

role of the judiciary within the separation of powers scheme and as the protector of individual rights, especially those found in the Bill of Rights. I will then conclude with my concerns over the state of American's individual liberty interest and why it is necessary that the judiciary acts as the protector of Americans' Constitutional Rights.

II. THE SEPARATION OF POWERS AND THE STANDING REQUIREMENT

In *United States v. Moussaoui*,[15] a prosecution in which production of enemy combatant witnesses had been refused by the government and the Doctrine of Separation of Powers was raised,[16] the United States Fourth District Court stated that the judiciary has "consistently . . . given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that . . . the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty."[17]

However, perhaps "the most influential of any political theorist" on the United States Constitution's Separation of Powers Scheme is Charles Louis De Secondant, Baron de Montesquieu.[18] Montesquieu's maxim that "the three governmental powers must be kept separate for liberty to flourish" shaped the early American Constitution[19] Montesquieu believed that "'[w]hen the legislative and executive powers are united in the

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15. 365 F.3d 292 (4th Cir. 2004).
16. *See id.* at 305.
17. *Id.* (citing Mistretta v. United States, 488 U.S. 361, 380 (1989)).
18. Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 745–46 (citing FORREST MCDONALD, NOVUS ORDO SECLORUM 80 (1985)). "Forrest McDonald claims that American 'republicans regarded selected doctrines of Montesquieu's as being virtually on a par with Holy Writ.'" *Id.* at 746 n.219 (quoting FORREST MCDONALD, NOVUS ORDO SECLORUM 80 (1985)).
19. *Id.* at 746.

> Montesquieu initially divided governmental power into three categories: legislative, executive foreign affairs, and executive law execution. [citation omitted]. Reflecting the increased prominence of the judiciary, however,
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> Montesquieu bisected the last category—"by[which the magistrate] punishes criminals, or determines the disputes that arise between individuals." [citation omitted]. The latter he called the "judiciary power" and the former "the executive power of the state." Thus, the executive power punished criminals and the judicial power settled disputes. The resulting taxonomy—legislative, executive, and judicial—was the focus of his subsequent discussion.

Id. (quoting BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS IV 69 (Frank Neuman ed. Encyclopedia Britannica, ed. 1952)(1748))

same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.'"[20]

Generally, Montesquieu believed that the executive branch should have the power to execute the laws; however, the executive power must not encompass the power to issue judgments in judicial cases—this is reserved for the judiciary.[21] Montesquieu feared that in regimes where one branch possessed the executive and judiciary authority, the judiciary becomes ineffective in stopping potentially tyrannical behavior by the executive because the judiciary will no longer check executive actions.[22]

Acknowledging the soundness of Montesquieu's "separation maxim," James Madison—often referred to as the "Father of the Constitution"[23]—admitted that fears of vesting all powers in one branch of the government were based on a "'political truth'" of the highest "'intrinsic value.'"[24] Madison affirmed Montesquieu contention that the separation of powers served to prevent tyranny, stating that "'the success of the usurpation will depend on the executive and judiciary departments, which are to expound and give effect to the legislative acts.'"[25] Essentially, Madison believed that when the

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20. *Id.* (quoting MONTESQUIEU, *supra* note 19, at 70).

21. *See* Prakash, *supra* note 18, at 747. According to Montesquieu, "the executive power no longer encompassed the power to issue judgments in judicial cases" because such a task is a judicial function. *Id.*

22. *See id.* at 746–47. According to Prakash, Montesquieu had a "pronounced horror of a complete fusion of all three powers," and if such a fusion happened, "[s]omeone would enjoy absolute authority to legislate, execute, and judge." *Id.* at 746–47.

23. When delegates to the Constitutional Convention assembled at Philadelphia, Madison took a frequent and emphatic part in the debates. Madison made a major contribution to the ratification of the Constitution by writing, with Alexander Hamilton and John Jay, the *Federalist* essays. In later years, when he was referred to as the "Father of the Constitution," Madison protested that the document was not "the off-spring of a single brain," but the work of "many heads and many hands." WIKIPEDIA ENCYCLOPEDIA, JAMES MADISON, http://en.wikipedia.org/wiki/James_Madison (last visited Dec. 11, 2006).

24. Parkash, *supra* note 18, at 781 (citing THE FEDERALIST NO. 47, at 324 (James Madison) (Jacob E. Cooke ed., 1961)).

25. *Id.* (citing THE FEDERALIST NO. 44, at 305 (James Madison) (Jacob E. Cooke ed., 1961)).

"three powers were in different hands, tyranny is less likely because each branch will check the others."[26]

In the end, the Framers divided the government of the United States into three branches, each vested with different types of power and each responsible for different governmental functions.[27] Article I of the Constitution vests "all legislative Powers . . . in a Congress of the United States, which . . . consists of a Senate and House of Representatives."[28] Article II declares that "the executive Power shall be vested in a President of the United States of America."[29] And, finally, article III places "the judicial Power . . . in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[30]

By separating the new government's powers among three branches, the Framers primarily were seeking "to protect the liberty and security of the governed" by restricting the overall power of the government.[31] The Framer's aim was "'to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of *every individual* may be a sentinel over the public rights.'"[32] The Framers believed by giving "'those who administer each department the necessary constitutional means and personal motives to resist encroachments of others' they were creating enough tension between the

26. *See id.* ("Madison . . . had captured the essence of Montesquieu's maxim. When the three powers were in different hands, tyranny was less likely because each branch could check the others.").

27. *See generally* U.S. CONST. art. I, art. II, art. III.

28. *Id.* at art. I.

29. *Id.* at art. II.

30. *Id.* at art. III. Note that "[o]ther constitutional provisions further divide the federal government's power among the three branches. For example, the power to enact laws through legislating is shared by both Congress and the President." James W. Cobb, Note, *By "Complicated and Indirect" Means: Congressional Defense of Statutes and the Separation of Powers*, 73 GEO. WASH. L. REV. 205, 211 n.45 (2004).

31. Cobb *supra* note 30, at 212 (quoting Metro Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 273 (1991) (quoting Morrison v. Olson, 487 U.S. 654, 693 (1988)).

