
ARTICLES

RECESS APPOINTMENTS IN THE AGE OF REGULATION

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Bob Curtin: Wouldn't it be better, the way things are, to separate tomorrow, or even tonight?

Fred C. Dobbs: That would suit you fine, wouldn't it?

Curtin: Why me more than you?

Dobbs: So you could fall on me from behind, sneak up, and shoot me in the back.

Curtin: All right, I'll go first.

Dobbs: And wait for me on the trail and ambush me?

Curtin: Why wouldn't I do it right here and now if I meant to kill you?

Dobbs: I'll tell you why. 'Cause you're yella. You haven't got nerve enough to pull the trigger while I'm lookin' you straight in the eye.

Curtin: If you think like that, there's nothing to do but to tie you up every night.

Dobbs: I'll tell you what. I'll make you a little bet . . . I'll bet ya . . . you go to sleep before I do.¹

INTRODUCTION

In the movie *The Treasure of the Sierra Madre*, three gold prospectors take a long, dangerous journey down a mountain after carefully dividing their gold into three equal shares. The older prospector is judicious and nonthreatening – and absent during the critical confrontation between the two younger prospectors. The two prospectors distrust one another and, in one scene, fight to stay awake for fear of being robbed by the other. What follows is a standoff in which both men fight the temptation to close their eyes so as not to give the other an opportunity to steal. The Madisonian system of government has often given rise to the same type of overt distrust among the three branches – particularly between the executive and legislative branches. Each branch has adopted novel means to jealously guard its own constitutional possessions in the tripartite division of power, while the judicial branch has largely stood to the side like the older prospector, leaving the other two branches to “work things out” through the political process. The controversy over President Barack Obama’s recent recess appointments demonstrates just how extreme and absurd the struggle has become over the appointment of federal officials. Each side appears to be engaged in a staring contest to deny the other any opportunity to rob it of its constitutional prerogatives. Congress refuses to recess for fear that the President will make unilateral appointments, while the President refuses to wait to allow Congress to act out of the belief that it will only abuse the time and opportunity. How recess appointments became an interbranch blinking contest is a cautionary tale for scholars who explore alternative approaches to the interpretation and limits of the separation of

¹ THE TREASURE OF THE SIERRA MADRE (Warner Bros. Pictures, Inc. 1947).

powers doctrine. These appointments offer an interesting context in which to explore the sufficiency of political checks and balances, as opposed to judicially enforced separation limitations, in conflicts between the executive and legislative branches. Generally speaking, modern interpretations of the Recess Appointments Clause² have followed a pronounced functionalist approach to such conflicts, resulting in highly dysfunctional effects within the system as a whole as presidents openly circumvent opposition to nominees and create a class of unconfirmed high-ranking government officials. More importantly, functionalist approaches to recess appointments have allowed for the very thing that the Framers fought to avoid under a tripartite system of government: the aggregation or aggrandizement of power by one branch. There is good reason for Congress in particular to fear for its constitutional assets after decades of marginalization following the rise of federal agencies and the increasing power of the American presidency.

Recess appointments continue to cause intense conflicts between the executive and legislative branches, as most recently illustrated by the intrasession nomination of Richard Cordray to serve as the first Director of the Consumer Financial Protection Bureau (CFPB).³ In these controversies, neither side appears particularly concerned that it is advancing a *reductio ad absurdum* interpretation of the Recess Appointments Clause. On one side stands President Obama, who claims the right to appoint four nominees during a three-day break in a congressional session because he could not wait for Senate to reconvene and give its advice and consent.⁴ On the other side stands the United States Senate, which continues its longstanding practice of engaging in pro forma sessions of three days or less to prevent the President from claiming that the Senate was not in session and making one or more recess appointments. More importantly, the plain language and meaning of the Recess Appointments Clause is becoming increasingly irrelevant, despite the fact that the Clause was long understood as drawing a clear and logical line between the two branches. As a result, the nomination and confirmation process has been reduced into a blinking contest wherein the briefest break in a senatorial

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

³ The Author testified before Congress on the controversy surrounding Cordray’s appointment, see *Executive Overreach: The President’s Unprecedented “Recess” Appointments: Hearing Before the H. Comm. on the Judiciary*, 112th Cong. 35-57 (2012) (statement of Jonathan Turley, Professor, The George Washington University Law School) [hereinafter *Executive Overreach*], and also addresses the controversy at length elsewhere, see Jonathan Turley, *Constitutional Adverse Possession: Recess Appointments and the Role of Historical Practice in Constitutional Interpretation*, 2013 WIS. L. REV. (forthcoming fall 2013) (on file with author) [hereinafter Turley, *Constitutional Adverse Possession*]; Jonathan Turley, Op-Ed., *Recess Appointments: President as Ruler*, USA TODAY, Feb. 15, 2012, at 7A [hereinafter Turley, *President as Ruler*].

⁴ See Turley, *Constitutional Adverse Possession*, *supra* note 3 (manuscript at 29-32).

session is now claimed as a sufficient basis for presidential recess appointments.

The opportunistic approaches of the two branches in this area have continued largely due to the absence of judicial intervention. The few courts that have addressed the controversy have principally followed an approach of judicial avoidance and relied heavily on the historical practices of the branches “working out” such conflicts. While facially neutral, judicial avoidance has largely worked to the benefit of the executive branch and allowed presidents to routinely circumvent the Senate in the face of opposition to nominations. The rationales put forward to explain both the expanded recess appointment powers and judicial avoidance of the issue are heavily functionalist. Courts and commentators view recess appointments as necessary under a new governmental model that reflects the rise of the administrative state. The assumption that the emergence of a “fourth branch”⁵ necessitates loosening the previously rigid separation of powers in the tripartite system is striking.⁶ The functionalist underpinnings of such an expansive interpretation of the presidential power offer a useful context in which to explore the formalist and functionalist theories that address separation of powers doctrine. Formalist analysis is premised on the belief that “[a]ny exercise of governmental power, and any governmental institution exercising that power, must either fit within one of the three formal categories . . . or find explicit constitutional authorization for [a deviation from these formal categories].”⁷ Underlying this view is a strong belief that the relatively rigid separation of the branches serves

⁵ Jonathan Turley, Op-Ed., *The Rise of the Fourth Branch of Government*, WASH. POST (May 24, 2013), at C1. This term is generally credited to Justice Jackson and is widely used to refer to the many administrative agencies that now promulgate and enforce a vast array of regulations in the United States. See, e.g., Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 CORNELL L. REV. 1, 1 (1994) (citing *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting)).

