FORMALISM, FUNCTIONALISM, AND THE SEPARATION OF POWERS

BURT NEUBORNE*

Americans tend to think about politics as a continuum from left to right, with the ideological center located midway between the poles. Where libertarians are concerned, however, it is much more accurate to conceive of politics as a circle. A left libertarian and a right libertarian are much closer to each other in their approach to the political landscape than either one is to the statist across the circle. The flag-burning decisions handed down by the Court at the end of the last decade provide an excellent illustration.[1] These decisions are perhaps the most doctrinally important First Amendment cases of our time and may be the most passionately disputed First Amendment decisions that the Court has issued in recent memory. Had the left and right wings of the Court not united to form a libertarian majority,[2] the flag-burning cases would have been decided differently, and the First Amendment's protection of speech would be significantly weaker. The lesson to be learned is that, when left and right libertarians vigorously disagree about an issue, we should try to remember the many issues about which we intensely agree.

The debate over formalism and functionalism is a prime example of an area in which political polarity obscures areas of common ground. It is a mistake to assign the "rights world" to liberals and the "structural world" to conservatives. To contrast

* John Norton Pomeroy Professor of Law, New York University School of Law.

1. *See* Texas v. Johnson, 491 U.S. 397, 406-07 (1989) (holding that the burning of the United States flag at a political rally is a form of political expression protected by the First Amendment and reversing the defendant's conviction under a Texas law prohibiting the desecration of venerated objects); United States v. Eichman, 496 U.S. 310, 318 (1990) (dismissing prosecutions for flag burning brought under the Flag Protection Act enacted in the wake of *Johnson* and declining to reconsider *Johnson* in light of congressional "recognition of a purported 'national consensus' favoring a prohibition on flag burning").

2. Justices Brennan, Marshall, Blackmun, Kennedy, and Scalia comprised the majority in both *Eichman* and *Johnson*.

liberalism with conservatism in this way is both empirically and historically false–in the contexts of property law, takings, and the Contracts Clause, conservatives are devoted rights theoreticians.[3]

The question of whether one is in favor of "rights" is not an abstract question determined by reference to one's general political views; it is a question answered by reference to the specific question at issue. It should not surprise us that, in some settings, certain individuals display a more intense commitment to rights than they do in other settings. In some sense, we are all structuralists and we are all rights protectors. Thus, although Judge Easterbrook's plea that we take a "judge-o-centric" view[4] in the debate over formalism and functionalism is a very helpful way of focusing our attention, it is nevertheless true that our continued focus on the differences between these two interpretive philosophies tends to obscure the common ground that formalists and functionalists share.

At some point, formalism and functionalism become metaphors for the traditional problem that we have distinguishing between easy cases and hard ones.[5] One's philosophy of interpretation ultimately drives this choice. If a judge believes that there is a single right answer to a particular case because the text fairly commands him to act in a particular way, then he will tend to couch his opinion in formal terms.[6] If,

---

3. Professor Epstein of the University of Chicago is a particularly noteworthy representative of this cadre. *See, e.g.*, RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 57 (1985) ("Let the government remove any of the incidents of ownership. Let it diminish the rights of the owner in any fashion, then it has prima facie brought itself within the scope of the eminent domain clause . . . ."); Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 717 (1984) ("[T]he protection of private contracts against government regulation is inseparably entwined with two elements of a distinctly political cast: individual freedom, of which freedom to contract is but one illustration, and the need to prevent legislative misbehavior, itself a central concern of any constitutional arrangement.").

4. Frank Easterbrook, *Formalism, Functionalism, Ignorance, Judges*, 22 HARV. J.L. & PUB. POL'Y 13, 20 (1998).

5. *See* Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1082-99 (1975) (arguing that existing legal materials should be adequate to generate a single correct answer for every legal issue even in the hard or close case); *id.* at 1060 (stating that "judicial decisions in civil cases... characteristically are and should be generated by principle not policy"); Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 404 (1985) ("The focus of constitutional litigation on certain substantive areas is importantly . . . a product of linguistic design, in which relatively precise language forestalls litigation with respect even to matters of great moment . . . ."); *id.* at 407 ("A theory, or at least a set of insights, about easy cases is the necessary first step toward development of a theory for dealing with hard cases.") (footnote omitted).

