

RELATIONSHIPS BETWEEN FORMALISM AND FUNCTIONALISM IN SEPARATION OF POWERS CASES

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Peter Strauss has usefully framed key debates in separation of powers jurisprudence around the distinction between formalist and functionalist methodologies for construing the Constitution.¹ The formalist-functionalist dichotomy is an appealing way to understand and to teach the cases, but it masks complexities I should like to explore.

There are no fewer than three different ways that constitutional formalism and functionalism can be contrasted. One is their apparently different approach to legal rules and standards.² Formalism might be associated with bright-line rules that seek to place determinate, readily enforceable limits on public actors. Functionalism, at least as an antipode, might be associated with standards or balancing tests that seek to provide public actors with greater flexibility.

Another way of contrasting formalism and functionalism focuses on the reasoning process by which we reach rules or standards. Formalism might be understood as deduction from authoritative constitutional text, structure, original intent, or all three working together. Functionalism might be understood as induction from constitutional policy and practice, with practice typically being examined over time. Formalist reasoning promises stability and continuity of analysis over time; functionalist reasoning promises adaptability and evolution.

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1. See generally Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

2. See generally HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); Frank H. Easterbrook, *Formalism, Functionalism, Ignorance, Judges*, 22 HARV. J.L. & PUB. POL'Y 13 (1998).

Finally and relatedly, formalism and functionalism could be contrasted as emphasizing different goals for law. Formalism might be understood as giving priority to rule of law values such as transparency, predictability, and continuity in law. Functionalism, in turn, might be understood as emphasizing pragmatic values like adaptability, efficacy, and justice in law.

The formalism-functionalism dichotomy is apparent even in the rhetorical discourse about the relationship of the three, or more, branches of the national government. "Separation of powers" connotes relatively formalist inquiries of rules, deductions, and sharp lines. "Checks and balances," on the other hand, connotes relatively functionalist inquiries of standards, inductions, and flexible interactions.

Whether understood as theories about rules, reasoning processes, or competing jurisprudence, neither formalism nor functionalism has wholly dominated American constitutional history. This absence of dominance begins with the Washington Administration, through the Marshall and Taney Courts, through the New Deal administrative state, and into the Burger and Rehnquist Courts.³ Indeed, some of the canonical cases treating allocations of national and state powers are classics in both genres. In *McCulloch v. Maryland*,⁴ perhaps the greatest constitutional decision in our history, Chief Justice John Marshall deduced from the text and structure—and maybe even the original intent—of the Constitution, rules apportioning national and state authority.⁵ That approach sounds formalist, but Chief Justice Marshall also construed the text flexibly, seizing upon the Necessary and Proper Clause⁶ and invoking a constitutional policy of expansive national power.⁷ That approach sounds functionalist. Like John Hart Ely, whose representation-reinforcement theory *McCulloch* anticipated, Chief Justice Marshall wove formalist and functional lines of thinking and argumentation throughout the opinion.⁸

3. See Daniel A. Farber, William N. Eskridge, Jr., and Philip P. Frickey, *Constitutional Law: Themes for the Constitution's Third Century* ch. 8 (2d ed. 1998).

4. 17 U.S. (4 Wheat.) 316 (1819).

5. Chief Justice Marshall also did this in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 187-239 (1824).

6. U.S. CONST. art. I, § 7, cl. 18 ("To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers").

7. See *McCulloch*, 17 U.S. at 421.

8. *Id.* at 401-37. Cf. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF*

In his comments at this Conference, Judge Easterbrook mentions the celebrated *Steel Seizure Case*,⁹ where the Supreme Court struck down President Truman's seizure of the steel mills as unauthorized by congressional statutes and therefore an executive usurpation of legislative powers.¹⁰ As Judge Easterbrook suggests, the *Steel Seizure Case* is therefore exemplary of formalist reasoning.¹¹ The *Steel Seizure Case*, however, rests just as firmly in functionalist reasoning.

Justice Black's opinion for the Court, joined by five Justices, deductively reasoned from the tripartite separation of powers—the Constitution allocates all the legislative powers of the national government to Congress and none to the President; President Truman's seizure of the steel mills was legislative in nature; ergo, his action was *ultra vires*.¹² Five Justices, four of whom joined Justice Black's opinion, wrote concurring opinions that considered more flexible standards, induction from experience, and pragmatic accommodation.¹³ Justice Jackson's concurring opinion, the best example, set forth a tripartite standard for evaluating presidential action and expressly accorded a role for considering political history, equilibrium, and expediency.¹⁴ Although Justice Jackson joined the majority opinion and spoke only for himself, it has emerged as the most influential of the *Steel Seizure Case* opinions.

