

## A FOURTH WAY? BRINGING POLITICS BACK INTO RECESS APPOINTMENTS (AND THE REST OF THE SEPARATION OF POWERS, TOO)

JOSH CHAFETZ†

Ron Krotoszynski has written a very interesting interpretation and defense of Justice Breyer’s majority opinion in *Noel Canning*.<sup>1</sup> In Krotoszynski’s account, the opinion is a paragon of “pragmatic formalism,”<sup>2</sup> a two-step process that navigates deftly between the Scylla of hidebound formalism and the Charybdis of unmoored functionalism.<sup>3</sup> The pragmatic *formalist*, Krotoszynski explains, begins by applying formalist tools, pulled from the standard textualist toolbox. In some cases, those tools will suffice to get to a determinate answer; if so, the pragmatic formalist is done. But the *pragmatic* formalist also recognizes that, in many situations, formalist tools are

---

Copyright © 2015 Josh Chafetz.

† Professor of Law, Cornell Law School. This Response was originally presented at the 2015 *Duke Law Journal* Administrative Law Symposium, and I am grateful to the Symposium organizers and participants for their comments. Thanks also to Ron Krotoszynski, David Pozen, and Catherine Roach for helpful and thought-provoking comments on earlier drafts. Any remaining errors or infelicities are, of course, my own.

1. Nat’l Labor Relations Bd. v. *Noel Canning*, 134 S. Ct. 2550 (2014).

2. See Ronald J. Krotoszynski, Jr., *Transcending Formalism and Functionalism in Separation-of-Powers Analysis: Reframing the Appointments Power After Noel Canning*, 64 DUKE L.J. 1513, 1533 (2015). Krotoszynski borrows the term from Martin Redish and Elizabeth Cisar. See *id.* at 1547 (citing Martin H. Redish & Elizabeth J. Cisar, “If Angels Were to Govern”: *The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449 (1991)).

3. I leave it to adherents of two schools to argue over whether I have correctly assigned the monster and the whirlpool. Cf. James Gillray, *Britannia Between Scylla & Charybdis* (London, H. Humphrey 1793), available at <http://www.loc.gov/pictures/item/94509857>.

underdeterminate;<sup>4</sup> when one of those situations arises, he then turns to historical gloss<sup>5</sup> and purposivist tools to guide the inquiry.<sup>6</sup> In this way, Krotoszynski suggests, the pragmatic formalist avoids the pitfalls most commonly associated with straightforward formalism and straightforward functionalism:<sup>7</sup> “Strict formalism presupposes that the text invariably offers clear answers, despite the fact that this is not always so. On the other hand, functionalism tends to undervalue the importance of the text when the Constitution *does* offer clear rules of the road.”<sup>8</sup> Pragmatic formalism is, accordingly, that most precious of modern political devices: a “third way.”<sup>9</sup>

### I. A FOURTH WAY: THE MULTIPLICITY-BASED ACCOUNT OF THE SEPARATION OF POWERS

At the risk of perpetuating a pernicious cycle of “way inflation,” I would like to suggest that there is a *fourth* way of viewing the separation of powers, one that brings *politics* more fully into the mix. I advance this understanding, which I have called a “multiplicity-based” account of the separation of powers, in some detail elsewhere;<sup>10</sup> here, I will provide only a brief summary. The label

---

4. On underdeterminacy, see Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 473 (1987) (“The law is *underdeterminate* with respect to a given case if and only if the set of results in the case that can be squared with the legal materials is a nonidentical subset of the set of all imaginable results.”).

5. On historical gloss generally, see Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012). For an application of historical-gloss arguments to recess appointments in particular, see Curtis A. Bradley & Neil S. Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2014 SUP. CT. REV. (forthcoming 2015), available at <http://ssrn.com/abstract=2547962>.

6. See Krotoszynski, *supra* note 2, at 1553–68.

7. “Formalism” and “functionalism” are here (and, I think, in Krotoszynski’s article) used as archetypes, with the clear understanding that there is, of course, significant variation within each camp. See William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL’Y 21, 21–22 (1998) (describing three different ways of characterizing the formalism/functionalism divide).