32. *Id.* (quoting THE FEDERALIST NO. 51, at 357 (James Madison) (Benjamin Fletcher Wright ed., 2002)).

branches to prevent imprudent governmental action."[33] The Framers made "'ambition . . . counteract ambition.'"[34]

Thus, the Separation of Powers Scheme of the United States Constitution is "'a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.'"[35] Absent such a self-executing scheme, the Framers envisioned nothing short of the tyranny against which they and their contemporaries had revolted against in the first place.[36]

A. *The Judiciary's Role Amongst the Three Branches*

The United States Separation of Powers Scheme, in accordance with the United States Constitution, restricts the manner in which each branch can act, setting forth a system that "preserve[s] a balance among the branches and . . . promote[s] governmental accountability."[37] This scheme imposes a system of checks and balances that prevents each branch from accumulating power at the expense of the others,[38] and also provides a means of protecting individual liberty from arbitrary governance; even by the democratically elected legislature.[39] It

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33. *Id.* (quoting THE FEDERALIST NO. 51, *supra* note 32, at 356).

34. *Id.* (quoting THE FEDERALIST NO. 51, *supra* note 32, at 356).

35. *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 122 (1976)).

36. *See* Cobb, *supra* note 30, at 212 ("Only in a regime that pitted ambition against ambition would sufficient means be available to prevent the unilateral abuse of power by any one official or branch of the government.").

37. Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253, 1258 (1988).

38. *See id.* at 1259.

> The focus in the Constitution is not so much on keeping the branches separate as on constructing a scheme of checks and balances. Although the powers of government are kept distinct for the most part, each branch is also to be accorded "the necessary constitutional means and personal motives to resist the encroachments of the others," [citation omitted] even if that permits one branch to participate in the functions of another. The framers made the branches interdependent, and the system of checks and balances evidences the intent to make each branch accountable to the other.

Id. (quoting THE FEDERALIST NO. 51, at 321–22 (J. Madison) (C. Rossiter ed., 1961) [hereinafter THE FEDERALIST NO. 51 II]).

39. *See id.* at 1260.

> The constitutional scheme, however, also reflects interest in making the branches responsible to some higher public interest. [citation omitted] The framers included checks and balances not only to prevent each branch from accumulating power at the expense of the others, but also to protect against the rule of "faction," primarily in the legislative branch. Madison, perhaps the leading spokesman for the Constitution, defined faction as "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."

does this by placing "a premium on accountability among the branches and on the responsibility of those branches to the public interest, specifically the individual liberty rights of United States Citizens."[40] Thus, as the United States Supreme Court examines "[s]eparation of powers issues, as they arise today," they must address such issues "by examining not merely the separation model envisioned by the classical theorist, but also the checks and balances that distinctively mark the government structure in the Constitution."[41]

However, due to the challenge of ensuring a balance among the branches, the Framers provided specific restrictions governing how the branches must act as a supplement to the Constitution's Separation of Powers Scheme.[42] An effective system of separated powers is not maintained merely by separating the branches or by inserting "external checks, such as the power of impeachment or the power of judicial review."[43] Rather, the goal of the constitutional scheme was to "contriv[e] the interior structure of the government, as that its several constituents may, by their mutual relations, be the means of keeping each other in their proper places."[44] Essentially, the Framers imposed a self-executing Constitutional scheme of internal controls that that circumscribes the ways each branch can act.[45] By doing this, the Constitution "attempts to minimize clashes among the branches."[46]

Id. (quoting THE FEDERALIST NO. 10, at 78 (J. Madison) (C. Rossiter ed., 1961)).

40. Krent, *supra* note 37, at 1260.

41. *Id.* "[T]he 'internal' checks in the Constitution circumscribing the manner in which each branch can act must also be understood as part of the overall effort to confine governmental authority and instill governmental responsibility." *Id.*

42. *See id.* at 1261 (stating that the Framers "supplemented the general separation provided in the Constitution" and provided "specific restrictions" as to how the branches were to act); *cf.* 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 517, at 1 (1833 ed.) ("Every government must include within it scope . . . the exercise of the three great powers . . . [t]he manner and extent, in which these powers are to be exercised . . . constitute the great distinctions which are known in the forms of government.").

43. Krent, *supra* note 37, at 1261.

44. THE FEDERALIST NO. 51 II, *supra* note 38, at 320.

45. Krent, *supra* note 37, at 1262; *see* THE FEDERALIST NO. 51 II, *supra* note 38, at 322.

46. Krent, *supra* note 37, at 1262.

Within this self-executing scheme, the judiciary branch has the power to strike down legislative, executive, or judicial actions that have ignored or circumvented the restraints place on them by the Constitution.[47] Even if a contested legislative measure does not usurp the powers of a coordinate branch of government, the separation of powers doctrine requires that the judiciary invalidate the action if it violates the Constitution.[48] This is because the primary purpose of the judiciary in the separation of powers scheme is to resolve "cases" or "controversies" involving Constitutional issues.[49]

Yet, even though Article III of the Constitution grants the judiciary the power to hear such "cases" and "controversies" concerning Constitutional issues, the Court has interpreted these words to limit access to the courts.[50] Currently, the "irreducible constitutional minimum of standing," or a litigant's ability to bring a suit, is only met if the harm alleged is "actual or immediate."[51] However, the Framers adhered to a constitutional system "of separated powers [whose] end [is] safeguarding individual liberty."[52] And when the Federal Government offends individual liberty interest by passing legislation that jeopardizes the individual protections found within the Bill of Rights, it is the job of the judiciary to grant standing to a litigant challenging such legislation, even if the harm alleged does not meet the classical definition of "actual or

47. *Id.*

48. *See id.* "Courts should scrutinize legislative actions to ensure their conformance with the procedural precepts of the Constitution. Even if the contested legislative measure does not usurp the powers of a coordinate branch of government, the separation of powers doctrine requires invalidating the action if it is procedurally defective." *Id.*

49. *See* U.S. CONST. art. III.

50. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (stating that Art. III of the United States Constitution limits the federal court's jurisdiction to cases and controversies, and in order to have a genuine case or controversy the plaintiff must establish standing).

51. Dana S. Treister, Note, *Standing to Sue the Government: Are Separation of Powers Principles Really Being Served?*, 67 S. CAL. L. REV. 689, 690 (1994).