⁶ The Supreme Court’s jurisprudence reflects its confusion and uncertainty concerning the enforcement of the lines drawn by the separation of powers doctrine. See Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1517 (1991) (characterizing the Court’s separation of powers jurisprudence as an “incoherent muddle”); Erwin Chemerinsky, *A Paradox Without a Principle: A Comment on the Burger Court’s Jurisprudence in Separation of Powers Cases*, 60 S. CAL. L. REV. 1083, 1083 (1987) (characterizing the Court’s approach to separation of powers questions under the leadership of Chief Justice Burger as “paradoxical”).

⁷ Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CALIF. L. REV. 853, 858 (1990) (“The separation of powers principle is violated whenever the categorizations of the exercised power and the exercising institution do not match and the Constitution does not specifically permit such blending.”); see also William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL’Y 21, 21 (1998).

to combat the accretion of power to a single branch and protects individual rights from the dangers of governmental abuse.

Formalism is often dismissed as “inflexible and unrealistic”⁸ or as an approach that “straitjacket[s] the government’s ability to respond to new needs in creative ways.”⁹ Where formalism offers predictability, functionalism offers adaptability,¹⁰ allowing for “workable” changes to the roles that the branches have traditionally played and calling on the judicial branch to intervene only when such changes threaten to fundamentally alter the functioning of the tripartite system – a generally high standard.¹¹ The term “functionalism” is often used as if it has a self-evident meaning, though frequently presented as the rejection of formalism – allowing greater flexibility so long as the “basic purposes” of the Constitution are maintained. The Supreme Court itself appears to fluctuate between functionalist and formalist approaches,¹²

⁸ Thomas O. Sargentich, *The Contemporary Debate About Legislative-Executive Separation of Powers*, 72 CORNELL L. REV. 430, 439 (1987).

⁹ Brown, *supra* note 6, at 1526.

¹⁰ See Eskridge, Jr., *supra* note 7, at 21 (“Formalist reasoning promises stability and continuity of analysis over time[, while] functionalist reasoning promises adaptability and evolution.”).

¹¹ See Harold H. Bruff, *On the Constitutional Status of the Administrative Agencies*, 36 AM. U. L. REV. 491, 503 (1987) (describing the functionalist view as one that is “far more permissive of diverse government structure” and focused on preserving only “the essential functions of the branches”). As Professor John Manning has noted:

[T]he Constitution not only separates powers, but also establishes a system of checks and balances through power-sharing practices such as the presidential veto, senatorial advice and consent to appointments, and the like. In light of that complex structure, functionalists view the Constitution as emphasizing the balance, and not the separation, of powers.

John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1941, 1952 (2011).

¹² On many occasions, the Court has taken a formalist approach to separation of powers questions. See, e.g., *Bowsher v. Synar*, 478 U.S. 714, 725 (1986) (striking down a provision of the Gramm-Rudman Act in light of “[t]he fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others” (internal quotation marks omitted) (quoting *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 629-30 (1935))); *INS v. Chadha*, 462 U.S. 919, 952 (1983) (striking down a legislative veto “that had the purpose and effect of altering the legal rights, duties, and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the Legislative Branch”). Other times, the Court has taken a more functionalist approach. See, e.g., *Morrison v. Olson*, 487 U.S. 654, 696-97 (1988) (upholding the Independent Counsel Act on the ground that “the Act give[s] the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties”); *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 854-55 (1986) (upholding a provision of the Commodity Exchange Act that empowered the Commodity Futures Trading Commission to adjudicate common law counterclaims in a reparations proceeding and finding that, “given the degree of judicial control saved to the federal courts, . . . the congressional purpose

depending largely on the Court's desired outcome in the case at hand.¹³ The controversy over the Recess Appointments Clause, however, shows how, in practice, the functionalist approach offers little beyond a rhetorical patina for departing from the Constitution's original design to accommodate a new model of the new administrative state. Indeed, courts rationalize their refusal to intervene in these disputes by citing the fact that the branches have other means of responding to recess appointment controversies and protecting their constitutional turf. That approach has led to demonstrably dysfunctional practices under ill-defined functionalist rationales. In this area, the judiciary as a whole has adopted a passive role that has been rightfully criticized as "judicial indifference" to separation of powers issues, particularly the structural integrity of the tripartite system.¹⁴ It is a striking example of the cost of the "passive virtues" espoused by Alexander Bickel.¹⁵

Bucking this trend in *Canning v. NLRB*, a unanimous decision of the U.S. Court of Appeals for the District of Columbia declared that two recess appointments made by President Obama were unconstitutional.¹⁶ Notably, the court rejected the functional approach advanced by the Obama Administration, observing that "the text of the Recess Appointments Clause offers no support for [such an] approach."¹⁷ The Justice Department has appealed the decision and the Supreme Court has accepted the case for review.¹⁸ The decision itself

behind the jurisdictional delegation, the demonstrated need for the delegation, and the limited nature of the delegation," the provision did not pose a substantial threat to the separation of powers doctrine). Scholars on both sides of this debate have criticized the Court for vacillating between the two approaches. *See, e.g.*, Stephen L. Carter, *From Sick Chicken to Synar: The Evolution and Subsequent De-Evolution of the Separation of Powers*, 1987 BYU L. REV. 719, 721 (1987) (observing that "[t]he Court has rarely been consistent . . . in choosing one tradition rather than the other to govern its constitutional analysis" and that, consequently, the Court's separation of powers jurisprudence is "lacking in analytical coherence and clear direction"); Chemerinsky, *supra* note 6, at 1085 (describing the Court's inconsistent approach to separation of powers cases as "troubling").

