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A "TIER-FUL" REVELATION: A PRINCIPLED APPROACH TO SEPARATION OF POWERS

In *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*,¹ the Supreme Court used formalist analysis to hold that Congress' transfer of operational control over Washington National Airport and Dulles International Airport to a joint authority comprised of Virginia and the District of Columbia² was an unconstitutional violation of the principle of separation of powers.³

The latest in a series of separation-of-powers cases,⁴ the Court's decision appears to mark yet another about-face in an area of jurisprudence notable for its tortuousness.⁵ Some commentators have characterized the Court as indecisive in this area, criticizing the Court for

vacillat[ing] over the years between using a formalistic approach to separation-of-powers issues grounded in the perceived necessity of maintaining three distinct branches of government (and consequently appearing to draw rather sharp boundaries), and a functional approach that stresses core function and relationship, and permits a good deal of flexibility when these attributes are not threatened.⁶

1. 111 S. Ct. 2298 (1991).

2. Metropolitan Washington Airports Act of 1986, 49 U.S.C. app. §§ 2451-2461 (1988).

3. *Washington Airports Authority*, 111 S. Ct. at 2301.

4. "Separation of powers has been a growth area of constitutional law in the 1970s and 1980s." Alan B. Morrison, *A Non-Power Looks at Separation of Powers*, 79 GEO. L.J. 281, 281 (1990).

5. In contrast to *Washington Airports Authority*, which used formalist reasoning, the Court in its two prior separation-of-power cases, *Morrison v. Olson*, 487 U.S. 654 (1988), and *Mistretta v. United States*, 488 U.S. 361 (1989), had relied on functionalist analysis. See *infra* text accompanying notes 132-44. Some scholars had concluded from *Morrison* and *Mistretta* that the Court had finally ended the debate and was ready to adopt functionalism as its exclusive method of analysis in separation of powers. See, e.g., Stephen L. Carter, *Framers Lost in Sentencing Cases*, LEGAL TIMES, Jan. 30, 1989, at 21.

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

The Court clearly demonstrated this inconsistency when, in two separation-of-powers cases decided on the same day, the same five Justices⁷ who held in *Bowsher v. Synar*⁸ that formalist analysis was applicable then held in *Commodity Futures Trading Commission v. Schor*⁹ that functionalism was the appropriate approach.

Although the Court's lack of adherence to a single method has been a source of frustration for many commentators,¹⁰ only the most single-minded approach could find that either formalism or functionalism alone would suffice for deciding all separation-of-powers cases.¹¹ Moreover, to believe that each branch is of equal strength, and therefore that each branch's encroachments are equally dangerous, is naive.¹²

This Note argues that both functionalism and formalism are necessary to cope with the myriad separation-of-powers problems that come before the courts, and it proposes a system for determining when to use each approach. To date the Supreme Court has failed to articulate a unifying theory that indicates when each method of analysis is appropriate, leading to an unprincipled coexistence of functionalism and formalism. As Professor Strauss has noted, "[C]lear rules contribute to planning, stability, even assurance that conduct can and will be governed by law."¹³ By clearly articulating its reasons for choosing functionalism or formalism

7. The five Justices were Chief Justice Burger and Justices Rehnquist, Powell, O'Connor, and Stevens.

8. 478 U.S. 714 (1986); see *infra* text accompanying notes 115-22.

9. 478 U.S. 833 (1986); see *infra* text accompanying notes 123-31.

10. Compare Earl C. Dudley, Jr., *Morrison v. Olson: A Modest Assessment*, 38 AM. U. L. REV. 255 (1989) (advocating a functionalist approach) with Lee S. Liberman, *Morrison v. Olson: A Formalistic Perspective on Why the Court Was Wrong*, 38 AM. U. L. REV. 313 (1989) (supporting a formalist approach). But see Strauss, *supra* note 6, at 512 ("Identifying a satisfactory principle for assessing the permissibility of distributions of governmental power, much less one that can be rooted in the 'separation-of-powers' framework, may simply be too much to expect.") (footnote omitted).

11. See *infra* text accompanying notes 20-33, 39-50 (discussing the weaknesses inherent in each method of analysis).

12. For example, encroachments by the judiciary upon the executive branch may not necessarily be so dangerous as encroachments by the legislature upon the executive. See *infra* notes 159-67 and accompanying text.

13. Strauss, *supra* note 6, at 512. Professor Strauss also warns, however, that "such rules present the twin hazards of inflexibility in the face of changing and unpredictably varying circumstances, and of inviting evasion by their clarity." *Id.* This Note, by advocating a two-tier method of separation-of-powers analysis, as opposed to a single method, attempts to

in future cases, the Supreme Court will provide the nation's lawmakers with important guidance; the Court must determine which legislative goals are permissible so that Congress will not have to use precious time and resources attempting to enact laws that cannot withstand separation-of-powers scrutiny ¹⁴

In fact, the Court actually has been very consistent in determining when to use either formalism or functionalism. Unfortunately, it has often failed to explain its reasoning. This Note articulates the principles underlying the Court's choices, beginning with a discussion of the Court's two approaches to separation-of-powers questions—formalism and functionalism—which focuses on the problems inherent in each method. The Note then analyzes the Court's reasoning in a wide variety of separation-of-powers cases, demonstrating the degree to which the Court has repeatedly vacillated between formalism and functionalism.

The next section then advocates a two-tier approach to separation of powers that uses formalism and functionalism, but in a principled fashion. By looking at original intent and examining the potential danger that each branch poses, this Note shows that the legislature poses the greatest threat to the principles underlying separation of powers and that legislative aggrandizement should therefore be subject to formalist analysis, the more rigorous tier. Conversely, executive or judicial aggrandizement is much less dangerous, and therefore should be subject to functionalist scrutiny, the less rigorous tier. The two-tier approach provides a unifying theory that is consistent with the purposes of separation of powers while recognizing the structure of modern government. The Note supports this contention by examining the Court's decisions in the context of the two tiers to demonstrate that the Court has been

provide guidance as to the appropriate standard while simultaneously providing flexibility sufficient to meet the various problems that may arise.

14. Certainly, Congress could not become more confused by the Court's vacillation. In recent years, for example, the Court has invalidated the legislative veto, putting in doubt the constitutionality of almost 200 statutes, *id.* at 489 (citing *INS v. Chadha*, 462 U.S. 919 (1983)), and "rejected Congress's effort to discipline itself from adding to the burgeoning national debt." *Id.* (citing *Bowsher v. Synar*, 478 U.S. 714 (1986)). At the same time, the Court has permitted Congress to create an independent prosecutor authorized to investigate and prosecute high-ranking government officials, *see Morrison v. Olson*, 487 U.S. 654 (1988), and a commission to promulgate mandatory sentencing guidelines, *see Mistretta v. United States*, 488 U.S. 361 (1989).

using two-tier analysis in a principled manner all along. The Note concludes that the Court should explicitly adopt the two-tier approach.

THE SUPREME COURT'S TRADITIONAL APPROACHES TO SEPARATION-OF-POWERS ANALYSIS

Formalism

Formalism presumes that the Constitution divides government into three separate branches in order to prevent all power from accruing within one branch—"the very definition of tyranny"¹⁵ To remain faithful to this rationale for separation of powers, the legislature may exercise only those powers characterized as legislative, the executive branch may only execute laws, and the judiciary may only adjudicate.¹⁶ Only where the Constitution expressly provides for exceptions may the branches cross their boundaries.¹⁷

Justice Black's opinion for the Court in *Youngstown Sheet & Tube Co. v. Sawyer*¹⁸ epitomizes the formalists' literal interpretation of the Constitution:

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. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that "All legislative Powers herein granted shall be vested in a Congress of the United States"¹⁹

Formalism is thus very mechanical; if a branch, or an agency within its control, exercises any other branch's powers except where expressly permitted by the Constitution, then that branch has encroached upon the other branch and has necessarily violated

15. THE FEDERALIST No. 47, at 246 (James Madison) (Max Beloff ed., 2d ed. 1987).

16. Michael L. Yoder, Note, *Separation of Powers: No Longer Simply Hanging in the Balance*, 79 GEO. L.J. 173, 173 (1990).

17. *Id.* For instance, the Constitution, by expressly authorizing the Senate to try impeachments, permits Congress to exercise a judicial power. U.S. CONST. art. I, § 3, cl. 6.

