

## Articles

# TRANSCENDING FORMALISM AND FUNCTIONALISM IN SEPARATION-OF- POWERS ANALYSIS: REFRAMING THE APPOINTMENTS POWER AFTER *NOEL CANNING*

RONALD J. KROTOSZYNSKI, JR.†

### ABSTRACT

*Contemporary separation-of-powers theory and practice generally rely on two competing theories—formalism and functionalism—to frame and decide contested questions about the scope of each branch’s constitutional power and authority. In some areas, this dichotomy works reasonably well and possesses significant explanatory force. But the dichotomy’s utility is considerably less obvious in the context of the federal appointments process.*

*The Supreme Court’s recent decision in National Labor Relations Board v. Noel Canning crisply demonstrates the limitations of formalism and functionalism in resolving separation-of-powers questions that equally implicate text, structure, and historical practice. Moreover, Justice Breyer’s Noel Canning opinion deftly transcends the formalism–functionalism dichotomy even while relying on textual, structural, historical, and practical arguments drawn from both modes of separation-of-powers analysis. Noel Canning teaches that constitutional text, by itself, will not always yield clear or reliable answers to difficult separation-of-powers questions. The decision also highlights a serious shortcoming in formalist legal analysis: When the Constitution expressly vests conflicting powers in different branches—as in the context of staffing the executive branch—purely formalist*

---

Copyright © 2015 Ronald J. Krotoszynski, Jr.

† John S. Stone Chair, Director of Faculty Research, and Professor of Law, University of Alabama School of Law. Thanks to the participants and commentators at the *Duke Law Journal’s* 45th Annual Administrative Law Symposium; this Article reflects the considerable benefit of their insights and observations. Thanks also to the University of Alabama Law School Foundation, which supported this project through a generous summer research grant. The usual disclaimer applies: any errors or omissions are the author’s responsibility alone.

*analysis will not suffice. Simply put, the Framers not only separated powers; they also blended them. In many important areas, the constitutional text does not clearly specify where one branch's authority ends and another's begins.*

*A workable account of the federal appointments process requires careful consideration of structure and practice, of original intent and appointments conventions developed over time, and of the conflicting textual imperatives of the Senate's advice-and-consent power and of the unitary executive (understood in light of the President's Article II "take care" duty). In order to develop an effective separation-of-powers jurisprudence, the federal courts must transcend the formalism–functionalism dichotomy in this important area of separation-of-powers theory and practice. More broadly, the shortcomings of the formalism–functionalism dichotomy in the context of appointments suggest the need to rethink the dichotomy more broadly as well.*

#### TABLE OF CONTENTS

Introduction .....	1515
I. The Constitution and the Federal Appointments Power.....	1521
A. The Constitutional Text and Federal Appointments.....	1521
B. Embracing the Second-Best Solution: Using Constitutional Practice to Resolve Conflicts Inherent in the Constitution's Text.....	1526
II. A Brief Overview of <i>Noel Canning</i> and Its Landmark Gloss on the Recess Appointments Clause.....	1530
A. The Factual Background and Lower-Court Holding in <i>Noel Canning</i> .....	1531
B. Justice Breyer's Pragmatic Formalism.....	1533
C. Justice Scalia's Textualism Masquerading as Formalism .....	1538
D. Squaring the Circle: Is <i>Noel Canning</i> a Formalist or Functionalist Decision? .....	1542
III. Considering the Predictable Failures of Both Formalism and Functionalism.....	1545
IV. Historical Practice as a Means of Reframing Separation-of- Powers Analysis.....	1553
A. The Duty To Decide: Why Courts Should Reach the Merits in Interbranch Disputes Between Congress and the President .....	1553

B. Historical Practice as a Potential Tiebreaker for Deciding Difficult Separation-of-Powers Questions.....	1555
C. On the Virtues of Taking the Least Unconstitutional Path .....	1559
Conclusion.....	1568

## INTRODUCTION

Few areas of separation-of-powers theory and practice present more analytical complexities than does the federal appointments process. Myriad reasons exist for this state of affairs, and it is relatively easy to sketch why this area of administrative law does not seem susceptible of an easy or linear analysis. Conflicting textual commands, variable historical practices, and larger policy considerations involving the legitimate prerogatives of both the President and the Senate make applying separation-of-powers doctrine to the federal appointments process a particularly difficult exercise.<sup>1</sup>

The Supreme Court’s landmark decision in *National Labor Relations Board v. Noel Canning*<sup>2</sup> confirms that the federal appointments process resists any easy or obvious separation-of-powers analysis. Although, strictly speaking, *Noel Canning* involves only the recess-appointments power rather than the appointments process more generally,<sup>3</sup> Justice Breyer’s majority opinion<sup>4</sup> offers a

---

1. For a thoughtful and comprehensive discussion of the potential importance of relying on consistent historical practice over time to inform separation-of-powers analysis, see generally Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012).

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

3. See *id.* at 2556–57, 2576–77.

4. Nominally, *Noel Canning* was a unanimous decision: all nine members of the Supreme Court voted to uphold the U.S. Court of Appeals for the D.C. Circuit’s holding that President Obama could not use the recess-appointments power to make the contested appointments to the National Labor Relations Board (NLRB). See *id.* at 2556–57 (opining that the Senate was in session at the time of the contested recess appointments, and holding that “the President lacked the power to make the recess appointments here at issue”); *id.* at 2592 (Scalia, J., concurring) (rejecting Justice Breyer’s reasoning in support of the outcome because it “transforms the recess-appointment power from a tool carefully designed to fill a narrow and specific need into a weapon to be wielded by future Presidents against future Senates,” and explaining that he, along with Chief Justice Roberts and Justices Thomas and Alito, “concur[red] in the judgment only”). Justice Scalia read the Recess Appointments Clause far more narrowly than the majority; he would permit its use only to make intersession appointments for offices that became vacant while the Senate was in an intersession recess. See *id.* at 2592–93. Accordingly, *Noel Canning* actually reflects a narrow 5–4 division of the Justices on the substantive issues before the Court. Because Justice Scalia rejected virtually *all* of Justice Breyer’s specific

novel “third way” of navigating separation-of-powers questions when conflicting specific constitutional mandates make it impossible to advance one constitutional imperative without, at the same time, doing violence to another.<sup>5</sup> The opinion relies on a pragmatic formalist methodology, and thus gives significant attention to the Constitution’s text, but it also relies on practice, history, and purpose to ascertain the scope and meaning of the Recess Appointments Clause.<sup>6</sup>

*Noel Canning* provides an important window into the salience and viability of formalism and functionalism as analytical tools in the specific context of the appointments process. Consideration of *Noel Canning* will also demonstrate the shortcomings of formalism and functionalism more generally.<sup>7</sup>

This Article explores the failure of traditional formalism and functionalism<sup>8</sup> in the specific context of the federal appointments process. It argues that sensible results—results that give meaning and effect to *all* the structural and substantive provisions of the Constitution—can be achieved only if reviewing courts blend concerns and methodologies associated with *both* schools of thought. This is so because, in the context of appointments, the Constitution creates competing—and potentially conflicting—mandates. It

---

reasoning in support of the Court’s ultimate conclusion, and because he and the other “concurring” members of the Court would impose significantly more-stringent limits on the President’s use of the recess-appointments power going forward, in this Article I will refer to Justice Breyer’s opinion as the “majority” opinion and to Justice Scalia’s nominally concurring opinion as the “dissent” or “dissenting opinion.”

5. See John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1944–48 (2011). Professor Manning persuasively argues that reviewing courts should consider the Constitution’s level of generality when applying separation-of-powers doctrine. “Where the Constitution is specific,” he argues, “the Court should not permit Congress to adopt a contrary approach under the more general authority it possesses under the Necessary and Proper Clause.” *Id.* at 1947–48. On the other hand, “where no specific clause speaks directly to the question at issue, interpreters must respect the document’s indeterminacy.” *Id.* at 1948; see *infra* notes 158–60 and accompanying text. *But cf.* Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CALIF. L. REV. 853, 857–58 (1990) (arguing that the nonspecific Vesting Clauses effect “a complete division of otherwise unallocated federal governmental authority” and that “[a]ny exercise of governmental power” must fall within the formal categories of legislative, executive, and judicial duties).

6. See *Noel Canning*, 134 S. Ct. at 2578 (observing that “as in all cases, we interpret the Constitution in light of its text, purposes, and ‘our whole experience’ as a Nation”); see also *infra* notes 82–117 and accompanying text.

7. See *infra* notes 148–85 and accompanying text.

8. For a discussion of formalism and functionalism and the importance of this dichotomy to separation-of-powers jurisprudence, see *infra* notes 52–65 and accompanying text.

requires Senate confirmation for the President's appointees to principal offices within the executive branch,<sup>9</sup> but it also requires the President to ensure the implementation and execution of federal law.<sup>10</sup> In these circumstances, formalist textualism will not provide plausible answers because the Constitution's text points in different directions.<sup>11</sup>

The Framers embraced a system of checks and balances as much, if not more, than a system of strictly separated powers. Moreover, the Framers designed a system for federal appointments that presents a serious risk of failure during periods when one party controls the Senate and a different party controls the White House.<sup>12</sup> In this specific context, the Framers did not *separate* powers, but instead *blended* them.<sup>13</sup> Nor is this unique to appointments; in multiple instances, the Framers allocated a power or responsibility to one branch that overlaps—or even conflicts—with powers and responsibilities vested in another.<sup>14</sup>

---

9. U.S. CONST. art. II, § 2, cl. 2.

10. U.S. CONST. art. II, § 3.

11. See *infra* notes 145–65 and accompanying text.

12. See Manning, *supra* note 5, at 1983 (observing that “Article II carefully divides the traditionally executive power of appointment between the President and Congress”). One could posit, of course, that the Framers did not anticipate the emergence of political parties and partisan contests for Senate seats and the presidency. See generally Joshua D. Hawley, *The Transformative Twelfth Amendment*, 55 WM. & MARY L. REV. 1501 (2014) (arguing that the Electoral College and the method of selecting the President and Vice President in the original Constitution presumed that these would be nonpartisan offices). Even so, if a serious disagreement regarding policy arose between the President and a majority of the Senate, the Framers must have recognized that the Senate would hold the trump card—even if they anticipated that the Senate would vote on all presidential nominees, they surely also anticipated that some nominees might fail to receive the Senate's approval. Thus, it is telling that the Framers did not provide the President with any alternative means of staffing principal offices within the executive branch.

13. This blending of powers seeks to achieve a “balance” rather than a “separation” of powers and functions; it reflects and incorporates the British constitutional tradition, which generally eschews separating powers in favor of balancing them. See Michael Skold, Note, *The Reform Act's Supreme Court: A Missed Opportunity for Judicial Review in the United Kingdom?*, 39 CONN. L. REV. 2149, 2154 (2007); see also A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 3, 21–23, 88–89 (1885) (discussing the centrality of the doctrine of parliamentary supremacy and its relationship to the concept of a balance, rather than a separation, of powers).

14. The war powers offer an instructive example. Article II provides that “[t]he President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.” U.S. CONST. art. II, § 2, cl. 1. Article I, however, states that Congress holds the power “[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water” and to create and regulate the armed forces of the United States. U.S. CONST. art. I, § 8, cls. 11–14.

Moreover, the Framers used this technique to create contested zones of authority between the President and Congress without offering *any* textual guidance on how to resolve the inevitable conflicts that would arise from these overlapping powers.<sup>15</sup> Indeed, strictly speaking, the Constitution does not even address the issue of *who* will resolve these questions in the event of an impasse between the President and Congress.<sup>16</sup> A workable approach to enforcing the

---

In this context, as with appointments, the Framers intentionally blended, rather than separated, the war powers. The Constitution simply does not provide a clear answer as to when the Commander-in-Chief's power ends and Congress's authority over declaring war and establishing the armed forces of the United States begins. For an instructive discussion, see LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 249–72 (2007). Accordingly, the constitutional boundaries of these powers remain highly contested. *See, e.g.*, The War Powers Resolution, 50 U.S.C. §§ 1541–1548 (2012). The relevant legal scholarship also reflects the deep-seated nature of this dispute; some legal scholars argue that congressional authorization must be obtained before the President undertakes action that otherwise constitutes an act of war, whereas others argue with equal fervor that the President enjoys substantial authority to undertake military action without first seeking and obtaining permission from Congress. *Compare* JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 3–5, 8–10 (1993) (advancing the congressionalist position, which posits Congress must authorize all offensive military operations), *with* JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11, at 5–11, 99–100 (2005) (advancing the presidentialist position, which posits that the President has inherent authority as Commander-in-Chief to initiate offensive military operations). Thus, in most cases presenting war-powers questions, a federal judge cannot rely solely on the Constitution's text, but must instead integrate text, history, practice, and conventions in order to fashion a persuasive opinion. In other words, only a blended approach will yield useful answers. *See* Manning, *supra* note 5, at 1972 (“New thinking about the legitimacy of strongly purposive reasoning reveals difficulties with the approach that underlies both strands of modern separation of powers doctrine.”); *see also* M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1138 (2000) (observing, in the context of separation-of-powers doctrine more generally, that “neither of the dominant approaches provides a consistent account of the methodology applied or the outcome of the cases”).

15. DAVID BRIAN ROBERTSON, THE ORIGINAL COMPROMISE: WHAT THE CONSTITUTION'S FRAMERS WERE REALLY THINKING 233–36 (2013).

16. Of course, the obvious answer is that the federal courts must resolve such disputes; this approach also clearly comports with the intention of the Framers. In *Federalist No. 78*, Alexander Hamilton writes that “where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former.” THE FEDERALIST NO. 78, at 468 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Thus, “whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.” *Id.* Given that the proponents of the Constitution clearly stated before ratification that the federal courts would enjoy the power of judicial review, it seems obvious that the federal judiciary must shoulder the unhappy task of serving as a referee in disputes between the President and Congress regarding the metes and bounds of their respective powers. *See* *Goldwater v. Carter*, 444 U.S. 996, 996, 1001 (1979) (Powell, J., concurring) (arguing that “the Judicial Branch should not decide issues affecting the allocation of power between the President

separation-of-powers doctrine must address the problems associated with blended, rather than separated, powers and responsibilities; *Noel Canning* could provide a sound roadmap to achieving this goal.

This Article proceeds in four parts. Part I sketches how the Constitution's text creates conflicting spheres of authority. It considers whether the federal courts are best positioned to resolve these conflicts; arguably conflicts of this sort might best be characterized as "political questions" and left to the President and Congress to sort out on their own.<sup>17</sup> This Part also discusses and critiques the two dominant approaches to framing and enforcing separation-of-powers doctrine—formalism and functionalism.<sup>18</sup>

Part II provides an overview of the Supreme Court's landmark decision in *Noel Canning*, with particular attention paid to the differences in interpretative methodology reflected in Justice Breyer's majority opinion and Justice Scalia's nominally concurring opinion. Part III then considers the failings of formalism in the context of disputes arising between the President and Congress in areas where the Constitution provides potentially conflicting textual mandates (as is the case with respect to the federal appointments process); it also examines the failings of functionalism where the Constitution's text provides clear rules of the road.<sup>19</sup> Parts II and III posit that an effective approach to framing the appointments process requires careful attention to both the Senate's constitutional role in the appointments process and to the Framers' conscious decision to create a unitary executive headed by a single national officer, the President.<sup>20</sup>

---

and Congress until the political branches reach a constitutional impasse," but also positing that "[t]he specter of the Federal Government brought to a halt because of the mutual intransigence of the President and Congress would require this Court to provide a resolution" after the political branches reach an impasse).

17. See Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 2–6, 17–19 (2013) (arguing that the federal courts should not resolve disputes between Congress and the President involving the President's power to remove principal and inferior officers serving in the executive branch); see also *Goldwater*, 444 U.S. at 996–1001 (Powell, J., concurring) (discussing the circumstances in which the federal courts should abstain from deciding disputes between the President and Congress and the circumstances in which the federal courts have a duty to serve as a referee between the political branches).

18. See *infra* notes 52–65 and accompanying text.

19. Manning, *supra* note 5, at 1950–62 (discussing and describing formalism and functionalism, but suggesting that a textual approach that considers the specificity or generality of constitutional text would greatly improve the resolution of separation-of-powers questions).

