THE ROBERTS COURT'S FUNCTIONALIST TURN IN ADMINISTRATIVE LAW

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The Supreme Court's administrative law jurisprudence has recently taken a functionalist turn. *West Virginia v. EPA*[1] is the latest installment in a series of cases in which the Court has asked questions of degree rather than kind and reasoned through issues in a fashion more integrated than stepwise. In other words, a broader analysis of the structural underpinnings and first principles of the Constitution's separation of powers has increasingly complemented deference rules and decision trees.

Administrative law observers are accustomed to characterizing the Roberts Court's approach to reviewing agency action as sounding in formalism. That is not entirely wrong. Indeed, when considering the separation of powers, the Court routinely voices formalist precepts like "[t]he entire 'executive Power' belongs to the President alone"[2] and that "the Constitution assigns 'all legislative Powers' to Congress and 'bar[s their] further delegation.'"[3]

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1. 142 S. Ct. 2587 (2022).

2. Seila Law v. Consumer Financial Protection Bureau, 140 S. Ct. 2183, 2197 (2020).

3. *West Virginia*, 142 S. Ct. at 2624 (Gorsuch, J., concurring) (quoting Gundy v. United States, 139 S. Ct. 2116 (2019) (Kagan, J., plurality)).

But the Court hits functionalist notes, too. In a host of recent cases,[4] the Court has assessed the validity of agency actions and structures against broader ideas like the checks and balances and principle of democratic accountability inherent in our constitutional structure. This emerging functionalism has complemented, though not supplanted, the Court's formalist instincts. The Roberts Court's functionalist turn leaves an administrative law doctrine focused as much on the balance of power as the separation of powers.

At one level, this development might seem surprising. It was Justice Antonin Scalia, after all, who proclaimed, "Long live formalism."[5] Formalist and textualist commitments have certainly motivated much of the Court's jurisprudence over the past several years in other areas of the law.[6] But at a broader level, this nascent functionalist turn is not surprising or necessarily unprincipled. Indeed, it is consistent with the Roberts Court's broader commitment to

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4. In this Note, we focus in particular on cases including *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), *Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019), and *Seila Law v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183 (2020).

5. ANTONIN SCALIA, A MATTER OF INTERPRETATION 25 (1997).

6. *See, e.g.*, United States v. Taylor, 142 S. Ct. 2015, 2035 (2022) (Alito, J., dissenting) (pointing out that the Court's "categorical approach" to ascertaining crimes of violence privileges form over defendants' actual conduct, which must be "scrupulously disregarded"); Bostock v. Clayton County, 140 S. Ct. 1731, 1737 (2020) (privileging the "express terms of a statute" over the "limits of the drafters' imagination" in analyzing what a statute requires); Yates v. United States, 574 U.S. 528, 553–55, 565 (2015) (Kagan, J., dissenting) (arguing that the text "tangible objects" should matter more than the function of documents, to "preserve information," in determining whether fish fall within the meaning of a criminal statute). In fact, in 2015, Justice Kagan famously quipped, "We're all textualists now." Harvard Law School, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg [https://perma.cc/5N7J-R9HH]. *But see infra* note 19.

methodologically constrained judging that takes a minimalist approach to reining in exercises of power that overstep constitutional boundaries.[7]

At the heart of the long-running formalism-functionalism debate is a pair of questions about the exercise of power: (1) What kind? (2) How much?[8] Formalism emphasizes the former, and functionalism emphasizes the latter.[9]

For formalists, as Professor M. Elizabeth Magill explains, "the structural provisions of the Constitution specify the type (legislative, executive, judicial) and place (Congress, President, Supreme Court) of all governmental power. The judge assessing the validity of an institutional arrangement must first identify the type of power being exercised and . . . make certain that that power is exercised

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7. *See, e.g.*, Dep't of Homeland Security v. Regents of the Univ. of California, 140 S. Ct. 1891 (2020) (enjoining Trump administration's rescission of DACA on narrow procedural grounds); Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n, 138 S. Ct. 1719 (2018) (reversing state commission's decision on grounds of animus without reaching broader constitutional questions).

8. Although we use the formalism-functionalism dichotomy extensively in this Note, we have our doubts that it illuminates as much as it obfuscates. In that sense, the "functionalist turn" we identify may help advance the conversation about administrative law beyond the existing divide.

9. *But cf.* William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL'Y 21, 29 (1998) (arguing there is some overlap between the two) ("[W]e ought not consider functionalism and formalism as inevitably antipodal, or even independent, forces of constitutional law. Ultimately, we must appreciate how they are inextricably related. As theories of governance, formalism cannot avoid functional inquires [sic], any more than functionalism can avoid formalist lines. As bases for state legitimacy, neither formalism nor functionalism alone is sufficient. As argumentative modes, the formalist argument conjoined with a functional counterpart is much stronger than either argument standing alone."); John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1950 (2011) ("[F]ocusing upon [the] differences [between formalism and functionalism], however real, overlooks an important tendency that the two approaches have in common: in some contexts, each approach relies on a freestanding separation of powers doctrine that transcends the specific meaning of any given provision of the Constitution.").

by an official residing in the appropriate governmental institution."[10] In the eyes of formalists, once an exercise of governmental power is classed as legislative, executive, or judicial, it is essential that the proper, constitutionally-appointed actor exercises said power.[11] In that way, powers stay separated.

Functionalists, on the other hand, eschew bright-line rules surrounding who must exercise what power.[12] Instead, as Professor Thomas Merrill explains, functionalists look to "an evolving standard designed to advance the ultimate purposes of a system of separation of powers"—namely, the maintenance of the *balance* of powers within our constitutional system.[13] As a result, functionalists like Professor Peter Strauss contend that "courts should view separation-of-powers cases in terms of the impact of challenged arrangements on the balance of power among the three named heads of American government."[14] Functionalists are less concerned with maintaining a strict separation of authorities. Instead, they ask how much infringement by one branch against another is too much. If the balance of power between the three branches remains largely intact, the functionalist will be satisfied.[15] In that way, functionalists view separation-of-powers questions as about *degree* rather than *kind*.

As Harvard Law School Dean John Manning has observed, both formalists and functionalists proceed based on their sense of the underlying spirit of the separation of powers: "[W]hat counts for functionalists is the apparent background purpose of balance

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10. M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1139–40 (2000).

11. *Id.* at 1141–42 (arguing that this poses a difficulty for formalists).

12. *See* Manning, *supra* note 9, at 1952.

13. Thomas W. Merrill, *The Constitution Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 231.

14. Peter L. Strauss, *Formal and Functional Approaches to Separation of Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 522 (1987).

15. Magill, *supra* note 10, at 1142–43.

among the branches. What counts for formalists is the apparent background purpose of strict separation."[16]

In recent administrative law cases, the Roberts Court has begun to examine both the questions of "what kind of power" and "how much power," considering the values of both separation and balance. As a result, administrative law doctrine is beginning to move away from "yes or no" questions with clear-cut answers—traditionally the comfort zone of many textualists and formalists alike—towards more challenging line-drawing questions, which invite reflection on the broader values at stake when agency actions reach the judiciary. As Professor William Eskridge wrote in this journal twenty-five years ago, "neither formalism nor functionalism has wholly dominated American constitutional history."[17] The same can now be said of the Roberts Court's administrative law jurisprudence.[18]

Many have bemoaned these developments, alluding to white knights like the major questions doctrine coming to rescue hyper-

16. Manning, *supra* note 9, at 1946.

17. Eskridge, *supra* note 9, at 22.

18. This is not surprising. In terms of rules, legal reasoning, and modes of thought, "formalism and functionalism are frequently and maybe typically interconnected." *Id.* at 24. Nor is it an outlier from the perspective of Supreme Court history. As Professor Magill has written: "For its part, the Supreme Court vacillates between what are described as formalist and functionalist approaches, fully embracing neither, and sometimes borrowing from both. Thus, neither of the dominant approaches provides a consistent account of the methodology applied or the outcome of the cases." Magill, *supra* note 10, at 1138 (footnote omitted). For examples of cases wherein the Supreme Court has opted for a more functionalist approach to separation of powers questions, see Manning, *supra* note 9, at 1942–43 (citing Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 443 (1977); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986); Morrison v. Olson, 487 U.S. 654 (1988); Mistretta v. United States, 488 U.S. 361, 386 (1989)). For examples of cases wherein the Supreme Court has opted for a more formalist approach to separation of powers questions, see Manning, *supra* note 9, at 1943–44 (citing Buckley v. Valeo, 424 U.S. 1, 125-26 (1976) (per curiam); INS v. Chadha, 462 U.S. 919, 944–59 (1983)).