8. Krotoszynski, *supra* note 2, at 1545.

9. *Id.* at 1515.

10. The fullest discussion appears in JOSH CHAFETZ, CONGRESS’S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS ch. 1–3 (book manuscript under contract with Yale Univ. Press) (on file with author) [hereinafter CHAFETZ, CONGRESS’S CONSTITUTION]. Preliminary discussions have appeared in Josh Chafetz, *Congress’s Constitution*, 160 U. PA. L. REV. 715, 768–78 (2012) [hereinafter Chafetz, *Congress’s Constitution*]; Josh Chafetz, *Multiplicity in Federalism and the Separation of Powers*, 120 YALE L.J. 1084, 1112–28 (2011).

“multiplicity-based” is meant to emphasize the ways in which claims of institutional authority multiply, overlap, and interact in a non-hierarchical constitutional order. This understanding of the separation of powers asserts that political power is largely endogenous to politics—that is to say, that the authority possessed by political actors is neither stable nor determined by something outside of the political process. Rather, political power is, to a large extent, a *consequence* of political behaviors and activities. Those political behaviors and activities take place in a distinctively constitutional register when they are concerned, not with first-order questions of policy, but instead with second-order questions of the distribution of governmental authority. Constitutional politics, in short, is metapolitics. The few relatively specific separation-of-powers provisions in the written Constitution should be understood primarily as providing the tools with which the branches engage in constitutional politics—which is to say, the tools with which they contest with one another in the public sphere for decision-making authority in the context of live political disputes. These disputes are settled locally, as one-offs, in a manner that is acutely sensitive to the surrounding political circumstances. And although these settlements can certainly alter the playing field for future disputes, they do not provide global, binding, or eternal resolutions of large-scale separation-of-powers questions. This means that the distribution of constitutional power is dynamic, not static, and that its dynamism is a function, not of some abstract notion of which branch is best suited to wield some particular power, but rather of the politics of the day.<sup>11</sup>

An example will help to make this more concrete. The Constitution provides that, “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law,”<sup>12</sup> and, of course, Article I, section 7 specifies the procedures for making law, including bicameralism and presentment.<sup>13</sup> If a middle-school civics exam asked how the federal government makes spending decisions, knowledge of those two constitutional provisions would suffice for a good answer. At a somewhat higher level of classroom sophistication, one might begin to talk about the differences between mandatory and discretionary spending, the structures and procedures

---

11. This assertion is fleshed out in significantly more detail in CHAFETZ, CONGRESS’S CONSTITUTION, *supra* note 10, at ch. 1.

12. U.S. CONST. art. I, § 9, cl. 7.

13. U.S. CONST. art. I, § 7.

created by the Budget Acts of 1921 and 1974, and so on.<sup>14</sup> But outside the classroom, such questions do not arise in the abstract; they arise in the context of the concrete politics of the day. To the extent that we are concerned with the actual distribution of decision-making authority, we must go beyond the question “how is the federal budget passed?” and consider the question “who will decide the federal government’s spending priorities for next year?”

Answering that question of course requires an engagement with the constitutional text. If the text gave the president unilateral spending authority, then our inquiry about who sets spending priorities would be almost entirely White-House-focused; conversely, if the text exempted appropriations from the presentment requirement, we would focus much more on Capitol Hill. But the constitutional text is best understood as setting the ground rules, the parameters, within which different actors contest with one another for decision-making authority over the politically relevant question: Who will determine our spending priorities? Answering that question requires going beyond the formalist text, but it does not lead us to functionalist considerations of comparative institutional competence, nor does it suggest that settlements reached in one era ossify into a “historical gloss” that binds future eras. Rather, it requires attentiveness to the surrounding politics—it requires us to look beyond the institutions in Washington and consider the various ways in which they engage with their publics. Thus, one cannot understand why the extremely vague appropriations of the late 1780s and early 1790s (the first appropriations bill divided spending into only four categories<sup>15</sup>) became the far more detailed appropriations bills of the mid-1790s and early 1800s without an awareness of the rise of parties and partisan conflict in that era. Nor can one understand the rise of presidential dominance in budgetary matters, inaugurated with the 1921 Budget Act, without an understanding of the growth of the administrative state and the pressures that put on congressional budgeting. Nor can one understand why and how Congress chose to reassert itself beginning in the 1970s without knowing something about the distrust of the presidency engendered by the Nixon