20. See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 596–97 (1984) [hereinafter Strauss, *The Place of*

Part IV argues that the federal courts should use historical practice as a means of resolving otherwise irreconcilable constitutional assignments of responsibility. To be clear, I do not claim that historical practice, as a normative matter, constitutes the only, or even the best, potential tiebreaker. But when the Constitution itself does not provide clear answers to difficult separation-of-powers questions or, worse still, yields conflicting rules, a principled decision rooted in historical practice, convention, and policy presents the best way forward.<sup>21</sup>

To the extent that judicial legitimacy rests on both the perception and underlying reality that federal judges make decisions based on rules derived from the Constitution itself, as opposed to their personal policy preferences,<sup>22</sup> using historical practice to resolve separation-of-powers questions in areas where the Framers blended, rather than separated, constitutional responsibilities makes a great deal of sense. Accordingly, in the absence of a clear textual mandate that disallows a constitutional convention,<sup>23</sup> the federal courts should rely on these conventions when engaging in separation-of-powers analysis; moreover, adoption of historical practice as a tiebreaker in cases involving conflicting responsibilities should be deployed not

---

*Agencies in Government*] (arguing that the Constitution's structural design clearly anticipates that the President will enjoy responsibility for the implementation of federal law, including major administrative programs, and positing that "[w]hatever arrangements are made, one must be able to characterize the President as the unitary, politically accountable head of all law-administration, sufficiently potent in his own relationships with those who actually perform it to serve as an effective counter to a feared Congress"); see also Peter L. Strauss, *Foreword: Overseer, or the "Decider"?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 696 (2007) [hereinafter Strauss, *Overseer*] ("All will agree that the Constitution creates a unitary chief executive officer, the President, at the head of the government Congress defines to do the work its statutes detail.").

21. See Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1165–68, 1181–88 (2013).

22. See ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 32 (1962). Of course, it bears noting that Professor Bickel once observed that "[t]he Court exists in the Lincolnian tension between principle and expediency." Alexander M. Bickel, *The Supreme Court 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 50 (1961).

23. The legislative veto provides an example of a circumstance in which the Constitution's text provided a clear rule and no conflicting substantive or structural rule existed. See *INS v. Chadha*, 462 U.S. 919, 944–59 (1983); see also Manning, *supra* note 5, at 1955–58 (discussing *Chadha* and rejecting Justice White's functionalist analysis as failing to give sufficient weight to the express textual commands of Article I, Section 7, Clause 2 with respect to the enactment of a bill into law). In such cases, the federal courts should not resort to past practice to validate an otherwise ultra vires action. See *infra* notes 209–31 and accompanying text.

only in cases involving the federal appointments process, but more generally as well.

## I. THE CONSTITUTION AND THE FEDERAL APPOINTMENTS POWER

This Part begins by examining in some detail the Constitution's text regarding the federal appointments process. It then considers how the federal courts should go about resolving the constitutional conflicts that are inherent in the text of the Constitution itself. In circumstances in which the Framers created potentially conflicting textual commands, reviewing courts must embrace second-best solutions—solutions premised on extratextual means of analysis. More specifically, a reviewing court should place significant reliance on constitutional conventions and practice over time in order to resolve such constitutional conflicts.

### A. *The Constitutional Text and Federal Appointments*

The Framers intentionally designed the federal appointments process as a shared power held jointly by the President and the Senate.<sup>24</sup> Although the President alone enjoys the sole power to nominate principal and inferior executive officers, as well as Article III judges,<sup>25</sup> the Framers conditioned this power of appointment on the Senate's giving its advice and consent to the President's nominations.<sup>26</sup> Moreover, the Senate's constitutional power of advice and consent does not force the Senate to vote on all presidential nominations subject to the Appointments Clause—or even to

---

24. See U.S. CONST. art. II, § 2, cl. 2; see also Jonathan Turley, *Recess Appointments in the Age of Regulation*, 93 B.U. L. REV. 1523, 1533–37 (2013) (discussing in some detail the debates surrounding appointments at the Federal Convention and the Framers' decision to vest appointments on a shared basis between the President and the Senate). Professor Jonathan Turley persuasively argues that the “apportionment between the executive and legislative branches was the dominant feature of the Framers’ [sic] design: the shared power that would encourage compromise and coordination between the branches.” *Id.* at 1532–33.

25. See U.S. CONST. art. II, § 2, cl. 2.

26. Jonathan Turley, *Constitutional Adverse Possession: Recess Appointments and the Role of Historical Practice in Constitutional Interpretation*, 2013 WIS. L. REV. 965, 973 (describing the Framers' decision to vest appointments jointly in the President and the Senate, and arguing that this process provides “a critical check and balance provision that the two branches must agree on who should sit on federal courts and in federal offices”).

consider them on the merits.<sup>27</sup> Thus, the Framers blended responsibility for federal appointments, but failed to specify what would happen if the political branches became polarized, such that the Senate simply refused to consider the President's nominations on a timely basis.

Accordingly, the federal appointments process provides a poster-child example of the problem of blended, rather than clearly separated, powers. The Constitution explicitly vests the Senate with a veto power over presidential appointments to senior executive-branch posts and Article III federal judgeships;<sup>28</sup> at the same time, however, the Constitution also requires the President to ensure the enforcement of federal laws.<sup>29</sup> When the Senate refuses to confirm presidential nominees, invoking its power under the Appointments Clause, its action substantially burdens the President's ability to discharge his responsibilities arising under the Take Care Clause.<sup>30</sup> The Opinions Clause<sup>31</sup> and the structural decision to create a unitary

---

27. Other provisions of the Constitution, however, include time deadlines for action with default rules that apply after a specified time for action has expired. *See infra* notes 34–39 and accompanying text (discussing the so-called “pocket veto” provision of the Constitution).

28. U.S. CONST. art. II, § 2, cl. 2.

29. *See* U.S. CONST. art. II, § 3 (providing that the President “shall take Care that the Laws be faithfully executed”); U.S. CONST. art. II, § 1 (providing that the federal executive power “shall be vested in a President of the United States of America”); *see also* Ronald J. Krotoszynski, Jr., *Cooperative Federalism, The New Formalism, and the Separation of Powers Revisited: Free Enterprise Fund and the Problem of Presidential Oversight of State-Government Officers Enforcing Federal Law*, 61 DUKE L.J. 1599, 1625–29, 1640–45 (2012) (discussing the Constitution's deliberate creation of a unitary executive and the consequences that must follow from this design regarding the President's ability to oversee and control the enforcement of federal law).

30. *See* John C. Roberts, *The Struggle over Executive Appointments*, 2014 UTAH L. REV. 725, 727 (arguing “that the long-term struggle between the President and the Senate over executive appointments has now reached a crisis and that we may be approaching a point where the President's crucial duty to take care that the laws be faithfully executed is significantly impaired”); *id.* at 750 (proposing that “specific steps . . . be taken to restore the proper balance between the President's prerogative to staff his administration and take care that the laws are faithfully executed and the Senate's rightful advice and consent role”).

31. *See* U.S. CONST. art. II, § 2, cl. 1 (providing that the President “may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices”). It would be nonsensical to grant the President the right to demand opinions in writing from nonexistent subordinate officers. Although this fact does not mean that the Senate has a duty to vote on presidential nominations, it suggests that the Framers believed that Congress would create subordinate executive offices and that the Senate would agree to give its consent to presidential appointees to staff them.

executive headed by the President<sup>32</sup> also demonstrate that the Constitution incorporates a strong assumption that the President will enjoy the assistance of loyal and reasonably responsive subordinate officers within the executive branch.<sup>33</sup>

The Framers obviously understood that inaction could lead to gridlock. In other contexts, however, the Constitution contains provisions that include default rules meant to check inaction by one branch at the expense of another. The “pocket veto” provision of Article I, Section 7, Clause 2, provides an illustrative example.<sup>34</sup> The President could, in theory, exercise a de facto veto by neither signing nor vetoing a particular bill—in the absence of a default rule, the President could simply toss the bill in a desk drawer and embark on an extended period of rumination about its merits and shortcomings. The Framers, however, anticipated this problem and provided a default rule that forces presidential action: if the President fails to sign or veto a bill within ten days—“Sundays excepted”<sup>35</sup>—it will become a law without his signature.<sup>36</sup> But if Congress has adjourned, making it impossible to return a vetoed bill, “it shall not be a Law.”<sup>37</sup>

---

32. See THE FEDERALIST NO. 70, *supra* note 16, at 424 (Alexander Hamilton) (arguing that “[t]hose politicians and statesmen who have been the most celebrated for the soundness of their principles and for the justice of their views, have declared in favor of a single Executive,” and observing that “[t]hey have with great propriety, considered energy as the most necessary qualification (of the former) and have regarded this as most applicable to power in a single hand”); see also Strauss, *The Place of Agencies in Government*, *supra* note 20, at 596–97, 649–50, 660–64, 668–69 (arguing that the Constitution’s text and structure create a unitary executive and also mandate sufficient presidential control to ensure that that President is meaningfully accountable for all actions of the executive branch).

33. See Manning, *supra* note 5, at 2036 (“Since well-settled rules of implication suggest that the imposition of a duty implicitly connotes a grant of power minimally sufficient to see that duty fulfilled, the Take Care Clause seems straightforwardly to call for the recognition of sufficient ‘executive power’ to allow the President to remove subordinates who, in his or her view, are not faithfully implementing governing law.”).

34. One good way to ascertain constitutional meaning is to read various clauses in tandem, rather than in isolation; this “intratextualist” approach helps to resolve ambiguities by considering them in light of how the Framers approached similar problems in other contexts. See Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 747–49 (1999).

35. See Jaynie Randall, *Sundays Excepted*, 59 ALA. L. REV. 507, 512 (2008) (discussing the Framers’ careful calibration of the President’s temporal window for considering bills that passed both houses of Congress).

36. Jaynie Randall explains that “the ten-day period reflects the Framer’s [*sic*] conception of a deliberative President, one who relied on advisors and collaborated with Congress in wielding his negative.” *Id.* at 510. The ten-day period, Sundays excepted, exceeded the period provided in contemporary state constitutions that vested the governor with a veto power. See *id.* at 510 n.16.

37. U.S. CONST. art. I, § 7, cl. 1.

Thus, Article I, Section 7, prevents the President from exercising a de facto veto through interminable delay. The Appointments Clause,<sup>38</sup> however, contains no comparable default rule requiring the Senate to act on presidential nominations; accordingly, the Senate is free to reject presidential nominations through inaction.<sup>39</sup>

The Framers did provide a bypass provision for appointments subject to the Senate's approval, but unlike the default rule governing presidential inaction on a bill, that provision does not provide a default rule declaring that inaction by the Senate constitutes consent to an appointment.<sup>40</sup> The Recess Appointments Clause instead permits the President to make time-limited appointments *without* the Senate's consent.<sup>41</sup> The President may make such appointments only "during the Recess of the Senate," and these appointments expire automatically at the end of the Senate's next session.<sup>42</sup> Thus, the Recess Appointments Clause, as written, constitutes an imperfect mechanism for bypassing an intransigent Senate's refusal to consider a presidential nomination.

Given the specificity of the Presentment Clause, however, in setting fixed time limits for presidential action on a bill that both houses of Congress have passed—and the corresponding lack of any temporal limits on the Senate's consideration of presidential nominations that require the Senate's approval in the Appointments Clause—one must conclude that the Framers intended to give the Senate an unreviewable veto power over presidential nominations through the expedient of simply not voting on a pending nomination.<sup>43</sup> This intuitive judgment, premised on the Constitution's

---

38. U.S. CONST. art. II, § 2, cl. 2.

39. *But cf.* Matthew C. Stephenson, *Can the President Appoint Principal Executive Officers Without a Senate Confirmation Vote?*, 122 YALE L.J. 940, 946–49, 952–57 (2013) (arguing that the President may deem the Senate to have approved senior principal executive-branch nominations if the Senate fails to vote on such nominations on a timely basis).

40. *Cf. id.* at 946, 950–58 (observing that the Appointments Clause does not explicitly state that the President may not unilaterally deem Senate inaction a form of implied consent, and proposing that Senate inaction should constitute implied or de facto consent to presidential nominations of senior principal officers).

41. *See* U.S. CONST. art. II, § 2, cl. 3 ("The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.").

42. *Id.*

43. *But cf.* Roberts, *supra* note 30, at 725–28, 745, 750 (arguing that the federal courts should permit the President to use the Recess Appointments Clause to fill vacancies in the executive branch even when the Senate holds regular pro forma sessions). Professor Roberts objects that "if the Supreme Court were also to uphold the validity of the Senate's pro forma

text, finds further confirmation in consistent practice over time: simply put, in over 225 years, no President has claimed that the Senate's failure to vote on a particular nomination within a time certain constituted a form of de facto consent to the appointment.

Nor, in the over 225 intervening years, has the Constitution been amended to provide the President with broader authority to bypass an intransigent Senate; if such a power were necessary to ensure the smooth functioning of the executive branch, it seems likely that an appropriate amendment would have been drafted, debated, and enacted.<sup>44</sup> In fact, the Twenty-Fifth Amendment—a relatively recent amendment to the Constitution ratified in 1967—provides for a maximum twenty-one-day period during which the Vice President, with the support of a majority of the principal officers within the executive branch, may act as President over the President's objection. If Congress fails to decide the issue within twenty-one days after being notified of the President's alleged incapacity, the President is restored to office automatically.<sup>45</sup> Thus, the Twenty-Fifth Amendment provides clear default rules that require joint action by the Vice President, the cabinet, and Congress to remove a sitting President other than by impeachment.

In sum, the Constitution and subsequent amendments provide for default rules in some cases, but not in others; impasses over presidential appointments fall into the latter category, not the former. That the Constitution does not require Senate action on presidential

---

session in blocking the President's appointment power . . . the recess appointments power could be extinguished altogether." *Id.* at 745. Of course, the Supreme Court has done just that—and the Senate does now enjoy the ability to block recess appointments by making itself constantly available to receive and consider nominations. *See Nat'l Labor Relations Bd. v. Noel Canning*, 134 S. Ct. 2550, 2555 (2014) (holding that "[f]or purposes of the Recess Appointments Clause, the Senate is in session when it says that it is, provided that, under its own rules, it retains the capacity to transact Senate business"); *see also id.* at 2573–77 (holding that the federal courts should defer to the Senate's own determination of when it is in session, and hence available to receive and consider nominations, unless the Senate cannot undertake these duties despite being nominally in session).

44. *Cf.* U.S. CONST. amend. XXV (providing for presidential succession on the death of the President, for appointment of a new Vice President with the advice and consent of both houses of Congress, and for the involuntary removal of the President under certain conditions).

45. U.S. CONST. amend. XXV, § 4. The Twenty-Fifth Amendment is a very odd constitutional duck. Section Four essentially provides a means of staging a constitutionally sanctioned coup d'état—provided that the Vice President can secure the support of a majority of the principal officers within the executive branch and two-thirds majorities of both houses of Congress. *See id.* The Amendment actually permits the Vice President to seize power for up to twenty-one days with the concurrence of a majority of the principal officers within the executive branch and without any action by Congress. *Id.*

nominations—much less action within a fixed time period—indicates that the Senate does not have a constitutional duty to act on such nominations.

But this is not the end of the matter. Article II plainly presupposes that the President will enjoy the assistance of subordinates in “tak[ing] Care that the Laws be faithfully executed”<sup>46</sup>—subordinates from whom he can demand “Opinion[s], in writing.”<sup>47</sup> In addition, specific powers delegated to the President cannot all be personally discharged by him, notably including control over foreign affairs and the military forces of the United States.

The Framers, in blending responsibility for federal appointments, created the possibility of a constitutional impasse between the President and the Senate without providing a rule of decision for resolving such impasses. No amount of close reading of the Constitution’s text will resolve this problem; for constitutional conflicts of this sort, to advance one set of priorities is to do violence to another.

*B. Embracing the Second-Best Solution: Using Constitutional Practice to Resolve Conflicts Inherent in the Constitution’s Text*

As Professor Akhil Amar has astutely observed, “Good interpreters need to know when and how to read between the lines.”<sup>48</sup> Reading between the lines, however, will not resolve the problem of overlapping constitutional responsibilities vested in different branches. This Section argues that, when faced with conflicting textual commands, a reviewing court must accept that only second-best solutions exist for resolving the conflict—the first and best (if elusive) solution being a clearly dictated textual resolution within the four corners of the Constitution itself.<sup>49</sup> With respect to the inherent structural conflict that the Framers created in the context of the federal appointments process, considering how the President and Congress have actually operationalized the appointments process over time arguably constitutes the most promising second-best

---

46. U.S. CONST. art. II, § 3.

47. U.S. CONST. art. II, § 2, cl. 1.

48. Amar, *supra* note 34, at 827.

49. See Bradley & Morrison, *supra* note 1, at 431 (“One need not be committed to a rigorous program of textualist originalism to agree that if the constitutional text clearly and straightforwardly answers a particular question, the burden of proof required to credit any argument for departing from that answer will—and should—be very heavy.”).

solution. The other alternatives, such as an open-ended cost-benefit analysis of the President's need for a particular appointee versus the imperative of honoring the Senate's role in the appointments process,<sup>50</sup> seem far worse.

Because the Constitution itself does not provide a bypass mechanism for presidential appointments,<sup>51</sup> it is inevitable that disputes will arise between the President and the Senate over the Senate's failure to consider and approve presidential nominees. The question then becomes: What kinds of self-help might the President be able to deploy? And what constitutional predicate—if any—could the President assert in support of such unilateral action?