18. 343 U.S. 579 (1952).

19. *Id.* at 587-88 (quoting U.S. CONST. art. I, § 1).

the separation of powers. However, if one believes that today the administrative state²⁰ is not only a reality but a necessity,²¹ then formalism appears to be hopelessly incompatible with modern government. Applying only formalist analysis to the administrative state, one must conclude that almost every administrative agency is unconstitutional because virtually every agency exercises legislative, executive, *and* judicial powers.²² In other words, the executive branch, which ostensibly controls many federal agencies,²³ encroaches upon the legislature each time an agency enacts a regulation, and it encroaches upon the judiciary each time an agency adjudicates a dispute. Thus, the executive branch violates the separation of powers virtually every time an agency acts.

The argument that certain agencies are immune to the formalist/functionalist debate because they are independent of the executive branch and constitute a "fourth branch"²⁴ is equally untenable under formalism. Such an argument places the agencies "beyond the constitutional text,"²⁵ a clear violation of the Constitution's mandate that government operate within the scope of the three branches. Moreover, even if one believes that the Constitution permits a fourth branch, the fact that the agencies within this branch exercise more than one type of power violates the Framers' intent of keeping the branches separate so that power would not accrue in one branch.²⁶

20. For discussion of the modern federal government's structure and methods of law administration, see generally Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

21. See Bernard Schwartz, *Curiouser and Curiouser: The Supreme Court's Separation of Powers Wonderland*, 65 NOTRE DAME L. REV. 587, 601 (1990) ("[I]ndependent agencies have become an essential part of modern government.").

22. Strauss, *supra* note 6, at 492-93. Agencies such as the Securities and Exchange Commission exercise[] *all three* of the governmental functions the Constitution so carefully allocates among Congress, President, and Court. These agencies adopt rules having the shape and impact of statutes, mold governmental policy through enforcement decisions and other initiatives, and decide cases in ways that determine the rights of private parties.

Id.

23. See Strauss, *supra* note 20, at 587 ("[T]he legal regime within which agencies function is highly unified under presidential direction.").

24. Strauss, *supra* note 6, at 495.

25. *Id.*

26. See THE FEDERALIST No. 47, *supra* note 15, at 245-46.

Essentially, if the Supreme Court rigidly adhered to formalist analysis, it would have to hold most independent agencies unconstitutional and the United States government could not exist in its current form.²⁷ Under formalist scrutiny, the fact that the administrative state has developed because it "is efficient, convenient, and useful in facilitating functions of the government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government."²⁸ An end to the administrative state may be difficult for us to conceive. Certainly, the Court did not wish to envision such a scenario, which may explain why it took great pains explicitly to point out that its formalist decision in *Bowsher v. Synar*²⁹ did not apply to independent agencies.³⁰ The Court's position, however, while protecting the structure of modern government from further erosion, did little to clarify the paradox inherent in its separation-of-powers jurisprudence.

Ultimately, criticism of formalism stems from the belief that "three rather strictly separated governmental branches cannot cooperate to produce permanently viable administrative governance for a modern society."³¹ For example, Congress alone, saddled with the cumbersome legislative process, could not possibly enact legislation that would sufficiently meet all the needs of today's complex

27. See Dudley, *supra* note 10, at 271 (commenting favorably on the Court's adoption of a functionalist approach in *Morrison v. Olson*, 487 U.S. 654 (1988), because adoption of formalism "at this point in our history [is] likely to revolutionize the conduct of government").

28. *INS v. Chadha*, 462 U.S. 919, 944 (1983).

29. 478 U.S. 714 (1986).

30. *Id.* at 725 n.4. During *Bowsher's* oral arguments, when the Solicitor General stated that proponents of the Gramm-Rudman Act, 2 U.S.C. §§ 901-922 (Supp. III 1982), were merely trying to "scare" the Justices with the argument that upholding the lower court's formalist decision would endanger independent agencies such as the Federal Trade Commission and the Federal Reserve Board, Justice O'Connor replied, "They scared *me* with it." Schwartz, *supra* note 21, at 603 (emphasis added); see also Stephen L. Carter, *The Independent Counsel Mess*, 102 HARV. L. REV. 105, 132 (1988) (noting that even Justice Scalia, the Court's foremost formalist, was "reluctant" to hold that the administrative state was unconstitutional).

31. Frederick R. Anderson, *Revisiting the Constitutional Status of the Administrative Agencies*, 36 AM. U. L. REV. 277, 279 (1987); see also Strauss, *supra* note 6, at 511-12 ("The government we have built and now live with has attained a complexity and intermarriage of function that beggars the rationalistic tripartite schemes of the eighteenth century.").

economy.³² Similarly, by permitting administrative agencies to settle disputes involving interpretation of the agencies' own regulations, Congress has relieved the judicial branch of the burden of handling every dispute requiring adjudication.³³ Strict adherence to formalist analysis could thus undermine the legislature's efforts to cope with an increasingly complex world.

Functionalism

The Court's other approach to separation of powers is functionalism. Professor Lee Liberman states that a functionalist approach

starts with the assumption that all exercises of power cannot be characterized as falling under one of the three headings and that the Constitution does not require them to do so. Rather, the vesting clauses allocate power only among the three principal actors—Congress, the President, and the Supreme Court—but permit all other governmental actors to exercise combined powers in whatever mixture Congress may prescribe under the necessary and proper clause, so long as Congress' choice does not interfere with the performance of its "core functions" by one of the named actors.³⁴

On several occasions, in explicitly adopting functionalism, the Court "rejected the argument that the Constitution contemplates a complete division of authority between the three branches."³⁵ Rather, the Court held, the Framers created three separate branches, but not with the belief that the branches should "have

32. See Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. U. L. REV. 323, 331 (1987) ("The demands on Congress' agenda far exceed its capacity to make collective decisions. Securing agreement by a majority of 435 representatives, a majority of 100 senators, and the President is typically an arduous, time-consuming, and difficult process.").

33. Strauss, *supra* note 6, at 493.

34. Liberman, *supra* note 10, at 343 (footnote omitted). "Core function" is a term commentators have used to paraphrase the Court's expression, "constitutionally assigned functions," *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977) (citing *United States v. Nixon*, 418 U.S. 683, 711-12 (1974)). See, e.g., Peter L. Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L.J. 789, 803-04 (discussing Justice Powell's approach to core notions of legislative function in *INS v. Chadha*, 462 U.S. 919 (1983)); see also *In re Sealed Case*, 838 F.2d 476, 526 (D.C. Cir.) (Ginsburg, J., dissenting) (discussing whether the law at issue tampered with a "'core' executive function"), *rev'd sub nom.* *Morrison v. Olson*, 487 U.S. 654 (1988).

35. *Nixon*, 433 U.S. at 443.

no *partial* agency in, or no *controul* over the acts of each other."³⁶ Instead, their intent was only to prevent " 'the *whole* power of one department [from being] exercised by the same hands which possess the *whole* power of another department.' "³⁷ Thus, functionalism permits structural relationships that do not rigidly adhere to branch boundaries, so long as they do not overly shift the balance of power toward one branch.³⁸

A purely functionalist approach to separation of powers, however, is fraught with as many dangers as a purely formalist approach. First, functionalism replaces the Constitution's explicit grants and limitations of power with a balancing test. As one commentator has stated, "While 'core function' may be the best that the most sophisticated of the analysts can suggest, it has no stable content."³⁹ This has led to fears that strict adherence to functionalism will lead to courts' engaging in "ad hoc balancing"⁴⁰ even when the Constitution explicitly proscribes an encroachment across branch lines.⁴¹

Second, functionalism undermines another purpose of separation of powers: ensuring accountability of the government to the peo-

36. *Id.* at 442 n.5 (quoting THE FEDERALIST No. 47, at 325-26 (James Madison) (Jacob E. Cooke ed., 1961)).

37. *Id.* (quoting THE FEDERALIST No. 47, *supra* note 36, at 325-26).

38. Mary Buffington, Comment, *Separation of Powers and the Independent Governmental Entity After Mistretta v. United States*, 50 LA. L. REV. 117, 123 (1989).

39. Strauss, *supra* note 6, at 513 (footnote omitted). Justice Scalia phrased the concern succinctly:

What are the standards to determine how the balance is to be struck, that is, [for example,] how much removal of Presidential power is too much? Many countries of the world get along with an executive that is much weaker than ours—in fact, entirely dependent upon the continued support of the legislature. Once we depart from the text of the Constitution, just where short of that do we stop?