52. Krent, *supra* note 37, at 1267.

immediate." This is because it is the job of the judiciary to interpret the Constitution and serve as the "protector of individual rights."[53]

B. *The Standing Requirement: What is a Case or Controversy?*

Traditionally, "[t]o have a genuine case or controversy, the plaintiff must establish standing."[54] Standing "'is an essential and unchanging part of the case-or-controversy requirement of Article III.'"[55] For a plaintiff to have standing to bring a suit, the following requirements must be met: 1) "'the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical'; 2) there must be a 'causal connection between the injury and the conduct complained of'; and 3) 'it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'"[56] Also, the burden of proving standing is on the party invoking federal jurisdiction.[57]

Although these requirements are required for a plaintiff to have standing, the "'core' of standing . . . is a minimum requirement of injury in fact which not even Congress can eliminate," with a legal injury being "by definition no more than the violation of a legal right."[58] As stated in *Flast v. Cohen*:[59]

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53. *See* Lee A. Albert, *Justiciability and Theories of Judicial Review: A Remote Relationship,* 50 S. CAL. L. REV. 1139, 1150 (1977*)* (arguing that the position that courts should not adjudicate injuries suffered by the citizenry at large is founded on the "dubious premise" that American courts only protect "tangible, highly specific interests of individuals"); *see also* Erwin Chemerinsky & Larry Kramer, Defining the Role of the Federal Courts, 1990 B.Y.U. L. REV. 67, 83 *(*stating that "few would disagree that a central function of the Constitution is to safeguard individual liberties and to assure equal protection . . . . [e]ffective judicial enforcement is imperative if these rights are to be protected.")

54. ACLU v. NSA, No. 06-CV-10204, slip op. at 15 (E. D. Mich. Aug. 17, 2006), *available at* http://www.aclu.org/images/nsaspying/asset_upload_file689_26477.pdf.

55. *Id.* (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)).

56. *Id.* at 16 (quoting *Lujan*, 504 U.S. at 560–61).

57. *See id.* ("The party invoking federal jurisdiction bears the burden of establishing the[] elements [of standing]." (citing *Lujan,* 504 U.S. at 561)).

58. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 885 (1983). In making this proposition, Justice Scalia compared the decision in Warth v.

> The "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." [citation omitted] . . . So stated, the standing requirement is closely related to, although more general than, the rule that federal courts will not entertain friendly suits . . . or those which feigned or collusive in nature . . . .
> . . . [T]hus, in terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be represented in an adversary context and in a form historically viewed as capable of judicial resolution.[60]

According to Justice Scalia, "[s]tanding . . . is only meant to assure that the courts can do their work well, and not to assure that they keep out of affairs better left to the other branches,"[61] making Federal Courts reluctant to grant standing to generalized grievances and generally only grant standing to an "individual who is the very object of a law's requirement or prohibition."[62] This classical notion of standing will only allow the Court to hear a case or controversy when a "law is bearing down upon the individual himself."[63] As Justice Antonio Scalia argued, a

> "[C]oncrete injury"—an injury apart from the mere breach of the social contract, so to speak, effected by the very fact of unlawful government action—is the indispensable prerequisite of standing. Only that can separate the plaintiff from all the rest of us who claim the benefit of the social contract, and can thus entitle him to some special protection from he democratic manner in which we ordinarily run our social-contractual affairs."[64]

Seldin, 422 U.S. 490, 512–14 (1975), to Justice Whites concurring opinion in Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 212 (1972) (White, J., concurring).

59. 392 U.S. 83 (1968).
60. *Id.* at 99–101.
61. Scalia, *supra* note 58, at 891.
62. *Id.* at 894 (citing, generally, Matz v. United States, 581 F. Supp. 714 (N.D. Ill. 1984)).
63. *Id.* According to Scalia, when the harm alone is a generalized grievance:
> The plaintiff may care more about it; he may be a more ardent proponent of constitutional regularity or of the necessity of the governmental act that has been wrongfully omitted. But that does not establish that he has been harmed distinctively—only that he assess the harm as more grave, which is a fair subject for democratic debate in which he may persuade the rest of us. Since our readiness to be persuaded is no less than his own . . . there is no reason to remove the matter from the political process and place it in the courts. Unless the plaintiff can show some respect in which he is harmed more than the rest of us . . . he has not established any basis for concern that the majority is suppressing or ignoring the rights of a minority that wants protection, and thus has not established the prerequisite for judicial intervention.

Id. at 894–95.

64. *Id.* at 895.

1. Generalized Grievances: A Doctrine in Need of Re-evaluation

Currently, the Court denies standing to a plaintiff bringing a generalized grievance on the theory that such grievances do not present "concrete injuries and are best remedied by the political process."[65] By refusing to hear generalized grievances, the judicial branch seeks to "enforce the rights of minorities and to avoid interfering with the representative branches, which serve majority interest."[66] As Judge Scalia once stated:

> There is . . . a functional relationship [between standing and the role of the federal courts] which can best be described by saying that the law of standing restricts courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority, and excludes them from the . . . undemocratic role of prescribing how the other two branches should function in order to serve the interest of the majority itself.[67]

However the assumption that the Supreme Court should not hear all generalized grievances is unwise. This is because the political process does not always provide an adequate remedy for constitutional claims; and because "certain constitutional rights protect all citizens and thus should be enforceable by whose who were intended to benefit from the protection."[68]

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65. Treister, *supra* note 51, at 706. Presently, the court holds that the political arena is the proper place for "dissatisfied citizens [to] convince a sufficient number of their fellow electors that elected representatives are delinquent in performing duties committed to them." United States v. Richardson, 418 U.S. 166, 179 (1974). Also, "[t]he Court has refrained from adjudicating 'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches." Valley Forge Christian Coll. v. Americans United for Separation of Church & State, 454 U.S. 464, 475 (quoting Warth v. Seldin, 422 U.S. 490, 499–500 (1975)).

66. Treister, *supra* note 51, at 706.

67. Scalia, *supra* note 58, at 894.

68. Treister, *supra* note 51, at 707. Also, as stated in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), the Court should hear such generalized grievances because:

> [W]here the heads of departments are the political or confidential agents of the executive, merely to execute the will of the president, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy . . . .
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> . . . The question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority . . . . [i]t is, then, the opinion of the court.

*Id.*at 166–67.

Also, the conclusion that the Supreme Court should not interfere with generalized grievances and with the actions of the political branches is not required by the separation of powers principles.[69] Rather, the separation of powers requires judicial review of all allegedly unlawful government acts to protect citizens from the unchecked accumulation of power by the representative branches, especially when such action jeopardizes individual liberty interest.[70]

2. The "Concrete Injury" Requirement: A Re-examination

Generally, the Supreme Court denies standing in generalized grievances cases based on its view that the party has not suffered a "concrete" or sufficiently "particular" injury.[71] A citizen who contends that the government has acted improperly has not asserted a sufficiently unique injury to satisfy Article III.[72] Even if the plaintiff cares deeply about a claim, "that does not establish that he has been harmed distinctively—only that he assesses the harm as . . . grave,

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69. *See* Treister, *supra* note 51, at 706.