At this point, one's general attitude toward the proper framing metrics for resolving separation-of-powers questions becomes acutely important. Two general approaches exist and find support in both the *U.S. Reports* and in major law reviews: formalism and functionalism.<sup>52</sup>

Formalism generally relies on the Constitution's allocation of particular powers and duties to create mandatory lines of demarcation that federal courts must strictly enforce: neither the reallocation of a power from one branch to another (aggrandizement), nor efforts to deny a power given to a particular branch without reallocating it (encroachment), should be tolerated.<sup>53</sup> Formalism relies on a kind of textualist analysis and places great

---

50. See Stephenson, *supra* note 39, at 946–58. For example, Professor Matthew Stephenson would limit his proposal for finding “tacit consent,” *id.* at 973, to appointments to senior principal offices, those which are “indispensable [*sic*] to carrying out the core programs and missions of the executive branch,” *id.* at 974, and enjoy significant policymaking authority; significantly, he would not permit the use of a legal fiction to appoint federal judges for “principally pragmatic” reasons, *id.* For further explanation of his proposal, see *id.* at 946, 973–78.

51. See *supra* notes 40–43 and accompanying text.

52. See M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 608–09 (2001) (distinguishing between formalism and functionalism in the separation-of-powers context); Magill, *supra* note 14, at 1136–48 (same). For a general discussion of formalism and functionalism as competing theories for framing and deciding contested separation-of-powers questions, see Krotoszynski, *supra* note 29, at 1611–15.

53. Linda D. Jellum, “Which Is To Be Master,” *the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 870–79 (2009) (discussing the salience of the concepts of encroachment and aggrandizement to both formalist and functionalist separation-of-powers analysis); Magill, *supra* note 52, at 626–33 (same); Manning, *supra* note 5, at 1944, 2021–22 (discussing formalism and the concept of interbranch encroachment). Dean Magill notes that “[t]he Supreme Court has frequently observed that the structural provisions of the Constitution are intended to prevent encroachment or aggrandizement of one branch at the expense of another.” Magill, *supra* note 52, at 627 n.66.

structural weight on the Vesting Clauses of Articles I, II, and III.<sup>54</sup> In consequence, formalism tends to prioritize close textual readings of the Constitution over constitutional conventions developed through consistent practice over time.<sup>55</sup> Moreover, strong formalists would permit recourse to historical practice only as a means of ascertaining the “original intent” of the Framers, and not as a means of supplementing or displacing that intent.<sup>56</sup>

Functionalists, in contrast, tend to generalize the underlying purposes of specific constitutional assignments of powers to particular branches<sup>57</sup> and then balance such textual commitments with a larger, and more pressing, commitment to creating an effective and efficient federal government.<sup>58</sup> As Professor John Manning describes this approach, “functionalists view the Constitution as emphasizing the balance, and not the separation, of powers.”<sup>59</sup> Dean Elizabeth Magill notes that the goal of functionalist analysis is “to achieve an appropriate balance of power among the three spheres of government.”<sup>60</sup>

---

54. Jellum, *supra* note 53, at 854, 861; see Lawson, *supra* note 5, at 859 (noting that “formalism is inextricably tied to both textualism and originalism”).

55. See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 YALE L.J. 541, 550–54 (1994). As Calabresi and Prakash state the proposition, “First and foremost, in interpreting text, commonsensically enough, one ought to begin with the text.” *Id.* at 550. Moreover, “One should have recourse to history only where one could assert plausibly that an ambiguity exists.” *Id.* But in setting forth a hierarchy of interpretive resources, history and consistent practice appear at the very end of a four-point list because “[s]uch history is the least reliable source for recovering the original meaning of the law, but may in some instances help us recover the original understanding of an otherwise unfathomable and obscure text.” *Id.* at 553. The problem, of course, is that ascertaining meaning through recourse to legislative history is a notoriously difficult task—in many cases, even the proponents of a particular rule understood the rule differently. Moreover, this approach to constitutional interpretation ignores the fact that the Framers built deliberate ambiguity—indeed, conflict—into the text. In light of this fact, the kind of originalism that Calabresi and Prakash advocate simply opens the door to naked exercises of judicial policymaking because of the absence of any real objective constraints rooted in neutral principles. Cf. Bradley & Morrison, *supra* note 1, at 414–15 (advocating a careful, context-sensitive analysis of historical practice to inform separation-of-powers doctrine in cases in which the Constitution itself does not yield clear answers to contested separation-of-powers questions).

56. Calabresi & Prakash, *supra* note 55, at 550–53.

57. See Manning, *supra* note 5, at 1950 (noting that “[f]unctionalists believe that the Constitution’s structural clauses ultimately supply few useful details of meaning”).

58. Jellum, *supra* note 53, at 854–55. For an example of an iconic functionalist opinion, see *INS v. Chadha*, 462 U.S. 919, 967–72, 983–87 (1983) (White, J., dissenting). Professor Manning argues that “Justice White’s dissent typifies modern functionalism,” Manning, *supra* note 5, at 1956, and presents a “classic example of functionalist generality shifting,” *id.* at 1955.

59. Manning, *supra* note 5, at 1952.

60. Magill, *supra* note 14, at 1142–43.

To be sure, the specificity of a particular delegation and the centrality of a power to a particular branch are important considerations in a functionalist analysis of a novel administrative structure.<sup>61</sup> A balancing exercise is almost always requisite, however, and to say that something must be taken into account is not to say that it must be given controlling weight in the analysis. Thus, for a functionalist, even radical departures from the Framers' constitutional design might be justified under the right conditions.

For example, a functionalist analysis might permit Congress to give the President alone the power to appoint principal officers within the executive branch in the event of a terrorist attack that causes mass casualties in Washington, D.C. For a formalist, on the other hand, exigent circumstances would almost never justify failing to satisfy the formal requirements of Article II, Section 2; even if compelling exigent circumstances existed, the President could not appoint principal officers without the advice and consent of the Senate.<sup>62</sup> But when the Constitution expresses conflicting textual commitments, a reviewing court may not legitimately choose which constitutional command it will observe and enforce; the court has a duty to take *all* relevant provisions into account. In considering such questions, it seems both practical and quite logical to consider how the political branches themselves have gone about operationalizing the textually conflicting constitutional provisions.

---

61. See, e.g., *Morrison v. Olson*, 487 U.S. 654, 693–97 (1988) (rejecting a separation-of-powers challenge to the appointment of an independent counsel because the powers of this office were sufficiently limited in scope to survive a functionalist balancing analysis, and holding that the independent-counsel provisions of the Ethics in Government Act gave “the Executive Branch sufficient control over the independent counsel to ensure that the President [wa]s able to perform his constitutionally assigned duties”); *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 850–57 (1986) (upholding an assignment of certain common-law counterclaims to an administrative agency because the assignment did not implicate a core function of the Article III courts and therefore did “not contravene separation of powers principles or Article III”); cf. *Morrison*, 487 U.S. at 708 (Scalia, J., dissenting) (“As I have said, however, it is ultimately irrelevant *how much* the statute reduces Presidential control. The case is over when the Court acknowledges, as it must, that “[i]t is undeniable that the Act reduces the amount of control or supervision that the Attorney General and, through him, the President exercises over the investigation and prosecution of a certain class of alleged criminal activity.” (citation omitted)).

62. See Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1523–24 (1991) (noting that “[t]hose who espouse the formalist view of separated powers seek judicial legitimacy by insisting upon a firm textual basis in the Constitution for any governmental act,” and observing that “formalists attempt to ensure that exercise of governmental power comports strictly with the original blueprint laid down in articles I, II, and III of the Constitution”).

Thus, even if consistent practice by the President and Congress does not formally bind a reviewing court, some measure of deference would seem requisite if the resolution presents a workable and reasonable solution to the problem. This is not to say that the federal courts can shirk their constitutional obligation to “say what the law is,”<sup>63</sup> but rather to say that in the absence of a clear outcome rooted in the Constitution’s text, practice represents the most logical—and least subjective—next-best source of meaning.

Judges must not craft a set of constitutional conventions governing the appointments process from whole cloth.<sup>64</sup> But when the Constitution points in radically different directions—and fails to harmonize conflicting priorities—using historical practice as a kind of “tiebreaker” reduces, rather than enhances, the problem of judicial discretion. This approach also alleviates the risk of judicial overreaching (which would arise if judges were to construe the separation of powers ahistorically and without regard to constitutional conventions).<sup>65</sup>

## II. A BRIEF OVERVIEW OF *NOEL CANNING* AND ITS LANDMARK GLOSS ON THE RECESS APPOINTMENTS CLAUSE

Before proceeding to consider *Noel Canning*’s implications for separation-of-powers theory and practice, some consideration of the decision’s facts and holding is requisite. This Part considers the factual background of *Noel Canning*, the dueling opinions authored by Justices Breyer and Scalia, and how and why both these opinions generally reflect formalist (rather than functionalist) methodology and reasoning.

---

63. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); see THE FEDERALIST NO. 78, *supra* note 16, at 466–67 (Alexander Hamilton) (noting that courts must decline to apply and enforce laws that violate the Constitution because “[l]imitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void”). Hamilton argues that in the absence of a federal judiciary vested with the power of judicial review, “all the [Constitution’s] reservations of particular rights or privileges would amount to nothing.” *Id.* at 466.

64. See Ronald J. Krotoszynski, Jr., *John S. Stone Chair Inaugural Lecture: A Man for All Seasons: Judge Frank M. Johnson Jr. and the Quest To Secure the Rule of Law*, 61 ALA. L. REV. 165, 184 (2009) (arguing that “the imprecision that exists in interpreting constitutional text is not a license for simply writing one’s own personal morality into the document”).

65. See Vermeule, *supra* note 21, at 1166–68, 1181–86 (discussing the development and importance of conventions in creating and maintaining governmental structures and practices).

A. *The Factual Background and Lower-Court Holding in Noel Canning*

The facts at issue in *Noel Canning* are straightforward. After having active nominations to the National Labor Relations Board (NLRB) pending before the Senate for over a year, on January 4, 2012, President Obama invoked his power to appoint principal officers of the United States during periods when the Senate is in recess<sup>66</sup> and purported to recess-appoint three new members to the NLRB.<sup>67</sup> The Senate had, in fact, met in “pro forma” sessions on January 3 and January 6, 2012;<sup>68</sup> if these sessions counted as bona fide meetings of the Senate, then the Senate had been in recess for less than twenty-four hours at the time the President purported to recess-appoint the new NLRB members.<sup>69</sup>

The Obama Administration took the legal position that it could simply disregard the Senate’s pro forma sessions; the President determined that the Senate had recessed on December 17, 2011, and would not reconvene to take up ordinary business until January 23, 2012 (a recess of almost one month).<sup>70</sup> Thus, according to the administration’s math, the Senate had been in recess for seventeen days when the President invoked his recess-appointments power.

In support of its decision to disregard the Senate’s pro forma sessions, the administration relied on an opinion offered by Assistant Attorney General Virginia A. Seitz, who headed the Office of Legal Counsel (OLC) in the Department of Justice.<sup>71</sup> OLC took the position that because the Senate itself claimed that there would be “no

---

66. The Recess Appointments Clause provides that “[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.” U.S. CONST. art. II, § 2, cl. 3.

67. *Nat’l Labor Relations Bd. v. Noel Canning*, 134 S. Ct. 2550, 2557 (2014).

68. *Id.* (emphasis removed). The Senate first adopted the practice of holding pro forma sessions in 2007, in order to block Republican President George W. Bush from using recess appointments to staff vacant executive and judicial offices. Roberts, *supra* note 30, at 747 (“Pro forma recesses to prevent recess appointments were first used in 2007 by the Democratic majority in the Senate to block recess appointments by President Bush, and the tactic was successful in that it deterred the President from attempting recess appointments.”); Carl Hulse, *Loneliest Man in Town? He’s on the Senate Floor*, N.Y. TIMES, Nov. 21, 2007, at A16.

69. *Noel Canning*, 134 S. Ct. at 2557.

70. *Id.*; see also Bryan J. Leitch, *NLRB v. Noel Canning: The Separation-of-Powers Dialogue Continues*, 2014 CATO S. CT. REV. 221, 223–26, 242 (2014) (providing a comprehensive factual background to *Noel Canning* and the Senate’s use of pro forma sessions to block recess appointments).

71. See *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. O.L.C. 1 (2012).

business conducted” during these pro forma sessions, the President could simply ignore them<sup>72</sup>—even though the Senate had in fact conducted regular legislative business during the pro forma sessions.<sup>73</sup>

Professor Jonathan Turley strongly criticizes the administration’s constitutional logic, arguing that OLC’s “position erases any real consideration of duration [of a recess] from the calculus.”<sup>74</sup> Turley posits that this approach “effectively say[s] that the President decides what a session is for the purposes of the Clause,” and that the President may ignore pro forma sessions because “these are not sessions to the satisfaction of the President.”<sup>75</sup>

In consequence of the President’s bold action, the subsequent actions of the NLRB were subject to attack on the theory that the agency lacked a quorum if one disregarded the NLRB’s improperly appointed members.<sup>76</sup> This was precisely the ground on which Noel Canning sought to fend off labor union charges that it had unlawfully failed to engage in collective bargaining with its employee union.<sup>77</sup>

The U.S. Court of Appeals for the District of Columbia Circuit agreed with Noel Canning’s position that President Obama’s recess appointments were legally invalid.<sup>78</sup> It reasoned that because the NLRB seats became vacant during a period when the Senate was in session, the President could not fill the vacancies through recess appointments.<sup>79</sup> The Supreme Court granted a writ of certiorari and

---

72. *See id.* at 19–21.

73. *See Leitch, supra* note 70, at 223–25.

74. Turley, *supra* note 26, at 994.

75. *Id.* at 991.

76. The Supreme Court, in an earlier opinion, had held that the NLRB must have at least three members in order to transact business. *See New Process Steel, L.P. v. Nat’l Labor Relations Bd.*, 560 U.S. 674, 679–82, 687–88 (2010). Writing for the *New Process Steel* majority, Justice Stevens explained that “[i]f Congress had intended to authorize two members alone to act for the Board on an ongoing basis, it could have said so in straightforward language.” *Id.* at 681. Accordingly, “the Board quorum requirement and the three-member delegation clause should not be read as easily surmounted technical obstacles of little or no import.” *Id.* at 687–88.

77. *See Nat’l Labor Relations Bd. v. Noel Canning*, 134 S. Ct. 2550, 2557 (2014) (“The [NLRB] found that a Pepsi-Cola distributor, Noel Canning, had unlawfully refused to reduce to writing and execute a collective-bargaining agreement with a labor union.”).

78. *See Noel Canning v. Nat’l Labor Relations Bd.*, 705 F.3d 490, 507–12 (D.C. Cir. 2013), *aff’d*, 134 S. Ct. 2550 (2014) (holding that the recess appointments were invalid).

79. *See id.* at 514 (“Even if the ‘End’ of the session were ‘during the Recess,’ . . . we hold that the appointment to that seat is invalid because the President must make the recess appointment during the same intersession recess when the vacancy for that office arose.”).

voted 9–0 to affirm the D.C. Circuit’s resolution of the case<sup>80</sup>—but not its reasoning. The Justices divided 5–4 on how broadly to construe the scope of the Recess Appointments Clause.<sup>81</sup>

### *B. Justice Breyer’s Pragmatic Formalism*

Justice Breyer’s majority opinion set out to answer three questions. First, may the President make recess appointments during an adjournment *within* a session of the Senate, or as the D.C. Circuit held, only during an intersession recess after the Senate adjourns *sine die*?<sup>82</sup> Second, may the President use the recess-appointments power to fill offices that become vacant during a session of the Senate (that is, what do the words “may happen” mean)?<sup>83</sup> Third, and finally, if intrasession recess appointments are constitutional, what is the minimum period of recess required for the Clause to apply, and relatedly, does the Senate or the President determine when the Senate is in session?<sup>84</sup> Methodologically, Justice Breyer placed significant reliance on text, history, and practice; no one factor enjoys controlling weight.<sup>85</sup>

---

80. See *Noel Canning*, 134 S. Ct. at 2578 (holding that the Recess Appointments Clause did not empower the President to make the relevant appointments); see also *id.* at 2592 (Scalia, J., concurring) (agreeing).

81. Compare *infra* notes 82–117 and accompanying text (discussing the majority opinion’s analysis), with notes 118–37 and accompanying text (discussing the concurring opinion’s analysis).

82. See *Noel Canning*, 134 S. Ct. at 2556 (Breyer, J., majority opinion) (“Does [‘recess of the Senate’] refer only to an inter-session recess (*i.e.*, a break between formal sessions of Congress), or does it also include an intra-session recess, such as a summer recess in the midst of a session?”).