6. A recent example of this formal approach to an "easy case" was the majority opinion written by Justice Stevens in *Clinton v. City of New York*, 118 S. Ct. 2091, 2102-04

on the other hand, a judge is puzzled because his philosophy of interpretation is such that there are at least two plausible textual interpretations in a given case, then functionalism is brought in as a way to tip the balance.[7] Not surprisingly, the lines between these two approaches are often blurred, and we see judicial opinions couched in formal terms despite being driven either openly or covertly by some sort of functionalist analysis about how the constitutional text works best in a particular setting.[8]

For example, originalists who claim to find single right answers in the text, either by reference to history or by reference to some other form of external interpretational guide,[9] will tend to rule in a formalist way. Why? Because they do not have to

---

(1998), which invalidated the Line Item Veto Act of 1996 as a violation of the Presentment Clause that departed from the Framers' "finely wrought" constitutional procedure for the enactment of laws. Indeed, Justice Stevens–who is rarely accused of a fondness for formalistic interpretation–found the disposition in this case to be so clearly required by the text of the Constitution that he actually announced his decision on the merits of the Line Item Veto Act when he dissented from the dismissal of the first Line Item Veto case for lack of standing. *See* Raines v. Byrd, 117 S. Ct. 2312, 2327 (1997) (Stevens, J., dissenting) ("Given the fact that the authority at stake is granted by the plain and unambiguous text of Article I, it is equally clear to me that the statutory attempt to eliminate it is invalid.").

7. An excellent example of this phenomenon is Chief Justice Rehnquist's majority opinion in *Morrison v. Olson*, 487 U.S. 654, 696-97 (1988), in which the Court held that "it does not violate the Appointments Clause for Congress to vest the appointment of independent counsel in the Special Division; that the powers exercised by the Special Division under the Act do not violate Article III; and that the Act does not violate the separation-of-powers principle." In an opinion replete with balancing tests on all fronts, perhaps the most naked functionalist argument made by the court was the following:

> There is no real dispute that the functions performed by the independent counsel are "executive" in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch. As we noted above, however, the independent counsel is an inferior officer under the Appointments Clause, with limited jurisdiction and tenure and lacking policymaking or significant administrative authority. Although the counsel exercises no small amount of discretion and judgment in deciding how to carry out his or her duties under the Act, we simply do not see how the President's need to control the exercise of that discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President.

Id. at 691-92.

8. *See* Brannon P. Denning & Glenn Harlan Reynolds, *Comfortably Penumbral*, 77 B.U. L. REV. 1089, 1089-92 (1997) (discussing recent Supreme Court cases that illustrate how the new "working conservative majority" on the Court has increasingly embraced "penumbral reasoning" of the sort its members had previously criticized, and showing how the liberal minority has responded by adopting a more textualist approach reminiscent of the "strict constructionism" earlier advocated more aggressively by the conservatives).

9. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856-57 (1989) (describing the sources considered by originalists and concluding that theirs is "a task sometimes better suited to the historian than the lawyer").

reach function. They are satisfied by the first set of criteria that a good judge should use: "Does the text tell me to do something? If so, my job is to do it."

But originalism, and even textualism, can only take the task of constitutional interpretation so far. These methods are bounded by the limitations, or lack thereof, found in the constitutional text itself. As Professor Merrill points out, ambiguous interpretations are almost inevitable when one discusses the Commerce Clause,[10] and there are certainly other examples of constitutional provisions that resist a single definitive reading no matter how hard one tries to shoe-horn them into a particular pigeonhole.[11] If one wishes to avoid flipping a coin or some other random procedure of adjudication, then functionalism is the only method suited to the task of interpreting such *ambiguitas patens*.[12] This is nothing more than the traditional "Henry-Hart-purposive theory"[13] of interpretation brought into the constitutional arena by the need to resolve a difficult question.