---

14. See generally STAFF OF S. COMM. ON THE BUDGET, 105TH CONG., THE CONGRESSIONAL BUDGET PROCESS: AN EXPLANATION (Comm. Print 1998); ALLEN SCHICK, THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS (3d ed. 2007); Chafetz, *Congress’s Constitution*, *supra* note 10, at 727–30.

15. See Act of Sept. 29, 1789, ch. 23, 1 Stat. 95, 95.

administration. More recently, one cannot understand budget brinkmanship during the Obama presidency without understanding the terms on which the 2010, 2012, and 2014 elections were fought.<sup>16</sup> These are *constitutional* questions—which is to say, they are questions over the distribution of authority to make decisions of policy—but they are understandable only by reference to political context.

Much as the distribution of budgetary authority varies as a function of the surrounding politics, so too does the distribution of appointments authority. Again, the constitutional text is relatively concise and familiar, with its provisions for the advice-and-consent appointments of all principal and some inferior officers, the ability of Congress to vest “by Law” the appointment of other inferior officers in “the President alone, the Courts of Law, or in the Heads of Departments,” and the creation of a recess-appointments mechanism.<sup>17</sup> A more detailed formalist account would also consider the history of statutory mechanisms like acting appointments and provisions dealing with government employees, as opposed to officers. But once again these formal observations—while necessary to understanding the appointments power—are far from sufficient. They do nothing to help us understand why some presidents, at some moments, have enjoyed a nearly free hand in putting their people in office, while other presidents, at other times, have faced significant congressional pushback. Without understanding the politics of the mid-1830s, it is hard to understand why the Senate twice rejected Andrew Jackson’s nomination of Roger Brooke Taney in 1834–1835 (once as Treasury Secretary and once as a Supreme Court Justice) before confirming him as Chief Justice in 1836. Or consider John Tyler, who, although elected to the Vice Presidency on the Whig ticket, saw a Whig-dominated Senate take much more of the appointments power on itself, rejecting an unprecedented percentage (and, indeed, one not equaled since) of Tyler’s nominees. Without knowing that Tyler was a Whig of convenience, rather than one of principle, that he became President when William Henry Harrison died a month after taking office (thus earning Tyler the derisive nickname “His Accidency”), and that Tyler was, in fact, expelled from the Whig Party mere months after becoming President, one cannot begin to understand why he faced such resistance in the

---

16. All of this budgetary political history, and a great deal more, is lovingly traced in CHAFETZ, *CONGRESS’S CONSTITUTION*, *supra* note 10, at ch. 4.

17. U.S. CONST. art. II, § 2, cl. 2–3.

appointments sphere. Likewise, it would be hard to understand why Eisenhower's nomination of Lewis Strauss as Secretary of Commerce failed in 1959 without knowing that nearly all of the plausible Democratic candidates for president in 1960 were in the Senate.<sup>18</sup> Once again, the distribution of decision-making authority—which is to say, of *constitutional* authority—depends on the political context and the various actors' political moves, as played out on a field that is defined and constrained by constitutional text.