¹³ Martin H. Redish & Elizabeth J. Cisar, "If Angels Were to Govern": *The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 450 (1991) ("[T]he modern Court has evinced something of a split personality, seemingly wavering from resort to judicial enforcement with a formalistic vengeance to use of a so-called 'functional' approach that appears to be designed to do little more than rationalize incursions by one branch of the federal government into the domain of another." (footnote omitted)).

¹⁴ *See, e.g., id.*

¹⁵ *See* ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 111-98 (1962).

¹⁶ 705 F.3d 490, 506-07 (D.C. Cir. 2013).

¹⁷ *Id.* at 504.

¹⁸ *Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted*, 80 U.S.L.W. 3629 (U.S. June 24, 2013) (No. 12-1281). The granting of certiorari was supported by a split among the Circuits. The D.C. Circuit decision conflicts with prior rulings. *See, e.g.*, *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004); *United States v. Woodley*, 751 F.2d 1008 (9th

represents a fundamental shift from the functionalist approach previously followed by the D.C. Circuit, but fails to articulate a broader approach to the separation of powers doctrine beyond recess appointment controversies. The question after *Canning* is whether that decision will serve as the foundation for a new approach to separation of powers questions or instead cabin, rather artificially, the antiaggregation approach to just one of a myriad of such conflicts between the executive and legislative branches.¹⁹

The key to preventing tyranny is to deny any branch the power to govern alone. Precisely for this reason, the power to appoint federal officers to the executive branch does not rest exclusively with either the legislative or executive branch. The Appointments Clause provides that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . . [.]”²⁰ The Clause plays an essential role in the tripartite system by granting the Senate final say on who may hold the high-ranking federal offices responsible for interpreting and enforcing the laws that Congress enacts. Final say, that is, so long as the Senate is around to give it, for the Recess Appointments Clause provides that “[t]he President shall have power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.”²¹

The recess power was inserted into the Constitution to address an obvious and straightforward problem: in the early years of the Republic, Congress was often not in session for as long as six months at a time.²² By necessity, a President had to be able to fill positions, particularly in a government that, in the eighteenth century, was much smaller. A President simply could not wait to appoint a customs official to address imports in places like New Orleans or Philadelphia without causing crippling commercial interruptions. On its face, the text of the Recess Appointments Clause does not appear to lend itself to an especially expansive reading of presidential power. While there is room for debate, the most obvious and straightforward meaning of the Clause is that it refers to vacancies that arise during the recess period, as opposed to previously vacant positions that the Senate chose not to fill with a confirmation vote.²³

Cir. 1985); *United States v. Allocco*, 305 F.2d 704 (2d Cir. 1962). The Third and Fourth Circuits reached the same result for different reasons. *See NLRB v. New Vista Nursing and Rehab.*, 719 F.3d 203 (3d Cir. 2013); *NLRB v. Enter. Leasing Co. Se.*, No. 12-1514, 2013 WL 3722388 (4th Cir. July 17, 2013).

¹⁹ Adam Liptak, *Justices to Hear Case on Obama’s Recess Appointments*, N.Y. TIMES, June 25, 2013, at A12.

²⁰ U.S. CONST. art. II, § 2, cl. 2.

²¹ *Id.* cl. 3.

²² Turley, *Executive Overreach*, *supra* note 3.

²³ *See* HENRY B. HOGUE, CONG. RESEARCH SERV., RS21308, RECESS APPOINTMENTS:

Not surprisingly, conflicts over the meaning of the Recess Appointments Clause have largely focused on the terms “Vacancies” and “Recess,” that is, on what qualifies as a vacancy or a recess so as to trigger a President’s ability to appoint an official to an office without Senate approval. The most controversial recess appointment cases tend to involve intrasession appointments, appointments made while Congress is in session but in recess – often just for a handful of days.²⁴ These cases focus attention on the meaning of the Vesting Clauses²⁵ and the judicial branch’s role in enforcing the constitutional separation of powers. While both formalists and functionalists recognize the allocation of power to the separate branches and support a system of checks and balances, formalists tend to emphasize a “separation of powers,” while functionalists tend to focus on a “separation of functions.”²⁶ Working back from the formalist and functionalist poles in the interpretive debate, many theorists have moved toward more nuanced approaches that are almost analogous to the selective incorporation approach of due process – calling for some structural provisions to be strictly enforced while leaving other provisions to more functionalist analysis.²⁷ Indeed, one scholar has

FREQUENTLY ASKED QUESTIONS (Sept. 10, 2002); Michael A. Carrier, *When Is the Senate in Recess for Purposes of the Recess Appointments Clause*, 92 MICH. L. REV. 2204, 2212-13 n.48 (1993-1994); Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 CARDOZO L. REV. 377 (2005); Michael Herz, *Abandoning Recess Appointments?: A Comment on Hartnett (and Others)*, 26 CARDOZO L. REV. 443 (2005); William Ty Mayton, *Recess Appointments and an Independent Judiciary*, 20 CONST. COMMENT. 515 (2003-2004); Steven M. Pysner, *Recess Appointments to the Federal Judiciary: An Unconstitutional Transformation of Senate Advice and Consent*, 8 U. PA. J. CONST. L. 61 (2006); Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487 (2005); Turley, *Constitutional Adverse Possession*, *supra* note 3; Stuart J. Chanen, Comment, *Constitutional Restrictions on the President’s Power to Make Recess Appointments*, 79 NW. U. L. REV. 191 (1984); Thomas A. Curtis, Note, *Recess Appointments to Article III Courts: The Use of Historical Practice in Constitutional Interpretation*, 84 COLUM. L. REV. 1758 (1984); Patrick Hein, Comment, *In Defense of Broad Recess Appointments*, 96 CALIF. L. REV. 235 (2008).

²⁴ Turley, *Constitutional Adverse Possession*, *supra* note 3 (manuscript at 23-33).