formalist decisions from counterintuitive (or undesired) conclusions.[19] But another way to read the recent separation-of-powers cases is to see a Court looking to context and structure—frequent tools of textualist statutory interpretation—alongside broader presumptive commitments in favor of preventing the concentration of power and safeguarding democratic accountability. Taken together, the Court seems to be resting horizontal separation-of-powers cases on the same edifice as existing vertical separation-of-powers cases.[20]

Such an approach remains methodologically consistent even if it falls outside the traditional formalist framework. Administrative law scholars (and students) have long sought to approach challenges to agency action with a series of yes or no questions, laid out as something of a decision tree. In the *Chevron* context, for example, one asks whether the statute is ambiguous. If so, then one asks whether the agency's interpretation is reasonable. If the answer is yes, the agency action is generally upheld. Trained in this paradigm, scholars understandably have an impulse to try to work cases like *West Virginia v. EPA*, *Barnhart v. Walton*,[21] or *United States v. Mead Corp.*[22] into such a decision tree. Indeed, after *West Virginia*, Nicholas Bednar rolled out an updated tree that added yet another branch to account for the Court's latest doctrinal innovation, the

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19. *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting) ("Some years ago, I remarked that '[w]e're all textualists now." It seems I was wrong. The current Court is textualist only when being so suits it. When that method would frustrate broader goals, special canons like the "major questions doctrine" magically appear as get-out-of-text-free cards." (citation omitted)); Chad Squitieri, *Who Determines Majorness?*, 44 HARV. J.L. PUB. POL'Y 463 (2021) (arguing the major questions doctrine betrays fundamental textualist commitments). *But see* Louis J. Capozzi, III, *The Past and Future of the Major Questions Doctrine*, OHIO ST. L.J. (forthcoming 2022) (manuscript at 3) (on file with authors) ("Contrary to some scholars' claims, the Court did not invent the [major questions] doctrine in the past few decades. The clear statement rule applied in *West Virginia* claims roots extending at least into the mid-to-late nineteenth century, when courts narrowly construed delegations by legislatures to agencies.").

20. *See infra* Part II.

21. 535 U.S. 212 (2002).

22. 533 U.S. 218 (2001).

major questions doctrine.[23] And while that approach reaches the right bottom-line question—ultimately a court decides either that a question *is* or *is not* of the type we would expect to be delegated, for example—reaching the answer often requires a more holistic analysis than a decision tree of multiple, discrete steps implies.

In this emerging mode of analysis, the Court seems to be asking whether, when taken as a whole, the agency action "stays within the lines" along three key dimensions—(1) the *scope* of congressional delegations of authority to administrative agencies, (2) *what* agencies do with that delegated power, and (3) *how* these agencies exercise that power. Whether the agency action is still valid after being analyzed through these three lenses—not whether it "fell off" at a particular branch of a decision tree—is a more effective description of the case law. Such an approach still retains a methodological consistency by examining those three dimensions concurrently. While the Court's approach does not require examining the three dimensions in the same sequence, neither does it enable unconstrained judicial freewheeling. The same three constraints guide the resolution of every case, setting the stage for future litigation.

In Part One of this Note, we analyze recent administrative law cases to illustrate the Roberts Court's three-dimensional approach to incorporating functionalist considerations. In Part Two, we zoom out to examine the implications of this emerging functionalism, drawing an analogy to Justice O'Connor's approach to federalism cases. And in Part Three, we offer some thoughts about how this functionalist turn might be responsive to concerns about methodological inconsistency and judicial overreach.

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23. *See* Nicholas Bednar, *Chevron's Latest Step*, YALE J. REG. (July 3, 2022), https://www.yalejreg.com/nc/chevrons-latest-step/ [https://perma.cc/A8BV-H9D9].

I. FUNCTIONALISM IN THREE DIMENSIONS

A. *The Major Questions Doctrine: A Functionalist Variant of the Nondelegation Doctrine*

"The nondelegation doctrine is the Energizer Bunny of constitutional law: No matter how many times it gets broken, beaten, or buried, it just keeps on going and going."[24]

The nondelegation doctrine is, once again, making a comeback. This time, though, it has arrived in new clothing: the major questions doctrine. This substantive canon illustrates the Court's functionalist turn in administrative law.[25] While the nondelegation doctrine would hold that Congress must decide certain questions itself, the major questions doctrine merely demands a clear statement from Congress that it has intended to delegate power to an agency to decide a certain question.

The Court's holding in *West Virginia* might indicate that the *functionalist*—as opposed to the *formalist*—variant of the nondelegation doctrine is gaining steam. In other words, as scholars debate the historical foundations of a strict formalist nondelegation doctrine,[26]

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24. Gary S. Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 330 (2002).

25. It is helpful to class the major questions doctrine as part of a class of "nondelegation canons," to use Professor Cass Sunstein's phrase. Professor Sunstein has explained that federal courts often employ "nondelegation canons" to "hold that federal administrative agencies may not engage in certain activities unless and until Congress has expressly authorized them to do so" rather than "invalidating federal legislation as excessively open-ended." *See* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 316 (2000).

26. *Compare* Julian Davis Mortenson and Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021) (asserting no such historical foundation exists), *with* Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490 (2021) (arguing the opposite). In *West Virginia*, Justice Kagan's dissent pointed to Mortenson and Bagley as having resolved the issue, West Virginia v. EPA, 142 S. Ct. 2587, 2642 (2022) (Kagan, J., dissenting), whereas Justice Gorsuch's concurrence cast doubt on that conclusion, pointing to an ongoing "battle of the law reviews," *id.* at 2625 n.6.

a more prudential approach has emerged that may *sometimes* reach the same conclusions, but generally asks different questions.[27]

At its core, the nondelegation doctrine arises out of the text and structure of the Constitution: Article I vests all "legislative powers" in Congress. A formalist argument can follow: Congress may not delegate away *legislative* powers to other actors (like administrative agencies). Quoting Professor Lawson's work,[28] Justice Gorsuch wrote in his *Gundy v. United States*[29] dissent that if Congress were able to "pass off its legislative power to the executive branch, the '[v]esting [c]lauses, and indeed the entire structure of the Constitution,' would 'make no sense.'"[30]

To varying degrees, leading thinkers within the conservative legal movement like Professors Michael McConnell[31] and Michael Rappaport[32] have advanced a categorical, formalist version of the nondelegation doctrine: Article I, Section 8 powers that are in fact "legislative"—namely, those that apply domestically and impact our "private rights" to life, liberty, and property—may not be delegated away at all. But Congress can freely delegate to the executive branch its non-"legislative" powers, like those that had previously been part of the King's royal prerogative powers, foreign affairs-related powers, and lawmaking authority impacting "public rights" (like welfare benefits).[33]

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27. It is not clear that the entire Court has settled on a particular approach to *applying* the Major Questions Doctrine. For a discussion of how the visions of Chief Justice Roberts and Justice Gorsuch diverge, see Frances Williamson, *Implicit Rejection of* Massachusetts v. EPA: *The Prominence of the Major Questions Doctrine in Checks on EPA Power*, 2022 HARV. J.L. PUB. POL'Y PER CURIAM 23, 6–7.

28. *See* Lawson, *supra* note 24, at 340.

29. 139 S. Ct. 2116 (2019).

30. *Id.* at 2134–35 (2019) (Gorsuch, J., dissenting).

31. *See* MICHAEL MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION (2020).