JUDICIAL REVIEW 88 (1980).

9. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

10. See Easterbrook, *supra* note 2, at 17.

11. See *id.*

12. See *Youngstown*, 343 U.S. at 587 ("In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker . . . [a]nd the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.").

13. See *id.* at 610 (Frankfurter, J., concurring) ("It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them."); *id.* at 633-34 (Douglas, J., concurring) ("Today a kindly President uses the seizure power to effect a wage increase and to keep the steel furnaces in production. Yet tomorrow another President might use the same power . . . to regiment labor as oppressively as industry thinks it has been regimented by this seizure."); *id.* at 634 (Jackson, J., concurring) ("The tendency is strong to emphasize transient results upon policies such as wages or stabilization and lose sight of the enduring consequences upon the balanced power structure of our Republic."); *id.* at 660 (Burton, J., concurring) ("The controlling fact here is that Congress, within its constitutionally delegated power, has prescribed for the President specific procedures, exclusive of seizure, for his use in meeting the present type of emergency."); *id.* at 662 (Clark, J., concurring) ("[T]he President's independent power to act depends upon the gravity of the situation confronting the nation.").

14. See *id.* at 635-38 (Jackson, J., concurring).

Moreover, Justice Jackson's express willingness to allow the legislative-executive boundary to shift through a constitutional "adverse possession" was accepted by five Justices: Justice Jackson himself, Justice Frankfurter concurring, and the three dissenters. The *Steel Seizure Case* contains at least two distinct majority voices, one predominantly formalist and the other generally functionalist.

The warring majorities in the *Steel Seizure Case* suggest the following thesis: along any of the dimensions I have suggested—rules, legal reasoning, modes of thought—formalism and functionalism are frequently and maybe typically interconnected. They are a "both-and" inquiry, rather than an "either-or" inquiry. Because state legitimacy depends upon both formal rule-following and functional efficacy, constitutional reasoning pervasively, and often unconsciously, melds formalist and functionalist justifications.

A dramatic illustration of this thesis is a case Judge Easterbrook invoked. The complexity of its reasoning was suggested to me a number of years ago by Michael McConnell. In *Morrison v. Olson*,¹⁵ the Supreme Court upheld the independent counsel statute.¹⁶ *Morrison* is typically taught as a functionalist opinion by Chief Justice Rehnquist, prevailing over a formalist dissent by Justice Scalia. Reading the opinions and the commentary, however, undermines the sharpness of these distinctions.

Consider the Chief Justice's opinion, which is considered a functional compromise of the Constitution's distinction between legislative and executive powers. The analysis starts with and closely focuses on the Appointments Clause, the last phrase of Article II, Section 2, Clause 2, of the Constitution, "the Congress may, by Law, vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."¹⁷ The Chief Justice reasons that the independent counsel is an "inferior" officer given her subordinate position and limited duties and firmly rejected Olson's suggestion that the clause should not be construed to allow appointment of prosecuting

15. 487 U.S. 654 (1988).

16. Ethics in Government Act tit. VI, 28 U.S.C. §§ 49, 591-99 (1994); see *Morrison*, 487 U.S. at 660.

17. U.S. CONST. art. II, § 2, cl. 2; see *Morrison*, 487 U.S. at 670.

officials outside the executive branch.¹⁸ The opinion for the Court was, in short, saturated with formalist analysis, as it derived a separation of powers rule from the plain constitutional text; supported its rule by examination of original understanding and precedent; and insisted that the constitutional text, structure, and precedent set limits on Congress's use of the Appointments Clause.¹⁹

This analysis is not to say that the conventional wisdom is wrong to view the Chief Justice's opinion in functional terms, for the opinion stops short of developing bright-line rules for determining exactly who is and is not an "inferior" officer under the Appointments Clause. More important, the opinion can be criticized as unpersuasive along the formalist lines the Chief Justice pursues, so unpersuasive, perhaps, as to undermine the opinion's claim to be honestly construing the Constitution.²⁰ Justice Scalia's merciless dissenting opinion contributes to the impression that the Court left Congress without either rules or even standards to create new executive organs in the future and that the Court did so because of the usefulness and political popularity of the independent counsel's office.²¹

With deference to Justice Scalia, whom I consider an extraordinary analyst, the opinion for the Court made out at least a plausible formalist case for its result. Indeed, Justice Scalia's dissent, celebrated as a brilliant specimen of formalist analysis, bears more than a trace of functionalist thinking in turn.