²⁵ U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress”); *Id.* art. II, § 1, cl. 1 (“The executive Power shall be vested in a President of the United States of America.”); *Id.* art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).

²⁶ See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 577 (1984) (discussing several different approaches to understanding separation of powers questions). Strauss observes that “[c]hecks and balances’ is the third idea, one that to a degree bridges the gap between these two domains.” *Id.* at 578.

²⁷ Indeed, scholars like Eskridge reject the dichotomy of the two theories:

[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

advocated abandoning separation of powers analysis in favor of a more “ordinary” approach to interpretation of the respective Vesting Clauses.²⁸ While much of formalist/functionalist literature focuses on the scope of congressional authority, particularly under the Necessary and Proper Clause,²⁹ the recess appointment controversy illustrates how functionalist theory can also lead to the expansion of executive power.

This Article examines the Recess Appointments Clause in light of the rise of the “fourth branch” and the administrative state.³⁰ Part I begins with a discussion of the purpose of the tripartite system, namely, to prevent the aggregation or the aggrandizement of power by any one branch. The Article then explores the evolution of functionalist interpretations of the Clause and examines the extent to which those interpretations have allowed Presidents to use the Recess Appointments Clause more frequently. This functionalist approach was largely the product of interpretations by past attorneys general and was later reinforced by historical practice and judicial avoidance in recess controversies. Part II discusses how the rise of the fourth branch of administrative agencies has magnified concerns over recess appointments and separation of powers generally. With the rise of the fourth branch, many have argued for a less rigid adherence to the separation of powers doctrine or even questioned the basis and viability of that doctrine.³¹ The Author takes the opposing view that greater adherence to the separation of powers doctrine is necessary to maintain the balance in our tripartite system, especially in the area of recess appointments, because confirmations are more important today than ever. Part III looks at how functionalist approaches have led to negative results in the political process and failed to address the growing imbalance of powers among the branches. In particular, this Article focuses on the tendency of functionalist theories to support judicial avoidance in the face of recess appointment conflicts. Although this Article argues for a more restrictive interpretation of the Recess Appointments Clause, it also intends to reopen the discussion of the original meaning and purpose of the Clause. This Article

inextricably related. As theories of governance, formalism cannot avoid functional inquires, any more than functionalism can avoid formalist lines. As bases for state legitimacy, neither formalism nor functionalism alone is sufficient.

Eskridge, Jr., *supra* note 7, at 29.

²⁸ Manning, *supra* note 11, at 2025.

²⁹ See, e.g., Manning, *supra* note 11.

³⁰ See, e.g., Strauss, *supra* note 26, 578 n.16 (noting that agencies like FTC “have become a veritable fourth branch of Government”).

³¹ Notably, the Court has remained expressly faithful to the core structural themes of the separation of powers. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 124 (1976) (“The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted . . .”). However, as shown in many functionalist works, one can accept this model in principle while relaxing the lines of separation on the assumption that the system of checks and balances will maintain sufficient separation to achieve the goals of Framers like Madison.

seeks to highlight not only the shift of power within the administrative state but also the loss of Madisonian functions associated with the legislative process. The Senate's confirmation power has become increasingly important as a vehicle for the expression of not just congressional but factional interests that were once expressed through legislation. Part IV returns to the key interpretive questions in recess appointment controversies and shows how an antiaggregation principle favors a more rigid separation of powers approach. Such an approach, it is argued, should reinforce legislative authority in the face of increasing executive power and the emergence of the fourth branch. This approach necessarily entails a greater judicial role and, thus, a rejection of the "countermajoritarian" arguments used to support judicial avoidance.

I. SEPARATION ANXIETY: THE EVOLUTION OF THE RECESS APPOINTMENTS CLAUSE FROM FORMALIST TO FUNCTIONALIST MEANING

The plain language of the Recess Appointments Clause reflects a desire of the Framers to apportion the appointment power between the legislative and the executive branches. The Clause states twice that federal appointments may only be made with "the Advice and Consent of the Senate,"³² plainly rebutting the modern tendency to view federal appointments as principally an executive function. For example, the report of the Committee of Detail, the drafting committee responsible for producing the first draft of the Constitution, granted the Senate the power not only to confirm but also to appoint federal judges.³³ The modern tendency to view federal appointments as an executive function ignores the fact that these appointed officials interpret and apply the laws that Congress enacts. The Framers sought to give the Senate an equal say in who would hold these positions, not just a rubberstamp with which to approve every competent nominee. This is reflected in the words of Gouverneur Morris, who reportedly said that "as the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security."³⁴ Thus, the Recess Appointments Clause is written as an exception to this general rule in the event that vacancies "happen during the Recess of the Senate."³⁵ The Clause does not state or suggest that the executive branch may use recess appointments to circumvent Senate opposition or retaliate for such opposition. To the contrary, the Clause's apportionment between the executive and legislative branches was the dominant feature of the Framers' design: the shared power that would encourage compromise and coordination between the

³² U.S. CONST. art. II, § 2, cl. 2.

³³ *Committee of Detail*, in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 129, 146 (Max Farrand ed., 1911).

³⁴ James Madison, *Notes of the Constitutional Convention (Sept. 7, 1787)*, in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 535, 539 (Max Farrand ed., rev. ed. 1966).