32. *See* Michael B. Rappaport, *A Two-Tiered and Categorical Approach to the Nondelegation Doctrine*, *in* THE ADMINISTRATIVE STATE BEFORE THE SUPREME COURT: PERSPECTIVES ON THE NONDELEGATION DOCTRINE 195 (Peter J. Wallison & John Yoo, eds., 2022).

33. *See* MCCONNELL, *supra* note 31, at 227–28.

But a more functionalist nondelegation test may be emerging. Under this approach to nondelegation—advanced by Professor Lawson[34] and buoyed by Chief Justice Marshall's dicta in *Wayman v. Southard*[35] as well as Chief Justice Rehnquist's concurrence in the *Benzene* case[36]—a fine-grained analysis of what constitutes "legislative" power is not necessarily the driver of the nondelegation inquiry. Rather, the Court must determine whether, in light of the relevant context, Congress has made the important policy choice. Once Congress has made the hard trade-off, it is free to allow an agency to "fill up the details"[37] and even exercise a hefty amount of policymaking discretion as it effectuates that choice.

Therefore, the guiding light of the functionalist nondelegation inquiry is to ensure that Congress is making the overarching, tough call regarding the policy question. Distinguishing between *types* of power is not as important as ensuring that Congress retains a *degree* of control over "the important subjects" befitting a representative government. Discerning those subjects can be a context-specific,

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34. *See* Gary Lawson, *A Private-Law Framework for Subdelegation*, *in* THE ADMINISTRATIVE STATE BEFORE THE SUPREME COURT: PERSPECTIVES ON THE NONDELEGATION DOCTRINE, *supra* note 32, at 123–60. Though we have framed Professor Lawson's proposed nondelegation test as functionalist, it is worth noting that his overarching theory of the separation of powers is expressly formalist. *See* Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CALIF. L. REV. 853, 857–58 (1990) (positing that the Vesting Clauses provide for "a complete division of otherwise unallocated federal governmental authority" such that "[a]ny exercise of governmental power . . . must either fit within one of the three formal categories thus established [by Articles I–III] or find explicit constitutional authorization for such deviation.").

35. 23 U.S. 1, 43 (1825) ("The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.").

36. Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring) (writing that one of the "important functions" that the nondelegation doctrine serves is "ensur[ing] to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will").

37. *Wayman*, 23 U.S. at 43.

loose, and wooly inquiry—precisely the sort of inquiry at which a purely formalist Court might shudder.

But the functionalist variant of nondelegation is what guides the Chief Justice's opinion in *West Virginia*. There, the Court declined to interpret a vaguely worded provision of the Clean Air Act as granting the Environmental Protection Agency (EPA) the power, in effect, to shutter the coal-fired power generation industry and to favor power generation from renewable energy sources. Section 7411 of the Clean Air Act empowered the EPA to determine the "best system of emission reduction," figure out the "degree of emission limitation achievable through the application" of that "best system," and then place a limit on emissions from new stationary sources that "reflects" that amount.[38]

Writing for the majority, Chief Justice Roberts deemed it "not plausible" that Congress had empowered the EPA to unilaterally cap "carbon dioxide emissions at a level that will force a nationwide transition away from the use of coal to generate electricity."[39] The Chief Justice rejected the notion that this provision could allow the EPA to judge which type of energy production would be best for the "overall power system" as opposed to what is best for each individual power source.[40]

In doing so, the Chief Justice explicitly invoked the "major questions doctrine," under which "clear congressional authorization"[41] is required for a court to conclude that Congress intended to delegate to an administrative agency a decision "of such economic and political significance"[42]—namely, "how much coal-based generation there should be over the coming decades."[43]

38. West Virginia v. EPA, 142 S. Ct. 2587, 2601 (2022) (quoting 42 U.S.C. § 7411(a)(1) (2018)).

39. *Id.* at 2616.

40. *Id.* at 2611.

41. *Id.* at 2614 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

42. *Id.* at 2608 (quoting Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000)).

43. *Id.* at 2613.

The upshot is that if Congress wants to authorize an agency to make a decision with great economic or social impact, the Court will require a clear statement.[44] Why? Because the presumption is that Congress itself must make such important calls.[45] And although the Court is not prohibiting Congress from delegating the power entirely, the major questions doctrine requires Congress to articulate consciously and clearly its desire for an agency to exercise that power.[46] This reinforces the functionalist idea that *how much* power is being exercised remains the linchpin of the separation of powers. It is no coincidence that the Chief's *West Virginia* majority opinion cites a dissent by then-Judge Kavanaugh on the D.C. Circuit,[47] whose articulation of the major questions doctrine emphasized that Congress must make the important calls. In the words of Professor Blake Emerson, this is evidence of a "formalist concern to

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44. The Court's implementation of a clear statement rule for the delegation of decision-making with respect to "major questions" can be seen as raising the "legislative enactment costs" for Congress to pass constitutionally suspect laws (that is, laws that butt up against nondelegation principles). *See* Matthew Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. 2 (2018).

45. *See* Gundy v. United States, 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting) ("Although it is nominally a canon of statutory construction, we apply the major questions doctrine in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency."); Sunstein, *supra* note 25, at 338 (discussing how "nondelegation canons," under which we may now class the major questions doctrine, "are designed to ensure that Congress decides certain contested questions on its own.").

46. In fact, Professor Christopher Walker has already offered a means for Congress to expressly weigh in on the hard question at issue. Specifically, Professor Walker has proposed a procedural mechanism for Congress to quickly ratify agency actions that have previously been struck down by federal courts on major questions doctrine grounds. *See* Christopher J. Walker, *A Congressional Review Act for the Major Questions Doctrine,* 45 HARV. J.L. & PUB. POL'Y (forthcoming 2022), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4230476 [https://perma.cc/TN8E-NZ8B].

47. United States Telecom Ass'n. v. FCC, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

preserve the separation of powers [giving] way to a functional analysis."[48]

Indeed, it is unsurprising that committed formalists like Professor Rappaport have critiqued the major questions doctrine and the approach adopted by the Court in *West Virginia*.[49] But the Roberts Court has not been wholly committed to formalism and is increasingly willing to use functionalist reasoning. Opting for a more functional major questions doctrine instead of, say, a more formalist nondelegation doctrine illustrates this phenomenon.

Even one of the Court's most committed formalists, Justice Gorsuch, signed onto the Chief's majority opinion in *West Virginia*. In his concurrence, Justice Gorsuch made clear that the major questions doctrine serves what we have characterized as a functionalist nondelegation principle.[50] He wrote: "The Court has applied the major questions doctrine for the same reason it has applied other similar clear-statement rules—to ensure that the government does 'not inadvertently cross constitutional lines.'"[51] The line at issue in the major questions doctrine context is that set forth by Article I's

48. Blake Emerson, *Major Questions and the Judicial Exercise of Legislative Power*, YALE J. REG. (Feb. 28, 2020), https://www.yalejreg.com/nc/major-questions-and-the-judicial-exercise-of-legislative-power-by-blake-emerson/ [https://perma.cc/A4QB-6BES].

49. *See* Michael Rappaport, *Against the Major Questions Doctrine*, THE ORIGINALISM BLOG (Aug. 15, 2022), https://originalismblog.typepad.com/the-originalism-blog/2022/08/against-the-major-questions-doctrinemike-rappaport.html [https://perma.cc/AK34-LEMK] ("[L]et me state my basic objection to the MQD: It neither enforces the Constitution nor applies ordinary methods of statutory interpretation. Thus, it seems like a made up interpretive method for achieving a change in the law that the majority desires.").

50. Justice Gorsuch tied the major questions doctrine to nondelegation—that is, constitutional—principles more expressly than the Chief Justice, whose majority opinion *could* be read as resting on more of an empirical proposition. That is, one might read Chief Justice Roberts's *West Virginia* majority as merely stating that it is unlikely as an empirical matter that Congress meant to give the EPA such broad power under the statute. *See also* Eli Nachmany, *There Are Three Major Questions Doctrines*, YALE J. REG. (July 16, 2022), https://www.yalejreg.com/nc/three-major-questions-doctrines/ [https://perma.cc/D7R4-SPKY].