Morrison v. Olson, 487 U.S. 654, 711 (1988) (Scalia, J., dissenting); see also Harold H. Bruff, *On the Constitutional Status of the Administrative Agencies*, 36 AM. U. L. REV. 491, 509 (1987) ("Focusing only on whether a branch is disrupting the core functions of another would result in a much more mixed set of outcomes than does formalism.").

40. Yoder, *supra* note 16, at 182.

41. *Id.* The danger is that the explicit system created by "the wise men who constructed our system, and [the] two centuries of history that have shown it to be sound" will be replaced by whatever a majority of the Court, at a given time, happens to believe is sufficient to maintain an adequate system of checks and balances. *Morrison*, 487 U.S. at 734 (Scalia, J., dissenting).

ple.⁴² The Constitution ensures “that those whom we elect as lawmakers will actually make the fundamental policy choices. When elected officials do not make these fundamental choices, but instead delegate them, . . . the people do not receive the representative, accountable government to which they are entitled.”⁴³

In the present administrative structure, some accountability remains because the President, an elected official, generally retains the power to appoint⁴⁴ and remove⁴⁵ agency heads. Thus, the President can appoint administrators who will run their agencies in accordance with Presidential policies, and he can remove administrators who abuse their discretion. Accountability exists because the President is an elected official who remains sufficiently identified with the actions of such agencies to present a target to citizens displeased with an agency's actions.⁴⁶

Under a purely functionalist system, however, Congress would be free to insulate an agency from the President's removal power. For instance, the Court could uphold a law giving Congress the exclusive power to remove the head of an executive agency, on the ground that such a small infringement upon the executive branch's removal power would have little impact on the President's overall ability to execute the laws.⁴⁷ Such a holding would greatly attenuate the agencies' accountability to elected officials, because “the removal authority represents the only formal means by which Presi-

42. Liberman, *supra* note 10, at 345.

43. Morrison, *supra* note 4, at 299-300.

44. *See, e.g.*, 47 U.S.C. § 154(a) (1988) (“The Federal Communications Commission shall be composed of five commissioners *appointed by the President*, by and with the advice and consent of the Senate . . .”) (emphasis added).

45. *See Myers v. United States*, 272 U.S. 52, 117 (1926) (holding that only the President has the power to remove executive officers).

46. Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 Nw. U. L. Rev. 62, 74 (1990).

47. *See, e.g.*, *Bowsher v. Synar*, 478 U.S. 714, 763 (1986) (White, J., dissenting). Justice White, the Court's leading functionalist, would have upheld a law giving Congress, and not the President, the power to remove the Comptroller General, an executive officer. *Id.*

Another method of insulating an agency from the President's removal power, and hence, from public accountability, is the delegation of executive power to agencies outside the federal government. *See Krent, supra* note 46.

dents can control their subordinates' ongoing exercise of power and ensure unified execution of law."⁴⁸

The danger would then be the creation of

all manner of "expert" bodies, insulated from the political process, to which Congress will delegate various portions of its law-making responsibility. How tempting to create an expert Medical Commission to dispose of such thorny, "no win" political issues as the withholding of life-support systems in federally funded hospitals, or the use of fetal tissue for research.⁴⁹

Thus, despite commentators' calls for uniform application of either formal or functional analysis by the Court, rigid adherence to a particular approach would create many problems. Perhaps for this reason, the Court has abstained from relying exclusively on either formalism or functionalism, alternating instead between the two in what has sometimes appeared to be random fashion.⁵⁰

THE SEPARATION-OF-POWERS CASES

Myers v. United States

The first modern separation-of-powers case using explicit formalist analysis was *Myers v. United States*.⁵¹ In *Myers*, the President removed a postmaster from office without consulting the Senate, despite a statute that required the President to obtain the Senate's advice and consent before he could remove a postmaster.⁵² Chief Justice Taft, writing for the majority, adopted a formalist position, holding that

the Constitution was so framed as to vest in the Congress all legislative powers therein granted, to vest in the President the executive power, and to vest in one Supreme Court and such inferior courts as Congress might establish, the judicial power. From this division on principle, the reasonable construction of the Constitution must be that *the branches should be kept separate in all cases in which they were not expressly blended,*

48. Krent, *supra* note 46, at 73.

49. *Mistretta v. United States*, 488 U.S. 361, 422 (1989) (Scalia, J., dissenting).

50. *Cf. Bruff, supra* note 39, at 505 ("[T]he Court's choice of analytic approach may be result-oriented.").

51. 272 U.S. 52 (1926).

52. *Id.* at 106-07 (citing Act of July 12, 1876, ch. 179, 19 Stat. 80, 81).

*and the Constitution should be expounded to blend them no more than it affirmatively requires.*⁵³

The Court then interpreted the removal power as an essential part of the President's executive powers, relying on the Vesting Clause,⁵⁴ Appointments Clause,⁵⁵ and "Take Care" Clause.⁵⁶ First, it held that the power of the President to remove his officers was a necessary corollary of his executive powers, because the President could not execute the laws unless he had the power to discipline those assistants who failed to follow his orders.⁵⁷ Second, it recognized "that as a constitutional principle the power of appointment carried with it the power of removal."⁵⁸ Third, the Court held that "when the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal."⁵⁹ Therefore, because the removal power resided exclusively with the President, Congress' attempt to limit that power represented a legislative encroachment upon the executive branch, an act which violated the Constitution's separation of powers.⁶⁰

Humphrey's Executor v. United States

Myers seemed to establish that at least a majority of the Justices had adopted a formalist stance. Yet, in *Humphrey's Executor v. United States*,⁶¹ a unanimous Supreme Court used functionalist analysis to uphold a Congressional limitation of the President's right to remove an agency official. *Humphrey's Executor* involved a law that allowed the President to remove a commissioner of the

53. *Id.* at 116 (emphasis added).

54. "The executive Power shall be vested in a President of the United States of America." U.S. CONST. art. II, § 1, cl. 1.

55. "[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law" *Id.* § 2, cl. 2.

56. "[The President] shall take Care that the Laws be faithfully executed" *Id.* § 3.

57. *Myers*, 272 U.S. at 135.

58. *Id.* at 119.

59. *Id.* at 122.

60. *Id.* at 176.

61. 295 U.S. 602 (1935).

Federal Trade Commission *only* for “ ‘inefficiency, neglect of duty, or malfeasance in office.’ ”⁶²

The Court distinguished *Humphrey's Executor* from *Myers* by holding that the agency was not an executive body, characterizing it instead as a “quasi-legislative or quasi-judicial” agency⁶³ “To the extent that it exercises any executive function—as distinguished from executive power in the constitutional sense—it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers.”⁶⁴ Therefore, the President’s “illimitable power of removal”⁶⁵ was not applicable, and Congress was free to dictate the terms of removal for such agency officers.⁶⁶

By refusing to place the FTC into one of the three prescribed branches of government and by permitting such agencies to exercise executive as well as legislative or judicial powers, the Court was engaging in functionalist analysis. Moreover, by asking whether the removal provisions would restrict the President’s power to execute the laws,⁶⁷ the Supreme Court was questioning whether the statute interfered with a branch’s core function, an inquiry central to functionalist analysis.⁶⁸ Characterizing the presidential power to execute the laws in terms of the ability to remove *executive* officers, the Court concluded that the statute did not impair the President’s ability to remove executive officers and thus did not affect a core executive function.⁶⁹

Youngstown Sheet & Tube Co. v. Sawyer

In 1952 the Court decided *Youngstown Sheet & Tube Co. v. Sawyer*,⁷⁰ striking down a presidential attempt to seize steel mills

62. *Id.* at 619-20 (quoting Federal Trade Commission Act, ch. 311, § 1, 38 Stat. 717, 718 (1914) (current version at 15 U.S.C. § 41 (1988))).

63. *Id.* at 628.

64. *Id.*

65. *Id.* at 629.

66. *Id.*

67. *Id.* at 631.

68. See Strauss, *supra* note 6, at 512 (characterizing core-function analysis as central to the Court’s functionalist decision in *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986)); see also *supra* text accompanying note 6 (stating that functionalism stresses core function and relationship).