To begin with, the dissent emphasizes functionalist reasons for strictly enforcing the Constitution's limits. The central issue in the case is *allocation of power*, Justice Scalia claims at the outset, and if that exercise is not sharply limited, power is

18. See *Morrison*, 487 U.S. at 671-73.

19. See *id.* at 693 (concluding that the statute does not "interfere impermissibly with [the President's] constitutional obligation to ensure the faithful execution of the laws" and inquiring whether the Act, "taken as a whole, violates the principle of separation of powers by unduly interfering with the role of the Executive Branch.>").

20. Scholars have feasted on the Chief Justice's opinion like famished dieters, and formalist criticisms have dominated the literature. See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994); Lee S. Liberman, *Morrison v. Olson: A Formalistic Perspective on Why the Court Was Wrong*, 38 AM. U.L. REV. 313 (1989).

21. See *Morrison*, 487 U.S. at 697-734 (Scalia, J., dissenting).

subject to expansion and abuse.²² Ultimately, what Justice Scalia and his formalist allies teach is that one reason to enforce the rules of the Constitution is the *ex ante* argument that, if the Court does not enforce the rules, then Congress and the President will behave as though there were no rules to constrain them.²³ In other words, you can have a functionalist argument for a formalist punch line, and I think that characterizes some of Justice Scalia's reasoning in *Morrison*. In other words, you can have a formalist argument for a functionalist punch line. The Chief Justice's opinion can be read as supporting the proposition that when key constitutional terms (such as "inferior officer" or "executive power") are formally undefined and therefore left ambiguous in close cases, the constitutional interpreter should consider pragmatic, consequentialist arguments.

The critical debate between the Court and the dissent is the following: Justice Scalia claimed that the independent counsel statute invades a core "executive" duty that the Constitution vests exclusively with the President, and the Appointments Clause cannot be construed to derogate from that core constitutional rule.²⁴ His analysis, however, of what is the core executive power is easier to defend from a functional than a formal perspective. For example, Professor Harold Krent has shown in some detail that, at the time of the framing, criminal prosecution was not dominated by the executive or controlled by the President.²⁵ Both private individuals and public prosecutors, state and federal, undertook to prosecute criminals in the 1790s, but not under any kind of hierarchical control by either the Attorney General or the President.²⁶ Krent's analysis does not undermine the proposition, to which both Chief Justice Rehnquist and Justice Scalia would subscribe, that criminal prosecution should be an executive function normally controlled by the President, but it does undermine Justice Scalia's claim that the Court's Appointments

22. See *id.* at 699.

23. See also *United States v. Lopez*, 514 U.S. 549, 565 (1995) (invalidating Gun Free School Zones Act, then codified at 18 U.S.C. § 922(q)(1)(A) (1988)).

24. See *Morrison*, 487 U.S. at 703-15 (Scalia, J., dissenting).

25. See Harold J. Krent, *Executive Control Over Criminal Law Enforcement: Some Lessons From History*, 38 AM. U. L. REV. 275, 286-90 (1989).

26. See *id.* at 286-90 (discussing Congress's refusal over time to centralize law enforcement authority in the executive).

Clause analysis betrayed the original understanding of the constitutional separation of powers.

An important reason Justice Scalia's dissent appears so persuasive today lies not in its formalist command of constitutional text or original understanding, which have been well-criticized, but rather in a functionalist argument which my student John Vecchione, former President of Georgetown Law Center's Federalist Society, once called the "Terminator argument." That is, the independent counsel is set up like Arnold Schwarzenegger's character in *The Terminator*, a movie set in a future where machines are conquering Earth and have developed cyborg assassins like Arnold to take out designated humans. Like the Terminator, the independent counsel is programmed to investigate, prosecute, and ultimately take out a designated human being. Like the Terminator, the independent counsel shuts down once she or he has done so. Like the Terminator, the independent counsel is frightening even if a possibly defensible creation.²⁷ What is frightening is the creation of a prosecutorial apparatus unfettered by normal fiscal, political, and fairness limits. Justice Scalia's dissent plays upon these libertarian fears.