51. West Virginia v. EPA, 142 S. Ct. 2587, 2620 (2022) (Gorsuch, J., concurring).

Vesting Clause: "In Article I, 'the People' vested '[a]ll' federal 'legislative powers . . . in Congress.'"[52] Citing Chief Justice Marshall's aforementioned opinion in *Wayman v. Southard*, Justice Gorsuch wrote that "this means that" Congress itself must regulate "the important subjects."[53] Going forward, then, the Court will filter most nondelegation concerns through the major questions doctrine. A functionalist nondelegation inquiry will therefore have arisen out of its formalist foundations.

B. What the Agency Actually Did

In addition (and closely related) to analyzing the scope of Congress's delegation of power to an agency, the Roberts Court simultaneously asks whether what the agency has done with its delegated power is lawful. It is not difficult to see how—in the context of the major questions doctrine—this inquiry gets wrapped up into the first question: If Congress has not authored a clear statement to convince the Court that it consciously delegated a great deal of policymaking authority to the agency, then an agency action assuming the opposite will be deemed out of bounds. In *West Virginia*, the EPA claimed that Congress had given it authority to push the American energy industry away from coal. Since Congress had not clearly stated that it was empowering the EPA to make such a momentous move, the Court ruled that the EPA's attempt to make such a move was unlawful. This is not at all unprecedented in the Roberts Court.[54]

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52. *Id.* at 2617.

53. *Id.*

54. *See, e.g.,* NFIB v. OSHA, 142 S. Ct. 661, 665 (2022) (requiring clear authorization of agency action that would require "84 million Americans to either obtain a COVID-19 vaccine or undergo weekly medical testing at their own expense."); Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) ("Even if the text were ambiguous, the sheer scope of the CDC's claimed authority under § 361(a) would counsel against the Government's interpretation. We expect Congress to speak clearly when authorizing an agency to exercise powers of "vast 'economic and political significance.'") (citations omitted); King v. Burwell, 576 U.S. 473, 485-86 (2015) (refusing to defer to an agency's interpretation of a statute because it would involve "billions of

But the Court is not making such moves only in the context of the major questions doctrine. In fact, its wholesale retreat from *Chevron*[55] deference is part and parcel of the second piece of its functionalist turn. Rather than defer to agency interpretations of statutes, the Roberts Court largely conducts its own *de novo* reviews, and when it does, it tends not to find the ambiguity that would trigger deference to the agency's statutory interpretation.

In that way, *Chevron* appears to be going the way of the *Lemon* test: ignored to the point of withering away.[56] It garnered only one measly citation this term—a drive-by mention in a concurrence[57]—and the Court has not actually applied *Chevron* deference in more than five years.[58] And while some commentators expected the Court to formally overrule (or at least address the status of) *Chevron* this term, it instead appears to be the dog that did not bark.[59] In *American Hospital Association v. Becerra*,[60] the proposed vehicle to

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dollars in spending each year" and would affect "the price of health insurance for millions of people"); Util. Air Regul. Grp. v. E.P.A., 573 U.S. 302, 324 (2014) ("EPA's interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization.").

55. Chevron v. NRDC, 467 U.S. 837 (1984).

56. *See* Pereira v. Sessions, 138 S. Ct. 2105, 2121 (2018) (Alito, J., dissenting) (suggesting the Court is "ignoring" *Chevron* as a "maligned" precedent without overruling it). *See also* Capozzi, *supra* note 19, at 26 ("*West Virginia* shows the continued irrelevance of *Chevron* deference at the Supreme Court."). *Cf. also* Kennedy v. Bremerton School District, 142 S. Ct. 2407, 2427 (2022).

57. *See* Wooden v. United States, 142 S. Ct. 1063, 1075 (2022) (Kavanaugh, J., concurring).

58. The most recent cases in which the Court has stepped through an actual *Chevron* analysis appear to be Encino Motorcars v. Navarro, 579 U.S. 211 (2016) (working within the *Chevron* framework, but ultimately not according deference due to a procedural defect) and Cuozzo Speed Tech. v. Lee, 579 U.S. 261 (2016) (according *Chevron* deference to an agency's reasonable statutory interpretation).

59. *See, e.g.*, American Hospital Ass'n v. Becerra, 142 S. Ct. 1896 (2022); *see also* James Romoser, *In an opinion that shuns Chevron, the court rejects a Medicare cut for hospital drugs*, SCOTUS BLOG (June 15, 2022), https://www.scotusblog.com/2022/06/in-an-opinion-that-shuns-chevron-the-court-rejects-a-medicare-cut-for-hospital-drugs/ [https://perma.cc/GRT9-7WCH].

60. 142 S. Ct. 1896 (2022).

overturn *Chevron*, the Court, without invoking *Chevron*, determined that the agency's reading of the statute was not the best reading. The Court thus concluded that the agency had exceeded the scope of its delegated power by not complying with what the statute in fact demanded.[61]

American Hospital Association, as well as the Roberts Court's broader turn away from *Chevron*, largely seem consistent with the rest of the Court's functionalist turn. Although many argue that *Chevron* is at odds with formalism,[62] *Chevron* is ultimately something of a formalist methodology.[63] Taking it on its own terms, *Chevron* prescribes a regime of judicial deference when certain formal conditions are met.[64] To abrogate *Chevron* is, in effect, to require agency explanations to rise and fall on their own merits, free from a thumb on the scale.[65]

While this approach may not be "functionalist" in the sense of the Court examining the functional import of a particular interpretation, it nonetheless belies the notion that administrative law cases

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61. *Id.* at 1903–06. *See also* Becerra v. Empire Health Foundation, 142 S. Ct. 2354 (2022) (upholding an HHS regulation as the best reading of a statute but not deploying or even mentioning *Chevron* deference).

62. *See, e.g.*, John O. McGinnis, *The Rise of Formalism and the Decline of Chevron*, LAW & LIBERTY (June 22, 2018), https://lawliberty.org/the-rise-of-formalism-and-the-decline-of-chevron/ [https://perma.cc/982K-L2R6].

63. Granted, this unique version of formalism offered by *Chevron* has been tempered by more searching, multi-factor inquiries into whether the framework of *Chevron* deference ought to apply in the first place. *See, e.g.*, United States v. Mead Corp., 533 U.S. 218 (2001).

64. *See* JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION: CASES AND MATERIALS 1111 (4th ed. 2021) ("[T]he overall thrust of *Chevron* is fairly clear: If the responsible administrative agency has reasonably resolved a statutory ambiguity, the reviewing court should accept the agency's resolution, even if the court would have resolved the question differently. If the agency's interpretation is unreasonable—if, for example, it contravenes the clear text of the statute—then the reviewing court should reject it.").

65. *See* BNSF Railway Company v. Loos, 139 S. Ct. 893, 908–09 (2019) (Gorsuch, J., dissenting); *see also* Bradley George Hubbard, *Deference to Agency Statutory Interpretations First Advanced in Litigation? The* Chevron *Two-Step and the* Skidmore *Shuffle*, 80 U. CHI. L. REV. 447 (2013) (arguing that agency litigating positions do not merit *Chevron* deference when not the product of reasoned policy making).

can be resolved in formalist decision trees. Instead, it calls for what amounts to *de novo* review of each element of an agency's decision, including how it was reached and its implications for broader questions about the separation of powers. Such a tack centers the Court's ex ante, holistic judgment. In other words, moving on from *Chevron*, once again places the Court in the position of evaluating the whole picture of how an agency reached its decision (alongside what that decision is) to assess whether it may carry the force of law. Fortunately, this posture is one of statutory interpretation, the bread and butter of judging.[66] It is functionalism in a different sense—one that gives great weight to the judiciary's prudential judgments—but it departs from procedural formalism just the same.