69. *Humphrey's Executor*, 295 U.S. at 631.

70. 343 U.S. 579 (1952).

during the Korean War. This case presented a unique situation: different members of the majority applied formalist and functionalist analysis but arrived at the same conclusion.⁷¹ Justice Black, writing for the majority, used purely formalist reasoning, holding that “[i]n 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.”⁷² Authorizing the seizures was a purely legislative function, however, and “[t]he Founders of this Nation entrusted the lawmaking power to the Congress alone

”⁷³ Therefore, because no legislation expressly or implicitly authorized the President to seize such property,⁷⁴ and because no provision of the Constitution authorized such actions by the executive,⁷⁵ the executive usurpation of legislative powers was unconstitutional.

In a concurring opinion, Justice Jackson applied functionalist analysis in joining the majority’s conclusion that the President’s actions were unconstitutional. He criticized the majority for seeking to define the powers of each branch from “isolated clauses or even single Articles torn from context.”⁷⁶ Instead, he argued that the Constitution intended “that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.”⁷⁷ Despite his flexible approach to the separation of powers, Justice Jackson agreed with the majority that the President’s actions were unconstitutional.⁷⁸ He held that permitting the President to act outside the scope of executive powers expressly granted by the Constitution *and* directly against Congress’ implicit intent would

71. *Id.*

72. *Id.* at 587.

73. *Id.* at 589.

74. *Id.* at 585.

75. The Court held that the Commander-in-Chief Clause, U.S. CONST. art. II, § 2, cl. 1, was not so broad that it enabled the President to seize private property in order to prevent a strike. *Youngstown*, 343 U.S. at 587.

76. *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

77. *Id.*

78. *Id.* at 638.

place enough power within the executive branch to upset "the equilibrium established by our constitutional system."⁷⁹

Buckley v. Valeo

*Buckley v. Valeo*⁸⁰ was another case in which a majority of the Court utilized formalist analysis. *Buckley* involved the constitutionality of the Federal Election Campaign Act of 1971, as amended in 1974,⁸¹ which created an eight-member Federal Election Commission to oversee federal elections. Two members of the Commission were appointed by the President *pro tempore* of the Senate, and two members were appointed by the Speaker of the House of Representatives.⁸² Among the Commission's powers was the authority to impose sanctions on those who violated the Act or regulations made pursuant to the Act.⁸³

The per curiam opinion used a formalist approach, characterizing the Commission's powers as executive in nature, because "[a] lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'"⁸⁴ Accordingly, the Court held that the Commission must be an executive body, and therefore the selection of its members must comply with the requirements of the Appointments Clause.⁸⁵ Because the statute authorized the President to select only two of this executive body's eight members,⁸⁶ the Court held that Congress was encroaching upon the executive's appointment powers, and thus the Act violated separation of powers.⁸⁷

79. *Id.*

80. 424 U.S. 1 (1976) (per curiam).

81. 2 U.S.C. §§ 431-456 (Supp. IV 1970).

82. *Buckley*, 424 U.S. at 113 (citing 2 U.S.C. § 437c(a)(1)(A)-(B)).

83. *Id.* at 111-12 (citing 2 U.S.C. § 437g(a)(5)-(7)).

84. *Id.* at 138 (quoting U.S. CONST. art. II, § 3).

85. *Id.* at 140-41.

86. 2 U.S.C. § 437c(1)(C).

87. *Buckley*, 424 U.S. at 143.

Nixon v. Administrator of General Services

The Supreme Court returned to functionalist analysis, however, in *Nixon v. Administrator of General Services*.⁸⁸ The case concerned a determination of whether the Presidential Recordings and Materials Preservation Act⁸⁹ violated the separation of powers.⁹⁰ The Act directed the Administrator of the General Services Administration to take custody of President Nixon's papers and tape recordings and determine which ones could be made public.⁹¹

The President contended that the statute interfered with the presidential prerogative to control internal operations of the Executive Office and that it therefore offended the autonomy of the executive branch.⁹² Justice Brennan, writing for the majority, rejected these arguments, stating that the Constitution did not create "three airtight departments of government."⁹³ Rather, "in determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions."⁹⁴

The Court then held that the possibility that presidential communications might be disclosed would not "adversely affect the ability of future Presidents to obtain the candid advice necessary for effective decisionmaking."⁹⁵ Thus, although a legislative act restricted the executive branch's freedom to execute laws, the Act did not *prevent* the President from proceeding with his constitutionally mandated executive powers, and therefore the Court upheld the statute.

88. 433 U.S. 425 (1977).

89. Pub. L. No. 93-526, §§ 101-106, 88 Stat. 1695 (1974).

90. *Nixon*, 433 U.S. at 429.

91. *Id.* at 433-35 (citing Pub. L. No. 93-526, §§ 101-104, 88 Stat. at 1695-98).

92. *Id.* at 439-41.

93. *Id.* at 443.

94. *Id.*

95. *Id.* at 450. The Court went on to say that it had no reason "to believe that the restriction on public access ultimately established by regulation will not be adequate to preserve executive confidentiality." *Id.*

Northern Pipeline Construction Co. v. Marathon Pipe Line Co.

The Supreme Court returned to formalist analysis once again in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*⁹⁶ Justice Brennan, writing for three other members of the Court, struck down procedural aspects of the Bankruptcy Act of 1978,⁹⁷ which granted United States Bankruptcy Courts "jurisdiction over all 'civil proceedings arising under title 11 [the Bankruptcy title] or arising in or related to cases under title 11.'" ⁹⁸ Under the Act, bankruptcy judges were appointed for fourteen-year terms,⁹⁹ could be removed by the judicial council of the circuit on account of "incompetency, misconduct, neglect of duty, or physical or mental disability,"¹⁰⁰ and had salaries subject to adjustment under the Federal Salary Act.¹⁰¹

The plurality held that the Framers had sought to insure an independent judiciary by instituting the Good Behavior Clause,¹⁰² which "guarantees that Art. III judges shall enjoy life tenure, subject only to removal by impeachment,"¹⁰³ and the Compensation Clause,¹⁰⁴ which "guarantees Art. III judges a fixed and irreducible compensation for their services."¹⁰⁵ After establishing that bankruptcy courts were Article III courts because "the Act vests all 'essential attributes' of the judicial power of the United States in the 'adjunct' bankruptcy court[s],"¹⁰⁶ the plurality found the Act to be unconstitutional because it did not give bankruptcy judges all of the protections guaranteed Article III judges by the Constitution.¹⁰⁷ Under the Act, the legislature could have exerted upon

96. 458 U.S. 50 (1982) (plurality opinion).

97. Pub. L. 95-598, 92 Stat. 2549 (1978) (codified in scattered sections of 28 U.S.C.).

98. *Northern Pipeline*, 458 U.S. at 54 (quoting 28 U.S.C. § 1471(b) (Supp. IV 1976)) (alteration in original).

99. 28 U.S.C. § 153(a).

100. *Id.* § 153(b).

101. *Id.* § 154; see Federal Salary Act, 2 U.S.C. §§ 351-361 (Supp. IV 1976).

102. "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour" U.S. CONST. art. III, § 1.

103. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 59 (1982).

104. "The Judges shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST. art. III, § 1.

105. *Northern Pipeline*, 458 U.S. at 59.

106. *Id.* at 84-85.

107. *Id.* at 60.

courts exercising the judicial power of the United States a degree of influence not anticipated by the Framers; thus, the Court held that the terms of the Act violated the principle of separation of powers.

INS v. Chadha

In *INS v. Chadha*,¹⁰⁸ the Court used formalist analysis to strike down the use of legislative vetoes as a violation of separation of powers.¹⁰⁹ At issue in *Chadha* was a provision of the Immigration and Nationality Act¹¹⁰ that gave Congress the power to veto, by resolution of one house of Congress, any actions taken by the Attorney General pursuant to the Act.¹¹¹

Writing for the majority, Chief Justice Burger began by characterizing legislative vetoes as exercises of legislative power because they were actions "that had the purpose and effect of altering the legal rights, duties and relations of persons outside the legislative branch."¹¹² Accordingly, such an act was unconstitutional if it did not comply with the Constitution's procedures for enacting legislation, because the process was designed to reinforce the separation of powers.

[T]he Framers were acutely conscious that the bicameral requirement and the Presentment Clauses would serve essential constitutional functions. The President's participation in the

108. 462 U.S. 919 (1983).