83. See *id.* (“Does [‘vacancies that may happen’] refer only to vacancies that first come into existence during a recess, or does it also include vacancies that arise prior to a recess but continue to exist during the recess?”).

84. See *id.* at 2557 (“In calculating the length of a recess, are we to ignore the *pro forma* sessions, thereby treating the series of brief recesses as a single, month-long recess?”); see also Leitch, *supra* note 70, at 227–28 (discussing the cert. phase of *Noel Canning* in some detail and noting that although the Obama Administration “sought review of only two questions,” Noel Canning succeeded in adding a critical third question—namely, “Whether the President’s recess-appointment power may be exercised when the Senate is convening every three days in *pro forma* sessions,” even though the D.C. Circuit “had not addressed that issue”). The Supreme Court granted review of the question regarding the effect of the Senate’s *pro forma* sessions over the Obama Administration’s objections. *Id.* at 228. This question proved to be outcome-determinative. See *Noel Canning*, 134 S. Ct. at 2574–78.

85. See *Noel Canning*, 134 S. Ct. at 2558–59 (noting that the Recess Appointments Clause “reflects the tension between, on the one hand, the President’s continuous need for ‘the assistance of subordinates’ and, on the other, the Senate’s practice, particularly during the Republic’s early years, of meeting for a single brief session each year” (citation omitted)); *id.* at

Justice Breyer opined that the President may make recess appointments during intrasession breaks and not only during intersession breaks. He explained that “[i]n our view, the phrase ‘the recess’ includes an intrasession recess of substantial length.”<sup>86</sup> After analyzing “[f]ounding-era dictionaries,”<sup>87</sup> common usage of the term “recess” in the early years of the federal government,<sup>88</sup> and historical practice over time,<sup>89</sup> the majority found that the “constitutional text is . . . ambiguous”<sup>90</sup> and concluded that the better approach reads “the Recess”<sup>91</sup> as applicable to “both intra-session and inter-session recesses.”<sup>92</sup>

Justice Breyer then considered what, if any, limits apply to making intrasession recess appointments. Using an intratextual mode of analysis,<sup>93</sup> he concluded that “a recess of more than 3 days but less than 10 days is presumptively too short to fall within the Clause.”<sup>94</sup> He derived the three-day lower limit from the Constitution’s requirement that the Senate obtain the consent of the House if it wishes to recess for more than three days during a session.<sup>95</sup> This approach makes sense: a recess too brief to require the consent of the other chamber does not constitute a sufficient interruption of the Senate’s ability to receive and consider nominations to permit the President to invoke the recess-appointments power.<sup>96</sup> The ten-day minimum period

---

2559 (arguing that it is appropriate to “*put significant weight upon historical practice*” in setting the metes and bounds of the President’s recess-appointments power).

86. *Id.* at 2561.

87. *Id.*

88. *Id.* at 2561–62.

89. *Id.* at 2562–65.

90. *Id.* at 2561.

91. U.S. CONST. art. II, § 2, cl. 3.

92. *Noel Canning*, 134 S. Ct. at 2561–62, 2567.

93. See Amar, *supra* note 34, at 791–95 (discussing various types of intratextual approaches to interpreting constitutional text).

94. *Noel Canning*, 134 S. Ct. at 2567.

95. See *id.* at 2566–67 (concluding that a Senate recess that is short enough to avoid the consent of the House does not trigger the Recess Appointments Clause); see also U.S. CONST. art. I, § 5, cl. 4 (“Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days.”).

96. But see *Noel Canning*, 134 S. Ct. at 2599 (Scalia, J., concurring) (“Fumbling for some textually grounded standard, the majority seizes on the Adjournments Clause, which bars either House from adjourning for more than three days without the other’s consent.”). Justice Scalia rejects an intratextual reading of the Recess Appointments and Adjournments Clauses, arguing that “the dramatically different contexts in which the two clauses operate make importing the 3-day limit from the Adjournments Clause into the Recess Appointments Clause ‘both arbitrary

derives from the practice of past presidents; with very few exceptions, presidents have not made recess appointments during breaks of less than ten days.<sup>97</sup>

Significantly, the majority's bright-line rule of a minimum ten-day recess would seem to apply to both intrasession and intersession breaks: "If a Senate recess is so short that it does not require the consent of the House, it is too short to trigger the Recess Appointments Clause," and "*a recess* lasting less than 10 days is presumptively too short as well."<sup>98</sup>

With respect to the second question—whether a vacancy must arise during a recess of the Senate—Justice Breyer concluded that both the broader purposes of the Recess Appointments Clause and the imperatives of Article II would be better served through a broader interpretation of the phrase "may happen."<sup>99</sup> As he explained, the Recess Appointments Clause exists "to permit the President to obtain the assistance of subordinate officers when the Senate, due to its recess, cannot confirm them."<sup>100</sup> To restrict the Clause only to vacancies that come into existence during a recess of the Senate "would prevent the President from making any recess appointment that arose before a recess, no matter who the official, no matter how dire the need, no matter how uncontroversial the appointment, and no matter how late in the last session the office fell vacant."<sup>101</sup> Ensuring the "President's control and political accountability" requires that he have the ability to rely on persons of his own choosing, rather than career service personnel designated to

---

and mistaken." *Id.* (quoting Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487, 1556 (2005)).

97. *See id.* at 2567 (majority opinion). The majority acknowledged that a very small number of counterexamples exist, but explained that "when considered against 200 years of settled practice, we regard these few scattered examples as anomalies." *Id.*

98. *Id.* (emphasis added). Justice Breyer did not draw any distinction between an intersession recess and an intrasession recess of less than ten days' duration; in either case, the recess-appointment power would be unavailable to the President. Justice Scalia, on the other hand, would permit only intersession recess appointments, but would permit them "even during very short inter-session breaks." *Id.* at 2599 n.4 (Scalia, J., concurring). In this particular, then, Justice Scalia's approach actually offers the President broader authority to circumvent the Senate's role in the appointments process than does the majority's approach.

99. *See id.* at 2567–68 (majority opinion) (concluding that the Recess Appointments Clause applies both to vacancies that arise before a recess and those that remain during the recess).

100. *Id.* at 2568.

101. *Id.* at 2569–70.

serve in an acting capacity.<sup>102</sup> Indeed, the majority invoked *Free Enterprise Fund v. Public Company Accounting Oversight Board*<sup>103</sup> in support of the proposition that the President must retain sufficient control and oversight over executive functions in order to be deemed politically accountable for their operation.<sup>104</sup>

To be sure, Justice Breyer acknowledged that broadly construing the Recess Appointments Clause to reach intrasession breaks and offices that have long been vacant creates some tension with the Senate's advice-and-consent power.<sup>105</sup> But in reconciling the Senate's advice-and-consent power with the President's obligations under the Take Care Clause and the structural implications of a unitary executive headed by a single officer—namely, the President—Justice Breyer avoided empowering the Senate to cripple the executive branch; he instead sought an appropriate accommodation, or balance, between considerations that point in opposite directions.<sup>106</sup>

Moreover, Justice Breyer did not embrace an abstract cost-benefit analysis to reach these conclusions; his analysis relied first and foremost on constitutional text. Only after carefully considering whether the text has a clear and unambiguous meaning (it did not with respect to the phrases “the Recess” and “may happen”) and the conflicting textual mandates in Article II's Recess Appointments and Take Care Clauses, as well as the overall structural imperative of the unitary executive, did Justice Breyer look to historical practice.<sup>107</sup> As

---

102. *Id.* at 2569 (citing *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 497–98 (2010)); *see also* 5 U.S.C. § 3345 (2012) (providing for the appointment of “[a]cting officer[s]” to discharge some of the duties vested in an office subject to the Senate's advice and consent for appointments).

103. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010).

104. *See Noel Canning*, 134 S. Ct. at 2569 (discussing the implications of limiting “the President's control and political accountability”); *see also Free Enter. Fund*, 561 U.S. at 497–98 (describing the decline in accountability that results from restricting presidential oversight powers).

105. *See Noel Canning*, 134 S. Ct. at 2569 (recognizing that interpreting the Recess Appointments Clause broadly may “permit a President to avoid Senate confirmations as a matter of course”).

106. *See id.* at 2577–78 (assuaging fears that the Court's holding significantly amended the constitutional balance between the branches of government); *see also* Leitch, *supra* note 70, at 251 (positing that Justice Breyer's opinion was not merely about “achieving a workable government or ensuring that each branch [is] able to perform its essential functions” but instead “about the authority of each branch to define its own institutional identity”).

107. *See Noel Canning*, 134 S. Ct. at 2561–63, 2567–70 (considering historical practice and conventions only after determining that the text itself was ambiguous and susceptible of more than one plausible interpretation); *cf. id.* at 2574 (finding that the Constitution's text clearly and

one commentator has observed, “In seamlessly blending these functionalist and formalist rationales, Justice Breyer’s opinion challenges the integrity of the distinction.”<sup>108</sup>

Finally, and perhaps most significantly, in answering the third question, Justice Breyer concluded that the Senate, not the President, may determine when it is in session.<sup>109</sup> He explained that the Constitution “gives the Senate wide latitude to determine whether and when to have a session, as well as how to conduct the session.”<sup>110</sup> Accordingly, “the Senate’s determination about what constitutes a session should merit great respect.”<sup>111</sup> The conclusion necessarily follows, then, that “the Senate is in session when it says it is, provided that, under its own rules, it retains the capacity to transact Senate business.”<sup>112</sup>

This portion of the opinion places strong weight on Article I, Section 5, Clause 2, which states that each house may “determine the Rules of its Proceedings.”<sup>113</sup> The Constitution also vests the Senate with considerable discretion to control its own schedule.<sup>114</sup> Because the Senate may both receive and consider nominations during its pro forma sessions, and has in fact conducted major legislative business during such meetings, the Senate’s position that it was not in recess for more than three-day periods in late 2011 and early 2012 was given determinative weight.<sup>115</sup> In the absence of a recess of more than ten days, then, the President could not constitutionally make the contested recess appointments to the NLRB.<sup>116</sup> This aspect of the majority’s decision effectively vests the Senate with the ability to

---

unambiguously vests the Senate with the power to determine its own schedule and operating rules and, accordingly, declining to consider historical practice and conventions).

108. Leitch, *supra* note 70, at 242; see EDWARD L. RUBIN, BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE 12 (2005) (arguing that outdated analytical constructs must be abandoned or updated to fit new circumstances in order to ensure that administrative law effectively addresses contemporary problems and issues).

109. See *Noel Canning*, 134 S. Ct. at 2573–77 (holding that “the Senate is in session when it says it is, provided that, under its own rules, it retains the capacity to transact Senate business”).

110. *Id.* at 2574.

111. *Id.*

112. *Id.*

113. U.S. CONST. art. I, § 5, cl. 2.

114. See U.S. CONST. art. I, § 5, cl. 4 (empowering each house of Congress to adjourn).

115. See *Noel Canning*, 134 S. Ct. at 2574–76 (concluding that “the Senate’s determination about what constitutes a session should merit great respect”).

116. *Id.* at 2573–77.

block recess appointments by remaining open for business (even if it does so through so-called pro forma sessions).<sup>117</sup>

*C. Justice Scalia's Textualism Masquerading as Formalism*

Justice Scalia, joined by Chief Justice Roberts and Justices Thomas and Alito, would have affirmed the D.C. Circuit's highly circumscribed reading of the Recess Appointments Clause. He would have reached this outcome by limiting the Clause to only intersession recesses (of whatever length)<sup>118</sup> and by permitting such appointments *only* for vacancies that come into existence during the Senate's intersession recess.<sup>119</sup> So construed, the Clause would be effectively meaningless—unless, of course, the President sought to time resignations to take effect during intersession recesses and made appointments a nanosecond after accepting the carefully timed resignation.

In Justice Scalia's view, the words "recess" and "may happen" are not ambiguous but have clear, discernable meanings. He specifically rejected the majority's textual analysis of the phrase "may happen" as "awkward and unnatural,"<sup>120</sup> and argued that "it is clear that the Constitution authorizes the President to fill unilaterally only those vacancies that arise during a recess, not every vacancy that happens to exist during a recess."<sup>121</sup> Justice Scalia accused the majority of manufacturing ambiguity in the constitutional text when none existed. He wryly observed that "[w]hat the majority needs to sustain its judgment is an ambiguous text and a clear historical

---

117. It also gives the *House* a say in the use of recess appointments. Article I provides that each house of Congress must agree to the other's recessing for more than three days—well under the ten-day minimum recess period that *Noel Canning* requires to trigger the President's recess-appointments authority. See U.S. CONST. art. I, § 5, cl. 4 (documenting the adjournment requirements). Thus, if the House of Representatives refuses to give its consent to a recess of the Senate exceeding three days, the Senate may not constitutionally adjourn. Interestingly, in the event of an impasse between the House and the Senate regarding a recess, the Constitution vests the President with the power to resolve the dispute; the President would presumably take the Senate's side if he wished to make recess appointments. See U.S. CONST. art. II, § 3 (empowering the President to adjourn Congress in the event of a disagreement). To be clear, however, the President does not have any general power to force the Senate into a recess against its will.

118. *Noel Canning*, 134 S. Ct. at 2595–98 (Scalia, J., concurring).

119. *Id.* at 2607–08.

120. *Id.* at 2595–2600 (opining that "recess" has a plain meaning and refers only to intersession recesses); *id.* at 2606–10 (opining that "may happen" can refer only to vacancies that come into existence during a recess).

121. *Id.* at 2610.

practice,”<sup>122</sup> but argued that “[w]hat it has is a clear text and an at-best-ambiguous historical practice.”<sup>123</sup> Justice Scalia charged that Justice Breyer and the majority had embraced an “adverse-possession theory of executive power,”<sup>124</sup> an approach that runs a substantial risk of “aggrandizing the Presidency beyond its constitutional bounds and undermining respect for the separation of powers.”<sup>125</sup>

The irony of Justice Scalia’s approach is that it would not, in practice, prove any more effective at protecting the Senate’s prerogative over presidential appointments than the majority’s approach (which essentially gives the Senate an unfettered ability to block all recess appointments, including intersession recess appointments, by holding sessions in which it could, in theory, conduct business at least once every nine days). Unlike Justice Scalia, the majority empowers the Senate, if it wishes, to essentially nullify the recess-appointments power—but it also permits the Senate to give the President leeway to make such appointments (by *not* holding sessions at least every nine days), an outcome that would seem to better protect the Senate’s advice-and-consent prerogative than Justice Scalia’s approach. The majority’s ten-day rule better safeguards against presidential self-help by applying the minimum-ten-day-recess rule to any and all recesses of the Senate—including intersession recesses.

Moreover, Justice Scalia’s approach to the recess-appointments question largely ignores the imperatives of Article II’s Vesting and Take Care Clauses (and arguably the Opinions Clause as well).<sup>126</sup> The

---

122. *Id.* at 2617.

123. *Id.*

124. *Id.* Professor Turley first coined this characterization of President Obama’s attempted use of the recess-appointments power. See Turley, *supra* note 26, at 971–72, 975 (describing the President’s attempted use of the recess-appointments power to bypass the Senate, and rejecting “the claim that somehow the Executive Branch has acquired title to a power of Congress by adversely occupying the area of recess appointments”); see also *id.* at 1030–34 (discussing and comparing the President’s “adverse possession” of the recess-appointments power with the common law property doctrine). Even so, Justice Scalia did not cite Turley’s work in his *Noel Canning* opinion.

125. *Noel Canning*, 134 S. Ct. at 2618. For a highly persuasive rejoinder to Justice Scalia’s adverse possession argument, see Curtis A. Bradley & Neil A. Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2015 SUP. CT. REV. (forthcoming 2015) (manuscript at 42–45), available at <http://ssrn.com/abstract=2547962>.

126. In fairness to Justice Scalia, he does suggest that the use of acting appointments could be used to ensure presidential control of federal administrative agencies. See *Noel Canning*, 134 S. Ct. at 2609–10 (describing the president’s authority to appoint “acting” officers to fill vacancies). But such appointments will not work for independent federal agencies, such as the

plain text of Article II presupposes that the President will be able to call on subordinate executive officers—“Heads of Departments.”<sup>127</sup> Yet, if the Senate refuses to confirm any appointees to these offices, the executive power cannot really be said to be vested in the President—Congress has encroached on this authority, and essentially dissipated the executive power, by preventing the President from staffing principal offices within the executive branch.<sup>128</sup> Other directly vested powers, such as control over the military forces<sup>129</sup> and foreign relations,<sup>130</sup> also require subordinate officers within the executive branch who are loyal and accountable to the President.