³⁵ U.S. CONST. art. II, § 2, cl. 2.

branches.³⁶ As the Court stated in *Edmond v. United States*,³⁷ the confirmation power “serves both to curb Executive abuses of the appointment power . . . and ‘to promote a judicious choice of [persons] for filling the offices of the union.’”³⁸

A. *The Original Basis for the Appointment and Confirmation Powers*

Delegates to the Constitutional Convention adopted the language of the Recess Appointments Clause without any recorded debate.³⁹ Richard Dobbs Spaight, the delegate from North Carolina, proposed the Clause,⁴⁰ which, significantly, paralleled a similar provision in the North Carolina Constitution.⁴¹ When the Recess Appointments Clause was adopted, the need for such a provision was obvious. At the time, congressional recesses commonly lasted as long as six or even nine months, with the first ten Congresses spending nearly seven months in recess on average.⁴² Absent the power to temporarily fill critical federal positions, such positions would remain vacant until the Senate was back in session.⁴³ Moreover, such vacancies would have had a far greater impact in the early Republic than today.⁴⁴ In 1790, the executive branch had fewer federal offices and only about one thousand nonmilitary employees.⁴⁵ The Supreme Court at the time consisted of only six

³⁶ *Freytag v. Comm’r of Internal Revenue*, 501 U.S. 868, 883 (1991) (“The manipulation of official appointments had long been one of the American revolutionary generation’s greatest grievances against executive power, . . . because the power of appointment to offices was deemed the most insidious and powerful weapon of eighteenth century despotism.” (internal quotation marks omitted)).

³⁷ 520 U.S. 651 (1997).

³⁸ *Id.* at 659 (quoting THE FEDERALIST NO. 76, at 386-87 (Alexander Hamilton) (Max Beloff ed., 2d ed. 1987)); *see also* Turley, *Constitutional Adverse Possession*, *supra* note 3 (manuscript at 7) (“A president must convince Congress on the merits of a confirmation and Congress may withhold its consent for good reason, bad reason, or no reason at all. That is the nature of a shared power of nomination and confirmation.”).

³⁹ *See* Madison, *Notes of the Constitutional Convention (Sept. 7, 1787)*, in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 34, at 532-33 (observing that the language “passed in the affirmative”); *id.* at 540 (stating that the language passed after a motion by Mr. Spaight). As in other areas, it would be a mistake to read much into the absence of a record on either side of this debate.

⁴⁰ *Id.* at 539.

⁴¹ *See* Turley, *Constitutional Adverse Possession*, *supra* note 3 (manuscript at 7).

⁴² *See* U.S. GOV’T PRINTING OFFICE, CONGRESSIONAL DIRECTORY FOR THE 112TH CONGRESS 522-23 (2011), *available at* <http://www.gpo.gov/fdsys/pkg/CDIR-2011-12-01/pdf/CDIR-2011-12-01-STATISTICALINFORMATION-7.pdf>.

⁴³ *See* Turley, *Constitutional Adverse Possession*, *supra* note 3 (manuscript at 8).

⁴⁴ *Id.*

⁴⁵ WALTER E. VOLKOMER, AMERICAN GOVERNMENT 231 (11th ed. 2006) (citing Bruce D. Porter, *Parkinson’s Law Revisited: War and the Growth of American Government*, 60 PUB. INT. 50, 50 (1980)). In 1816, the federal system employed 4837 employees. Deanna

members.⁴⁶ The Vacancies Act⁴⁷ was not yet enacted, and accordingly there was no guarantee that work would continue in the absence of a confirmed official.⁴⁸

The ratification conventions produced a record that better documents the Recess Appointments Clause's separation of powers foundation. During the North Carolina ratification debate, for example, Archibald Maclaine responded to the concern that the Clause granted the executive branch the unilateral power to appoint federal officers:

It has been objected . . . that the power of appointing officers was something like a monarchical power. Congress are not to be sitting at all times; they will only sit from time to time, as the public business may render it necessary. Therefore the executive ought to make temporary appointments This power can be vested nowhere but in the executive, because he is perpetually acting for the public; for, though the Senate is to advise him in the appointment of officers, &c., yet, during the recess, the President must do this business, or else it will be neglected; and such neglect may occasion public inconveniences.⁴⁹

Maclaine acknowledged that the appointments process was a critical component of the separation of powers and explained that the Recess Appointments Clause was a limited exception to be used during long recesses "from time to time."⁵⁰ Clearly a vacancy that existed prior to a recess would

Malatesta, *Evolution of the Federal Bureaucracy*, in 1 A HISTORY OF THE U.S. POLITICAL SYSTEM: IDEAS, INTERESTS, AND INSTITUTIONS 373, 380 tbl.1 (Richard A. Harris & Daniel J. Tichenor eds., 2010).

⁴⁶ Notably, recess appointees to the Supreme Court generally did not exercise the power of that office. See Mayton, *supra* note 23, at 520 (stating that, prior to the 1950s, only two of twelve justices appointed to the Supreme Court while Congress was in recess – Chief Justice John Rutledge and Justice Benjamin Curtis – heard cases prior to their confirmation).

⁴⁷ Act of July 23, 1868, ch. 227, 15 Stat. 168, 168 (codified at 5 U.S.C. §§ 3345-3349d (2012)). It allowed for the filling of positions subject to presidential appointment with Senate confirmation. *Id.* ("And be it further enacted, That in any of the cases hereinbefore mentioned it shall be lawful for the President of the United States, in his discretion, to authorize and direct the head of any other executive department or other officer in either of those departments whose appointment is, by and with the consent of the Senate, vested in the President, to perform the duties of the office vacant . . . until a successor be appointed . . ."). The law was amended in 1998 by the Federal Vacancies Reform Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681-611 (codified as amended at 5 U.S.C. §§ 3345-3349d (2012)).

⁴⁸ See Turley, *Constitutional Adverse Possession*, *supra* note 3 (manuscript at 9).

⁴⁹ *Speech by Mr. Maclaine (July 28, 1788)*, in 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 135, 135 (Jonathan Elliott ed., Philadelphia, Lippincott 2d ed. 1836).

⁵⁰ *Id.* Other references to the Clause were quite limited and often only restated the terminology of the Clause. See, e.g., *Speech by Mr. M'Kean (Dec. 11, 1787)*, in 2 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 529, 534 (Jonathan Elliott ed., Philadelphia, Lippincott 2d ed. 1836) ("Nor need the Senate be

have allowed the Senate to give its advice, including advice that the Senate opposed a nominee. It is the countervailing danger of the “monarchical power” that is most striking in articulating not just the danger of recess appointments, but by extension the antimonarchical role of the confirmation power held by the Senate.