109. *Id.* at 956. Typically, in a legislative veto,

Congress passes legislation on a subject that gives the president, or an executive agency, the power to enact regulations with the force of law if one or both Houses of Congress do not take certain action. Pursuant to this method of legislative enactment, Congress provides in a statute that the president or other executive official must submit the proposed regulation to Congress. Under one alternative, this proposal then will become law unless one House of Congress (or both Houses, according to some statutes) by resolution affirmatively disapproves of the proposal. Under another form, the proposal only will become law if one House of Congress (or alternatively, both Houses) affirmatively approves of the proposal.

JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 264 (2d ed. 1983). For discussion of legislative vetoes, see generally Jacob K. Javits & Gary J. Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N.Y.U. L. REV. 455 (1977).

110. 8 U.S.C. §§ 1101-1503 (1976).

111. *Chadha*, 462 U.S. at 923 (citing 8 U.S.C. § 1254(c)(2)).

112. *Id.* at 952.

legislative process was to protect the Executive Branch from Congress and to protect the whole people from improvident laws. The division of the Congress into two distinctive bodies assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings. The President's unilateral veto power, in turn, was limited by the power of two thirds of both Houses of Congress to overrule a veto thereby precluding final arbitrary action of one person. It emerges clearly that *the prescription for legislative action in Art. I, § 1, 7 represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.*¹¹³

Essentially, legislative vetoes would have permitted Congress "to exercise what amounts to veto-proof lawmaking power,"¹¹⁴ because they would have prevented the President from getting an opportunity to exercise his veto power over legislative actions. The Court thus struck down the legislative veto portion of the statute as an unconstitutional violation of separation of powers.

Bowsher v. Synar

In *Bowsher v. Synar*,¹¹⁵ the Supreme Court again used formalist analysis to strike down congressional action. The law at issue in *Bowsher* was the Balanced Budget and Emergency Deficit Control Act of 1985,¹¹⁶ which required the Comptroller General to review deficit estimates and budget reduction calculations and then make recommendations to the President.¹¹⁷ Under the Act, only Congress, by joint resolution, could remove the Comptroller General

113. *Id.* at 951 (emphasis added). The "bicameral requirement" is found in the Constitution's requirement that "[a]ll legislative powers herein granted shall be vested in a congress which shall consist of a senate *and* a house of representatives." U.S. CONST. art. I, § 1 (emphasis added). The Presentment Clause consists of the provision stating that "[e]very bill which shall have passed the house of representatives *and* the senate, shall, before it become a law, be presented to the president of the United States." *Id.* § 7, cl. 2 (emphasis added).

114. Schwartz, *supra* note 21, at 599.

115. 478 U.S. 714 (1986).

116. 2 U.S.C. §§ 901-922 (Supp. III 1982). The Act was popularly known as the Gramm-Rudman-Hollings Act. *Bowsher*, 478 U.S. at 717.

117. 2 U.S.C. § 901(a)-(b).

for permanent disability, inefficiency, neglect of duty, malfeasance, commission of a felony, or conduct involving moral turpitude.¹¹⁸ In his majority opinion, Chief Justice Burger noted that the Comptroller General's duties entailed interpreting provisions of the Act and exercising judgment concerning application of the Act.¹¹⁹ Because "[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law,"¹²⁰ the Chief Justice held that the Comptroller General was an executive officer.¹²¹ The Act was therefore unconstitutional, because

once Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation. By placing the responsibility for execution of the Balanced Budget and Emergency Deficit Control Act in the hands of an officer who is subject to removal only by itself, Congress in effect has retained control over the execution of the Act and has intruded into the executive function. The Constitution does not permit such intrusion.¹²²

Commodity Futures Trading Commission v. Schor

The Court then returned to functionalist analysis in *Commodity Futures Trading Commission v. Schor*,¹²³ holding that the Commodity Futures Trading Commission (CFTC), an administrative agency, had jurisdiction to decide common law counterclaims arising out of state law claims.¹²⁴

118. *Bowsher*, 478 U.S. at 728 (citing 31 U.S.C. § 703(e)(1)(B) (1982)). Congress could also remove the Comptroller through impeachment. 31 U.S.C. § 703(e)(1)(A). Although the President could veto the joint resolution, Congress could override the veto with a two-thirds vote in each House. *Bowsher*, 478 U.S. at 728 n.7.

119. *Bowsher*, 478 U.S. at 733.

120. *Id.*

121. *Id.*

122. *Id.* at 733-34.

123. 478 U.S. 833 (1986).

124. *Id.* at 857. Congress created the CFTC, 7 U.S.C. § 4a (1976), giving it broad power to implement the Commodity Exchange Act, *id.* §§ 1-22. *Schor*, 478 U.S. at 836. To promote efficient dispute resolution, the CFTC promulgated the regulation permitting it to decide common law counterclaims arising out of state law claims. *Id.* at 837 (citing 17 C.F.R. § 12-23(b)(2) (1983)).

Justice O'Connor, writing for the majority—five members of whom, including herself, had decided *Bowsher v. Synar*¹²⁵ that same day on formalist grounds¹²⁶—stated that the Court should view the separation-of-powers issue in this case by reference to the purposes underlying Article III, with “‘practical attention to substance rather than doctrinaire reliance on formal categories.’”¹²⁷ Accordingly, instead of characterizing the CFTC as an executive or legislative agency and then automatically striking down the enabling legislation because it permitted an executive agency to exercise a traditional judicial power, the Court considered such factors as the degree to which Article III courts retained “essential attributes of judicial power,”¹²⁸ the range and scope of Congress’ delegation to the CFTC, and the concerns which had led Congress to act.¹²⁹

Applying these criteria, the Court held that the congressional delegation of power to the CFTC to adjudicate common law counterclaims was constitutional because the CFTC’s jurisdiction was too limited to constitute an unacceptable intrusion into the Article III judiciary’s province¹³⁰ and because the CFTC’s jurisdiction did not preclude district court jurisdiction.¹³¹ Thus, although a non-Article III court was authorized to exercise powers conceded by all parties to belong to the judicial branch, under functionalist analysis the encroachment was not deemed great enough to violate separation of powers.

Morrison v. Olson

Similarly, in *Morrison v. Olson*,¹³² the Supreme Court used functionalist analysis to uphold Congress’ creation of an “independent counsel” to investigate and, if appropriate, prosecute high-ranking

125. 478 U.S. 714 (1986).

126. See *supra* notes 7-9 and accompanying text.

127. *Schor*, 478 U.S. at 848 (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 587 (1985)).

128. *Id.* at 851.

129. *Id.*

130. *Id.* at 852.

131. *Id.* at 853.

132. 487 U.S. 654 (1988).

government officials for criminal violations.¹³³ At issue in the case was Congress' stipulation that the independent counsel could be removed by the Attorney General, an executive officer, only for good cause or physical or mental disability.¹³⁴

Chief Justice Rehnquist's majority opinion held that the statutory provision restricting the Attorney General's power to remove the independent counsel did not impermissibly interfere with the President's exercise of his constitutionally appointed functions.¹³⁵ The Chief Justice contrasted *Morrison* with *Bowsher v. Synar*,¹³⁶ stating that here, Congress had not attempted to gain a role in the removal of executive officials; instead, the Act "put [] the removal power squarely in the hands of the Executive Branch,"¹³⁷ although it did somewhat limit the Executive's exercise of that power. Therefore, applying a functionalist balancing of the importance of the Act against its infringement upon another branch, the Court deemed that limiting the Attorney General's, and thus, the executive branch's, removal power was essential in establishing the independence necessary for an effective independent counsel.¹³⁸

Mistretta v. United States

*Mistretta v. United States*¹³⁹ continued the Court's functionalist trend, upholding the United States Sentencing Commission's power to promulgate mandatory sentencing guidelines.¹⁴⁰ The separation-of-powers issue in *Mistretta* was whether Congress could delegate a legislative function—the creation of mandatory sentencing guidelines—to a body that was partially composed of sitting federal judges.¹⁴¹ In other words, was the judiciary, by taking on legislative powers, encroaching upon the legislative branch?

133. *Id.* at 660.

134. *Id.* at 663 (citing 28 U.S.C. § 596(a)(1) (Supp. V 1982)).