It is unlikely that our jurisprudential brawls over the proper approach to constitutional and statutory interpretation will end any time soon, if ever. The dance of punch and counterpunch between formalists and functionalists, originalists and conventionalists, and textualists and normativists will continue to inform and enrich our understanding of the law as long as laws need to be interpreted. In the meantime, however, many of the specific judicial problems that these theories seek to address might be more easily solved elsewhere, which is why I take a somewhat different approach to separation-of-powers issues than my colleagues.

Rather than quarrel about the degree to which formalism and functionalism (or any other "ism" for that matter) may be

10. *See* Thomas W. Merrill, *Toward a Principled Interpretation of the Commerce Clause*, 22 HARV. J.L. & PUB. POL'Y 31, 34 (1998).

11. *See, e.g.*, U.S. CONST. amend. VIII (prohibiting "cruel and unusual punishments").

12. H. Jefferson Powell artfully reintroduced this ancient term into contemporary legal scholarship in his provocative article, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 898 (1985).

13. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 139 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (1958) ("The most precise form of authoritative general direction may conveniently be called a *rule* . . . [which] may be defined as a legal direction which requires for its application nothing more than a determination of the happening or non-happening of physical or mental events–that is, determinations of *fact*.").

nothing more than vehicles for ideologically desirable outcomes,[14] our attention should be focused on a deeper problem that concerns formalists and functionalists alike.

Although Congress has displayed occasional bursts of energy during the last fifty years, rarely has a legislative body been more bent on avoiding responsibility, assuring reelection, and passing all controversial decisions on to someone else. This is the "safe-seats" hypothesis of congressional politics. Once elected, the trick is to do nothing that will jeopardize reelection.[15] That is the first principle of being a member of Congress, and it has been enormously successful.

In 1988, I debated the Deputy Minister of Justice of the then-Soviet Union. He made a point that I think is relevant to the separation of powers. He stated that in the preceding twenty-five years, the turnover rate in the Politburo was higher than the turnover rate in the House of Representatives. It is certainly true that if Americans were permitted to create vacancies in the House in the way that Stalin created vacancies in the Politburo,[16] Congress would have an impressive turnover rate, too. Nevertheless, the minister made a telling point–America has a permanent legislative oligarchy.

Even in 1994, the year of the Republican landslide, more than 90 percent of the incumbent members of the House of Representatives were reelected.[17] In an ordinary year, the figure ranges from 95 percent to 98 percent,[18] and the survivors have accomplished this because they have found a way of avoiding

---

14. *See* LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998) (arguing that Supreme Court Justices are, as a group, sophisticated political actors who strategically maximize their personal public policy preferences while attempting to satisfy external observers that their interpretations are derived from neutral legal principles).

15. *Cf.* William Marshall, *Process Federalism and American Political Culture*, 22 HARV. J.L. & PUB. POL'Y 139, 145 (1998) (arguing that Congress will continue to push for federalization because a congressman simply "cannot get away with arguing that a given piece of legislation should be defeated because Congress does not have the authority to enact it").

16. *See generally* ZBIGNIEW K. BRZEZINSKI, THE PERMANENT PURGE: POLITICS IN SOVIET TOTALITARIANISM (1956) (describing the nature of the Soviet purge to explain the character of Soviet totalitarianism).

17. *See* Robert Dornan, *Dispelling the Myths that Surround Term Limits*, CHRISTIAN SCI. MONITOR, Mar. 24, 1995, at 19; Ann McBride, *Q: Was the GOP proposal to reform campaign finance a good idea?; No: The so-called reform opened the floodgates to more special-interest money*, INSIGHT MAG., Aug. 19, 1996, at 25.