> The [Supreme] Court's current standing doctrine s based on the false presumption that separation of powers means that the judicial branch should minimize its review of government acts. In reality, separation of powers suggests the appropriate role. A standing doctrine that provides the courts with too little authority violates separation of powers as much as, or more than, a system in which courts have too much authority.

Id.

70. *See id.* at 704–05.

> Separation of powers principles should determine the proper allocation of power between the three branches of government. Accordingly, one of the Court's most important powers is to ensure that the government complies with the Constitution in order to prevent too much power from vesting in any one branch. Thus, separation of powers principles should not limit federal court jurisdiction when doing so allows unlawful governmental behavior to go unchecked. [citation omitted]. Separation of powers is a necessary tool for a constitutional government to function. It should not be used to diminish another requisite tool of any constitutional government - judicial review.
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> . . . The Constitution should be interpreted to enable the judicial branch to prevent the unchecked accumulation of power in the elected branches.

Id. (citing EDWARD S. CORWIN, INTRODUCTION TO THE 1953 EDITION OF THE CONSTITUTION OF THE UNITED STATES: ANALYSIS AND INTERPRETATION xvii (John H. Killian ed., 1987)); *id.* (citing 1 RONALD D. ROTUNDA & JOHN E. NOVAK, TREATISE ON CONSTITUTIONAL LAW 3.12, at 352 (2d ed., 1992)).

71. *See, e.g.* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 221–22 (1974); United States v. Richardson, 418 U.S. 166, 177 (1974); *see also* Valley Forge Christian Coll. v. Americans United for Separation of Church & State, 454 U.S. 464, 485 (1982) (denying standing because the plaintiffs failed to allege any injury suffered "as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct which one disagrees").

72. Allen v. Wright, 468 U.S. 737, 756 (1984). The uniqueness of the injury to the plaintiff is commonly referred to as "injury in fact," and is part of the core requirements for Article III standing. The United States Supreme Court has established that standing exists when the plaintiff demonstrates "injury in fact, economic or otherwise." *Id.* at 152.

which is a fair subject for democratic debate in which he may persuade the rest of us."[73] Traditionally, a party who cannot show injuries more concrete than those suffered by the public at large has "not established the prerequisite for judicial intervention." [74]

However, in focusing solely on the particularity of the plaintiff's injury, the Court fails to consider the rights at stake in a given case.[75] The government's acts may injure a plaintiff's individual liberty interest, even though the injury is widely shared by others.[76] When evaluating standing, the Court should consider the constitutional significance of the contested rights and the intended beneficiaries of those protections.[77] The Court's rigid concrete injury requirement prevents it from enforcing rights guaranteed by the Constitution for the benefit of all citizens.[78]

For example, in *Valley Forge Christian College v. Americans United for Separation of Church and State*,[79] the First Amendment was intended to protect all citizens from a government that fosters a particular religion.[80] However, the plaintiffs in Valley Forge were denied a chance to assert their First Amendment rights because their injury was too general "to confer standing under Article III."[81] Though much of the Constitution was designed to protect the body politic as a whole, *Valley Forge* and similar standing cases prevent individual citizens from enforcing their collective rights because they cannot adequately distinguish their injuries from those suffered by the public at large. Simply, to deny standing solely because "many others are also

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73. Scalia, *supra* note 58, at 894.
74. *Id.* at 895.
75. *Richardson,* 418 U.S. at 174.
76. *See Valley Forge*, 454 U.S. at 493–94 (Brennan, J., dissenting).
77. *See* Albert, *supra* note 53, at 1151. Judges should be free to make normative judgments as to whether "the substantive law invoked creates a personal interest or right in the complainant that has been infringed by the challenged action." *Id.*
78. *See Valley Forge,* 454 U.S. at 504; *see also The Supreme Court 1981 Term-Leading Cases*, 96 HARV. L. REV. 62, 202–05 (1982) [hereinafter *The Supreme Court*](arguing that citizens should have standing concerning "constitutional provisions that assert inherently shared rights").
79. 454 U.S. 464 (1982).
80. *See id.* at 504.
81. *Id.* at 485.

injured" would result in the "most injurious and widespread government actions [being] questioned by nobody."[82]

III. THE "NEW" CONCRETE INJURY: THE USA PATRIOT ACT

September 11 showed that the United States needed to make changes to improve security against terrorists.[83] Many changes effected by the USA PATRIOT Act, including airport and airplane security measures, are warranted and don't violate individual liberty interests.[84] On the other hand, other provisions of the Act dramatically expand the "government's power to invade the privacy of United States Citizens and violate other civil liberties" protected by the Constitution.[85]

A. *The USA PATRIOT Act's Passage*

"'Congress overwhelmingly approved the USA PATRIOT Act. In the House, Representatives voted 357 to 66 for the measure, while the Senate supported the legislation by a near unanimous 98-to-1 vote.'"[86] However, many members of Congress—in the panic stricken post 9-11 environment—hastily passed this bill without fully reading it and understanding its implications.[87] As Representative Diana DeGette admitted, "in an end run around bipartisanship and the committee process, the House majority leadership brought a different and controversial bill to the floor without allowing

82. United States v. Students Challenging Regulatory Agency Procedures (*SCRAP*), 412 U.S. 669, 688 (1973).

83. Timothy Edgar & Witold Walczak, *Perspectives on the USA PARTIOT Act: We Can Be Both Safe and Free: How the Patriot Act Threatens Civil Liberties*, 76 PA B. ASS'N Q. 21, 21 (2005).

84. *Id.*

85. *Id.*

86. ANDREW P. NAPOLITANO, THE CONSTITUTION IN EXILE 210–11 (2006) [hereinafter CONSTITUTION IN EXILE] (quoting *Lane County Bill of Rights Bill of Rights Defense Committee: Hearing of the House Judiciary Committee on the Oversight of the Justice Department*, 108th Cong. 1 (2003) (statement of John Ashcroft, then Att'y Gen. of the United States)).