Justice Scalia simply does not address the critical relationship of appointments to the exercise of these specifically delegated presidential powers. Thus, the dissent largely misses the forest—namely, the Framers’ structural design, which requires the President to ensure enforcement of federal law and to conduct the nation’s diplomatic and military affairs.<sup>131</sup> It instead focuses on a single tree—the Recess Appointments Clause and the general requirement that

---

NLRB, that feature collective agency heads. A staff member at the NLRB, or even members comprising less than a quorum, may not legally act on behalf of the agency. *See* *New Process Steel, L.P. v. Nat’l Labor Relations Bd.*, 560 U.S. 674, 687–88 (2010) (discussing and strictly enforcing the Board’s quorum requirements). Such officers also lack the imprimatur of a presidential appointment and the Senate’s advice and consent; these facts could weaken their efficacy. *See* Anne Joseph O’Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 981–84 (2009) (discussing the importance of political accountability, political legitimacy, and expertise in high-ranking executive officers, and noting that although acting officers often possess expertise, they usually lack the other attributes).

127. *See* U.S. CONST. art. II, § 2, cl. 1; *see also* AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 324–27 (2012) (discussing the meaning and importance of the Opinions Clause). Amar argues that the Opinions Clause serves to help secure responsibility and accountability for the executive branch by preventing the President from disclaiming personal responsibility for the actions of his subordinates; as Amar states the proposition, “the buck stops with him.” *Id.* at 327.

128. *See* AMAR, *supra* note 127, at 327 (positing that the “big idea behind the opinions clause” relates to presidential accountability—namely, that “a president could never claim that his hands were tied because he had been outvoted or overridden by his advisers in a secret conference”).

129. *See* U.S. CONST. art. II, § 2, cl. 1 (providing that “[t]he President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States”).

130. *See* U.S. CONST. art. II, § 2, cl. 2 (providing that the President “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, . . . and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls”).

131. *See* J. Gregory Sidak, *The President’s Power of the Purse*, 1989 DUKE L.J. 1162, 1183–94 (1989) (discussing the Constitution’s imposition of “mandatory” presidential duties, and arguing that the Constitution requires the President to perform them, even if Congress elects not to provide appropriations to fund the President’s constitutional obligations).

the Senate consent to presidential appointments of executive-branch officers and federal judges.<sup>132</sup>

To be sure, Justice Breyer's majority opinion does not mine Article II as much as it could—beyond a passing reference to presidential control and oversight, the majority opinion does not fully engage the scope of the conflict between the Senate's advice-and-consent power and specific provisions of Article II.<sup>133</sup> Nevertheless, a plausible textualist opinion must, at a minimum, seek to engage *all* the relevant constitutional text. This, however, Justice Scalia did not do.

Moreover, Justice Scalia's account of the absolute veto power the Senate should hold over presidential appointments is fundamentally inconsistent with his important and iconic defense of the unitary executive in other contexts. Over time, Justice Scalia has been a principal advocate of the unitary executive theory and of the absolute necessity of ensuring that the president may personally oversee and direct all operations of the executive branch.<sup>134</sup> Thus, it seems odd for Justice Scalia to say that Congress may not limit presidential oversight of an independent counsel,<sup>135</sup> but may force an entire shutdown of the Department of Justice by refusing to confirm any principal or inferior officers to staff it.

Principled formalism requires a reviewing court to consult *all* relevant constitutional text. One must also carefully consider all of the relevant structural implications of the Framers' design for each of the three coordinate branches of the federal government. A close reading of the Appointments and Recess Appointments Clauses, shorn of any effort to integrate these provisions within the larger

---

132. Ironically, even as Justice Scalia decried the majority's substantial reliance on conventions developed over time to inform the meaning and scope of the Recess Appointments Clause, he himself relied on these very same materials to support his claim that the Clause has a plain meaning with respect to both intrasession recess appointments and the use of recess appointments to fill vacancies that come into being during a session of the Senate. *See Nat'l Labor Relations Bd. v. Noel Canning*, 134 S. Ct. 2550, 2596 (2014) (Scalia, J., concurring) (citing early opinions of the attorney general); *id.* at 2607–09 (invoking the early practice of presidents to support limiting recess appointments to offices that become vacant while the Senate is in an intersession recess). Practice is either relevant, or it is not; so too, the constitutional text is either unambiguous on its face, or it is not. Justice Scalia's objection, then, seems to boil down to one of scope rather than kind.

133. *See Noel Canning*, 134 S. Ct. at 2567–70.

134. *See Morrison v. Olson*, 487 U.S. 654, 705–09 (1988) (Scalia, J., dissenting).

135. *See id.* at 705 (arguing that the Vesting Clause of Article II, Section 1, creates a unitary Executive who holds the entire executive power, and that “this does not mean *some* of the executive power, but *all* of the executive power”).

constitutional framework, is simply not good formalist analysis—indeed, it is not even good textualist analysis, for a close reading of the text ought to require a close reading of *all* the relevant text. Justice Scalia’s opinion largely abandons his longstanding commitment to the textual and structural imperatives of Article II—an odd result that might lead a skeptical observer to question whether his more general commitment to a unitary executive extends to the current occupant of the Oval Office.<sup>136</sup>

More broadly, given that *any* reading of the Recess Appointments Clause will inevitably leave both branches in possession of plausible workaround devices, one also has to wonder whether the whole game was worth the candle. Given that both solutions leave the door open to clever shenanigans that honor the text, but not the spirit, of the Recess Appointments Clause, it seems plausible to ask whether the Justices should have simply left this problem to the political branches to work out for themselves.<sup>137</sup>

*D. Squaring the Circle: Is Noel Canning a Formalist or Functionalist Decision?*

Justice Breyer’s majority opinion does not rest on a truly functionalist analysis. To be sure, thoroughly functionalist approaches to framing the Recess Appointments Clause not only existed, but also found eager advocates within the scholarly community. If one views the appointments process as “broken” and in need of “fixing,” very broad forms of presidential self-help become desirable. Professor Matthew Stephenson, for example, has posited that the Senate’s failure to vote on a presidential nomination within a reasonable period of time should be construed as a form of constructive

---

136. See also *Arizona v. United States*, 132 S. Ct. 2492, 2521–22 (2012) (Scalia, J., dissenting) (criticizing President Obama for failing to adequately enforce the nation’s immigration laws).

137. See Huq, *supra* note 17, at 5–8. Of course, one of the virtues of Justice Breyer’s opinion is that, although it does not reduce the Appointments Clause to a nullity, it leaves both branches well armed to continue to engage in partisan conflict over appointments. It did not give the President what he sought and what some legal academics advocated—the ability to make recess appointments whenever a recess exists and without regard to whether the Senate is available to receive and consider appointments. See, e.g., Roberts, *supra* note 30, at 726–27, 750–52. As Bryan Leitch observes, “Were the president able to trump the Senate’s own determination of when it is or is not in recess, there is no principled reason for prohibiting the president from independently deciding, for example, whether the Senate has given its advice and consent under the Appointments Clause.” Leitch, *supra* note 70, at 252.

consent.<sup>138</sup> Professor Stephenson, citing “[e]xcessive Senate obstructionism,”<sup>139</sup> argues that the Senate’s silence (that is, its failure to vote on a pending nomination) should be construed as its de facto consent (at least for senior posts within the executive branch).<sup>140</sup> Thus, “the ordinary meaning of the term, as well as its usage in law and legislative practice, establishes that the text of Article II, Section 2 does not provide any prima facie reason to conclude that an affirmative Senate confirmation vote is always necessary.”<sup>141</sup>

Professor Stephenson’s proposal, of course, essentially reads the consent requirement out of Article II, Section 2. It also ignores over 225 years of settled practice between the President and the Senate.<sup>142</sup> But from a truly functionalist perspective, the Senate’s ability to impede—and perhaps cripple<sup>143</sup>—the operation of a federal administrative agency justifies broader and stronger forms of presidential self-help. Other legal academics, including Professors Peter Shane and John Roberts, have also argued that if the Senate will not reliably vote on the President’s nominees, the President should be able to install them without the Senate’s consent.<sup>144</sup>

The standard route to this result is not by treating inaction as consent (as Professor Stephenson proposes), but rather by torturing the Recess Appointments Clause to permit the President to recess-appoint executive officers when the Senate takes a lunch break. If the

---

138. See Stephenson, *supra* note 39, at 950–51 (arguing that “consent can be understood either as requiring some affirmative, express act or declaration, or as something that can be given tacitly, through inaction or failure to object, depending on context”).

139. *Id.* at 944.

140. See *id.* at 951–53 (positing that “tacit consent” should be deemed to satisfy the imperatives of Article II, Section 2, Clause 2, and noting that “[i]ndeed, a hoary English common law maxim, derived from Roman law, asserts that *qui tacet consentire videtur* (‘one who keeps silent is understood to consent’)”).

141. *Id.* at 953.

142. Presumably Professor Stephenson would not extend this argument to *judicial* nominations, insofar as he rests his argument on the notion that the President cannot discharge his constitutional duties without the assistance of subordinate executive officers. See *id.* at 953–58 (arguing that the President’s “take care” duties under Article II permit him to treat Senate inaction on executive-branch nominations as “tacit consent” to such nominations). Oddly, however, Stephenson excludes judicial appointments from his theory of implied senatorial consent for “primarily pragmatic” reasons related to their life tenure. See *id.* at 973–74 (explaining this exception); see also *id.* at 974 (“Article III judges, though appointed by the President, perform a different constitutional function, and the Take Care Clause has little bearing on how one should interpret the process for judicial appointments.”).

143. The President’s options for securing meaningful control over independent agencies are far more limited than with respect to presidentially controlled departments. See *supra* note 126.

144. See *infra* notes 173–85 and accompanying text.

President alone may determine when the Senate is in “recess,” then no good reason exists to take the more radical step that Professor Stephenson advocates. Moreover, the Constitution does not prohibit successive recess appointments for the same person, holding the same office; accordingly, the President could simply use successive recess appointments, implemented whenever the Senate adjourns, to nullify the clear constitutional command that the Senate agree to the appointment of principal officers serving within the executive branch.

By contrast, Justice Breyer’s *Noel Canning* majority opinion is strongly rooted in the text of the Constitution; only when the text was ambiguous did he look to conventions established over time.<sup>145</sup> His opinion reflects a pragmatic form of formalist analysis;<sup>146</sup> the decision is simply too tightly tethered to the Constitution’s text—and to enforcing the text as written<sup>147</sup>—to pass muster as a functionalist exercise. It also leaves open the real possibility of the Senate blocking recess appointments by remaining available to receive and consider nominations at least one out of every ten days. A functionalist approach would attempt to find a more balanced point of equilibrium between Congress and the President.

By way of contrast, Justice Scalia’s nominally concurring opinion relies almost exclusively on a kind of originalist–textualist approach to render the Recess Appointments Clause largely irrelevant to the staffing of the executive branch. Even more than Justice Breyer’s opinion, then, Justice Scalia’s approach is strikingly formalist in both tone and result.

---

145. See *Nat’l Labor Relations Bd. v. Noel Canning*, 134 S. Ct. 2550, 2561–62 (2014) (observing that “[t]he constitutional text is thus ambiguous,” and consulting historical practice to resolve this ambiguity); *id.* at 2567–70 (discerning ambiguity in the phrase “that may happen,” and consulting historical practice to resolve this ambiguity); *cf. id.* at 2574 (holding that “the Constitution explicitly empowers the Senate to ‘determine the Rules of its Proceedings’”). As Professors Bradley and Siegel cogently observe, “*Noel Canning* exemplifies how the constitutional text, perceptions about clarity or ambiguity, and ‘extra-textual’ considerations such as historical practice operate interactively rather than as separate elements of interpretation.” Bradley & Siegel, *supra* note 125, at 55.

146. Martin H. Redish, *Separation of Powers, Judicial Authority, and the Scope of Article III: The Troubling Cases of Morrison and Mistretta*, 39 DEPAUL L. REV. 299, 314–15 (1990) (describing and advocating a pragmatic formalist approach to separation-of-powers questions, and noting that such analysis includes “elements of common sense”).

147. See *Noel Canning*, 134 S. Ct. at 2573–77 (holding that Article I, Section 5, Clause 2, vests the Senate with the power to adopt and enforce its own rules of procedure, including decisions related to how to conduct its own sessions, and accordingly, that the Senate’s own view of when it is in session should normally be controlling).

Thus, *both Noel Canning* opinions are properly characterized as formalist in character. An important distinction nonetheless exists: Justice Breyer embraces a pragmatic approach to formalist analysis, whereas Justice Scalia does not.

### III. CONSIDERING THE PREDICTABLE FAILURES OF BOTH FORMALISM AND FUNCTIONALISM

Neither formalism nor functionalism, strictly applied, will provide reliable answers to difficult separation-of-powers questions. In circumstances where the Constitution provides conflicting textual mandates, formalism—particularly its strictest, originalist–textualist variety—does not work. 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 text when the Constitution *does* offer clear rules of the road.<sup>148</sup> This Part considers how both traditional modes of separation-of-powers analysis routinely fail to yield workable solutions to difficult separation-of-powers problems.

Formalism, in its strictest form, reduces to a variation of textualism.<sup>149</sup> A more moderate approach to formalist separation-of-powers analysis places some reliance on legislative-history materials to clarify or resolve ambiguities that a reviewing court finds in the Constitution’s text.<sup>150</sup> But under this approach, legislative-history materials are relevant only to ascertaining the “public meaning” of the relevant text and only insofar as they “might shed light on the original meaning the constitutional text had to those who wrote it into law.”<sup>151</sup> Both last and least, a reviewing court may consider historical practice, but “[s]uch history is the least reliable source for recovering the original meaning of the law.”<sup>152</sup>

---

148. See *infra* notes 161–87 and accompanying text.

149. See 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, 453–54, 495–96 (1991) (characterizing originalist–textualist formalism as “epistemologically naïve” and “plagued by the difficulties that plague originalism,” including “the many variations in opinions among the Framers and the difficulty of extrapolating how the Framers would approach unforeseen problems or take into account modern developments”); see also Calabresi & Prakash, *supra* note 55, at 551 (arguing that “the text of the Constitution, as originally understood by the people who ratified it, is the fundamental law of the land”).

150. See Calabresi & Prakash, *supra* note 55, at 552–53 (describing a “methodology of originalism that sets out a hierarchy of originalist source materials”).

151. *Id.* at 553.

152. *Id.*

Formalist analysis works quite well with respect to some questions. For example, Article I, Section 7, Clause 2, expressly requires a bill to be passed in both houses of Congress and presented to the President “before it become a Law.”<sup>153</sup> One need not consult legislative history, materials from the Federal Convention, or historical practice in order to ascertain this provision’s meaning and effect—much less contemporary dictionaries from the time of the framing.<sup>154</sup> Other provisions of the Constitution, such as the minimum-age requirements for service in the House or Senate,<sup>155</sup> are equally easy to understand and do not require any interpretative gymnastics.<sup>156</sup>

These differences in specificity ought to play a significant role in separation-of-powers doctrine. For example, Professor Manning argues that the federal courts should strictly enforce specific constitutional clauses that establish procedural requirements or vest particular powers with a specific branch.<sup>157</sup> On the other hand, when a clause “is indeterminate—as the Vesting Clauses often (but not always) are—interpreters have no basis to displace judgments made by Congress pursuant to the express power delegated to it to compose the government under the Necessary and Proper Clause.”<sup>158</sup> Of

---

153. U.S. CONST. art. I, § 7, cl. 2.

154. See *INS v. Chadha*, 462 U.S. 919, 957–59 (1983).

155. See U.S. CONST. art. I, § 2, cl. 2 (requiring that all members of the House be at least twenty-five years old); U.S. CONST. art. I, § 3, cl. 3 (requiring that all members of the Senate be at least thirty years old).

156. *But cf.* JOSH CHAFETZ, *DEMOCRACY’S PRIVILEGED FEW: LEGISLATIVE PRIVILEGE AND DEMOCRATIC NORMS IN THE BRITISH AND AMERICAN CONSTITUTIONS* 180 (2007) (discussing the interesting case of Senator Rush Holt, who was elected to the Senate some seven months before his thirtieth birthday and nevertheless was seated because he waited until after his birthday to present his credentials to the Senate); RICHARD D. HUPMAN, *SENATE ELECTION, EXPULSION AND CENSURE CASES FROM 1789 TO 1960*, at 135 (1962) (same). Thus, even constitutional text that most people agree has a single, clear, and fixed meaning can give rise to interpretive difficulties. In some respects, this is probably an unavoidable aspect of language itself. See STANLEY E. FISH, *IS THERE A TEXT IN THIS CLASS?* 2–8, 12–14, 42–59 (1980) (arguing that words have meaning only within the context of a particular interpretive community that agrees to give particular words and phrases a particular significance); STANLEY FISH, *THERE’S NO SUCH THING AS FREE SPEECH AND IT’S A GOOD THING TOO* 182–86 (1994) (arguing that all legal texts are susceptible of multiple interpretations, positing that “one can always find meanings in a text other than the ones intended by the author,” and arguing that “since looking for evidence of intention is what every interpreter does, knowing that one is doing it is no methodological advantage”). In fact, Fish asserts that “[f]ormalist literalist or ‘four corners’ interpretation is not inadvisable . . . it is impossible.” *Id.* at 208.