In an oft-quoted passage from *The Federalist No. 67*, Alexander Hamilton makes this point and assures his contemporaries that the Clause is “nothing more than a supplement . . . for the purpose of establishing an auxiliary method of appointment, in cases to which the general method was inadequate.”⁵¹ The general method was “inadequate” simply because Congress regularly recessed for extend periods. Hamilton stressed that the executive and legislative branches were to hold the regular appointment power “jointly” – emphasizing that the power to nominate and the power to confirm were to stand on equal footing.⁵² Yet Hamilton defended the Recess Appointments Clause as relieving pressure on legislators since “it would have been improper to oblige this body to be continually in session for the appointment of offices, and as vacancies might happen *in their recess*, which it might be necessary for the public service

under any necessity of sitting constantly, as has been alleged; for there is an express provision made to enable the President to fill up all Vacancies that may happen during their recess . . .”).

⁵¹ THE FEDERALIST NO. 67, at 444 (Alexander Hamilton) (Belknap Press, 2009). The use of “supplement” obviously has a certain functionalist appeal as a recognized alternative to the standard appointment process. That is clearly not what Hamilton was referencing given the context of his remarks. Hamilton states that confirmation remains “the general mode of appointing officers of the United States.” *Id.* Indeed, given Hamilton’s view that confirmation serves as a “check upon a spirit of favoritism in the President,” it would not make sense to create a simple alternative for circumvention to achieve such favoritism. THE FEDERALIST NO. 76, *supra*, at 392 (Alexander Hamilton). Yet, in his dissent in *National Labor Relations Board v. Enterprise Leasing Co. Southeast*, 722 F.3d 609 (4th Cir. 2013), Judge Diaz made Hamilton a virtual advocate for circumvention by insisting that he “offered a succinct rationale for the recess appointment power, stating that ‘it might be necessary for the public service [for the President] to fill [vacancies] without delay.’” *Id.* at 667 (quoting THE FEDERALIST NO. 76, at 410 (Alexander Hamilton) (Carey & McClellan eds., 1990)). In Judge Diaz’s view, while the Framers intended that the Senate play “a significant role in the [appointments] process, . . . its duty primarily was to ferret out appointments doled out based upon favoritism or corruption.” *Id.* at 667 (citing THE FEDERALIST NO. 76, at 455 (Alexander Hamilton) (C. Rossiter ed., 1961) (“[The Senate] would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity.”)). Thus, Judge Diaz argues, Hamilton’s view was that “the [appointment] power was intended primarily for the President, and that the recess appointment power in particular was a practical aid in support of the President’s constitutional obligations as the nation’s chief executive.” *Id.*

⁵² THE FEDERALIST NO. 67, *supra* note 51, at 444 (Alexander Hamilton) (“The ordinary power of appointment is confided to the President and Senate *jointly*, and can therefore only be exercised during the session of the Senate . . .”).

to fill without delay.”⁵³ Hamilton himself would insist on a rigid interpretation of the Clause to limit the power of a President. While serving as a Major General, Hamilton was asked by the Secretary of War about the meaning of the Recess Appointments Clause and Hamilton stressed that “[i]t is clear, that independent of the authority of a special law, the President cannot fill a vacancy which happens during a session of the Senate.”⁵⁴

In addition to the history and language of the Recess Appointments Clause, the clear purpose of our tripartite system of government – to avoid the aggregation of power in any one branch – should guide our interpretations of the Clause.⁵⁵ Madison and his contemporaries relied heavily on the work of writers like Baron de Montesquieu and John Locke, both of whom argued that the separation of powers is essential to safeguarding liberty.⁵⁶ In their view, liberty could not flourish without adequate safeguards against tyranny. Both federalists and antifederalists alike referred to the separation of powers in similar, antiaggregation terms. For example, Madison’s fear of man’s natural tendency toward corruption and the aggregation of power that led him to make his famous “if men were angels” argument in *The Federalist No. 51*.⁵⁷ The separation of powers doctrine was expressed and defended as a means to protect the liberty of individual citizens, not as a way to produce a more efficient government.⁵⁸ Similarly, Thomas Jefferson stressed that “[t]he concentrating [of the legislative, executive, and judicial powers of government] in the same hands is precisely the definition of despotic government.”⁵⁹ The Framers viewed the Appointments Clause as central to preventing this aggregation of power, insofar as it afforded Congress control over those individuals tasked with interpreting and enforcing the laws.

⁵³ *Id.*

⁵⁴ Letter from Alexander Hamilton to James McHenry (May 3, 1799), in 23 THE PAPERS OF ALEXANDER HAMILTON 94, 94 (Harold C. Syrett ed., 1976).

⁵⁵ Jonathan Turley, From Madison to Mies: How Form Follows Function in Constitutional and Architectural Interpretation (Aug. 23, 2013) (unpublished manuscript) (on file with author).

⁵⁶ See, e.g., JOHN LOCKE, TWO TREATISES OF GOVERNMENT 164 (Ian Shapiro ed., Yale Univ. Press 2003) (1690) (insisting separation of powers is necessary because “it may be too great a temptation to human frailty, apt to grasp at power, for the same persons who have the power of making Laws, to have also . . . the power to execute them”); CHARLES LOUIS DE SECONDAT, BARON DE LA BRÉDE ET DE MONTESQUIEU, THE SPIRIT OF THE LAWS 200-14 (David Wallace Carrithers ed., 1977) (1748) (“To prevent the abuse of power, ‘tis necessary that by the very disposition of things power should be a check to power.”).

⁵⁷ THE FEDERALIST NO. 51, *supra* note 51, at 341 (James Madison) (“But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.”).

⁵⁸ *Id.* at 356-57.

⁵⁹ THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 113 (Harper & Row 1964) (1861).