C. *How the Agency Did What It Did*

Apart from *what* agencies do, the Roberts Court has paid attention to *how* they do it, both as a matter of procedure and structure. Against the backdrop of both the Administrative Procedure Act (APA) in the procedural context and the principles undergirding the unitary executive theory in the structural context, the Roberts Court has added a functionalist dimension to its formalist analyses of agency action. Structural principles such as democratic accountability and control have frequently animated the functionalist turn in these contexts. What is left amounts to a more holistic review of agency action, one that asks not only whether an agency had the formal power to do what it did, but also whether it held or discharged that power in a manner consistent with our constitutional structure. This sort of "all things considered" review of agencies' actions and structures does not neatly proceed from major to minor

66. *Cf.* Raymond M. Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 VAND. L. REV. EN BANC 315, 319 (2017) ("That a statute is complicated does not mean it is ambiguous. It just means that the judge needs to work harder to determine—in the sense of ascertain—the statute's meaning . . . . And I would suggest that the persistence and willingness of judges to work hard before declaring statutes ambiguous is an important but perhaps overlooked difference between judges.")

premises as a purely formalist approach would. Rather, it begins from formalist precepts and then asks a functionalist question: On net, does the agency action or structure square with constitutional first principles?

An early example of this paradigm in the APA context occurred midway through the Trump administration, when the Department of Commerce sought to add a question to the United States Census inquiring about respondents' citizenship status. The putative purpose of the question was to provide data that would help the Department of Justice better enforce the Voting Rights Act.[67] In announcing its decision to add the question, the Department of Commerce technically jumped through all the hoops of the APA. But the Court, in a 5-4 majority opinion authored by Chief Justice Roberts, held that mere compliance with the APA is not a complete shield when pretext is at play.[68] As the Court observed:

> We are presented … with an explanation for agency action that is incongruent with what the record reveals about the agency's priorities and decisionmaking process. It is rare to review a record as extensive as the one before us when evaluating informal agency action—and it should be. But having done so for the sufficient reasons we have explained, we cannot ignore the disconnect between the decision made and the explanation given. Our review

67. *See* Dep't of Commerce v. New York, 139 S. Ct. 2551, 2562 (2019).

68. Notably, the Court has upheld compliance with the APA as a *necessary* condition for an agency action to be upheld, just not a sufficient one. *See, e.g.*, Dep't of Homeland Security v. Regents of the Univ. of California, 140 S. Ct. 1891 (2020) (enjoining Trump administration's rescission of DACA as a violation of the APA); *see also* Fred Barbash & Deanna Paul, *The Real Reason the Trump Administration is Constantly Losing in Court*, WASH. POST. (Mar. 19, 2019, 12:05 PM) https://www.washingtonpost.com/world/national-security/the-real-reason-president-trump-is-constantly-losing-in-court/2019/03/19/f5ffb056-33a8-11e9-af5b-b51b7ff322e9_story.html [https://perma.cc/GMQ6-E4LP] (noting that, as of 2019, the Trump administration had a six-percent win rate in APA cases, largely stemming from insufficient attention to administrative procedure).

> is deferential, but we are "not required to exhibit a naiveté from which ordinary citizens are free."[69]

In other words, form is not all that matters. When "contrived reasons" underpin an agency's explanation, judicial review—if it is to be anything more than an "empty ritual"—demands more than a formalistic checkoff.[70] As Professor Benjamin Eidelson has argued, for the Roberts Court, the pretextual explanation at issue in the *Department of Commerce* case did not cut it on this front.[71] Nor did the "buck-passing"[72] or "post hoc"[73] explanations in *Regents of the University of California*.[74]

The Roberts Court's demand that the executive branch be candid about why it did what it did, shoulder responsibility for its decisions, and offer reasons for its moves early enough to invite meaningful public scrutiny (all while clearing the formal hurdles of the APA) fosters the very same value as the major questions doctrine: democratic accountability. While the major questions doctrine nudges our elected representatives in Congress to make the tough policy choices, this holistic review of agency action pushes presidential administrations to be open and honest about why they are doing what they are doing.

That transparency fosters democratic accountability. As Professor Eidelson explains: "Political accountability sometimes depends on the public's understanding not only *what* the government has done, but *why*."[75] Thus, the Court's recent rigorous review of stated rationales "reflect[s] a vision of courts as political ombudsmen—one might even say umpires—who will rarely second-guess the executive branch's policy judgments themselves, but who will police the

69. *Dep't of Commerce*, 139 S. Ct. at 2575 (citing United States v. Stanchich, 550 F.2d 1294, 1300 (2d Cir. 1977)).

70. *Id.* at 2576.

71. Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 YALE L.J. 1748, 1785–94 (2021).

72. *Id.* at 1761–64.

73. *Id.* at 1764–67.

74. 140 S. Ct. 1891 (2020).

75. Eidelson, *supra* note 71, at 1758.

reason-giving process to ensure that the public has a fair opportunity to evaluate and respond to those same decisions."[76] This more open-ended inquiry goes beyond box checking and attempts to uphold the core constitutional value of democratic control.

The Roberts Court has not confined its focus on democratic accountability and control to its scrutiny of executive branch agencies' stated rationales for their actions. Functionalist inquiries in the service of democratic responsiveness also mark the Roberts Court's approach to agency structure cases. The Court's answer to whether an agency is constitutionally structured might hinge, in part, on the *degree* of presidential control. Often in the context of opprobrium,[77] many have deemed the Roberts Court's removal jurisprudence—in cases such as *Free Enterprise Fund v. PCAOB*[78] and *Seila Law v. Consumer Financial Protection Bureau*[79]—as formalist through and through.[80] And although a formalist instinct to maintain the separation of powers certainly permeates these decisions, the Roberts Court has also incorporated functionalist considerations—such as

76. *Id.* at 1755.

77. Such distaste for formalism, particularly in the legal academy, is not new. In a 1988 *Yale Law Journal* article, Professor Frederick Schauer made note of "the pejorative connotations of the word 'formalism'"). *See* Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1988).

78. 561 U.S. 477 (2010).

79. 140 S. Ct. 2183 (2020).

80. *See, e.g.*, Jodi L. Short, *Facile Formalism: Counting the Ways the Court's Removal Jurisprudence Has Failed*, YALE J. REG. (Dec. 14, 2020), https://www.yalejreg.com/nc/facile-formalism-counting-the-ways-the-courts-removal-jurisprudence-has-failed-by-jodi-l-short/ [https://perma.cc/TV3L-9Z2M] (concluding that *Free Enterprise Fund* and *Seila Law* are part and parcel of the Roberts Court's shift to "facile formalism"); Timothy G. Duncheon & Richard L. Revesz, Seila Law *as an Ex Post, Static Conception of Separation of Powers*, U. CHI. L. REV. ONLINE (Aug. 27, 2020), https://lawreviewblog.uchicago.edu/2020/08/27/seila-duncheon-revesz/ [https://perma.cc/QD3C-UV9Q] ("In his majority opinion in *Seila Law*, Chief Justice John Roberts embraces formalism, arriving at an apparently bright-line rule that a for-cause removal restriction on a single-headed agency with executive power violates Article II."); MANNING & STEPHENSON, *supra* note 64, at 766 (arguing that "*Seila Law* appears to have replaced *Morrison*'s functionalist multi-factor balancing test with a more categorical approach").

by analyzing *how much*, as opposed to *whether*, a particular arrangement infringes on the president's executive power—as part of its reasoning.[81]

In fact, a close reading of *Seila Law*, in particular, indicates that the Roberts Court sometimes employs functionalism in order to invalidate novel agency structures that run afoul of formalist commitments without overturning precedents that do the very same. The Chief Justice's *Seila Law* majority opinion did rest on formalist commitments. He explained that "[u]nder our Constitution, the 'executive Power'—all of it—is 'vested in a President.'"[82] The structure of the Consumer Financial Protection Bureau's (CFPB's) leadership—with a single-headed director who in turn had for-cause removal protections—ran afoul of that precept. In reaching this conclusion, the Chief Justice did not go so far as to overturn past precedents like *Humphrey's Executor v. United States*[83] and *Morrison v. Olson*.[84] Instead, he distinguished the CFPB's invalid structure from those that had been upheld as valid in *Humphrey's Executor* and *Morrison*. He did so on functionalist grounds.