157. Manning, *supra* note 5, at 1945–49, 2039–40.

158. *Id.* at 2040.

course, “No interpretive method . . . is complication free.”<sup>159</sup> The most obvious complication with Manning’s principled formalism is that, to use Manning’s own words, “the particular ways in which constitutionmakers blended power . . . do not constitute a coherent listing or grouping.”<sup>160</sup>

Any textualist approach to enforcing the separation-of-powers doctrine will fall short when the text itself allocates powers on a shared, or blended, basis (as is the case with both the appointments process and the war powers<sup>161</sup>). Yet, a principled form of constitutional originalism<sup>162</sup> must frankly acknowledge that the Framers intentionally introduced ambiguity into the document—and did so without specifying how to disentangle conflicting and shared powers.<sup>163</sup> As Professor David Robertson observes, “the Constitution created an ingenious national government of separated institutions *sharing* powers”<sup>164</sup>—that is, “a government of separate institutions, each with the will and ability to defend its independence.”<sup>165</sup>

I do not suggest that formalism never provides clear guidance, but it does not invariably provide clear guidance. In light of this fact, a sensible person sympathetic to formalism’s first-order concerns should embrace a pragmatic variant of the doctrine.<sup>166</sup> In this context, pragmatism means straightforwardly acknowledging that the Constitution’s text does not provide clear answers to all questions regarding the power and authority of each branch, even though it *does* make some mandatory allocations of powers among the three branches.

Professor Martin Redish and Elizabeth Cisar have advocated “pragmatic formalism,” by which they mean a variant of formalism that “is a ‘street-smart’ mode of interpretation, growing out of a recognition of the dangers . . . which a more ‘functional’ or ‘balancing’

---

159. *Id.* at 2039.

160. *Id.* at 2015.

161. *See supra* note 14.

162. Calabresi & Prakash, *supra* note 55, at 551–52, 558–59.

163. *See* ROBERTSON, *supra* note 15, at 235–36 (noting that “[t]he Framers’ Constitution was deliberately unfinished, an incomplete framework for the future play of republican politics” and that “the people’s conventions ratified the Constitution with all these ambiguities in place”).

164. *Id.* at 233.

165. *Id.*

166. *See generally* Redish & Cisar, *supra* note 149, at 453–56, 474–78 (advocating a “pragmatic formalist” approach to enforcing the separation-of-powers doctrine).

analysis in the separation of powers context may create.”<sup>167</sup> Pragmatic formalism “recognizes that once a reviewing court begins down those [functionalist] roads in the enforcement of separation of powers, no meaningful limitations on interbranch usurpation of power remain.”<sup>168</sup> Accordingly, Redish and Cisar reject a strictly textualist approach to formalism because it “represents a commitment to a rigidity and level of abstraction that is quite probably not possible, and that is certainly unwise.”<sup>169</sup> Importantly, their “pragmatic brand of formalism, however, grows not out of a rejection of an inquiry into the social and political purposes that underlie text, but out of a careful search for them.”<sup>170</sup>

The alternative advanced by proponents of highly textualist formalism—interpretation by dictionary—does not seem either principled or normatively attractive. Consulting a dictionary to ascertain the document’s meaning<sup>171</sup> does not tell us what the Framers actually meant; after all, the Constitution lacks a glossary, and it does not declare a particular contemporaneous dictionary as the next-best option. Nevertheless, Professors Steven Calabresi and Saikrishna Prakash argue that “[l]anguage is a social invention, and thus meaningless without access to those external sources, such as dictionaries, that explain the rules as to how a particular language is used.”<sup>172</sup> This approach offers only a false hope of avoiding the need for judges to exercise discretion in interpreting and applying the Constitution. When a constitutional conflict exists, a dictionary provides a very poor basis for interpreting and applying the Constitution when lived experience has important lessons to teach.

---

167. *Id.* at 454.

168. *Id.*

169. *Id.* Redish and Cisar emphasize that “our version of formalism also rejects use of an originalist perspective, sometimes thought to be an inherent element of formalism in general.” *Id.* at 454 n.23. They expressly reject the use of originalist textualism as a primary means of enforcing their vision of pragmatic formalism. *See id.* at 494–97; *cf.* Calabresi & Prakash, *supra* note 55, at 550–58 (advocating a strictly originalist-textualist approach to enforcing separation-of-powers doctrine).

170. Redish & Cisar, *supra* note 149, at 505. For a more complete overview of Redish and Cisar’s iteration of pragmatic formalism, a topic that lies beyond the scope of this Article, see *id.* at 474–90.

171. Calabresi & Prakash, *supra* note 55, at 552 n.35; *see* ROBERT H. BORK, *THE TEMPTING OF AMERICA* 144–45 (1990) (advocating the use of “dictionaries in use at the time” of the framing, as well as other contemporaneous materials, to ascertain the Constitution’s meaning).

172. Calabresi & Prakash, *supra* note 55, at 552 n.35.

On the other hand, it is remarkable that serious legal academics would suggest that the President may construe the Senate's inaction on a nomination as constituting its de facto consent to it. And yet, Professor Stephenson suggests that

when the President nominates an individual to a principal office in the executive branch, where filling that office is essential for the President to fulfill his or her duty faithfully to execute the laws, the Senate's failure to act on the nomination within a reasonable period of time, despite good faith efforts of the nominee's supporters to secure a floor vote, shall be construed as providing the Senate's tacit or implied "Advice and Consent" to the appointment within the meaning of the Appointments Clause.<sup>173</sup>

In case there is any doubt about his meaning, he helpfully adds that "[t]he argument, in other words, is that the appointment of certain senior executive officers does not require a Senate confirmation vote as a matter of constitutional law."<sup>174</sup>

Stephenson's argument represents functionalism running amok. In light of the unambiguous text of the Appointments Clause, in tandem with over 225 years of consistent practice—regardless of the party controlling the White House or the Senate—this kind of "ends justify the means" reasoning simply won't wash.<sup>175</sup> Constitutional law and interpretation do not constitute simply another species of politics.<sup>176</sup>

In fairness to Professor Stephenson, he correctly, and reasonably, invokes the Take Care Clause and the structural imperatives of the unitary executive to justify his otherwise radical proposal.<sup>177</sup> But his solution—construing a failure to act as the equivalent of the Senate's

---

173. Stephenson, *supra* note 39, at 946.

174. *Id.*

175. See Bradley & Morrison, *supra* note 1, at 431 (observing that "interested parties are more likely to find ambiguity when their political needs demand it, and in such cases arguments from historical practice are more likely to feature prominently").

176. See ARCHIBALD COX, *THE COURT AND THE CONSTITUTION* 26, 68, 258–59, 375–76 (1987) (arguing that the legitimacy of constitutional review rests on the "fragile faith" that constitutional law and politics are separate enterprises); see also Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959) (arguing that "the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved"). *But cf.* Bradley & Morrison, *supra* note 1, at 431–32 (positing that "constitutional law and politics are intertwined" in controversies involving interbranch disputes implicating the separation of powers).

177. See Stephenson, *supra* note 39, at 947–49, 953–57.

affirmative consent to senior executive nominations—is “to burn the house to roast the pig.”<sup>178</sup> Other forms of presidential self-help, such as designating “czars,” holding presidential staff appointments in the West Wing, and vesting them with oversight of acting officers within the various departments, would constitute a less radical approach<sup>179</sup>—and one that does not do violence to the plain meaning of the Constitution’s text.<sup>180</sup>

It also bears noting that Professor Stephenson is hardly alone in advocating strong forms of presidential self-help in staffing the executive branch. Professor Roberts argues that the President should be permitted to determine for himself whether the Senate is available to receive and consider nominations; if he deems that it is not, Roberts argues, the President should enjoy a free hand to use the Recess Appointments Clause to fill vacancies.<sup>181</sup> Roberts contends that

[t]he crux of the President’s argument, therefore, is that while the Senate could constitutionally preclude any recess appointments by actually remaining in session throughout the year—in the sense that a quorum is present and official business is conducted—it may not block the President’s power by pretending to be in session when it is not. The argument seems compelling. If pro forma sessions were valid to block recess appointments during what would otherwise be a recess, then the President’s power to make recess appointments even during months-long recesses would be negated, surely disrupting the balance established by the Appointments Clause.<sup>182</sup>

This argument largely corresponds to the arguments advanced by OLC in support of the President’s position that he could simply disregard the Senate’s pro forma sessions.<sup>183</sup>

---

178. *Butler v. Michigan*, 352 U.S. 380, 383 (1957) (“The State insists that, by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely, this is to burn the house to roast the pig.”).

179. See Aaron J. Saiger, *Obama’s “Czars” for Domestic Policy and the Law of the White House Staff*, 79 *FORDHAM L. REV.* 2577, 2583–95 (2011) (discussing the use of White House-based “czars” to superintend policymaking in both cabinet and independent federal agencies).

180. See generally *id.* at 2603–09 (discussing and analyzing the constitutional status of domestic policy czars, with particular attention to the separation-of-powers issues that such appointments present).

181. Roberts, *supra* note 30, at 749–52.

182. *Id.* at 749.

183. See *supra* notes 71–73 and accompanying text.

Professor Peter Shane has offered multiple functionalist arguments in favor of permitting the President to bypass the Senate's advice-and-consent prerogative to staff positions within the executive branch.<sup>184</sup> He suggests that, at a minimum, the federal courts should decline to intervene if the President engages in self-help by holding that the dispute presents a nonjusticiable political question.<sup>185</sup> Even Shane and Roberts, however, do not suggest that the President should be permitted to construe Senate inaction as de facto consent to a nomination.

These theories all demonstrate quite clearly the significant shortcomings of functionalism in addressing problems associated with blended powers. That methodology does not offer any clear guideposts and leaves federal judges vulnerable to the accusation that they are simply pursuing their own ideological or, worse yet, political preferences.<sup>186</sup> Functionalism, at least in this context, does not offer an objective basis to justify any particular merits outcome.<sup>187</sup>

Someone more sympathetic to the Senate's institutional prerogatives, and particularly to the Senate opposition caucus, could just as easily argue that because Congress created federal executive offices, it has the power to abolish them. Failing to confirm nominations is simply one way of exercising congressional power to abolish an office on a temporary basis. Accordingly, the argument would go, the President may not engage in self-help to execute federal laws, such as relying on White House staff (not subject to senatorial confirmation) or designating acting officers within the various cabinet departments. These outcomes are no more principled—or related to constitutional text, history, and practice—than the approaches advocated by Professors Stephenson, Roberts, and Shane. Overlapping powers require courts to take careful account

---

184. Peter M. Shane, *Noel Canning v. NLRB: Should Courts Police the Recess Appointments Power?*, 8 N.Y.U. J.L. & LIBERTY 195, 202, 207–09 (2013).

185. *Id.* at 207–09; *see also* Peter M. Shane, *The Future of Recess Appointments in Light of Noel Canning v. NLRB*, BLOOMBERG LAW (May 14, 2013), <http://www.bna.com/the-future-of-recess-appointments-in-light-of-noel-canning-v-nlr/> (arguing that the Supreme Court should sustain the President's contested recess appointments or deem the dispute a nonjusticiable political question); Peter M. Shane, *NLRB v. New Vista Nursing and Rehabilitation: Third Circuit Further Fuels the Constitutional Conflict over Recess Appointments*, BLOOMBERG BNA DAILY REPORT FOR EXECUTIVES (May 24, 2013) (arguing that “unanticipated circumstances” justify new forms of presidential self-help in filling vacancies).

186. *See* Redish & Cisar, *supra* note 149, at 490–91.

187. *See id.* at 476–77, 491 (arguing that functionalism does not provide “any comprehensible standard by which to guide particular incursions on the separation of powers”).

of text, history, and practice to arrive at sensible results. And reviewing courts should take care not to do more harm than good through their interventions in these highly contested disputes between the political branches.

At bottom, functionalism essentially collapses constitutional law and politics—and in favor of politics. To be sure, there is more than a little truth to the intuition that judges are hardly apolitical handmaidens of the law.<sup>188</sup> But the federal courts should be wary of publicly embracing this intuition if they wish to retain the confidence and support of the American people. If judges become just another set of politicians in black robes, the theoretical basis for judicial review more or less evaporates.<sup>189</sup>

Cases presenting constitutional conflicts, in light of blended or shared allocations of power within the Constitution itself, present the greatest risk of judges appearing to act as political agents rather than honest brokers. Accordingly, just as a strictly formalist legal analysis cannot generate useful answers in cases involving constitutional conflicts,<sup>190</sup> neither can a strictly functionalist analysis. In such cases, courts must deploy the full menu of accepted interpretive techniques. This toolkit certainly includes text, legislative history, and historical practice. It also includes broader public-policy concerns, changes in background facts over time, and the larger purposes that undergird specific constitutional text. All of these interpretive devices enjoy broad-based acceptance and legitimacy. Moreover, consistent practice over time—in the form of constitutional conventions—presents the most promising and objective interpretive device for resolving conflicts that are simply part of the Constitution's original design.

---

188. See Ronald J. Krotoszynski, Jr., *An Epitaphios for Neutral Principles in Constitutional Law: Bush v. Gore and the Emerging Jurisprudence of Oprah!*, 90 GEO. L.J. 2087, 2093–97 (2002) (discussing the political undertones of the Justices' opinions in *Bush v. Gore*, 531 U.S. 98 (2000)).

189. See *id.* at 2097–2101 (discussing the importance of principled constitutional decisionmaking to judicial legitimacy, and positing that “if federal judges are simply another set of partisan actors, it is difficult to see why their decisions should not be popularly accountable”).

190. In such cases, the Constitution mandates diametrically opposed outcomes and does not provide a textual basis for privileging one clause at the expense of another. See *supra* notes 24–47 and accompanying text.

#### IV. HISTORICAL PRACTICE AS A MEANS OF REFRAMING SEPARATION-OF-POWERS ANALYSIS

When the Constitution provides conflicting rules of decision, as is arguably the case in the context of the Appointments and Take Care Clauses,<sup>191</sup> three questions necessarily follow. First, should federal courts resolve the conflict or leave it to the political branches to work out between themselves? Second, and assuming that such disputes should be viewed as justiciable, what methodology should a reviewing court use to resolve conflicting constitutional commands? Third, and finally, what general principles should courts follow in such circumstances? This Part considers each of these questions and concludes that such disputes should be deemed justiciable, that the federal courts should rely on historical practice to inform their analysis of how to resolve constitutional conflicts, and that the federal courts should choose the “least unconstitutional”<sup>192</sup> path as they attempt to resolve constitutional conflicts.

##### A. *The Duty To Decide: Why Courts Should Reach the Merits in Interbranch Disputes Between Congress and the President*

Professors Aziz Huq and Peter Shane have separately argued that the federal courts should not resolve separation-of-powers disputes between the President and Congress.<sup>193</sup> Professor Huq, writing in the context of presidential removal of executive officers insulated by for-cause protection, posits that the federal courts should treat such removals as nonjusticiable political questions because of an absence of judicially manageable standards for evaluating such claims.<sup>194</sup> He observes that “[r]endering removal nonjusticiable leaves the underlying constitutional question to be resolved through contestation between democratically credentialed actors.”<sup>195</sup> Huq

---

191. See Stephenson, *supra* note 39, at 950–58.

192. Neil H. Buchanan & Michael C. Dorf, *How To Choose the Least Unconstitutional Option: Lessons for the President (and Others) from the Debt Ceiling Standoff*, 112 COLUM. L. REV. 1175, 1175 (2012).

193. See Huq, *supra* note 17, at 6–9; Shane, *supra* note 184, at 207–08; Peter M. Shane, *In NLRB Recess Appointments Case, Roberts Court Can Now Show It Knows How To Exercise Judicial Restraint*, 27 LAB. REL. WK. 1533, Aug. 7, 2013.

194. Huq, *supra* note 17, at 22–24.

195. *Id.* at 73.

argues that abstention on political-question grounds “is not to award the laurel to either Congress or the White House.”<sup>196</sup>

Professor Shane, writing in the context of the President’s appointments power, advances very similar arguments. He argues that the Supreme Court should have treated the dispute in *Noel Canning* as presenting a nonjusticiable political question<sup>197</sup>—one “that the Court regards as constitutionally left to the elected branches of government to decide for themselves.”<sup>198</sup> He posits that “[w]here the Constitution assigns to the elected branches a shared power, as with treaties or appointments, the Court behaves wisely in allowing each branch’s political and institutional incentives and disincentives to operate, as they were intended, to curb overreach by the other branch.”<sup>199</sup>

Of course, the Court did not heed this advice—both Justice Breyer and Justice Scalia offered extensive opinions on all three merits questions presented for decision.<sup>200</sup> But the fact that both the majority and dissenting blocs reached the merits in *Noel Canning* does not answer the harder question of whether they *should* have done so. In my view, judicial abstention from interbranch disputes is not a passive virtue,<sup>201</sup> but rather an active vice.<sup>202</sup>

Justice Lewis Powell authored one of the most thoughtful, and influential, glosses on when the Supreme Court should agree to referee interbranch disputes between the President and Congress. In his iconic concurring opinion in *Goldwater v. Carter*,<sup>203</sup> he posited that “[i]nterpretation of the Constitution does not imply lack of respect

---

196. *Id.*; *see id.* at 75 (“The net effect of nonjusticiability, in short, is to leave in place whatever statutory framework Congress and the President have already converged upon, while effectuating little change to the de facto doctrinal status quo.”).