87. *Id.*

time for committee consideration and without even giving Members time to figure out what the bill does."[88]

Government officials did not act with malice intent or have anything other than good intentions when they enacted the USA PATRIOT Act. But Americans should remember Justice Louis Brandeis' famous admonition:

> "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."[89]

B. *The Implications of the USA PATRIOT Act*

In short, The USA PATRIOT Act increases the governments surveillance powers in four areas: 1) Section 215 expands the government's ability to look at records on an individual's activity being held by third parties;[90] 2) Section 213 expands the government's ability to search private property without notice to the owner;[91] and 3) Section 214 expands another Fourth Amendment exception for spying that collects

88. *Id.*

89. Olmstead v. United States, 277 U.S. 438, 479 (1928).

90. *See* 50 U.S.C. § 1861 (2)(d)–(e) (Supp. IV 2004). The Act states that: "An order under this section shall not disclose that it is issued for purposes of an investigation . . . (d) No person shall disclose to any other person (other than those persons necessary to produce the tangible things under this section) that the Federal Bureau of Investigation has sought or obtained tangible items under this section. (e) A person who, in good faith, produces tangle things under an order pursuant to this section shall not be liable to any other person for such production. Such production shall not be deemed to constitute a waiver of any privilege in any other proceeding or context." *Id.* Essentially, by enacting this law, the government has waived an individual privilege to keep private matters of record, such as doctor's records, private. They have done this without having to give the individual with whom the records are invaded notice, and have relieved themselves, and the government who obtain the records, from all personal liability. *See id.*

91. *See id.* The Act reads: "With respect to the issuance of any warrant or court order under this section . . . to search for and seize property or material that constitutes evidence for a criminal offense in violation of the laws of the United States, any notice required, or that may be required, to be give *may be delayed.*" *Id.* The use of may indicates that the government, for very vague reasons stated in the subsections following the statement, may delay, indefinitely, notifying citizens that their Fourth Amendment rights against unreasonable searches and seizures of their home is being transgressed. *See* § 1861.

"addressing" information about the origin and destination of communications, as opposed to the content—these are known as "trap and trace" searches.[92]

However, the true danger to the Bill of Rights caused by the USA PATRIOT Act is stated in Section 215. Specifically, Section 215 violates the Fourth Amendment by allowing searches to be conducted without the requirements of a warrant and probable cause; also it fails to provide notice—even after the fact—to persons whose privacy haas been compromised—a key element of due process, guaranteed by the Fifth Amendment.[93] Section 215 then violates the First Amendment, a "guarantee" of free speech, by prohibiting the recipients of search orders from telling others about those orders, even where there is no real need for secrecy. Also, section 215 effectively authorizes the FBI to launch investigations of American citizens in part for exercising their freedom of speech.[94]

The result of these expansions of powers is that the government, namely the executive who executes the law, has the power to rifle through individuals' financial records, medical histories, Internet usage, bookstore purchases, library usage, travel patterns, or any other activity that leaves a record.[95] Making matters worse is the fact that: 1) The government no longer has to show evidence that the subjects of search orders are an agent of a foreign power, a requirement that previously protected

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92. *See generally id.*

93. American Civil Liberties Union, *Surveillance Under the USA PATRIOT Act*, April 4, 2003, http://www.aclu.org/safefree/general/17326res20030403.html (last visited Dec. 11, 2006) [hereinafter *Surveillance*].

94. *Id.*; *see* 50 U.S.C. § 1861 (Supp. IV 2004). The Act provides that such warrantless investigations are allowed if they "are not conducted solely upon the basis of activities protected by the first amendment." Essentially, if a citizen has expressed a first amendment right that catches the attention of the government, and then engages in an act that may generate even the slightest suspicion of unlawful activity, the government is then free to conduct a warrantless search. *See* § 1861.

95. American Civil Liberties Union, *The USA PATRIOT Act and Government Actions that Threaten Our Civil Liberties*, http://www.aclu.org/FilesPDFs/patriot%20act%20flyer.pdf (last visited Dec. 11, 2006).

Americans against abuse of this authority;[96] 2) the Federal Bureau of Investigation (FBI) does not have to show a reasonable suspicion that the records are related to criminal activity, much less fulfill the requirement of "probable cause" that is listed in the Fourth Amendment;[97] 3) Judicial oversight of these new powers is essentially nonexistent; specifically, the government must only certify to a judge that a search met the statute's broad criteria, with the judge not having authority to reject the application;[98] 4) Surveillance orders are based in part on a person's First Amendment activities—such as the books they read, the Web pages they visit, etc.;[99] and 5) A person or organization who is forced to turn over records is prohibited from disclosing the search to anyone; meaning that a "gag order" is placed upon them.[100] As a result of this expansion of power for the Federal Government, the PATRIOT Act also does not provide *meaningful* judicial review before federal agents review Internet usage histories or access, use and disseminate sensitive educational, banking, credit, consumer, communications and library records.[101]

C. *Has the United States Digressed?*

"The [USA] Patriot Act and its progeny are the most abominable, unconstitutional governmental assaults on personal freedom since the Alien and Sedition Acts of 1798."[102] In effect, by way of the USA PATRIOT Act, the government says "'give us your freedoms, and we will protect you.'"[103] The government has manipulated fears after the serious security crisis of 9/11 and has attempted—via the USA PATRIOT Act—to

96. *Surveillance*, *supra* note 93.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. Edgar & Walczak, *supra* note 83, at 23.
102. CONSTITUTION IN EXILE, *supra* note 86, at 209.
103. *Id.*

permanently erode Americans' individual personal liberties.[104] As Representative Diana Degette, one of the few opponents of the bill, noted: The bill would "allow federal investigators to obtain search warrants without specifically naming each person who is involved . . . and allow federal authorities to obtain information like credit card numbers and bank account numbers with a subpoena, not a court order, as is the case under [the USA Patriot Act]."[105]

Although the Patriot Act may help law enforcement personally combat terrorism, it is doing so in a way that is giving more power to the federal government at the expense of "the constitutionally guaranteed liberties of every person in America."[106] In short, the actions of the legislative branch in passing the USA PATRIOT Act, and the executive in executing this law, are jeopardizing the constitutional rights of Americans at an unprecedented scale—arguably resembling the tyranny of the British government that the colonist fought so bravely to liberate themselves from.[107]

IV. THE "NEW" CONCRETE INJURY AS GROUNDS FOR STANDING

The first eight amendments of the Constitution, titled the Bill of Rights, expressly "protect citizens from governmental invasions into highly valued rights."[108] These provisions