135. *Id.* at 692.

136. 478 U.S. 714 (1986).

137. *Morrison*, 487 U.S. at 686.

138. *Id.* at 693.

139. 488 U.S. 361 (1989).

140. *Id.* at 397.

141. The Commission was composed of seven members appointed by the President, three of whom were to be sitting federal judges chosen from a list of six submitted by the Judicial Conference. *Id.* at 368 (citing 28 U.S.C. § 991(a) (Supp. IV 1982)).

Justice Blackmun's majority opinion rejected a formalist approach to separation of powers that would have held that members of the judiciary may not legislate. Instead, he found "that the role of the Commission in promulgating guidelines for the exercise of that judicial function bears considerable similarity to the role of this Court in establishing rules of procedure under the various enabling acts."¹⁴² Thus, because the Commission's functions paralleled the Court's role in promulgating procedural rules, the Commission was acting in a manner consistent with "a central element of the historically acknowledged mission of the Judicial Branch."¹⁴³ Therefore, because the Act did not undermine the integrity of the judiciary, and because it did not deprive either the executive or legislative branch of its powers, the Court held that separation of powers was not violated.¹⁴⁴

Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.

Despite the Supreme Court's alleged adoption of functionalism as its sole method of analysis after *Morrison* and *Mistretta*,¹⁴⁵ the Court in *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*¹⁴⁶ struck down a law on purely formalist grounds.¹⁴⁷ The statute at issue was the Metropolitan Washington Airports Act of 1986,¹⁴⁸ which transferred operational control of Washington National Airport and Dulles International Airport from the federal government to the Metropolitan Washington Airports Authority (MWAA),¹⁴⁹ which was created by a compact between Virginia and the District of Columbia.¹⁵⁰ The Act also contained a provision creating a Board of Review, composed of nine Members of Congress serving in their individual ca-

142. *Id.* at 391.

143. *Id.*

144. *Id.* at 395-96.

145. See *supra* note 5 (noting that scholars such as Professor Carter believed that the Court had exclusively adopted functionalism).

146. 111 S. Ct. 2298 (1991).

147. *Id.* at 2301.

148. 49 U.S.C. app. §§ 2451-2461 (1988).

149. *Washington Airports Authority*, 111 S. Ct. at 2301.

150. *Id.* at 2302.

pacities as representatives of users of the airports, that had veto power over any decisions made by the MWAA.¹⁵¹

In striking down the legislation, Justice Stevens' majority opinion first pointed out that although the Act specified "[t]hat the Members of Congress who serve on the Board nominally serve 'in their individual capacities, as representatives of users' of the airports,"¹⁵² clearly, they were "congressional agent[s] exercising federal authority for separation-of-power purposes. '[S]eparation-of-powers analysis does not turn on the labeling of an activity' "¹⁵³ Once the Court had established that the Board's members were also members of the legislature, characterizing the Board's functions as executive or legislative became irrelevant because "[i]f the power is executive, the Constitution does not permit an agent of Congress to exercise it. If the power is legislative, Congress must exercise it in conformity with the bicameralism and presentment requirements of Art. I, § 7 "¹⁵⁴ In either case, the legislature was seeking to exercise powers the Constitution had not accorded it, and thus the Act violated separation of powers.¹⁵⁵

A TWO-TIER APPROACH TO SEPARATION OF POWERS

A Justification for Two Tiers

Despite scholarly clamor for adherence to either formalism or functionalism,¹⁵⁶ the Court should not abandon either approach. Neither formalism or functionalism alone can sufficiently protect the principles of separation of powers imbued in the Constitution¹⁵⁷ while sufficiently accommodating the flexibility required by today's modern government.¹⁵⁸ Instead, a two-tier system, utilizing

151. *Id.* at 2303-04 (citing 49 U.S.C. app. § 2456(f)).

152. *Id.* at 2307 (quoting 49 U.S.C. app. § 2456(f)(1)).

153. *Id.* (quoting *Mistretta v. United States*, 488 U.S. 361, 393 (1989)).

154. *Id.* at 2312.

155. *Id.*

156. *See supra* note 10 and accompanying text (discussing various scholars' contentions that the Court should adopt either approach exclusively).

157. *See supra* notes 36-50 and accompanying text (discussing the values that separation of powers was designed to protect).

158. *See supra* notes 31-33 and accompanying text (discussing the complexity of modern government).

both formalism and functionalism in a principled manner, is necessary

In fact, the Court's decisions have implicitly used a two-tier standard of analysis, selecting formalism or functionalism on the basis of which branch was being aggrandized. The Supreme Court has always explicitly recognized that the Framers regarded the system of separated powers and checks and balances as a "self-executing safeguard against the encroachment of aggrandizement of one branch at the expense of the other."¹⁵⁹ More importantly, the Court has recognized that encroachment or aggrandizement by one particular branch may be more dangerous than by the others, pointing specifically to the "danger of encroachment 'beyond the legislative sphere.'"¹⁶⁰ The understanding that self-aggrandizement by the legislative branch is more dangerous than aggrandizement of either the executive or judicial branch is the distinction upon which the two-tier system turns.

The Most Feared Branch

The Supreme Court has long been aware that it should particularly fear legislative encroachment upon the other branches because the Framers were clear in their warnings: "[T]he tendency of republican governments is, to an aggrandizement of the legislative, at the expense of the other departments."¹⁶¹

[I]n a representative republic where the executive magistracy is carefully limited, both in the extent and the duration of its power; and where the legislative power is exercised by an assembly, which is sufficiently numerous to feel all the passions which actuate a multitude; yet not so numerous as to be incapable of pursuing the objects of its passions by means which reason prescribes; it is against the enterprising ambition of this de-

159. *Buckley v. Valeo*, 424 U.S. 1, 122 (1976). The Framers believed that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands may justly be pronounced the very definition of tyranny." *THE FEDERALIST* No. 47, *supra* note 15, at 245-46.

160. *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*, 111 S. Ct. 2298, 2311 (1991) (emphasis added) (quoting *THE FEDERALIST* No. 48, at 334 (James Madison) (Jacob E. Cooke ed., 1961)).

161. *THE FEDERALIST* No. 49, at 259 (Alexander Hamilton or James Madison) (Max Beloff ed., 2d ed. 1987).

partment that the people ought to indulge all their jealousy and exhaust all their precautions.¹⁶²

Justice White argued, however, that in the modern world, the Framers' fears were misplaced. As he stated in *Washington Airports Authority*,

[t]he majority attempts to clear the path for its decision by stressing the Framers' fear of overweening legislative authority. It cannot be seriously maintained, however, that the basis for fearing legislative encroachment has increased or even persisted rather than substantially diminished. *At one point Congress may have reigned as the preeminent Branch, just as the Framers predicted. It does so no longer* This century has witnessed a vast increase in the power that Congress has transferred to the Executive. Given this shift in the constitutional balance, the Framers' fears of legislative tyranny ring hollow¹⁶³

Justice White was correct in pointing out that Congress had delegated much of its power to the other branches and thus was no longer the creature feared by the Framers. Nonetheless, he was asking the Court to rely on an extremely subjective standard: when has a branch lost enough power that it is no longer to be feared?¹⁶⁴ Moreover, and perhaps most tellingly, he based his rationale on the present weak state of Congress, a state into which Congress literally willed itself by delegating so much power to the various agencies; Justice White ignored the awesome potential the legislative branch possesses should it choose to exercise its powers fully¹⁶⁵

162. THE FEDERALIST No. 48, at 253 (James Madison) (Max Beloff ed., 2d ed. 1987).

163. *Washington Airports Authority*, 111 S. Ct. at 2317 n.3 (White, J., dissenting) (citations omitted) (emphasis added).

164. Compare Justice Scalia's argument that straying from the text of the Constitution leads to a dangerously subjective standard. *Supra* note 39.