Madison himself helped define the meaning of the Recess Appointments Clause after its adoption when, in 1814, he invoked the Clause to appoint several commissioners to negotiate the Treaty of Ghent, ending the War of 1812. The Senate objected that, because the commissioners' positions had not existed prior to the Senate's recess, the President could not fill these "vacancies" while the Senate was in recess.⁶⁰ To defend the appointments, Madison could point to the country's desire to end the War and the prospect of a long delay in doing so were he to wait for the Senate to reconvene. A strong argument could therefore be made that a vacancy did in fact arise during the recess. Madison's interpretation also did not conflict with the separation of powers rationale behind the Recess Appointments Clause. Madison's appointments enabled him to negotiate a treaty but did not interfere with the Senate's right to ratify or reject that treaty. With a nation at war and an enemy in the field, Madison acted to end hostilities without the delay caused by waiting for the Senate to return. Today, the dispute seems almost quaint, in light of modern recess appointment controversies. The debate that followed the appointments revealed the view of the confirmation authority as a key congressional power that was tied not only to the competence of the nominee but the purpose of the appointment. It was not as much the nominee selected for the negotiation of the treaty as the overall negotiation that concerned senators. If the Senate had the opportunity to vet and confirm Madison's nominees to negotiate the treaty, it could have spoken directly to the substance of the treaty.

The dispute over the Ghent negotiations is particularly poignant in the context of the modern administrative state and rise of the fourth branch. Two hundred years later, the Senate is still struggling to exercise its confirmation power to shape the work of federal agencies and influence policy. As the center of gravity has shifted in favor of executive power, the confirmation power has become far more important to maintaining the distribution of power between the branches. The feeling of Madison's contemporaries that the President had circumvented the Senate is commonplace today, as Presidents continue to stretch the meaning of the Recess Appointments Clause to justify ever greater recess appointments. This expanding interpretation has largely tracked a corresponding shift from a formalist to a functionalist approach to constitutional interpretation.

⁶⁰ JOSEPH STORY, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 366 (Boston, Little, Brown, & Co. 1873) ("[A] question was made, whether he had a constitutional authority to [appoint commissioned ministers to negotiate the treaty], there being no *vacancy* of any existing office, but this being the creation of a new office. The senate, at their next session, are said to have entered a protest against such an exercise of power by the executive.").

B. *Functionalism and the Adoption of a Permissive Presidential Power of Recess Appointments*

The contemporary discussion of the Appointments Clause and the Recess Appointments Clause reflects the Framers' commitment to the separation of powers.⁶¹ The Recess Appointments Clause is a particularly interesting avenue for exploring functionalist theories because the expansion of the recess appointments power is often linked not to the Clause's text but to the modern realities of government. Notably, even past attorneys general have admitted that the language supports the more restrictive definition of vacancy or recess. The original intent behind the Recess Appointments Clause gradually gave way to political necessities and opportunities, leading Presidents to claim that "vacancy" refers to a vacancy that arises "at any time and for any reason."⁶² Because the executive construed "vacancy" so broadly that the term did not retain any meaningful limit, the modern interpretation of the Clause shifted to emphasize the meaning of "recess." The Obama Administration took this expansion to the extreme when it argued that the President has the authority to determine what is a "functional" session, as opposed to a "recess."⁶³ The constitutional provisions themselves suggest the opposite: the President should defer to Congress to define its sessions and recesses.

Early interpretations evinced a fairly formalist approach to the interpretation of the Recess Appointments Clause. Thomas Jefferson discussed the meaning of the Clause with Edmund Randolph in 1792. Randolph, the first Attorney General and a member of the influential Committee on Detail at the Constitutional Convention, provided Jefferson with an interpretation that was closely tied to the clear language and purpose of the Clause. According to Randolph the Recess Appointments Clause was concerned only with vacancies actually arising during a recess.⁶⁴ This reading frustrated Jefferson's desire to appoint a new Chief Coiner of the Mint,⁶⁵ because that position was created – and therefore the vacancy occurred – during the prior session of Congress.

⁶¹ See Turley, *supra* note 55 (manuscript at 7-23).

⁶² Turley, *Constitutional Adverse Possession*, *supra* note 3 (manuscript at 11).

⁶³ *Id.* (manuscript at 12).

⁶⁴ Notably, Randolph was one of three delegates who initially refused to sign the Constitution and identified the recess appointment power, at least as it pertained to judicial appointments, as one of his chief objections. Edmund Randolph, *Letter from Edmund Randolph to the Speaker of the Virginia House of Delegates (Oct. 10, 1787)*, in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 123, 127 (Max Farrand ed., rev. ed. 1966) ("But I am sanguine in hoping that in every other justly obnoxious cause, Virginia will be seconded by a majority of the States. I hope that she will be seconded . . . [i]n taking from [the President] the power of nominating to the judiciary offices, or of filling up vacancies which may there happen during the recess of the senate . . .").

⁶⁵ Edmund Randolph, *Opinion on Recess Appointments*, in 24 THE PAPERS OF THOMAS JEFFERSON 165, 166-67 (John Catanzariti et al. eds., 1990) (expressing Jefferson's belief that the President could not grant a temporary commission to a Chief Coiner).

Randolph warned that circumventing the Senate to make a recess appointment in that case would violate the “Spirit of the Constitution.”⁶⁶

Randolph’s principled approach, however, proved too restrictive for his successors. Attorney General William Wirt advanced an interpretation of the Clause that failed to mention Attorney General Randolph’s view.⁶⁷ Although Wirt acknowledged that the language of the Recess Appointments Clause supported Randolph’s interpretation, Wirt adopted an alternative interpretation based on the Clause’s “spirit, reason, and purpose.”⁶⁸ This approach was quintessentially functionalist, emphasizing that “[t]he substantial purpose of the constitution [sic] was to keep these offices filled; and the powers adequate to this purpose were intended to be conveyed.”⁶⁹ Interpretation of the phrase “as may happen to occur during the recess” thus became “as may happen to exist during the recess.”⁷⁰ Wirt saw the change as eminently reasonable given the demands of both branches:

[I]f we interpret the word “*happen*” as being merely equivalent to “happen to exist,” (as I think we may legitimately do,) [sic] then all vacancies which, from any casualty, happen to exist at a time when the Senate cannot be consulted as to filling them, may be temporarily filled by the President; and the whole purpose of the constitution is completely accomplished.⁷¹

Having already set aside the plain meaning of the Recess Appointments Clause, the executive branch next began to view the Clause’s language through the lens of functionalism. In 1921, Attorney General Harry Micaiah Daugherty shifted authority to determine what constitutes a recess from Congress to the President. Daugherty justified this change by arguing that the Senate could legitimately “receive communications from the President or participate as a body in making appointments.”⁷² Emphasizing this functional test inevitably raises the question of who decides whether a session of Congress is a “true” session. On this subject, Daugherty opined that “the President is necessarily vested with a large, although not unlimited, discretion to determine when there is a real and genuine recess making it impossible for him to receive the advice

⁶⁶ *Id.* at 166.