## II. THE MULTIPLICITY-BASED ACCOUNT AND RECESS APPOINTMENTS

Let's return, then, to the topic of Krotoszynski's article: recess appointments and the *Noel Canning* decision.<sup>19</sup> What would a multiplicity-based account emphasize that Krotoszynski does not? First, it would emphasize what actually gave rise to the facts of *Noel Canning*: not a Senate majority that refused to confirm the President's nominees, but rather a Senate minority that was engaged in wholesale obstruction using the filibuster.<sup>20</sup> None of the *Noel Canning* opinions use the word "filibuster," nor does Krotoszynski's article.<sup>21</sup> And yet, the President's unprecedented assertion that he could unilaterally declare the Senate to be in recess can only be understood in light of the fact that it was minority obstruction, rather than majority disagreement, that was preventing these nominees from being confirmed in the first place. It enabled Obama to make a completely different sort of argument in the public sphere: instead of claiming that he, as President, had some sort of "right" to have his nominees confirmed, he could assert that minority obstruction—not even giving nominees an up-or-down vote!<sup>22</sup>—was illegitimate and

---

18. The political history of the appointments power is detailed in CHAFETZ, CONGRESS'S CONSTITUTION, *supra* note 10, at ch. 5.

19. Nat'l Labor Relations Bd. v. Noel Canning, 134 S. Ct. 2550 (2014).

20. See Chafetz, *Congress's Constitution*, *supra* note 10, at 764–66 (noting the use of the filibuster against a number of Obama's nominees and Obama's eventual use of the recess appointments at issue in *Noel Canning* as a response). For evidence of the transformation of the filibuster into a routine supermajority requirement in the years leading up to *Noel Canning*, see Josh Chafetz, *The Unconstitutionality of the Filibuster*, 43 CONN. L. REV. 1003, 1008–11 (2011).

21. Krotoszynski does allude to the filibuster, when he writes that the nominations at issue in *Noel Canning* had been "pending before the Senate for over a year." Krotoszynski, *supra* note 2, at 1531. However, that brief allusion plays no role in his subsequent analysis.

22. See Remarks at Shaker Heights High School in Shaker Heights, Ohio, 2012 DAILY COMP. PRES. DOC. 2–3 (Jan. 4, 2012), available at <http://www.gpo.gov/fdsys/pkg/DCPD-201200003/pdf/DCPD-201200003.pdf> ("For almost half a year, Republicans in the Senate have

therefore justified unprecedentedly aggressive moves on his own part.<sup>23</sup>

By way of contrast, when the Republican *majority* in the House of Representatives balked at raising the debt ceiling in 2011,<sup>24</sup> Obama dismissed out of hand any suggestion that he rely on equally aggressive (or strained) legal arguments to raise the debt ceiling unilaterally. Obama insisted that “that’s not how our democracy works” because “Americans made a decision about divided Government,”<sup>25</sup> and it was not his place to override that decision. Indeed, he made the majoritarian premise explicit: “My challenge, then, is I’ve got to get something passed. I’ve got to get 218 votes in the House of Representatives.”<sup>26</sup> In the appointments context, however, he railed against the notion that he had to get sixty votes. In other words, at nearly the same time, Obama was willing to stretch the boundaries of the recess-appointments power but unwilling to stretch other powers in order to avoid a default on the debt. And the reasons sounded in the surrounding politics, and specifically in the President’s confidence that he could win the public politics of evading minority obstruction, but he could not win the public politics of evading the preferences of a House majority.<sup>27</sup>

Indeed, this political valence of the filibuster became even clearer about a month and a half before *Noel Canning* was argued,

---

blocked Richard [Cordray]’s confirmation. They refused to even give Richard an up-or-down vote . . . . But when Congress refuses to act, and as a result, hurts our economy and puts our people at risk, then I have an obligation as President to do what I can without them. I’ve got an obligation to act on behalf of the American people. And I’m not going to stand by while a minority in the Senate puts party ideology ahead of the people that we were elected to serve.”)

23. See David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 46 (2014) (noting, with reference to recess appointments, that “allegations that another branch has engaged in unprecedented or destructive behavior can almost always be mobilized to support a claim of enhanced discretion”). As Pozen notes, the fact that our legal separation-of-powers discourse tends to be inattentive to political context has “driven a wedge” between the justifications offered to the general public and those offered in “official legal scripts,” which “have effaced the actual motivations and developments that seem to be driving some of [the Obama Administration’s] most controversial behaviors.” *Id.* at 77–78.