The Chief Justice characterized *Humphrey's Executor* and *Morrison* as less severe infringements on the president's executive power. In *Humphrey's Executor*, he wrote, the Court upheld the for-cause removal protections for the multi-member Federal Trade Commission (FTC) on the grounds that it "performed legislative and judicial functions and was said not to exercise any executive power."[85]

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81. *Cf.* Eskridge, *supra* note 9, at 23 ("As Judge Easterbrook suggests, the *Steel Seizure Case* is … exemplary of formalist reasoning. The *Steel Seizure Case*, however, rests just as firmly in functionalist reasoning."); *id.* at 22 ("Chief Justice Marshall wove formalist and functional lines of thinking and argumentation throughout the [*McCulloch v. Maryland*] opinion."); *see also* Collins v. Yellen, 141 S. Ct. 1761, 1784 (2021) ("[B]ecause the President, unlike agency officials, is elected, this control is essential to subject Executive Branch actions to a degree of electoral accountability).

82. 140 S. Ct. at 2191.

83. 295 U.S. 602 (1935).

84. 487 U.S. 654 (1988).

85. 140 S. Ct. at 2199.

And in *Morrison*, the good-cause tenure protections for an independent counsel, an inferior officer, were allowed because they "did not unduly interfere with the functioning of the Executive Branch."[86]

Chief Justice Roberts then framed the CFPB's removal protections for a single-headed director as being more severe infringements on the president's executive power. Unlike in *Humphrey's Executor*, the CFPB director could hardly be described as "a mere legislative or judicial aid."[87] Indeed, "the Director's enforcement authority includes the power to seek daunting monetary penalties against private parties on behalf of the United States in federal court—a quintessentially executive power not considered in *Humphrey's Executor*."[88] He then contrasted the CFPB setup's encroachment on the president's executive power with the more limited infringement wrought by the arrangement at issue in *Morrison*—an inferior officer with for-cause removal protections. While the CFPB Director exercised immense executive power—as they could "bring the coercive power of the state to bear on millions of private citizens and businesses"—the independent counsel in *Morrison* "lacked policymaking or administrative authority," could only train its exercise of executive power "inward," and "was confined to a specified matter."[89] Chief Justice Roberts then closed his constitutional analysis by noting that the CFPB structure even "foreclose[d] certain indirect methods of Presidential control."[90] He wrote:

> Because the CFPB is headed by a single Director with a five-year term, some Presidents may not have any opportunity to shape its leadership and thereby influence its activities. A President elected in 2020 would likely not appoint a CFPB Director until 2023, and a President elected in 2028 may *never* appoint one. That means an unlucky President might get elected on a consumer-protection

86. *Id.*
87. *Id.* at 2200.
88. *Id.*
89. *Id.*
90. *Id.* at 2204.

> platform and enter office only to find herself saddled with a holdover Director from a competing political party who is dead set *against* that agenda. To make matters worse, the agency's single-Director structure means the President will not have the opportunity to appoint any other leaders—such as a chair or fellow members of a Commission or Board—who can serve as a check on the Director's authority and help bring the agency in line with the President's preferred policies.[91]

In sum, the Chief Justice distinguished the question in *Seila Law* from non-formalist precedents like *Humphrey's Executor* and *Morrison* with the help of functionalism: He reasoned that the CFPB removal scheme infringed on the president's executive power more than these prior arrangements had. Even in response to functionalist questions of degree rather than formalist questions of kind, the CFPB's structure could not mount a constitutionally sound response. The Chief Justice distinguished from past functionally-reasoned precedents, thereby leaving them intact, by effectively answering the same functionalist question that the Court had posed in *Morrison*: Are "the removal restrictions . . . of such a nature that they impede the President's ability to perform his constitutional duty?"[92] He answered "no" with respect to the CFPB, while letting the Court's past "yeses" stand.

In other words, the *Seila Law* majority did not rely solely on the pure formalist approach to removal that Justice Scalia articulated so forcefully in his *Morrison* dissent.[93] Had it done so, it would have expressly invalidated precedents like *Humphrey's Executor*—as Justices Thomas and Gorsuch urged in their concurrence.[94] Rather, it explicitly noted a functionalist rationale for deeming the for-cause removal protections for the CFPB Director unconstitutional: the

91. *Id.* (emphasis in the original).

92. Morrison v. Olson, 487 U.S. 654, 691 (1988).

93. There, Justice Scalia stressed "the constitutional principle that the President had to be the repository of *all* executive power." *Id.* at 726 (Scalia, J., dissenting) (emphasis in the original).

94. *See Seila Law*, 140 S. Ct. at 2211 (Thomas, J., concurring).

protections infringed too much on the President's capacity to exert control over the executive branch.

To a large extent, the emergence of the functionalist turn in agency structure (that is, removal) cases is nothing new. It was present in *Seila Law*'s precursor case, *Free Enterprise Fund v. Public Company Accounting Oversight Board*.[95] With Chief Justice Roberts writing for the majority, the Court invalidated a provision of the Sarbanes-Oxley Act that insulated members of the Public Company Accounting Oversight Board (PCAOB)—which was empowered to oversee the accounting industry in the wake of various scandals—from removal.[96] Specifically, the act provided that PCAOB members could only be removable by the Securities and Exchange Commission (SEC) for good cause. SEC members already enjoy good-cause removal protections.[97] Chief Justice Roberts concluded that this double insulation model was unconstitutional, as it infringed too much on the president's control of the executive branch. He wrote: "This novel structure does not merely add to the Board's independence, but transforms it. Neither the President, nor anyone directly responsible to him, nor even an officer whose conduct he may review only for good cause, has full control over the Board."[98]

Much like Justice Kagan's dissent in *Seila Law*, Justice Breyer's dissent in *Free Enterprise Fund* critiqued the Chief Justice's majority opinion for being unduly formalist. Justice Breyer argued that the statutory scheme was permissible, given that it "will not restrict Presidential power significantly."[99] Though surely the Chief's *Free Enterprise Fund* opinion can be framed as formalist,[100] it nonetheless asked a question of *degree*: How much insulation was too much?

95. 561 U.S. 477 (2010).
96. MANNING & STEPHENSON, *supra* note 64, at 736.
97. *Id.*
98. 561 U.S. at 496.
99. *Id.* at 525 (Breyer, J., dissenting).
100. *See* MANNING & STEPHENSON, *supra* note 64, at 740 ("[I]t's … possible to read *Free Enterprise Fund* as signaling a more fundamental shift in the judicial approach toward a doctrine that is both stricter and more formalist in scrutinizing congressional encroachment on presidential removal power.").

How much presidential control was required? As Dean Manning explained:

> [T]he Court in *Free Enterprise Fund* ultimately relied on fairly high-level functional considerations to draw the constitutional line at issue. To be sure, the Court asserted that the Act compromised "the President's ability to ensure that the laws are faithfully executed." But, since the Court nowhere identified what it means to "take Care that the Laws be faithfully executed," its reference to that clause—and its reference to the Vesting Clause—served largely as placeholders for the Court's own functional assessment of how much accountability executive officers properly owe to the President.[101]

Moreover, just like in *Department of Commerce* and *Seila Law*, the Chief Justice stressed the importance of democratic accountability in *Free Enterprise Fund*: "Our Constitution was adopted to enable the people to govern themselves, through their elected leaders. The growth of the Executive Branch . . . heightens the concern that it may slip from the Executive's control, and thus from that of the people."[102]

II. IN THE ADMINISTRATIVE LAW AREA, IS THIS THE "O'CONNOR COURT"?

This emerging functionalist turn raises the question: in the administrative law area, might we see the Roberts Court as resembling more of an O'Connor Court? After all, it was Justice O'Connor who most forcefully articulated a functionalist case for the vertical separation of powers in the federalism context, and that basic logic might apply with equal force to the horizontal separation of powers in the administrative law domain.

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101. John F. Manning, *The Supreme Court, 2013 Term—Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 47 (2014).

102. 561 U.S. at 499.