18. *See 95 Percent of Incumbents Win Reelection in 1996, Aided by Dramatic Fundraising Advantage over Challengers, According to Common Cause*, COMMON CAUSE PRESS RELEASE (Nov. 7, 1996), <http://www.commoncause.org/publications/11-71sdy.htm>.

hard questions. Even worse, the Supreme Court has aided and abetted this process by not enforcing the basic lessons of seventh-grade civics.[19]

Since World War II, the issues of great national importance generally have not been decided by Congress. Instead, Congress has increasingly delegated those issues to non-democratic bodies. Complex issues of regulation have been increasingly delegated to administrative agencies,[20] our economic policy has been delegated to the Federal Reserve,[21] and our national social policy has been delegated to the federal courts. Time and again, the issues that count–the ones in which people are emotionally invested and would actually come out and vote to decide–have been taken out of the democratic arena to be resolved in an inherently non-democratic one.[22] Now, that may be a good idea. I am not suggesting that it is wrong to have an insulated Federal Reserve Board, and I am not suggesting that it was wrong for the Court to drive the nation forward in terms of racial[23] and gender[24] equality when Congressional leadership was lacking.

---

19. *See* Burt Neuborne, *In Praise of Seventh Grade Civics: A Plea For Stricter Adherence to Separation of Powers*, 26 LAND & WATER L. REV. 385 (1991) (summarizing and critiquing the Court's failure to enforce the doctrine of separation of powers).

20. *See* David Schoenbrod, *The Delegation Doctrine: Could the Court Give it Substance?*, 83 MICH. L. REV. 1223 (1985). Professor Schoenbrod's observation that since 1935 the Court "has never again held a statute unconstitutional on the basis of the delegation doctrine," *id.* at 1225, remains just as true today as when he wrote it fourteen years ago.

21. *See, e.g.*, Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 568 (1980) ("[W]hile not abdicating their ultimate judicial responsibility to determine the law, generally judges ought to refrain from substituting their own interstitial lawmaking for that of the Federal Reserve, so long as the latter's lawmaking is not irrational.") (citation omitted); *id.* at 565 ("Unless demonstrably irrational, Federal Reserve Board staff opinions construing the [Truth in Lending] Act or Regulation [Z] should be dispositive ...."). *See generally* Naaman Nickell, *Fed May be a Bit Too Independent for Comfort*, ARIZ. REPUBLIC, Nov. 20, 1994, at D1.

22. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 153 (1973) ("This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."); Washington v. Glucksberg, 117 S. Ct. 2258, 2271 (1997) ("[T]he asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause.").

23. The leading case in this field is clearly *Brown v. Board of Education*, 347 U.S. 483, 493 (1954), in which the Court overruled the "separate but equal" doctrine by holding that the "segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive[s] the children of the minority group of equal educational opportunities."

24. *See, e.g.*, Reed v. Reed, 404 U.S. 71, 74 (1971) (striking down an Idaho statute that established a preference for men over equally qualified women in the administration of estates in violation of the equal protection guarantees of the Fourteenth Amendment); Craig v. Boren, 429 U.S. 190, 197 (1976) (striking down an Oklahoma statute that

Yet, however much we might applaud the substantive results achieved by the Court in the fifties, sixties, and seventies, the process was certainly not majoritarian.[25]

Perhaps the most novel and egregious example of congressional delegation we have witnessed in recent decades was the establishment of the Federal Sentencing Commission in 1984[26] and the subsequent promulgation of the Federal Sentencing Guidelines.[27] Among the most important democratic judgments that a society can make is how long people should go to jail for particular acts; it is, after all, a decision to strip away a person's liberty. The weight of this judgment is why the Court's decision in *Mistretta v. United States*[28] was so disturbing. When Congress is allowed to get away with the kind of delegation represented by the guidelines, the voters have no opportunity to pass judgment on its decisions. Unfortunately, the Court chose to place its trust in a similarly small group of specialists rather than in the people[29]–a tendency with which we have become all too familiar.

I approach separation-of-powers issues from a level of deep functionalism, but the Court's consistent failure to enforce the

---

established different purchase ages for men and women for a specific kind of beer and articulating the intermediate scrutiny test for gender classifications).