24. See, e.g., David A. Fahrenthold, *Some in GOP See Little Crisis in the Debt-Ceiling Crisis*, WASH. POST, July 15, 2011, at A6 (noting House Republican opposition to raising the debt ceiling without significant policy concessions from Democrats).

25. Remarks at a Town Hall Meeting and a Question-and-Answer Session in College Park, Maryland, 2011 DAILY COMP. PRES. DOC. 7 (July 22, 2011), available at <http://www.gpo.gov/fdsys/pkg/DCPD-201100516/pdf/DCPD-201100516.pdf>.

26. *Id.* at 6.

27. See Josh Chafetz, *The Phenomenology of Gridlock*, 88 NOTRE DAME L. REV. 2065, 2082–84 (2013) (discussing the politics of the filibuster in the public sphere).

when the Senate Democratic majority (invoking what supporters call the “constitutional option” and opponents call the “nuclear option”) eliminated the filibuster for all nominees other than those to the Supreme Court.<sup>28</sup> As a result, nominees that the Democratic majority in the Senate wanted to prioritize had been getting confirmed for more than seven months before the Court ruled in *Noel Canning*.<sup>29</sup> By the time Justice Breyer wrote his opinion, any worries about a Senate minority indefinitely holding up appointments across the board had dissipated. One might well wonder whether this newfound ability of the Senate to confirm nominees made it easier for Breyer and some of his colleagues to rule against the administration on recess appointments. In any case, an account of the recent controversies over recess appointments that ignores this essential political context seems to me to be an unnecessarily impoverished one.

Krotoszynski suggests that the Senate’s failure to confirm nominees is inconsistent with the principles underlying the Article II Vesting Clause, the Take Care Clause, and the Opinions Clause.<sup>30</sup> The acontextual nature of this argument suggests that it is equally true regardless of whether that failure results from minority obstruction in the Senate (as it did between 2010 and late 2013) or from a Senate majority’s refusal to confirm nominees (as we may see in the current, 114th Congress). But the politics are radically different, and options that may have been politically feasible for the President under the former scenario are largely foreclosed under the latter.

Bringing politics back into the equation does not simply allow us to better understand what is going on in actual separation-of-powers conflicts; it also allows us to come to more sophisticated normative judgments about those conflicts. In this vein, consider an alternative defense of the result in *Noel Canning*, one that is more attentive to

---

28. See 159 CONG. REC. S8414–28 (daily ed. Nov. 21, 2013); Paul Kane, *Senate Eliminates Filibusters on Most Nominees*, WASH. POST, Nov. 22, 2013, at A1.

29. Anne O’Connell’s fascinating contribution to this Symposium makes it clear that Senate Democrats seem to have prioritized judicial confirmations, with both failure rates and length of time to confirmation dropping for judges after filibuster reform, while time-to-confirmation went up for all other nominations, and failure rates were mixed. Anne Joseph O’Connell, *Shortening Agency and Judicial Vacancies Through Filibuster Reform? An Examination of Confirmation Rates and Delays from 1981 to 2014*, 64 DUKE L.J. 1645, 1676–78 (2015).

30. Krotoszynski, *supra* note 2, at 1522, 1523, 1546, 1549–50.

the surrounding politics.<sup>31</sup> Under the Adjournment Clauses, neither house can adjourn for more than three days without the consent of the other,<sup>32</sup> but, if the houses cannot agree as to the time of adjournment, then the president “may adjourn them to such Time as he shall think proper.”<sup>33</sup> Importantly, a motion to adjourn is non-debatable,<sup>34</sup> which means that it cannot be filibustered. A majority can cause the Senate (or the House) to adjourn at any time, but they can only adjourn for more than three days if they both adjourn together. Under *Noel Canning*, an adjournment of ten days or more qualifies as a recess allowing the president to make recess appointments.<sup>35</sup> Also under *Noel Canning*, the Senate’s determination of whether or not it is in recess is authoritative—it can hold *pro forma* sessions every three days to keep the length of any given recess to less than three days.<sup>36</sup> Now, consider how all of these interlocking formal pieces interact with different political possibilities:

(1) Suppose that a *Senate* majority wants a president to be able to make recess appointments (presumably because minority obstruction prevents the majority from simply confirming nominees). The majority can vote to adjourn for ten or more days. The House would then have two choices: it could consent, in which case the recess would be long enough to justify recess appointments under *Noel Canning*. Or it could refuse consent, in which case there would be disagreement between the houses as to the time of adjournment, and the president could adjourn them to such time as he thinks proper. So long as he thinks it proper to adjourn them for more than ten days, the recess would be long enough to justify recess appointments under *Noel Canning*. In short, President + Senate Majority = Recess Appointments (in those situations in which it does not simply equal confirmation of the nominee).

---

31. Given that no American president has ever exercised his Article II power to adjourn the houses of Congress, this defense of *Noel Canning* may also be an example of the sort of innovation in separation-of-powers arrangements for which Gillian Metzger advocates in her contribution to this Symposium. See Gillian E. Metzger, *Appointments, Innovation, and the Judicial–Political Divide*, 64 DUKE L.J. 1607, 1636–43 (2015).

32. U.S. CONST. art. I, § 5, cl. 4.

33. U.S. CONST. art. II, § 3.

34. STANDING RULES OF THE SENATE, S. DOC. NO. 113-18, at 15 (2013) (R. XXII(1)). This is not a quirk of Senate rules, but rather a widely accepted principle of parliamentary practice. See HENRY M. ROBERT, ROBERT’S RULES OF ORDER REVISED 5 (Morrow Quill Paperbacks 1979) (1915).

35. Nat’l Labor Relations Bd. v. *Noel Canning*, 134 S. Ct. 2550, 2567 (2014).

36. *Id.* at 2573–77.

(2) Suppose that a *House* majority wants a president to be able to make recess appointments (perhaps because the same party controls the House and presidency, while the other party controls the Senate). The House majority can vote to adjourn for ten or more days. The Senate would then have two choices: it could consent, in which case the recess would be long enough to justify recess appointments under *Noel Canning*. Or it could refuse consent, in which case there would be disagreement between the houses as to the time of adjournment, and the president could adjourn them to such time as he thinks proper. So long as he thinks it proper to adjourn them for more than ten days, the recess would be long enough to justify recess appointments under *Noel Canning*. In short, President + House Majority = Recess Appointments.

(3) Suppose that *neither* chamber has a majority that wants the president to be able to make recess appointments. In that case, the chambers can simply work together to ensure that they agree on the timing of adjournments and that they are never adjourned for ten days or more, which means that there will never be a recess giving rise to the opportunity for recess appointments.<sup>37</sup> In short, President alone = No Recess Appointments.

This almost certainly was not what Justice Breyer intended, but notice how nicely politically calibrated it all is. Given the different, but cross-cutting, lifespans and constituencies of each of the three institutions (House, Senate, and presidency), a party that controls at least two of them can be said to be winning the public political battle in an at least somewhat sustained way.<sup>38</sup> Consider that, in the last eighteen elections (1980–2014, inclusive), there have only been either three or four times, depending on how one counts, when more than one of these institutions simultaneously switched partisan control.<sup>39</sup>

---

37. The “never” in that sentence perhaps deserves qualification. As I read it, *Noel Canning* is unclear as to whether the ten-day floor applies to intersession recesses or just intrasession recesses. If it applies to both, then concerted action by the House and Senate really could ensure that a president could never make recess appointments. However, if *any* intersession adjournment (as well as intrasession adjournments lasting ten days or more) allows for recess appointments, then presidents could always take the intersession opportunity to make recess appointments. In this, they would be following the august example of Teddy Roosevelt, who made more than 160 recess appointments in an infinitesimally short intersession recess in 1903. The incident is recounted in *Noel Canning*, 134 S. Ct. at 2563.

38. For an analogous argument about unified government (i.e., all three in the same hands), see Chafetz, *supra* note 27, at 2075–77.