197. Shane, *supra* note 184, at 207–09.

198. *Id.* at 208.

199. *Id.* at 209.

200. *See supra* notes 82–137 and accompanying text.

201. *See Bickel, supra* note 22, at 49–50, 74–79 (arguing that the federal courts sometimes act wisely in declining to reach the merits of disputes at the first available opportunity).

202. *See* Ronald J. Krotoszynski, Jr., *Constitutional Flares: On Judges, Legislatures, and Dialogue*, 83 MINN. L. REV. 1, 46–48 (1998) (discussing the “active vices of the passive virtues” and the reasons why judges should consider engaging in a dialectic with Congress about constitutional values); *see also* Gerald Gunther, *The Subtle Vices of the “Passive Virtues”—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 24–25 (1964) (describing and discussing the potential pitfalls of undue judicial caution in the enforcement of constitutional rights).

203. *Goldwater v. Carter*, 444 U.S. 996, 997 (1979) (Powell, J., concurring).

for a coordinate branch.”<sup>204</sup> Consistent with this view, Justice Powell argued that when the President and Congress reach “irreconcilable positions” on a question regarding the proper scope of each branch’s respective constitutional authority, the Supreme Court has a duty under *Marbury v. Madison*<sup>205</sup> to “say what the law is.”<sup>206</sup> Undertaking this responsibility constitutes a core judicial duty that Article III judges cannot legitimately shirk.<sup>207</sup>

Failing to resolve conflicting interbranch claims to constitutional authority does not so much indicate respect for the coordinate branches of the federal government as it does abdicate a core responsibility of the judicial branch. As Justice Powell observed, “If the President and the Congress had reached irreconcilable positions, final disposition of the question presented by this case would eliminate, rather than create, multiple constitutional interpretations.”<sup>208</sup> Accordingly, refusing to decide the limits and scope of the President’s recess-appointments power does not constitute judicial statesmanship, but rather judicial abdication.

*B. Historical Practice as a Potential Tiebreaker for Deciding Difficult Separation-of-Powers Questions*

When constitutional provisions point in different directions, as with the Appointments Clause and the Take Care Clause,<sup>209</sup> recourse to the Constitution itself will not resolve the ambiguity. In this respect, Justice Scalia’s opinion in *Noel Canning* lacks persuasive force because he focuses myopically on the Appointments Clause and gives no attention whatsoever to the Take Care Clause (or, for that matter, to the Opinions Clause).<sup>210</sup> To focus exclusively on the

---

204. *Id.* at 1001.

205. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

206. *Goldwater*, 444 U.S. at 1000 (Powell, J., concurring) (citing *Marbury*, 5 U.S. (1 Cranch) at 177).

207. *Id.* at 1001; see *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427–28 (2012) (“In general, the Judiciary has a responsibility to decide cases properly before it, even those it ‘would gladly avoid.’” (citing *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821))).

208. *Goldwater*, 444 U.S. at 1001.

209. See Stephenson, *supra* note 39, at 953–55.

210. See *Nat’l Labor Relations Bd. v. Noel Canning*, 134 S. Ct. 2550, 2617–18 (2014) (Scalia, J., concurring) (dismissing the majority’s analysis as little more than an endorsement of the so-called “adverse-possession” theory of the recess-appointments power, and arguing that it “will have the effect of aggrandizing the Presidency beyond its constitutional bounds”). *But see* Adrian Vermeule, *Recess Appointments and Precautionary Constitutionalism*, 126 HARV. L. REV. F. 122, 123 (2013) (warning against a “myopic” focus, “even to the point of obsession, on a

Senate's role in giving its advice and consent, to the complete exclusion of the textual mandate for the President to enforce federal law,<sup>211</sup> is to miss the forest for the tree.

On the other hand, focusing exclusively on the Take Care Clause, to the detriment of the Appointments Clause,<sup>212</sup> would be no less objectionable. Formalism must take seriously *all* of the textual and structural commitments relevant to a particular separation-of-powers problem. In this context, such an approach would require a reviewing court to reconcile the Framers' clearly stated intention that the Senate consent to the President's appointments to principal executive-branch offices with the equally clearly stated intention that the President be able to oversee effectively the operation of the executive branch (reflected in both the Take Care and Opinions Clauses<sup>213</sup>). Simply put, the text, unaided, will not provide clear answers.

Professor Curtis Bradley and Dean Trevor Morrison have advanced a thoughtful and carefully calibrated gloss on how historical practice should inform contemporary separation-of-powers disputes.<sup>214</sup> As they accurately observe, "Arguments based on historical practice are a mainstay of debates about the constitutional separation of powers."<sup>215</sup> This is so precisely because, in many key

---

particular target risk, while ignoring countervailing risks, including risks generated by the precautions themselves"). Vermeule suggests that "[a]n enlightened decisionmaker will do well to consider the systemic, dynamic, and long-run effects of any given precaution, including the long-run risk of backlash resulting in perverse outcomes." *Id.* at 124.

211. It is ironic that Justice Scalia, in another context, has called out President Obama for, in his view, failing to enforce federal law with sufficient vigor in the context of federal immigration law and policy. *See Arizona v. United States*, 132 S. Ct. 2492, 2521–22 (2012) (Scalia, J., concurring in part and dissenting in part).

212. *See Roberts*, *supra* note 30, at 733–39; *Shane*, *supra* note 184, at 202.

213. *See AMAR*, *supra* note 127, at 326 (arguing that the "animating spirit of the opinions clause" is "to concentrate accountability for presidential action on the president himself"); *Sidak*, *supra* note 131, at 1164 (arguing that "the fundamental principle animating the Constitution—the separation of powers—dictates a unitary Executive, and that a unitary Executive cannot tolerate congressional encroachments that, under the pretext of guarding the public purse, deny the President the funds necessary to perform the duties and exercise the prerogatives conferred on him by article II"); *id.* at 1185–89 (arguing that Congress may not constitutionally prevent the President from discharging mandatory duties by refusing to appropriate the funds necessary for their execution). *Amar* argues that "[n]o matter how Congress might choose to contour various executive departments and offices beneath the president, the president needed to serve as the legal hub of the executive inner circle and the apex of the executive pyramid." *AMAR*, *supra* note 127, at 326.

214. *See Bradley & Morrison*, *supra* note 1, at 414–17.

215. *Id.* at 412.

contexts, the Framers pursued a balance of powers<sup>216</sup> rather than a true separation of powers.

Among the factors that Bradley and Morrison identify as relevant to using historical gloss to inform separation-of-powers doctrine and practice are the reasons historical practice is relevant, and the nature, if any, of acquiescence by one branch in another branch's practices (including "whether they reflect interbranch agreements or mere waivers").<sup>217</sup> They also suggest that reviewing courts should maintain some degree of skepticism about executive-branch claims of legislative acquiescence (in light of collective-action problems that plague Congress). Finally, Bradley and Morrison posit that the "institutional context in which the question arises" must be taken into account.<sup>218</sup>

Accordingly, "The more an interpreter deems nonpractice evidence like the text and original understanding to be clear, the less likely the interpreter is to credit historical practice that points in a different direction—or, put differently, the more widespread and deeply entrenched the practice must be in order to change the outcome."<sup>219</sup> Conversely, if nonpractice material is "ambiguous or indeterminate, the more likely the interpreter is to rely on historical practice to inform constitutional meaning."<sup>220</sup>

Along similar lines, Professor Adrian Vermeule has suggested that quasi-constitutional rules arise through "conventions"—

---

216. The British Constitution, too, features a "balance of powers" rather than a full separation of powers. See James Hyre, Comment, *The United Kingdom's Declaration of Judicial Independence: Creating a Supreme Court To Secure Individual Rights Under the Human Rights Act of 1998*, 73 *FORDHAM L. REV.* 423, 432–33 (2004); see also ROBERT STEVENS, *THE ENGLISH JUDGES: THEIR ROLE IN THE CHANGING CONSTITUTION* 9 (2002) (observing that "balance of powers rather than separation of powers was the British choice"). Although the U.S. Constitution plainly embraces the concept of separating and dividing government powers in order to better secure individual liberty, in some important contexts—for example, the war powers—the Framers instead elected to blend, rather than clearly divide, constitutional responsibilities. See *supra* note 14. In these contexts, where the Constitution calls for a balance rather than a separation of powers, courts simply cannot avoid engaging in careful analysis and balancing to resolve interbranch disputes. Neither formalism nor functionalism, unaided, will prove adequate to the task at hand.

217. Bradley & Morrison, *supra* note 1, at 414.

218. *Id.* at 415; see Michael J. Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 *B.U. L. REV.* 109, 134 (1984) (arguing that three conditions must be met in order for a consistent practice to become a binding constitutional convention—namely, that the custom "must consist of acts," the branch affected must have been aware of the practice, and "the branch placed on notice must have acquiesced in the custom").

219. Bradley & Morrison, *supra* note 1, at 430.

220. *Id.* at 430–31.

consistent practices over time.<sup>221</sup> Vermeule argues that “[b]etween ‘politics’ on the one hand and formal written law on the other lies a third category of unwritten rules of the game, or conventions.”<sup>222</sup> He suggests that, at least in theorizing agency independence, “the lens of convention is useful . . . in the American administrative state, allowing us to make sense of phenomena that from a formal legal point of view must remain mysterious.”<sup>223</sup> When formal law provides conflicting rules of decision, reliance on conventions, established and applied over time, presents the best available means of providing an objective basis for a reviewing court’s decision, thereby insulating it from the potential objection that it reflects simply a judicial, rather than constitutional, ordering of values.<sup>224</sup>

Other scholars of the administrative process have observed that administrative agencies are themselves responsible for creating constitutional rules through their practices.<sup>225</sup> Professor Gillian Metzger, for example, posits that “[i]n practice, administrative constitutionalism also encompasses the elaboration of new constitutional understandings by administrative actors, as well as the construction (or ‘constitution’) of the administrative state through structural and substantive measures.”<sup>226</sup> She situates her work as part of a larger body of legal scholarship that seeks to explain the “constitutional role played by ordinary law and the central importance to our constitutional system of political efforts to construct constitutional meaning.”<sup>227</sup>

Metzger’s argument corresponds in important ways with Vermeule’s work on conventions—both scholars argue that practices,

---

221. See Vermeule, *supra* note 21, at 1166–68, 1181–86. Vermeule defines conventions as “unwritten rules,” *id.* at 1231, and suggests that conventions are binding even if they are not formally judicially enforceable, see *id.* at 1181–83.

222. *Id.* at 1231.

223. *Id.*

224. Cf. BICKEL, *supra* note 22, at 69–72, 204–96 (discussing the countermajoritarian problem of courts invalidating the actions of the politically accountable branches of the federal government, and suggesting that the legitimacy of judicial decisions must rest on both the appearance and reality of being grounded in constitutional, rather than individual, morality). As Judge Frank M. Johnson, Jr., explained, “it is one thing for a judge to adopt a theory of political morality *because it is his own*; it is another for him to exercise his judgment about what the political morality implied by the Constitution is.” Frank M. Johnson, Jr., *In Defense of Judicial Activism*, 28 EMORY L.J. 901, 909 (1979).

225. See generally Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897 (2013).

226. *Id.* at 1900.

227. *Id.* at 1902.

over time, come to enjoy a kind of quasi-constitutional (if not full constitutional) status.<sup>228</sup> Thus, Metzger argues that “[s]imilar exploitation of the ordinary law–constitutional law overlap could occur in other contexts, for example by courts according entrenched statutory norms more of a constitutional status.”<sup>229</sup>

These arguments, advanced by distinguished administrative-law scholars, demonstrate that consistent practice, over time, can come to play a role in constraining government—a constraint that, if not identical to formal constitutional rules, resembles them in terms of its effective binding force. I do not suggest that practice—or conventions—should be permitted to override the express requirements of the Constitution. For example, it is nonsensical to suggest that the President may appoint principal executive officers without seeking and obtaining the overt consent of the Senate to each and every appointment.<sup>230</sup> But in trying to assess how best to reconcile the Recess Appointments Clause with the reality that the contemporary Senate seems incapable of acting expeditiously on most presidential nominations (especially in periods of divided government), recourse to the historical dynamics between the Senate and the President has much to recommend it.<sup>231</sup>

### C. *On the Virtues of Taking the Least Unconstitutional Path*

The Senate’s inability (or unwillingness) to act on many senior presidential appointments presents nontrivial constitutional problems.<sup>232</sup> The President cannot ensure that the laws are faithfully

---

228. *See id.* at 1903–15.

229. *Id.* at 1902.

230. *But cf.* Stephenson, *supra* note 39, at 978 (“This Essay has argued that under some circumstances, the President should be able to appoint senior executive branch officers without a Senate confirmation vote.”). Stephenson explains that “[t]he pragmatic justification for this proposal derives from the concern that Senate obstruction of executive branch appointments seems to be getting out of hand.” *Id.*

231. STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 117 (2005) (discussing the duty of judges to interpret and apply constitutional values in ways that ensure the relevancy of moral and political commitments enshrined in the document itself, and emphasizing that “[t]he relevant values limit interpretive possibilities”).

232. *See* Roberts, *supra* note 30, at 727 (arguing that the “long-term struggle between the President and the Senate over executive appointments has now reached a crisis and that we may be approaching a point where the President’s crucial duty to take care that the laws be faithfully executed is significantly impaired”); *see also* Vermeule, *supra* note 210, at 124 (warning that the existence of partisan gridlock on appointments could “produce so much pent-up demand for reform of the appointments process that the President offers some radical reinterpretation of the Constitution, one that gives him substantially increased discretion over appointments”).

executed if he cannot staff offices within the executive branch. Nor may the President seek and obtain “Opinions in Writing”<sup>233</sup> from absent officers. Nevertheless, the very structure of the executive branch presupposes that the President will enjoy the assistance of subordinates loyal to him and his administration.<sup>234</sup>

The work of several prominent administrative-law scholars provides helpful insights on how best to navigate the structural conflict between the Senate and President over appointments. This Part explores how the scholarship of Professors O’Connell, Manning, Buchanan, and Dorf could inform answers to these difficult questions.

Professor Anne Joseph O’Connell persuasively argues that “agency vacancies have consequences for the unitary theory of the executive and for separation of powers doctrine more generally.”<sup>235</sup> If the President cannot staff key positions within the administration, the unitary executive becomes less unitary; an acting or career officer holding a position in a caretaker capacity lacks both political legitimacy and political accountability.<sup>236</sup> So too, judicial-deference doctrines, like *Chevron*,<sup>237</sup> rest on the premise that politically accountable agency administrators enjoy greater legitimacy if the question presented for decision is really one of policy rather than law; whether the same presumption of legitimacy should be afforded to the handiwork of an acting official caretaker presents a difficult question.<sup>238</sup>

Thus, the failure to staff executive-branch offices produces constitutional harms—just as would presidential self-help of the sort posited by Professor Stephenson. But whether one leaves the President minding the store without sufficient subordinates to ensure faithful execution of the law or permits the President, by some subterfuge, to evade the requirement of obtaining the Senate’s consent to the appointment of all principal officers, a constitutional harm will occur. A constitutional injury, in these circumstances, simply cannot be avoided.

---

233. See U.S. CONST. art. II, § 2, cl. 1.

234. See O’Connell, *supra* note 126, at 974–85.

235. *Id.* at 974.

236. See *id.* at 974–80.

237. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984).