New York v. United States[103] best demonstrates Justice O'Connor's functionalist mode of reasoning in federalism cases—the very same mode of analysis at work in the Roberts Court's administrative law jurisprudence. In *New York*, the Supreme Court invalidated a provision of the 1985 Low-Level Radioactive Waste Policy Amendments Act that compelled states to "take title" to waste they had not properly discarded prior to a certain date. Those states would then be held liable "for all damages directly or indirectly incurred."[104] The Court held that while Congress could provide monetary incentives to states to dispose of their waste, mandating that the states either take ownership of their waste or regulate it in accordance with Congress's dictates was impermissible.[105] Forcing the states to take ownership of the waste would "commandeer" the states in violation of the Tenth Amendment: ordering the states to regulate waste as Congress sets forth would amount to requiring the states to implement federal law.[106]

Writing for the Court in *New York*, Justice O'Connor observed that although a particular "result may appear 'formalistic'"[107]—and indeed, many have categorized her opinion as such[108]—in fact her opinion was motivated by an explicit desire to prevent the excessive concentration of power. This, in fact, is not the "epitome of formalistic reasoning,"[109] but functionalism in action. Justice O'Connor stressed that the Constitution "divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day."[110] To apply Dean

103. 505 U.S. 144 (1992).
104. *Id.* at 153–54 (quoting 42 U.S.C. § 2021e(d)(2)(C) (1988)).
105. *Id.* at 175.
106. *Id.*
107. *Id.* at 187.
108. Erwin Chemerinsky, *Formalism and Functionalism in Federalism Analysis*, 13 GA. ST. U.L. REV. 959, 964 (1997) (arguing that "[t]he decision appears formalistic because it is formalistic").
109. *Id.* at 962.
110. 505 U.S. at 187.

Manning's framing of functionalism,[111] Justice O'Connor was stressing the *balance* of power between the federal and state governments.[112]

In this way, it would not matter if the states acquiesced to the federal government's encroachment on their domain.[113] Why? Because the separation of powers prevents a concentration of power that threatens the people's liberty.[114] In other words, the key question—more than "what kind of power"—is "how much power." And when the answer is "too much," the *concentration* of power matters as much as the *type* of power. As Justice O'Connor wrote in *Gregory v. Ashcroft*[115]: "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."[116]

And just like the Roberts Court has done in its administrative law rulings, Justice O'Connor grounded her functionalist approach in the constitutional value of democratic accountability:

> [W]here the federal government compels States to regulate, the accountability of both state and federal officials is diminished . . . . [W]here the federal government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral

111. *See* Manning, *supra* note 9, at 1952.

112. There is some evidence that Justice O'Connor adopted this same quasi-functionalist approach in the horizontal separation of powers context as well. For example, in *Lujan v. Defenders of Wildlife*, she joined Justice Blackmun's dissent wherein he critiqued Justice Scalia's majority opinion as taking an "anachronistically formal view of the separation of powers." 504 U.S. 555, 602 (1992) (Blackmun, J., dissenting).

113. 505 U.S. at 182.

114. *See* Coleman v. Thompson, 501 U.S. 722, 759 (Blackmun, J., dissenting) ("Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.") (quoted in *New York*, 505 U.S. at 181).

115. 501 U.S. 452 (1991).

116. *Id.* at 458.

> ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.[117]

The Roberts Court's administrative law jurisprudence seems to be doing the same: it is turning to a more functionalist approach in the service of democratic accountability. Rather than narrowly focusing on *what kind* of power is being exercised at a particular moment,[118] the Roberts Court—in its approach to applying the nondelegation and major questions doctrines, assessing agency actions themselves, and examining agency structure and compliance with procedure—seems more inclined to ask whether the challenge at issue comports with its underlying sense of what constitutional first principles such as democratic accountability demand. It is, in other words, a pragmatic functionalism, one that sets new terrain on

117. 505 U.S. at 168-69. In more recent years, the Supreme Court has continued to underscore the importance of preserving the vertical separation of powers, such as by enforcing the anti-commandeering doctrine, to promote political accountability. *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1477 (2018) ("[T]he anticommandeering rule promotes political accountability. When Congress itself regulates, the responsibility for the benefits and burdens of the regulation is apparent. Voters who like or dislike the effects of the regulation know who to credit or blame. By contrast, if a State imposes regulations only because it has been commanded to do so by Congress, responsibility is blurred."). Moreover, the Roberts Court has continued this quasi-functionalist approach in the vertical separation of powers context. *See* Manning, *supra* note 101, at 42 ("At a minimum, the question of whether the individual mandate cuts too deeply against the federal-state balance struck by American federalism, and the question of where these lines should be drawn in general, turns on functional considerations about which reasonable people can differ.").

118. *Cf.* Loving v. United States, 517 U.S. 748, 776–77 (1996) (Scalia, J., concurring in part and concurring in judgment) (distinguishing delegating legislative power, which, on Justice Scalia's conception, is not allowed, from "assign[ing] responsibilities" to the executive, which, on that conception, is allowed); *see also* Whitman v. American Trucking Ass'n, 531 U.S. 457, 475–76 (2001) (acknowledging a certain degree of discretion that "inheres in most executive or judicial action" but insisting that delegations do not result in the *disposition* of legislative power by the executive) (citing Mistretta v. United States, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting)).

which future administrative law battles will be fought and leaves lingering uncertainty about how those battles will play out.

III. THE CONSTRAINTS OF STRUCTURE AND TEXTUALISM

The Roberts Court's functionalist turn may lead some to worry that it fails to constrain the Court. For example, in the context of the major questions doctrine, adding a functionalist dimension to a textualist mode of interpretation may understandably raise suspicion from a variety of jurisprudential perspectives. But a more capacious account of textualism may offer at least tentative answers to these critiques, tempering the potential for this functionalist turn to become a vessel for unfettered judicial discretion.

On one hand, the Court's functionalist turn does seem less consistent with the traditionally conservative jurisprudential tenet of opting for bright lines over balancing. Committed formalists might viscerally chafe at the seemingly open-ended, normative inquiries that comprise this turn.[119] And they might wonder whether this turn will provide cover for judges to wield broad discretion to reach preferred policy outcomes (a concern likely shared by those on the left skeptical of the Court's conservative majority).[120]

But this functionalist turn need not inaugurate the type of unconstrained pragmatism that Judge Richard Posner famously advocated.[121] Contrary to Judge Posner's proposed approach that would prize socially beneficial consequentialism (in the eyes of the judge) over legal stodginess (ostensibly inherent in methodological consistency),[122] the Roberts Court's emerging approach binds judges along three dimensions—the scope and nature of the delegation it-

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119. After all, as Professor Thomas Merrill has noted: "The principal criticism leveled against functionalism is not that it is too rigid but that it is not rigid enough." Merrill, *supra* note 13, at 234.

120. *Cf., e.g.*, Squitieri, *supra* note 19, at 464–66.

121. *See, e.g.*, RICHARD POSNER, THE FEDERAL JUDICIARY: STRENGTHS AND WEAKNESSES 376–97 (2017).

122. *See id.* at 17, 385–86 (2017).

self, what the agency does with the delegated power, and the process it uses to discharge its delegated power. And it asks whether the challenged action comports with the "social contract between the governed and their governors," the Constitution, "in a way that protects the 'exceptionally valuable' 'stability in [the] political system.'"[123] This inquiry squares with the functionalist aspiration to maintain fidelity to the Constitution while respecting the democratic branches' power to experiment where the Constitution is opaque.

This approach may expand the task of interpretation a bit beyond what Judge Frank Easterbrook envisioned.[124] He explained that while the "political branches have power to act pragmatically . . . judges do not."[125] But the Roberts Court seems to be suggesting that a constrained version of functionalism offers the predictability necessary to keep the elected branches in line without aggrandizing the judicial role. Done well, the Roberts Court's pairing of formalism with functionalism could reinforce the indispensable roles of the elected branches as the primary channels for political engagement while strengthening the bedrock values of democratic accountability and checks and balances particularly important in an increasingly complex federal government.

In other words, weighing functionalist considerations could *vindicate* the enterprise of forcing Congress to work out compromises in the text (leaving citizens less apt to run to the courts to solve their problems). Judges, then, have space to consider constitutional structure transparently rather than hiding such consideration in in-

123. Amul R. Thapar & Benjamin Beaton, *The Pragmatism of Interpretation: A Review of Richard A. Posner,* The Federal Judiciary, 116 MICH. L. REV. 819, 828 n.31 (2018) (quoting Frank H. Easterbrook, *Pragmatism's Role in Interpretation*, 31 HARV. J.L. & PUB. POL'Y 901, 902–05 (2008)).