25. "The root difficulty," as Alexander Bickel put it, "is that judicial review is a counter-majoritarian force in our system." ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (2d ed., 1986) (1962); *see also id.* at 18 ("[J]udicial review is a deviant institution in the American democracy."). The countermajoritarian difficulty framed by Bickel more than three decades ago has been a central theme of constitutional theory ever since. *See* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 334 & n.1 (1998) (making this claim and listing numerous scholarly inquiries into Bickel's conundrum).

26. *See* Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 217(a), 98 Stat. 1987, 2017 (codified as amended at 28 U.S.C. § 991 (1994)). The various provisions of the Sentencing Reform Act are codified as amended at 18 U.S.C. §§ 3551-3559, 3561-3566, 3571-3574, 3581-3586 (1994), and 28 U.S.C. §§ 991-998 (1994).

27. The Sentencing Guidelines became effective on November 1, 1987. *See* FEDERAL SENTENCING GUIDELINES MANUAL § 2B1.1 (1995).

28. 488 U.S. 361 (1989). In *Mistretta*, the Court held that "in creating the Sentencing Commission–an unusual hybrid in structure and authority–Congress neither delegated excessive legislative power nor upset the constitutionally mandated balance of powers among the coordinate Branches." *Id.* at 412. With respect to delegation, the Court "harbor[ed] no doubt that Congress' delegation of authority to the Sentencing Commission is sufficiently specific and detailed to meet constitutional requirements." *Id.* at 374.

29. *See id.* at 379 ("Developing proportionate penalties for hundreds of different crimes by a virtually limitless array of offenders is precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate.").

first command set forth in the Constitution[30] should alarm committed formalists as well. My questions apply to both camps. What kind of rules, consistent with the text, can we enunciate that will make Congress behave as a responsible legislature again? What can we do to stop them from sloughing off the hard questions to politically unaccountable institutions and make government more responsive to the public will?

The failure, both structurally and functionally, to enforce the separation of powers over the last thirty years is a large part of the problem that we have with American democratic life today. Were it up to me, the delegation doctrine would be seriously reinforced, notions of the unitary executive would be seriously enforced, and the nonsense that silence can constitute legislative action[31] in any arena would be swept away. Congress would be held, with its feet to the fire, to act as the responsible legislature that the Founders assumed it would be.

---

30. Article I, Section 1, of the Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States."

31. *See* Johnson v. Transportation Agency, 480 U.S. 616, 671-72 (1987) (Scalia, J., dissenting) (arguing that the "'complicated check on legislation' erected by our Constitution . . . makes it impossible to assert with any degree of assurance that congressional failure to act represents" approval of a previous statutory interpretation) (citation omitted); Girouard v. United States, 328 U.S. 61, 69 (1946) (stating that "[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law"); *cf.* Tafflin v. Levitt, 493 U.S. 455, 462 (1990) ("To rebut the presumption of concurrent jurisdiction, the question is not whether any intent at all may be divined from legislative silence on the issue, but whether Congress in its deliberations may be said to have affirmatively or unmistakably intended jurisdiction to be exclusively federal."); Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection, 474 U.S. 494, 501 (1985) ("The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.") (citation omitted).

For scholarly criticism of the courts' reliance on the congressional acquiescence doctrine as a basis for its decisions, see REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 181 (1975) (stating that even where a legislature is "fully aware" of an outstanding interpretation, "there are often reasons other than approval why a legislature remains silent or inactive"); William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 95-98 (1988) (noting the formalist objections to the acquiescence doctrine and arguing that legislative silence is, at best, only indirect support of a statutory interpretation); John C. Grabow, *Congressional Silence and the Search for Legislative Intent: A Venture into "Speculative Unrealities,"* 64 B.U. L. REV. 737, 763 (1985) ("Given the doubtful validity and practical difficulties of the duty imposed on Congress by the reenactment rule, the doctrine should be rejected."). *But see* John Paul Stevens, *The Shakespeare Canon of Statutory Construction*, 140 U. PA. L. REV. 1373, 1382 (1982) ("The Court is sometimes skeptical about the meaning of a statute that appears to make a major change in the law when the legislative history reveals a deafening silence about any such intent.").