238. See O’Connell, *supra* note 126, at 981–84.

One could attempt to resolve the conflict by giving the more specific constitutional command precedence over the more general command; Professor Manning advocates this approach to deciding separation-of-powers conflicts.<sup>239</sup> He rejects the notion of a freestanding separation-of-powers doctrine based on general structural features of the Constitution, such as the Vesting Clauses.<sup>240</sup> Still, he cautions that “[t]o say that there is no freestanding separation of powers doctrine is not to say that the Constitution contains no judicially enforceable separation of powers.”<sup>241</sup>

Professor Manning argues that “when the Constitution is specific, the Court should read it the way it reads all specific texts,”<sup>242</sup> by which Manning means that a specific constitutional allocation of a power or duty cannot simply be reassigned for reasons of convenience or efficiency.<sup>243</sup> On the other hand, “where no specific clause speaks directly to the question at issue, interpreters must respect the document’s indeterminacy.”<sup>244</sup> Manning posits that separation-of-powers inquiries should be refocused on “the specific ways in which constitutionmakers did, and did not, resolve structural issues in the bargained-for constitutional text.”<sup>245</sup>

Professor Manning’s general theory—of strictly enforcing specific constitutional limits and recognizing substantial congressional discretion to adopt novel agency structures in cases where any separation-of-powers objection rests largely (if not entirely) on the Vesting Clauses<sup>246</sup>—will work well in circumstances in which a general or a specific clause is at issue. It will also work when only a *single* specific clause is at issue—or when a single specific clause is in tension with one or more general clauses. However, Manning does not address how best to resolve conflicts that implicate not a general and a specific clause, but two or more specific clauses. In such a

---

239. See Manning, *supra* note 5, at 1947–49.

240. See *id.* at 1945–48, 1985–86, 1991–93, 2017–21.

241. *Id.* at 1947.

242. *Id.*

243. See *id.* at 1947–48.

244. *Id.* at 1948.

245. *Id.* at 1948–49.

246. *But see* Lawson, *supra* note 5, at 857–58 (arguing that the federal courts should enforce the structural implications of the Vesting Clauses to block reassignment of functions or duties among the three branches because “[a]ny exercise of governmental power, and any governmental institution exercising that power, must either fit within one of the three formal categories thus established [by the Vesting Clauses] or find explicit constitutional authorization for such a deviation”).

circumstance, one can infer that the general judicial duty to give full effect to specific power-allocating clauses would apply, but a conflict between such clauses cannot be self-resolving. The questions then become whether the courts should resolve such conflicts (or simply defer to the President and Congress) and, assuming that they should, how best to resolve constitutional conflicts of this sort.

Courts clearly have a duty to resolve cases that present otherwise irreconcilable conflicts between the political branches.<sup>247</sup> Accordingly, courts must determine how best to reconcile conflicting constitutional commands when, on the facts presented, it is impossible to give full effect to both.

Professors Neil Buchanan and Michael Dorf, in the context of the debt-ceiling controversy, have argued cogently that the President has a duty to take the “least unconstitutional” road when he cannot fully discharge all of his constitutional responsibilities.<sup>248</sup> By this, they mean that when a conflict arises between statutes, it may not be possible for the President to implement both fully and effectively— notwithstanding a general constitutional duty to “take [c]are” that *all* federal laws be given effect.<sup>249</sup> As Buchanan and Dorf state the paradox, “the president risks acting unconstitutionally no matter what he might do, because he will have failed to execute at least one duly enacted law of the United States.”<sup>250</sup> They also note that, at present, “[t]here is virtually no legal doctrine governing the choice among unconstitutional options.”<sup>251</sup>

In the specific context of the debt-ceiling limit and the countervailing duty to pay principal and interest on existing U.S. debt instruments, or in cases of a conflict between an annual appropriation and the debt ceiling, Buchanan and Dorf argue that ignoring the debt ceiling would present the “least unconstitutional” option.<sup>252</sup> In reaching this conclusion, they offer three general principles that should govern the analysis. First, the President should choose the option that minimizes his usurpation of power.<sup>253</sup> Second, he also

---

247. See *supra* notes 205–08 and accompanying text.

248. See Buchanan & Dorf, *supra* note 192, at 1181–82, 1218–19, 1243.

249. *Id.* at 1196–97 & n.93.

250. *Id.*

251. *Id.* at 1221.

252. See *id.* at 1243.

253. *Id.* at 1222–29. Buchanan and Dorf emphasize that, in undertaking this analysis, “any measure of comparative constitutional harm should be qualitative, not quantitative—or at least not *merely* quantitative.” *Id.* at 1224.

should minimize subconstitutional harm.<sup>254</sup> Finally, the President should choose the option that is easiest to remedy with respect to the constitutional violation (or violations) that result.<sup>255</sup>

*Noel Canning* presented facts involving a certain constitutional harm—either failing to honor the clear procedural requirements of the Appointments Clause or leaving the President incapable of enforcing federal laws because of his inability to staff an independent agency featuring a collective head. President Obama chose an unconstitutional option, by unilaterally deciding for himself that the Senate’s pro forma sessions did not count for purposes of applying the Recess Appointments Clause. In consequence, the Supreme Court disallowed this exercise in presidential self-help and voided the President’s contested NLRB appointments.<sup>256</sup>

Tellingly, however, Justice Breyer’s majority opinion does not resolve the larger constitutional impasse between the President and the Senate. To be sure, the Senate may decide for itself whether or not it is in session (within very broad parameters).<sup>257</sup> But even if the Senate may refuse to confirm pending nominations and may also block the President from making recess appointments by holding pro forma sessions at least every ten days,<sup>258</sup> President Obama’s actions hardly exhaust the universe of potential presidential responses to Senate intransigence on his nominations.<sup>259</sup>

Simply put, the full potential scope of presidential self-help in staffing and operating the executive branch was not presented in *Noel Canning*. Accordingly, the exact parameters of permissible presidential self-help in operating an executive branch plagued by vacancies remain to be determined. The President could conceivably

---

254. *Id.* at 1229–39.

255. *Id.* at 1239–43. They also note that “[t]o the extent that a choice among putatively unconstitutional options is controversial because of a contest over constitutional meaning, political actors ought to strive to ensure that their favored option permits expeditious judicial review.” *Id.* at 1240.

256. Nat’l Labor Relations Bd. v. *Noel Canning*, 134 S. Ct. 2550, 2567, 2574–75 (2014).

257. *Id.* at 2574–77.

258. *Id.* at 2567, 2574–77.

259. The possibility of frustrating a coordinate branch runs in both directions, of course. If the President opposed a law but could not successfully seek its repeal, he could frustrate the law’s execution by simply failing to nominate the principal and inferior officers needed to execute the authority that Congress delegated to the agency in question. In this way, the Constitution’s provisions on nominations reflect not only a check by the Senate on the President, but also a check by the President against Congress. Just as the President may not decide when the Senate is in session, the Senate may not entertain nominations not offered by the President.

take steps short of ignoring the Senate's availability to receive and consider nominations that would facilitate faithful execution of the laws (and thereby ensure presidential accountability for the enforcement of federal law). Moreover, such intermediate steps would be more likely to constitute the least unconstitutional option—and therefore should be preferred over bolder unilateral presidential action.<sup>260</sup>

Read against the work of Professors Vermeule, O'Connell, Buchanan, and Dorf, the *Noel Canning* majority opinion constitutes a masterful solution to a difficult constitutional conflict—and it manages not to upset the careful balance of powers that the Framers struck in assigning responsibility for appointments between the President and the Senate. In so doing, it takes into account the practical necessity of the President having sufficient assistance to execute his constitutional responsibilities. As Justice Breyer observes, the Recess Appointments Clause exists “to permit the President to obtain the assistance of subordinate officers when the Senate, due to its recess, cannot confirm them.”<sup>261</sup> The Constitution mandates presidential “control and political accountability” over the executive branch.<sup>262</sup> At the same time, however, “the Recess Appointments Clause is not designed to overcome serious institutional friction,”<sup>263</sup> but rather “simply provides a subsidiary method for appointing officials when the Senate is away during a recess.”<sup>264</sup>

Moreover, although the *Noel Canning* majority squarely rejected President Obama's attempt to install principal and inferior officers without satisfying the procedural requirements of the Appointments Clause, it left the recess-appointments power on the table as a means of overcoming entrenched senatorial opposition to the President's nominations—if, but only if, the Senate elects to close up shop for a nontrivial period of time. The rules set forth by the Supreme Court should also be largely self-enforcing and will not require active and ongoing judicial superintendence of the appointments process.

Faced with a direct constitutional conflict, Justice Breyer fashioned the “least unconstitutional” result by integrating the imperative of presidential control and oversight over the executive

---

260. See Buchanan & Dorf, *supra* note 192, at 1181–82, 1218–19, 1239–43.

261. *Noel Canning*, 134 S. Ct. at 2568.

262. *Id.* at 2569.

263. *Id.* at 2577.

264. *Id.*

branch with the concurrent constitutional command that the Senate play a meaningful role in overseeing presidential appointments.<sup>265</sup> He did so because “friction between the branches is an inevitable consequence of our constitutional structure.”<sup>266</sup>

Justice Breyer’s approach is entirely consistent with the text of the Recess Appointments Clause and comports with the larger purposes that animated its inclusion in the Constitution. Writing in *Federalist No. 67*, Alexander Hamilton explains:

The ordinary power of appointment is confined to the President and Senate *jointly*, and can therefore only be exercised during the session of the Senate; but as it would have been improper to oblige this body to be continually in session for the appointment of officers and as vacancies might happen in their recess, which it might be necessary for the public service to fill without delay, the [Recess Appointments Clause] is evidently intended to authorize the President, *singly*, to make temporary appointments “during the recess of the Senate, by granting commissions which shall expire at the end of their next session.”<sup>267</sup>

It is clear from this passage that the Framers undertook *both* to establish a norm of senatorial approval of presidential appointments and to provide an alternative means of appointment that would permit the government to function effectively when the Senate, for whatever reason, was not available to consider presidential nominations. Justice Breyer’s majority opinion fully honors these intentions.

So where does this leave a President who lacks the personnel required to discharge his constitutional duties? Professor O’Connell notes that presidents have invoked the Take Care Clause as a predicate for making emergency appointments free and clear of *both* the Appointments Clause and the Recess Appointments Clause.<sup>268</sup> Professor O’Connell explains that “[e]arly Attorneys General consistently argued that the president retained power to make temporary appointments outside of the Appointments Clause” and that “[t]his power derived, in their view, from the Take Care

---

265. It is clear that the Framers viewed the question in these terms. See THE FEDERALIST NO. 67, *supra* note 16, at 409–10 (Alexander Hamilton).

266. *Noel Canning*, 134 S. Ct. at 2577.

267. THE FEDERALIST NO. 67, *supra* note 16, at 409–10 (Alexander Hamilton).

268. See O’Connell, *supra* note 126, at 975–77.

Clause.”<sup>269</sup> Although the Supreme Court has never reached the question of the scope of the President’s power to staff positions within the executive branch incident to the Take Care Clause, the Court must read the Recess Appointments Clause in tandem with this overarching, textually specific, presidential obligation.<sup>270</sup>

Nevertheless, in the *Noel Canning* dispute over the contested NLRB appointments, the President failed to choose the least unconstitutional option in purporting to recess-appoint members to the NLRB when the Senate’s recesses were shorter than ten days (meaning that the Senate was effectively available to receive and consider nominations). Rather than determine for himself what constitutes a session of the Senate, President Obama should instead have considered using less controversial forms of self-help that did not usurp the Senate’s authority under Article I, Section 5, Clause 2.

For example, the President could have appointed “czars” holding staff appointments in the West Wing, perhaps in conjunction with reliance on acting officials who could discharge at least some of the statutory duties vested in a particular board, bureau, commission, or department of the executive branch.<sup>271</sup> To be sure, these alternatives would not work effectively in all cases, but they would surely work in at least *some* cases.

Moreover, the Supreme Court would likely sustain such presidential self-help practices as constitutional because Article II’s specific language creates mandatory duties that the President must discharge. Just as the President may not seek to superintend the Senate or exercise a power delegated to Congress,<sup>272</sup> Congress may not seek to usurp the President’s constitutional prerogatives.<sup>273</sup> In sum, a pragmatic formalist approach must take account of both the Senate’s role in the appointments process and also the President’s duty to enforce the laws that Congress has enacted.<sup>274</sup>

---

269. *Id.* at 975.

270. *See* Amar, *supra* note 34, at 788–95.

271. For a thoughtful and thorough discussion of the Obama administration’s use of czars to direct policy within the executive branch, see Saiger, *supra* note 179, at 2577–83.

272. *See* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (holding that “the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker”).

273. *See, e.g.,* *Bowsher v. Synar*, 478 U.S. 714, 722–25 (1986); *Buckley v. Valeo*, 424 U.S. 1, 121–22 (1976).

274. *See* Redish & Cisar, *supra* note 149, at 453–55, 474–78 (describing pragmatic formalism and discussing its merits, which include careful attention to text, context, and historical practice to address the ambiguities that inhere in the Constitution’s text).

Professor Amar argues that constitutional clauses must be read dynamically and conjunctively—synergistically—rather than in splendid isolation. He posits that sound constitutional interpretation must “always focus[ ] on at least two clauses and highlight[ ] the link between them.”<sup>275</sup> Amar claims that “[c]lause-bound textualism paradigmatically stresses what is explicit in the Constitution’s text,” whereas “intratextualism paradigmatically stresses what is only implicit in the Constitution’s text.”<sup>276</sup> In thinking about the federal appointments process, the federal courts have to reconcile conflicting constitutional imperatives—the Senate’s voice in the appointments process and the President’s concomitant duty to oversee the enforcement of federal laws, such that the President is meaningfully responsible and politically accountable for his discharge of these duties.<sup>277</sup>

The Framers designed a presidency whose chief officer was to oversee a “vigorous Executive.”<sup>278</sup> Writing in *Federalist No. 70*, Alexander Hamilton argues that an energetic chief executive is essential to effective governance and that “energy in the executive” comprises “unity; duration; an adequate provision for its support; and competent powers.”<sup>279</sup> The President has a serious constitutional basis for demanding that Congress provide the subordinate officers necessary for him to perform his constitutional duties.<sup>280</sup> But the strength of this claim is not sufficient to justify any and all forms of presidential self-help. Instead, as Buchanan and Dorf have suggested

---

275. Amar, *supra* note 34, at 788.

276. *Id.* To be clear, I do not endorse or embrace the strong form of intratextualism that Professor Amar advocates. This interpretative methodology should not be used in isolation, but rather in conjunction with careful attention to precedent, practice, and history. See DANIEL A. FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS* 77–83 (2002). As Farber and Sherry state their main objections, “To the extent that intratextualism is designed to mandate some conclusions and preclude others, then, it is too weakly specified and too easily manipulable.” *Id.* at 82. Thus, unlike how Amar presents it—and consistent with Farber and Sherry’s main objection—intratextual interpretation should be an interpretive tool used only *after* an ambiguity in need of clarification has been identified in a specific clause or provision of the Constitution, rather than to introduce an ambiguity where it otherwise does not seem to exist.

277. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 497–98 (2010).

278. *THE FEDERALIST NO. 70*, *supra* note 16, at 423 (Alexander Hamilton).

279. *Id.* at 424.

280. See Sidak, *supra* note 131, at 1185–94, 1235–39. Sidak argues that “[a]ny article II duty is a mandatory task of the Presidency,” *id.* at 1185, and that Congress may not impede the ability of the President to perform such mandatory tasks. See *id.* at 1185–88.

in a different context,<sup>281</sup> the federal courts should require the President to choose the “least unconstitutional” form of self-help in the face of congressional intransigence on appointments. Usurping the power to decide when the Senate is in session, however, is emphatically *not* the least unconstitutional choice.<sup>282</sup>

### CONCLUSION

At the end of the day, even if one is generally sympathetic to formalist analysis of separation-of-powers questions, formalism’s first principles will not always yield clear or consistent results. This is so because the Framers not only separated, but also blended, both structures and substantive powers. In light of this reality, a commitment to a principled—and pragmatic—brand of formalism requires careful consideration of historical practice in cases in which an exclusively text-based approach will not resolve one of the many ambiguities that the Framers deliberately built into the Constitution. The federal appointments process provides an excellent illustrative example of this problem.

The Constitution contains conflicting objectives—notably including the Senate’s prerogative to play a meaningful role in filling federal executive and judicial vacancies alongside a concurrent, freestanding commitment to a unitary executive headed by a President who enjoys both the power and a duty to enforce all federal laws. Accordingly, both simplistic formalist textualism *and* unprincipled “ends justify the means” functionalist proposals to permit the President to bypass the Senate should be squarely rejected in favor of an analytical approach that uses historical practice to inform how best to resolve the conflict embedded in the Constitution’s text.

The *Noel Canning* majority embraces pragmatic formalism: it carefully relies on text, history, practice, and policy to ground its resolution of the important separation-of-powers questions presented for decision. Moreover, *Noel Canning* leaves the political branches largely free to continue their historical dialectic—the decision provides rules of the road going forward, but it does not vest either branch with an absolute trump card. In this respect, the majority

---

281. See Buchanan & Dorf, *supra* note 192, at 1181–82, 1219–20, 1239–40, 1243.

282. See Nat’l Labor Relations Bd. v. Noel Canning, 134 S. Ct. 2550, 2567, 2574–75, 2577–78 (2014).

opinion respects the Framers' considered decision to balance, rather than separate, power in the context of appointments by leaving the Constitution's deliberate ambiguity in place. A pragmatic formalist should welcome decisions of this sort, which honor the Framers' intentions far more effectively than blindly enforcing one constitutional rule at the direct expense of another.