39. In 1980, both the Senate and the presidency flipped from Democratic to Republican control. In 1994, both the House and the Senate flipped from Democratic to Republican

Controlling more than one simultaneously is thus the result either of having several good election cycles in a row or of a true wave election. Either way, it says something about that party's success in engaging with the electorate. And when a party has enjoyed that success and controls at least two of those institutions, it exercises more of the appointments power. If the president's party also controls the Senate, then (post-filibuster-reform) he should be able to get his nominees confirmed, but even if he cannot, he should be able to make recess appointments. If the president's party controls the House but not the Senate, he should be able to make recess appointments. And if the party that controls both the House and the Senate does not control the presidency, then it should be able to prevent any appointments, recess or otherwise, that it wishes to prevent. (This is all, of course, subject to the usual caveats about the imperfect nature of partisan discipline.) A broader democratic mandate for one party translates into that party's exercising a larger share of the appointments power. Assuming that we want elections to matter, this seems to be a normatively attractive way to view the appointments power.

#### CONCLUSION

The multiplicity-based account of the separation of powers thus has both descriptive and normative virtues over straight formalism, straight functionalism, or Krotoszynski's pragmatic formalist hybrid. Descriptively, by focusing on political context, the multiplicity-based

---

control. And in 2006, both the House and the Senate flipped from Republican to Democratic control. The wildcard (of course) is the 2000 election, where the presidency flipped from Democratic to Republican control, *see generally* *Bush v. Gore*, 531 U.S. 98 (2000); the House remained in Republican hands; and the Senate (which had previously been under Republican control) was split 50-50. That meant that, between January 3 and January 20, 2001, Vice President Al Gore cast the tie-breaking vote, and the Senate was in Democratic hands. On January 20, Dick Cheney became Vice President, returning the Senate to Republican control. On May 24, 2001, Senator James Jeffords of Vermont left the Republican Party and began caucusing with the Democrats, returning the chamber to Democratic control, where it remained for the rest of that Congress. Even if one counts the 2000 election as one in which two of the three institutions changed hands, that makes only four out of the last eighteen, or 22.2 percent. For the partisan control of the House, Senate, and presidency at the beginning of each Congress through the 112th, see CQ PRESS, *HOW CONGRESS WORKS* 227–28 (5th ed. 2013). For the results of the 2012 elections, see Karen Tumulty, *With Status Quo Intact, More Gridlock to Come*, WASH. POST, Nov. 7, 2012, at A41. For the results of the 2014 election, see Karen Tumulty, *New Majority Likely to Mean Same Gridlock*, WASH. POST, Nov. 5, 2014, at A1. For the effects of Jeffords's switch, see Emily Langer, *Senator Walked Away from GOP During Final Term*, WASH. POST, Aug. 19, 2014, at B4.

account can help us understand actually occurring separation-of-powers conflicts, not just classroom hypotheticals. Constitutional disputes are always politically situated. If we lose sight of the political context, then we are left with underdeterminate formalist tools, functionalist claims about comparative institutional competence that frequently fail to carry the day, and arguments from historical gloss that cannot by themselves tell us which history is relevant or how. A focus on politics, which of course takes place within a framework shaped by formalist tools and the gloss of past practice, binds these elements together, allowing us to see how actors make use of formal tools, historical precedents, functionalist arguments, and whatever else is to hand in the service of contesting for decision-making authority in the moment.

Normatively, the focus on politics allows our separation-of-powers analysis to keep sight of important values of self-governance.<sup>40</sup> It emphasizes the success or failure of political actors' engagement in the public sphere, which means that the focus is turned outward from governing institutions to focus more on those institutions' engagements with their publics. Whether formalist, functionalist, or pragmatic formalist, a separation-of-powers theory that has nothing to say about engagements with the public—which is to say, one that ignores politics—is a democratically impoverished one.

---

40. The normative dimension of the multiplicity-based conception of the separation of powers is discussed in significantly more detail in CHAFETZ, *CONGRESS'S CONSTITUTION*, *supra* note 10, at ch. 2.