165. Certainly the Framers were under no illusion, stating that "[t]he legislative department derives a superiority in our governments from other circumstances. Its constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments." THE FEDERALIST No. 48, *supra* note 162, at 253. Madison's wariness was all the more remarkable because he made his statements before modern interpretation of the Constitution expanded Congress' power far beyond anything he might have anticipated. Compare THE FEDERALIST No. 45, at 237 (James Madison) (Max Beloff ed., 2d ed. 1987) ("The powers delegated by the proposed constitution to the federal

However, fearing what Congress could be, rather than what Congress is, is reasonable. Merely because the legislature has chosen to give away much of its power does not mean that it could not take much of that power back.¹⁶⁶ When the Framers invested the Constitution with its separation-of-powers principles, they were concerned with *possible*, not merely *probable*, abuse of power.¹⁶⁷ For the nation's highest court to be less protective of the Constitution's structure simply because modern politics have—perhaps only temporarily¹⁶⁸—shifted the balance of power in government would be to sacrifice the security provided by the Framers' protections for the illusory security of contemporary legislative weakness.

The Two Tiers

In separation-of-powers jurisprudence, not all encroachments or aggrandizements are equally dangerous. Therefore, the Court should explicitly recognize a two-tier system of analysis for separation of powers.¹⁶⁹ When Congress, "the most dangerous branch,"¹⁷⁰

government, are few and defined.") with Joseph Lesser, *The Course of Federalism in America—An Historical Overview*, in *FEDERALISM: THE SHIFTING BALANCE* 1, 8-11 (Janice C. Griffith ed., 1989) (discussing the dramatic expansion of Congress' commerce, taxing, and spending powers during the 20th century).

166. Congress has numerous options. For example, it can simply enact legislation terminating an independent agency. See, e.g., Victoria Slind-Flor, *Congress Considers Sweeping Revisions in Copyright Law*, NAT'L L.J., Mar. 15, 1993, at 19, 27 (discussing H.R. 897, 103d Cong., 1st Sess. (1993), which calls for the termination of the Copyright Royalty Tribunal, an independent agency). Congress can also end specific agency programs by altering the enabling legislation. See, e.g., H.R. 62, 103d Cong., 1st Sess. § 402 (1993) (requiring the Federal Emergency Management Agency to end the Erosion-Threatened Structures Program). Finally, it can override agency actions in many ways. See generally Frederick M. Kaiser, *Congressional Action to Overturn Agency Rules: Alternatives to the "Legislative Veto"*, 32 ADMIN. L. REV. 667 (1981).

167. See *THE FEDERALIST* No. 48, *supra* note 162, at 253 (discussing the inherent superiority of the legislative branch over the executive and judicial branches).

168. A major transformation in Congress would not be unprecedented. In a recent article, Professor Sargentich attributed the dominance of Congress during the late-19th century to a "succession of relatively weak Presidents." Thomas O. Sargentich, *The Limits of the Parliamentary Critique of the Separation of Powers*, 34 WM. & MARY L. REV. 679, 691 & n.72 (1993). The emergence of strong Presidents during the late-19th and early-20th centuries, and corresponding restructuring within Congress, led to the modern ascendancy of the executive branch. *Id.* at 691 & n.77. Following this logic, a succession of weak Presidents could again cause Congress to become the dominant branch of government.

169. The use of different levels of scrutiny in the same area of jurisprudence is fairly common. For example, in equal protection cases, the Court has traditionally used three dif-

seeks to aggrandize itself by exercising powers that the Constitution does not grant it, the Court should apply the stricter tier, formalist analysis. For example, if Congress gives itself the power to appoint ambassadors to other countries,¹⁷¹ then "formal scrutiny"¹⁷² of the legislation will be appropriate.

On the other hand, when the other branches are aggrandized, the Court should use "functional scrutiny" because they do not pose a threat to the balance of powers nearly so dangerous as legislative aggrandizement. For instance, if the executive branch is aggrandized through a delegation of power from Congress authorizing an executive officer to enact certain regulations, then the Court should review the enabling legislation using functionalist analysis and thereby determine whether the executive branch now wields so much legislative power that "the equilibrium established by our constitutional system"¹⁷³ will be disrupted. Similarly, when the executive or judiciary aggrandizes itself by usurping another branch's power, the Court should apply the functionalist tier to the aggrandizement, balancing the encroaching branch's need for the new power against the degree to which the exercise of that power will interfere with another branch's "core functions." For example, if

ferent standards of review, because although all legislation discriminates in some fashion, some forms of discrimination are less acceptable than others. Laws that discriminate on the basis of race are the least acceptable and therefore "are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). On the other hand, the Court will subject statutes that classify by gender to an intermediate standard of scrutiny, such that the classification "must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig v. Boren*, 429 U.S. 190, 197 (1976). Finally, the Court will uphold legislation that differentiates on the basis of nonsuspect criteria as long as the legislation is "rationally related to a legitimate governmental purpose." *City of Cleburne*, 473 U.S. at 446.

170. See *supra* notes 161-68 and accompanying text.

171. The Constitution vests the power to appoint ambassadors exclusively in the President; Congress' role in such matters is limited to "the Advice and Consent of the Senate." U.S. CONST. art. II, § 2, cl. 2.

172. This is my own phrase, based on the Court's use of the expression "strict scrutiny." See *supra* note 169. Similarly, I call analysis under the functionalist tier "functional scrutiny."

173. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 638 (1952) (Jackson, J., concurring).

the Vice President seeks to participate in all Senate votes,¹⁷⁴ functional scrutiny will be appropriate, weighing the executive branch's need for the vote against the degree to which this will impair Congress' core function.

Two Tiers and the Administrative State

In addition to establishing order out of the Court's seemingly haphazard jurisprudence in separation of powers, the two-tier system allows formalism to coexist with the administrative state in a principled manner. No longer will the Court have to resort to judicial inventions such as the "fourth branch"¹⁷⁵ or "quasi-legislative agency"¹⁷⁶ and the constitutional dangers such invention engenders.¹⁷⁷ Moreover, the Court will no longer be forced to carve out an "administrative state exception" in its formalist opinions¹⁷⁸ to protect administrative agencies in a blatant display of result-oriented jurisprudence.¹⁷⁹

Under two tiers, functionalist analysis will be the appropriate standard of review for most laws concerning administrative agencies, because most such laws involve delegations of power *away* from the legislative branch. As long as the Court continues to characterize administrative and independent agencies as part of the executive branch,¹⁸⁰ it may permit an agency to exercise executive, legislative, and judicial powers simultaneously, unless that exercise would be so extensive as to disrupt the core functions of another branch. Under the two-tier system, therefore, the Court can discard the fourth-branch/quasi-legislature fiction,¹⁸¹ and it can pro-

174. The Constitution permits the Vice President to vote with the Senate only when it is equally divided. U.S. CONST. art. I, § 3, cl. 4.

175. Strauss, *supra* note 6, at 495.

176. *Humphrey's Ex'r v. United States*, 295 U.S. 602, 628 (1935).

177. See *supra* notes 42-50 and accompanying text (discussing the loss of accountability that could result from the insulation of independent agencies from control by elected officials).

178. See *supra* notes 29-30 and accompanying text.

179. See *supra* note 50.

180. Administrative agency heads are generally appointed and subject to removal by the President. Krent, *supra* note 46, at 72.

181. See Bruff, *supra* note 39, at 499 (stating that in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), "the Court distinguished independent from executive agencies on the basis of a functional difference that does not exist").

tect the administrative state from formal scrutiny, which is almost always fatal.

The Two Tiers in Practice

Although the Court has not explicitly recognized the two-tier approach in separation of powers, its cases have in fact been remarkably consistent with this theory. Essentially, when Congress has tried to expand its own powers beyond those expressly enumerated in the Constitution, its actions have been subjected to formal scrutiny. When Congress has merely delegated away its power to another branch, with no corresponding benefit to itself, the Court has used functional scrutiny, weighing the benefits of the aggrandizement against the potential threat to the other branches' core functions.

A review of the Court's separation-of-powers cases in the context of the two-tier framework will demonstrate that the Court has been implicitly using a two-tier approach all along; it has looked at which branch has been aggrandized in order to select the appropriate tier of scrutiny.

Formalist Cases

The common thread of cases in which the Court has used formalist scrutiny is that they all involved legislative aggrandizement. In three of the cases, Congress sought to aggrandize itself by assuming executive powers. First, in *Myers v. United States*,¹⁸² by requiring Senate consent for the President to dismiss a postmaster,¹⁸³ Congress sought to acquire an active role in removing executive officials. The Court deemed that removing executive officers was an executive power, thus Congress was aggrandizing itself by usurping the executive's power in the absence of express authorization by the Constitution.¹⁸⁴ The Court properly used formalist analysis in striking down the legislative action.