Now, *Morrison* and the arguments I can make concerning the majority and dissenting opinions, help us to see a broader point—formalism and functionalism are related, perhaps as two sides of a coin. Both formalism and functionalism appeal to our images of proper constitutionalism. Proper constitutionalism includes with it elements of stability and continuity of the core rules and principles contained in the foundational document but also contains escape hatches of flexibility to adapt to inevitably new and changed circumstances. Typically, the Constitution's Framers understood matters better than modern commentators; their division of government among three branches aimed to assure *both* liberty of citizens against state tyranny, formalism, *and* efficacy of the state to deal with crises and national problems, functionalism.²⁸ The Framers did not see such a profound gulf between form and function, and

27. In *Terminator II*, Arnold plays a "good" Terminator sent back in time to protect humans from assassination by a "bad" Terminator. Draw your own constitutional or political parallels.

28. See Suzanna Sherry, *Separation of Powers: Asking a Different Question*, 30 WM. & MARY L. REV. 287 (1989).

neither should we today.

Thus it is that functionalists such as Peter Strauss happily endorse the rule-of-law and stability of expectations that formalism seeks.²⁹ Formalists such as Justice Scalia are just as happy to announce that the formal Constitution can be flexibly applied to new cases and new circumstances, as he emphasized in his recently published Tanner lectures.³⁰

What sensible formalists and sensible functionalists ought to recognize, as many of them do, is that government legitimacy is not mono-vocal; it is multi-vocal. It is an amalgam of rule-following-formalism, rule-of-law-and political efficacy-functionalism, flexibility. Moreover, our particular Constitution embodies within its four corners both precepts, as exemplified by *Morrison*. The Constitution does have in it many bright-line rules, such as the division of authority: executive to the President, judicial to the Supreme Court, and legislative to the Congress. The Appointments Clause is an example of a bright-line rule in the Constitution.

But the rules deployed in the Constitution typically utilize undefined terms that must be, or inevitably will be, construed in light of multiple constitutional policies that the Framers refused to cabin. What, indeed, is the "executive power," which the Framers declined to define? An "inferior officer," for the purpose of the Appointments Clause? In independent counsel cases, the constitutional policies are not just those of separation of powers, not just those of checks and balances, but involve those of due process and individual rights, as well.

Finally, consider precedent, which I have left out of the account thus far. Precedent itself serves both formalist and functionalist purposes and suggests the merger, or at least relationship of the two. In *Morrison*, two of the major precedents were *Myers v. United States*,³¹ which had struck down a statute limiting presidential discretion over the termination of post office officials,³² and *Humphrey's Executor v.*

29. See, e.g., Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, in 72 CORNELL L. REV., *supra* note 1, at 526.

30. See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 37-44 (Amy Gutmann ed., 1997).

31. 272 U.S. 52 (1926).

32. See *Morrison*, 487 U.S. at 686 (citing *Myers v. United States*, 272 U.S. 52, 176 (1926)).

United States,³³ which upheld the creation of a quasi-legislative agency, the Federal Trade Commission, whose commissioners were partially immunized from presidential termination.³⁴ Precedent in *Morrison* and in other cases is formalist in setting the Constitution's textual rules more clearly and precisely. It is also formalist in the sense that precedent itself is a rule of law which gives continuity and stability to constitutional expectations. Yet, at the same time, precedent is functionalist, because it is elastic, allowing the text to breathe and evolve in response to new times, new problems, and new circumstances in an incremental, common law way.

In these comments, I have aimed only to show that we ought not consider functionalism and formalism as inevitably antipodal, or even independent, forces of constitutional law. Ultimately, we must appreciate how they are inextricably related. As theories of governance, formalism cannot avoid functional inquires, any more than functionalism can avoid formalist lines. As bases for state legitimacy, neither formalism nor functionalism alone is sufficient. As argumentative modes, the formalist argument conjoined with a functional counterpart is much stronger than either argument standing alone.

33. 295 U.S. 602 (1935).

34. See *id.* at 687-88 (citing *Humphrey's Executor v. United States*, 295 U.S. 602, 631-32 (1934)).