104. *Id.* at 210.
105. *Id.*
106. *Id.* at 211.
107. CONSTITUTION IN EXILE, *supra* note 86, at 211. During the Colonial Period of the America, parliament enact the Writs of Assistance Act, authorizing the issuance of open-ended search warrants, which allowed the king's soldiers to give themselves permission to know on any door they wanted by writing for themselves permission to do so. The king's soldiers literally just wrote out the warrant, presented it to the colonists at their front door, and demanded entrance to search for the stamps. Similarly, the Patriot Act has enacted provisions called "sneak and peak." The federal government can now, with an order from a judge, break into an individual's home and plant an electronic bug. This operation can continue for up until six months before the government has to disclose that your home was bugged. Also, for the first time in American history, the government, without showing probable cause and without getting a search warrant from a judge, can read tour mail before you do, can go to your lawyer's office, bank, hospital, physician, or pharmacist and seize your personal files. *See generally id.* at 211–19.
108. Treister, *supra* note 51, at 712.

attach to all citizens.[109] When the government violates these all-important individual rights, a concerned citizen should have standing to sue even if no one person is uniquely injured.[110] The rights protected by the Bill of Rights are so fundamental that any plaintiff alleging a violation of one of these rights should merit standing.[111] This is because the incorporation of such individual liberty interests in the Constitution "singles them out as interests that may not be adequately protected by the representative branches of government."[112] The Bill of Rights, by their very nature, are shared by all citizens and are the most important of all rights found in the Constitution—warranting that citizens as a whole must be able to enforce them if they are to have any real meaning.[113]

In lieu of the importance of the individual liberty interest found in the Bill of Rights,[114] the Supreme Court must consider a "concrete injury," sufficient alone to grant standing, as one in which an individual citizen claims that their individual liberty interests found in the Bill of Rights is potentially violated by the application of federal legislation—such as the USA PATRIOT Act.[115] This is because the rights found within the Bill of Rights lay at the very core

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109. *See* Donald L. Doernberg, *"We the People": John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 CAL. L. REV. 52, 62–64 (1985) (arguing that the legislature and the executive branch—in fact the entire government—are accountable to the people as a whole).

110. *See* United States v. Richardson, 418 U.S. 166, 202–03 (1974) (Stewart, J., dissenting). Justice Stewart argued that the standing doctrine should not address whether the Constitution protects the rights of all citizens. Whether the government has violated a duty and if that duty extends to the plaintiff "are questions that go to the substantive merits of litigation." *Id.*

111. *See* Treister, *supra* note 51, at 712–13 (arguing that the Judiciary Branch was "specifically established to uphold the Constitution" and must review any allegedly "unconstitutional behavior of another branch").

112. *The Supreme Court*, *supra* note 78, at 204.

113. Treister, *supra* note 51, at 714.

114. *See id.* (stating that the Bill of Rights is "arguably the most important and fundamental source of legal rights").

115. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176–77 (1803)).

> [T]he people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles [found in the Constitution], therefore, so established, are deemed fundamental. And as the authority [the Constitution] from which they proceed is supreme, and can seldom act, they are designed to be permanent.

of American Constitutional Principles.[116] And when such rights are completely disregarded by legislation, the constitutional protections intended for United States citizens by the Framer's are disregarded as well.[117] In order to combat such potentially unconstitutional legislation, it is the direct role of the judiciary, as intended by the Framers, to serve as a check on the legislative and executive branches by granting standing to such cases and perhaps, if appropriate, use their power of judicial review to invalidate all or part of such legislation.[118] As James Madison stated, in addressing the overall power of the judiciary as he presented his proposal for the judiciary's power to act as a Council of Revision:

> . . . . [The Constitution] is the fundamental and paramount law of the nation, and, consequently, the theory of [our] government must be, that an act of the legislature, repugnant to the [C]onstitution, is void.
>
> This . . . . [is] one of the fundamental principles of our society. It is not therefore to be lost sight of.

Id.

116. *See* ACLU v. NSA, No. 06-CV-10204, slip op. at 15–44 (E. D. Mich. Aug. 17, 2006), *available at* http://www.aclu.org/images/nsaspying/asset_upload_file689_26477.pdf; *see also* Hamdi v. Rumsfeld, 542 U.S. 507, 532, 537 (2004) (plurality opinion) (holding that due process, found in the Bill of Rights, is paramount especially during times of war because "it is in those times that we must preserve our commitment at home to the principles for which we fight abroad"); U.S. v. U.S. District Court, 407 U.S. 297, 328–29 (1972) (Douglas, J. concurring) (stating that "the tyrannical invasions [of the British] . . . endured by the colonists, have been recognized as the primary abuses which ensured the [Fourth Amendment] a prominent place in our Bill of Rights"); Marcus v. Search Warrant of Prop., 367 U.S. 717, 729 (1961) (stating that the "Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression [under the First Amendment]").

117. *See* Cobb *supra* note 30, at 212. Notably, the Framers were most concerned with Congress potentially abusing its powers. *Id.* at 212–13 ("Although each of the new government's three branches had the potential to abuse its power, the Framers were most concerned with Congress . . . ."). The Framer's specific concern was that Congress, being populated by elected individuals, would sacrifice the public interest in pursuit of their own political gain—transgressing "the constitutional limitations on its power." The Federalist papers, for example, contain many statements reflecting a deep-seated fear of an unrestricted, unchecked, and too powerful legislature; *Id.* at 213. For example, in the Federalist papers, Madison stated that: "There can be no liberty where the legislative and executive powers are united in the same person[,]"and it will not be denied, "that [legislative] power is of an encroaching nature, and . . . it ought to be effectually restrained from passing the limits assigned to it." THE FEDERALIST NO. 48, at 343–44 (James Madison) (Benjamin Fletcher Wright ed., 2002).

118. *See Marbury*, 5 U.S. (1 Cranch) at 177–78.

> It is emphatically the province and duty of the judicial department to say what the law is . . . .
>
> So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

Id.

> Laws may be unjust, may be unwise, may be dangerous, may be dangerous, may be destructive; and yet be not so unconstitutional as to justify the Judges in refusing to give them effect. Let [the judiciary] have a share in the Reversionary power [in order to counteract] the improper views of the Legislature.[119]

Although Madison's Council of Revision was struck down, his basic principals of a reversionary power for the judiciary over potentially unconstitutional legislation helped lead to the Supreme Court's present day reversionary power of judicial review.[120] And, via judicial review, it is now within the judiciary's reversionary power to stop the furtherance of "improper law,"[121] such as the USA PATRIOT Act.