Second, in *Buckley v. Valeo*,¹⁸⁵ Congress sought to give itself the power to appoint members of the Federal Election Commission, an

182. 272 U.S. 52 (1926).

183. *Id.* at 106-07.

184. *Id.* at 161.

185. 424 U.S. 1 (1976).

executive body¹⁸⁶ Because Congress was aggrandizing itself by giving itself the appointment power that the Constitution grants exclusively to the President, the Court applied formalist analysis, striking down the statute.¹⁸⁷

Third, *Bowsher v. Synar*¹⁸⁸ involved a legislative attempt to acquire the power to remove the Comptroller General for good cause.¹⁸⁹ Because the Comptroller General was an executive officer, Congress would be acquiring the ability to remove an executive officer without going through impeachment procedures.¹⁹⁰ Therefore, the Court subjected the statute to formalist analysis and invalidated the Act.¹⁹¹

The Court's other three formalist cases concerned attempts by Congress to exceed the powers expressly granted it by the Constitution. In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,¹⁹² a plurality of the Court struck down a legislative scheme that, inter alia, appointed bankruptcy judges for fixed terms.¹⁹³ Because the Constitution requires life tenure for Article III judges, once the plurality found bankruptcy courts to be Article III courts, formalism was the proper method of analysis; Congress was aggrandizing itself by giving itself a power over federal judges' tenures that was not permitted by the Constitution.¹⁹⁴

*INS v. Chadha*¹⁹⁵ involved an immigration statute containing a legislative veto that would go into effect upon approval by only one House of Congress.¹⁹⁶ Through the legislative veto, Congress was attempting to give itself the power to enact legislation without going through all of the procedures required by the Constitution.¹⁹⁷

186. *Id.* at 140-41.

187. *Id.* at 143.

188. 478 U.S. 714 (1986).

189. *Id.* at 728.

190. "[T]he Constitution explicitly provides for removal of Officers of the United States by Congress only upon impeachment by the House of Representatives and conviction by the Senate." *Id.* at 723.

191. *Id.* at 734.

192. 458 U.S. 50 (1982).

193. *Id.* at 87.

194. *Id.* at 60.

195. 462 U.S. 919 (1983).

196. *Id.* at 923.

197. *Id.* at 951.

Faced with such legislative aggrandizement, the Court correctly used formalist analysis to strike down the statute.

Similarly, in *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*,¹⁹⁸ the Court struck down a legislative veto contained in a congressional delegation of power to a state compact.¹⁹⁹ Although the legislative veto was aimed at state actions (whereas it was tied to executive action in *Chadha*) the Court held that *Chadha*'s rationale still controlled; permitting Congress to use legislative vetoes was tantamount to permitting Congress to enact legislation without following procedures required by the Constitution.²⁰⁰ In the face of such potential aggrandizement of Congress, the Court properly applied formal scrutiny

Functionalism Cases

In the Court's functionalist cases, determining whether Congress is aggrandizing itself is often more difficult. This question frequently turns on whether Congress is assuming a power that it must affirmatively exercise, or whether it is merely limiting another branch's powers. For example, in *Humphrey's Executor v. United States*,²⁰¹ Congress was not seeking an active role in the supervision of an agency official. Unlike in *Myers v. United States*,²⁰² the President needed no affirmative action by Congress to exercise his executive powers. Rather, Congress sought only to qualify the President's executive power by requiring him to have a good reason for removing an agency officer.²⁰³ Congress did not aggrandize itself, because it acquired no new powers as a result of this legislation; thus functionalist analysis was appropriate.²⁰⁴ Because the limitation on the President's removal power did not un-

198. 111 S. Ct. 2298 (1991).

199. *Id.* at 2301.

200. *Id.* at 2312.

201. 295 U.S. 602 (1935).

202. 272 U.S. 52 (1926); see *supra* text accompanying notes 182-84.

203. *Humphrey's Executor*, 295 U.S. at 619.

204. One could argue that "any diminution of the power of the presidency must be deemed *ipso facto* an aggrandizement of the power of 'its primary competitor,' the Congress." Dudley, *supra* note 10, at 268 (quoting *In re Sealed Case*, 838 F.2d 476, 509 (D.C. Cir.), *rev'd sub nom.* Morrison v. Olson, 487 U.S. 654 (1988)). The Court, however, in determining whether legislative aggrandizement exists, has chosen to focus only on whether Con-

duly interfere with his ability to execute the laws, the Court upheld the statute.²⁰⁵

In many ways, *Nixon v. Administrator of General Services*²⁰⁶ paralleled *Humphrey's Executor*. Congress was again seeking to limit the President's executive powers,²⁰⁷ but in so doing was not aggrandizing itself by granting itself powers not explicitly enumerated in the Constitution. The appropriate standard of review therefore was functional scrutiny, and under that standard, the Court upheld the statute, stating that the President's ability to execute the laws had not been fundamentally affected.²⁰⁸

Continuing the functionalist trend, the Court held in *Morrison v. Olson*²⁰⁹ that the Constitution permitted Congress to create an independent prosecutor.²¹⁰ Although Congress limited the executive branch's power to remove the independent prosecutor,²¹¹ Congress had not otherwise aggrandized itself because it did not retain the powers to investigate and prosecute.

Another line of functionalist cases involved the delegation of power by Congress. Because in these cases Congress gained no supraconstitutional powers through its delegation, and the only aggrandized branch was the executive or judiciary, functional scrutiny was appropriate. For example, in *Commodity Futures Trading Commission v. Schor*,²¹² the Court used functional scrutiny to uphold a statute authorizing an administrative agency to adjudicate claims commonly heard by judicial courts.²¹³ Because Congress was delegating adjudicative power to an administrative agency—increasing the powers of the executive branch, but not aggrandizing itself—functional scrutiny was appropriate.

gress has given itself an affirmative role in determining whether there has been legislative aggrandizement. *Id.*

205. *Humphrey's Executor*, 295 U.S. at 631.

206. 433 U.S. 425 (1977).

207. *Id.* at 429.

208. *Id.* at 450.

209. 487 U.S. 654 (1988).

210. *Id.* at 660.

211. *Id.* at 663.

212. 478 U.S. 833 (1986).

213. *See id.* at 857.

Similarly, *Mistretta v. United States*²¹⁴ employed functional scrutiny to examine Congress' delegation of its rulemaking power to a body partially comprised of sitting federal judges.²¹⁵ Because the delegation merely authorized a body other than Congress to make the guidelines, while generating no reciprocal benefit for Congress, functionalist analysis was the appropriate standard of review.

A third type of functionalist case did not involve legislative action at all, but was more concerned with usurpations by the other branches. Although the majority opinion in *Youngstown Sheet & Tube Co. v. Sawyer*²¹⁶ was clearly formalist, Justice Jackson's concurrence,²¹⁷ using a functionalist approach, is of greater importance to the two-tier scheme. Functional scrutiny was appropriate because the executive branch, and not the legislature, was seeking to aggrandize itself. Even under the less strict standard of functionalism, Justice Jackson held that the President's action was unconstitutional because permitting the President to make the very laws he was charged with executing would disrupt one of the legislative branch's core functions.²¹⁸

Justice Jackson's concurrence was also significant because it demonstrated that functional scrutiny is not merely a "rubber stamp" for governmental action. Although functional scrutiny—like rational review in equal protection jurisprudence—is a more forgiving standard of review than formal scrutiny, governmental action will not always be upheld when the Court applies it.²¹⁹

CONCLUSION

The Supreme Court should explicitly adopt a two-tier standard of review for separation-of-powers cases. The Court has implicitly employed this methodology all along, applying formal scrutiny when Congress aggrandized itself and using functional scrutiny when Congress aggrandized another branch of government or when

214. 488 U.S. 361 (1989).

215. *Id.* at 368.

216. 343 U.S. 579 (1952).

217. *Id.* at 634 (Jackson, J., concurring).

218. *See id.* at 637-40.

219. *Cf. City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (using rational review to strike down a statute that discriminated against the mentally retarded).

another branch aggrandized itself. The two-tier standard recognizes that either formalism or functionalism alone is rife with problems. Neither method, used exclusively, can provide the flexibility required by the complexities of modern government and adequately protect the principle of separation of powers. Used together, however, in a principled fashion, formalism and functionalism endow the Court with a useful tool for analyzing separation-of-powers problems.

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