124. *See* Easterbrook, *Pragmatism's Role in Interpretation* at 904–05.

125. *Id.* at 903.

tuitions about social good, and the political branches have clear instructions.[126] To Congress: delegate clearly. To the executive: act in accordance with the power delegated, and do so in an accountable and procedurally consistent way. If the political branches satisfy these demands, the Court will get out of the way, leaving the political branches to work out the policy challenges of modern government. Such ex ante transparency has immeasurable value for the rule of law.[127]

On the other hand, Justice Kagan also criticized the *West Virginia* majority for abandoning textualist precepts too. In her view, the best reading of the statute at issue *justified* the agency action, and the majority resorted to the major questions doctrine, a substantive canon, to get out of what the text demanded.[128] But the force of this critique might be blunted when we consider that functionalist considerations legitimate textualism itself. Part of the logic of textualism is that the actual language that Congress passes by way of the Article I Section 7 process of bicameralism and presentment is the product of hard-fought compromise. That is, Congress, not the Court, is the institution empowered by the Constitution to make the tough choices and trade-offs inherent in legislating. Therefore, the Court must respect the choices Congress has made—namely, the words on the page—provided that they do not run afoul of the

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126. *Cf.* Thapar & Beaton, *supra* note 123, at 827 (citing Michael H. McGinley, Note, *Textualism as Fair Notice*, 123 HARV. L. REV. 542 (2009)) (arguing that methodological consistency creates incentives for prospective clarity by Congress, which reinforces the rule of law).

127. *See generally id.* at 829–30.

128. *See* West Virginia v. Env't Prot. Agency, 142 S. Ct. 2587, 2628 (Kagan, J., dissenting) ("The limits the majority now puts on EPA's authority fly in the face of the statute Congress wrote. The majority says it is simply 'not plausible' that Congress enabled EPA to regulate power plants' emissions through generation shifting. But that is just what Congress did when it broadly authorized EPA in Section 111 to select the 'best system of emission reduction' for power plants.") (citations omitted).

Constitution.[129] One-off statements from legislators, committee reports, or a vague sense of the purpose of the statute cannot override the actual compromise—enshrined in the text of the statute—that the members of Congress reached.

When viewed in this light, textualism is grounded in respect for Congress's constitutional power to do the legislating. A functionalist variant of the nondelegation inquiry—as embodied in the major questions doctrine—is the flip side of that coin: It amounts to requiring that Congress shoulder its responsibility to make the hard legislative choices, or at least—if it is going to duck those choices—to say so.[130] With power comes responsibility. Textualism and the major questions doctrine might not be at odds, then, so much as they are two means by which the Court vindicates these twin aspects of constitutional theory.

CONCLUSION

What is the upshot of the Roberts Court's functionalist turn? Why does it matter? Reckoning with the functionalist turn ought to shape Supreme Court litigation strategy going forward and alter perceptions of just how "rogue" the Roberts Court has allegedly gone.

Litigants should be aware of the Court's willingness to incorporate functionalist reasoning into its separation of powers decisions.

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129. *See* John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287, 1290 (2010) ("Second-generation textualism argues that lawmaking inevitably involves compromise; that compromise sometimes requires splitting the difference; and that courts risk upsetting a complex bargain among legislative stakeholders if judges rewrite a clear but messy statute to make it more congruent with some asserted background purpose. Simply put, when a statute speaks unambiguously, judges must presume that Congress chose its words for a reason; to assume otherwise would be to undercut Congress's ability to use semantic meaning to express and record its agreed-upon outcomes.").

130. *Cf.* Whitman v. American Trucking Ass'n, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

They might increase their chances of prevailing at the Court if they craft arguments that are grounded in formalist precepts—by invoking the vesting clauses of Articles I and II, for example—and buttressed with functionalist considerations. This belt-and-suspenders, formalist-functionalist pairing could be especially potent for litigants when functionalist precedents stand in their way. Despite what critics may charge, the Roberts Court appears intent on not blowing up every precedent (or the administrative state, for that matter) that seems at odds with its baseline formalist commitments. Instead, it is pushing separation of powers doctrine in a formalist direction while cabining rather than invalidating conflicting precedents on *functionalist* grounds.[131] Litigants ought to take note, then, both of the existence of functionalist reasoning in these landmark decisions and how precisely the Court employs that functionalist reasoning.

Conceptualizing the Roberts Court's separation of powers jurisprudence in this manner also takes the sting out of some allegations that the Court has gone "rogue."[132] Our survey of some of the Court's major decisions in the horizontal separation of powers context cuts against the narrative that the Court is upending doctrine at lightning speed. Rather, the Court is mediating its formalism with functionalism. And as explained above, the Court's unique brand of functionalism is not as freewheeling as some might worry; it constrains judges in meaningful ways. Moreover, it leaves plenty of room for the political branches to solve problems. Congress and the executive branch can continue to tackle big policy problems, provided that they respect the formal and functional separation of

131. *Seila Law* is a case in point. As explained above, the Chief Justice's majority opinion employed formalist precepts to invalidate the CFPB's for-cause removal setup, but it then employed functionalist reasoning to avoid repudiating *Humphrey's Executor* and *Morrison* wholesale. *See supra* Section I.C.

132. *See, e.g.*, Jamelle Bouie, *How to Discipline a Rogue Supreme Court*, N.Y. TIMES (June 25, 2022), https://www.nytimes.com/2022/06/25/opinion/supreme-court-constitution.html [https://perma.cc/5JAA-VGDE].

powers. With a properly calibrated delegation, if an agency acts according to the authority it has been clearly granted, and wields its delegated power transparently, it *can* exercise broad power.

Finally, it is worth pointing out that the functionalist turn could be here to stay. Some might contend that "the Roberts Court" as we have framed it no longer exists. That is, many of the opinions we have cited in this Note were written by the Chief Justice himself, and since 2020, the Court's membership has shifted in a way that have led some to conclude that the Chief Justice has "lost control" of the Court to the other five conservative Justices.[133]

But at least in the separation of powers context, that formulation obscures far more than it illuminates. Even before the possibility of a five Justice majority without the Chief Justice emerged (that is, before Justice Barrett's confirmation), Chief Justice Roberts commanded majorities in separation-of-powers cases like *Free Enterprise Fund* and *Seila Law*. And post-2020, the Chief Justice himself authored the crucial decision of *West Virginia v. EPA*. It is not at all clear that the more committed formalist wing, led by Justice Thomas and Justice Gorsuch (as exemplified by their *Seila Law* concurrence) is in fact ascendant in the separation of powers context. And even then, that wing might be too fractured to repudiate the functionalist turn wholly.[134]

This is to say: the functionalist turn might have some staying power. Litigators and scholars alike ought to appreciate the functionalist turn for what it is—even if it cuts against pre-existing narratives or challenges certain ideological commitments. Whether it is "right" as a matter of law or "good" as a matter of policy is up

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133. *See, e.g.*, Stephen I. Vladeck, *Roberts Has Lost Control of the Supreme Court*, N.Y. TIMES (Apr. 13, 2022), https://www.nytimes.com/2022/04/13/opinion/john-roberts-supreme-court.html [https://perma.cc/E8W7-J4JF].

134. For example, in a recent case dealing with potential Congressional infringement upon the judiciary's Article III prerogatives, Justice Gorsuch broke with Justice Thomas's formalist plurality opinion and joined a decidedly functionalist dissent penned by the Chief Justice. *See* Patchak v. Zinke, 138 S. Ct. 897, 914 (2018) (Roberts, C.J., dissenting).

for debate. In this paper, we have taken on a more modest task: describing the turn on its own terms, developing possible justifications for it, and placing it in the broader sweep of ongoing debates about the separation of powers. What is clear to us is that the functionalist turn exists. It deserves a label and further analysis.