Therefore, if an individual alleges that the wording of legislative—in its potential application—will lead to a violation of their individual rights under the Bill of Rights, particularly the first eight amendments; the Court must grant standing because what is placed at risk by the legislation is that party's individual right to be free from an overreaching Federal Government, whose powers are subject to, and limited by, the Constitution.[122] Simply, there is not a more concrete, actual, and immediate injury that the Supreme Court needs to address then overturning federal legislation that has the potential, through its application, to violate the

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119. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 73 (Max Farrand ed., 1966) [hereinafter Farrand].

120. *See* 5 WRITINGS OF JAMES MADISON 294 (Hunt ed. 1904)

> A reversionary power [for the Judiciary] is meant as a check [on] unconstitutional laws. These important ends would it is conceded be more effectually secured, without disarming the Legislature of its requisite authority, by requiring bills to be separately communicated to the Exec. & Judic'y depts.
>
> . . . In the State Constitutions & indeed in the Fed'l one also, no provision is made for the case of a disagreement in expounding them; and as the Courts are generally the last in making [the] decision, it results to them by refusing or not refusing to execute a law, to stamp it with its final character. This makes the Judiciary Dept paramount in fact to the Legislature, which was never intended and can never be proper.

Id.

121. *See Marbury*, 5 U.S. (1 Cranch) at 177. "Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void." *Id.*

122. *See* ACLU v. NSA, No. 06-CV-10204, slip op. at 40 (E. D. Mich. Aug. 17, 2006), *available at* http://www.aclu.org/images/nsaspying/asset_upload_file689_26477.pdf.

> The office of the Chief Executive has itself been created, with its powers, by the Constitution. There are no hereditary Kings in America and no powers not created by the Constitution.
>
> . . . [W]e have been taught that the "Constitution is a law for rulers and people, equally in war and in peace."

Id.

individual liberties preserved for United States citizens by the Bill of Rights. And by granting standing to such claims, the Court will properly fulfill its role as a check on the legislative and executive branch, as set forth by the Framers.[123]

A. *The Legislature is Not the Solution*

Arguably, issues concerning legislation, like the Patriot Act, are best left for the legislative branch of the government. However, the major obstacle in addressing allegedly unconstitutional acts through the political process is the system's relative ineffectiveness.[124] Elected officials, responsible to their constituents, will loose their office if they act in a fashion contrary to the will of the majority.[125] And often, when citizens assert unconstitutional conduct, the government often presents a vigorous defense of its actions. Thus, "even with a perfectly functioning political process, citizens would have to wait for an election to try and stem un[constitutional] behavior."[126]

Moreover, the Constitution protects the minority from undesired governmental acts, but if enforcement is relegated to the political process, representative bodies will condone unconstitutional actions whenever a majority of voters favor them.[127] The "very purpose of a constitution is to protect fundamental principles from the political process."[128] This purpose is

123. *E.g.,* Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579 (1952). Justice Black, for the court, held that the Presidential order in question was not within the constitutional powers. This is an example of how the Judiciary has previously checked the actions of the executive when it has overreached its powers under the Constitution. *See id.* at 587–88.

124. *See* United States v. Richardson, 418 U.S. 166, 179 (1974). Justice Burger, who in *Richardson* advocated leaving generalized grievances to the elected branches, noted that the electoral process is at times "slow, cumbersome, and unresponsive." *Id.*

125. Professor Erwin Chemerinsky, discussing the importance of constitutional protections, states: "Although the assurance of electoral accountability through regular elections and the checks imposed by other branches of government provide some protection against tyranny, these limits were viewed as inadequate [by the founding fathers]." ERWIN CHEMERINSKY, INTERPRETING THE CONSTITUTION 28 (1987).

126. *See* Treister, *supra* note 51, at 708–09.

127. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 2.3.5 83–84 (1989) ("The effect of the generalized grievance doctrine . . . is to read these clauses out of the Constitution except to the extent the political branches want to voluntarily comply with them.").

128. *See* Treister, *supra* note 51, at 708.

frustrated when constitutional questions are left to the majority because, "[i]f the majority favors an unconstitutional act, the government's actions cannot be remedied by the political process."[129] Therefore, relegating constitutional questions to the political process effectively guarantees that some unconstitutional acts will go unremedied.

B. *The Judiciary Must Do Its Job*

The judiciary is primarily responsible for interpreting the Constitution, even though it shares this task with the president and Congress.[130] While it is not the job of the Court to save the country from ruin, it should take an active role in protecting liberty interests during times of crisis.[131] This is because the Constitution, even in times of war, is the protector of individual rights and rejects a simple majoritarian theory of government.[132] Furthermore, relying on the political process would yield a majority rules approach to civil liberties, and minority groups might suffer as a result.[133]

Also, the political process alone cannot safeguard our Constitutional rights.[134] Members of the judiciary are not elected officials and have an obligation to the Constitution, not the public.[135] The Constitution provides citizens with individual liberty interests and these rights are best protected by the judiciary, with the Court's role being to resolve public controversies to safeguard constitutional freedoms.[136] For example,

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129. *Id.*

130. *See* Lori Sachs, *September 11, 2001: The Constitution During Crisis: A New Perspective*, 29 FORDHAM URB. L.J. 1715, 1718 (2002).

131. *See id.*

132. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 133 (1977) (rejecting the simple majoritarian theory of government and relying instead on the judiciary to safeguard our rights).

133. *Id.*

134. *Id.*

135. *Id.* at 255. Dworkin concludes that though a democracy may, at first glance, espouse a government in which elected officials decided "debatable issues of moral and political theory," citizens will only be able to enforce their moral rights against the state through an institution that does not have to answer to a constituency. *Id.*

136. *See* William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification,* 27 S. TEX. L.J. 433, 437 (1986). Justice Brennan assumes that there are certain values that are beyond the scope of any

Justice Brennan argued that, despite its apparent appeal, resolving certain controversial individual liberty issues through the political process is not suitable for a democracy. Specifically, "[i]t is the very purpose of a Constitution—and particularly the Bill of Rights—to declare certain values transcendent, beyond the reach of temporary political majorities."[137] Brennan believed that the judiciary is better suited to resolve issues off individual liberty interest because its structure prevents judges from injecting their own views into their opinions;[138] insisting that the greatest strength of democracy and of the Constitution is the ability of justices to adapt the principles embodied in the Constitution to current situations.[139] He held that justices cannot 'avoid a definitive interpretation" of controversial statutes or situations because they are responsible for advancing and protecting the rights and interests of individual citizens.[140]

Accordingly the Supreme Court, even in times of crisis, must safeguard the principles embodied in the Constitution for all citizens.[141] Civil liberties should not be sacrificed during times of crisis. Particularly because "[a] jurisprudence that is capable of sustaining the supremacy of civil liberties over exaggerated claims of national security only in times of peace is, of course, useless at the moment that civil liberties are most in danger."[142]

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legislature and, in rejecting a majoritarian theory of government, Brennan embraces the idea that judges must resolve controversies that result from competing factions, such as the legislative and executive branches. *Id.*

137. *Id.*

138. *Id.* at 434. "Justices are not Platonic guardians appointed to wield authority according to their personal moral predilections . . . . [however] judges provide the building blocks for future generations to protect against the majority." *Id.* at 434, 438.

139. *See* Brennan, *supra* note 136, at 438. "For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs." *Id.*

140. *Id.*

141. Sachs, *supra* note 130, at 1720.

142. William J. Brennan, Jr., The Quest to Develop A Jurisprudence of Civil Liberties in Times of Security Crises, Speech at the Law School of Hebrew University, Israel (Dec. 22, 1987) (published by the Brennan Center for the Justice at the NYU School of Law).

Therefore, the best way to protect the individual rights of citizens is to rely on the fundamental aspirations embodied in the Constitution, and not on the impulses of representatives. For the furtherance of this principle, the Court must grant standing to claims involving legislation that jeopardizes individual liberty—even if the claim doesn't meet the classic definition of an injury in fact—because this will ensure that the goals of the Constitution are enforced.

C. *Adherence to the Separation of Powers*

The United States' Separation of Powers Scheme, in its simplest interpretation, requires that branches of government serve as a check on another. When James Madison discussed the "cases or controversies" requirement of Article III with delegates to the Constitutional Convention, he noted that the reference was meant to limit judges' attention "to cases of a judiciary nature."[143] This statement indicates that Madison intended for each branch to be responsible for its various spheres of activity, with the judiciary's main concern being the individual liberty interests of United States citizens.[144] Moreover, the Supreme Court has stated that "the law of Art. III standing is built on a single basic idea—the idea of separation of powers;"[145] with the doctrines adherence to Article III's "case or controversy" requirement being "founded in concern about the proper . . . role of the courts in a democratic society."[146]

However, in recent times, judges have "incanted the separation-of-powers mantra as if it was coterminous with deference to the legislative and executive branches."[147] A court's

143. Farrand, *supra* note 119, at 430.

144. Note, *And Justiciability for All?: Future Injury Plaintiffs and the Separation of Powers,* 109 HARV. L. REV. 1066, 1076 (1996) [hereinafter *Justiciability*].

145. Allen v. Wright, 468 U.S. 737, 752 (1984).

146. Warth v. Seldin, 422 U.S. 490, 498 (1975); *see also Allen*, 468 U.S. at 750.

147. *Justiciability*, *supra* note 144, at 1077.

recognition of the judiciary's rightful place in the structure of our government, however, does not demean the doctrine.[148] On the contrary, the preservation of separation of powers demands that the judiciary, legislature, and executive not only defer to each other when the resolution of an issue properly belongs in another branch, but also that each branch exercise the powers assigned to it under the Constitution.[149] Judges must use the doctrine not only as a shield to fend off claims improperly brought before the courts, but also as a sword to lay claim to issues that belong within the judiciary's province.[150] And by hearing cases or controversies involving individual violations of the Bill of rights, particularly the first eight amendments, the judiciary is fulfilling its role as a check on an overreaching executive and, congruently, is fulfilling its job to "'solely . . . decide on the rights of individuals.'"[151]

V. CONCLUSION

Presently, the individual rights of Americans are placed in peril by the USA PATIOT Act. Although this peril was more than likely brought on by a panicked nation in the aftermath of the September 11th Attacks, the legislative and executive branches, however inconsequentially, nonetheless passed and executed the USA PATRIOT Act—a piece of legislation that has altered the individual rights of all Americans. And if the Supreme Court grant's standing to a litigant who challenges such legislation, the

148. *See* Scalia, *supra* note 58, at 895 (emphasis added). Justice Scalia notes that Article III imposes limitations on federal courts that must be strictly followed to maintain the balance of power among the branches. He acknowledges, however, that his discussion applies only "to challenges to governmental action." *Id.* Essentially, Justice Scalia's goal is to insure that the proper branch hears the dispute. This concern requires a vision of separation of powers that acknowledges the authority—in addition to the limits—of each branch, such as the role of judiciary as the protector of individual liberty interests. *Id.*

149. *See, e.g.* Lujan v. Defenders of Wildlife, 504 U.S. 555, 576 (1992); *see also Justiciability*, *supra* note 146, at n.72. "Nonetheless, in limited contexts—namely, actions involving [individual] rights . . . the federal court may, and indeed must, invoke separation of powers principles and recognize their constitutional mandate to hear those claims if [] considerations so militate." *Justiciability*, *supra* note 144, at n.72.

150. *See Justiciability*, *supra* note 144, at n.73 ("Article III contains an affirmative grant of power in addition to a limitation on the federal judiciary.").

151. Scalia, *supra* note 58, at 884 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803)).

judiciary is protecting not only the immediate rights of all Americans now, but of Americans in the Future.

The Court generally considers a concrete injury to an individual to be something that is "actual" and "immediate," such as an economic interest. However, there is no injury more concrete, immediate, and actual to an individual than the potential that the Federal government, via legislation, has violated the basic principles of freedom as intended for them by the Framer's centuries ago. There is no grander purpose for the judiciary—whose job is to protect the individual liberty interest of Americans—then to have them hear cases or controversies that may affect the liberty interests found within the Bill of Rights.

Therefore, in accordance with the Framer's basic principals of liberty as set forth in the Constitution, and within the United States Separation of Powers Scheme, it is up to the judiciary to serve as a check on the other two branches of the government and properly restore—and protect—the individual liberty interests given to the people, by the Framers, over 200 years ago by taking a more active role in scrutinizing legislation that potentially violates the Bill of Rights.