⁶⁷ Interestingly, this was not the first time Wirt and Randolph found themselves on opposite sides of a legal issue. Wirt was one of the lawyers prosecuting Aaron Burr in 1807, while Burr’s defense counsel included Edmund Randolph. See Brent Tartar & Wythe Holt, *The Apparent Political Selection of Federal Grand Juries in Virginia, 1789-1809*, 49 AM. J. LEGAL HIST. 257, 280 (2007).

⁶⁸ Exec. Auth. to Fill Vacancies, 1 Op. Att’y Gen. 631 (1823).

⁶⁹ *Id.* at 632.

⁷⁰ *Id.* at 631 (citing various reasons for such vacancies to arise during a session that are not the result of presidential circumvention of Senate opposition).

⁷¹ *Id.* at 633.

⁷² Recess Appointments, 33 Op. Att’y Gen. 20, 24 (1921).

and consent of the Senate.”⁷³ Daugherty’s interpretation was coupled with a new presumption of legitimacy for executive action, by which “[e]very presumption is to be indulged in favor of the validity of whatever action [the President] may take.”⁷⁴ Proponents supported this new presumption using the strongly functionalist view that “[i]f the President’s power of appointment is to be defeated because the Senate takes an adjournment to a specified date, the painful and inevitable result will be measurably to prevent the exercise of governmental functions.”⁷⁵

The ultimate functionalist expression in the interpretation of the Recess Appointments Clause came in the January 6, 2012 opinion of Assistant Attorney General Virginia Seitz and the Office of Legal Counsel (OLC).⁷⁶ Seitz faced long-standing opposition to the appointment of Richard Cordray to serve as the first Director of CFPB. Despite Cordray’s qualifications, senators had concerns about the independence of CFPB and critical questions about its jurisdiction and funding. The Senate thus repeatedly blocked Cordray’s confirmation. To avoid Cordray’s recess appointment, the Senate resolved to stay in session through pro forma sessions – a practice Democrats had previously used for the same purpose. President Obama used the Senate’s efforts to block the Cordray’s nomination as an example of his opponents’ anticonsumer sentiments.⁷⁷

Seitz rendered an opinion that took the functionalist approach of prior attorneys general to move even further from the original meaning of the Clause. The opinion advanced what is described as the Justice Department’s long-standing view that the Clause can be “construed . . . to fulfill its purpose that there be an uninterrupted power to fill federal offices.”⁷⁸ Seitz approached the question on expressly functionalist terms and dismissed the prior emphasis on the length of a recess.⁷⁹ Pro forma sessions, she argued, “affect the Legislative Branch *alone*”⁸⁰ and leave open the question of whether a recess

⁷³ *Id.* at 25.

⁷⁴ *Id.*

⁷⁵ *Id.* at 23.

⁷⁶ Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions, 36 Op. O.L.C. 1 (2012).

⁷⁷ See David Nakamura & Ylan Q. Mui, *Obama Denounces Senate Vote to Block Cordray at Consumer Watchdog Agency*, WASH. POST (Dec. 8, 2011), http://articles.washingtonpost.com/2011-12-08/politics/35287128_1_richard-cordray-president-obama-payroll-tax.

⁷⁸ Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions, 36 Op. O.L.C. 1, 11 (2012).

⁷⁹ *Id.* at 9 n.13 (“Because we conclude that pro forma sessions do not have [the effect of interrupting the recess of the Senate], we need not decide whether the President could make a recess appointment during a three-day intrasession recess. This Office has not formally concluded that there is a lower limit to the duration of a recess within which the President can make a recess appointment.”).

⁸⁰ *Id.* at 19.

appointment is warranted in the broader context of interbranch relations. Seitz insisted that the Clause serves as a constitutionally permissible way for a President to respond to the Senate's failure to act. This leaves one possible check on such authority – the Senate can stay in actual working sessions without a break.⁸¹ The focus on the length of the recess reflected a lingering belief that the Constitution clearly anticipates some period in which a President cannot act unilaterally. Even Daugherty recognized that a President, before he could invoke the recess appointments power, had to establish that a recess was of such duration that the Senate could “not receive communications from the President or participate as a body in making appointments.”⁸² Thus, “an adjournment for 5 or even 10 days [could not] be said to constitute the recess intended by the Constitution.”⁸³

The Seitz position dismisses such clear lines separating the powers of the branches over appointments. It also narrows the purpose of the Clause to filling positions rather than responding to the long recesses that existed at the time of its adoption. Additionally, it ignores the Appointments Clause's purpose – to give the Senate a say in the selection of high-ranking federal officials. In defense of this sweeping interpretation, Seitz relied on the historical practices of Presidents who repeatedly made recess appointments with what she describes as congressional acquiescence.⁸⁴ Such historical practices have formed the basis for something akin to “constitutional adverse possession.”⁸⁵ Seitz combined this problematic use of historical practices with a recitation of the checks and balances that Congress may use to defend its own institutional interests.⁸⁶ Emphasis on these checks and balances reflects a corresponding de-

⁸¹ *Id.* at 1 (“The Senate could remove the basis for the President's exercise of his recess appointment authority by remaining continuously in session and being available to receive and act on nominations . . .”).

⁸² Recess Appointments, 33 Op. Att'y Gen. 20, 24 (1921).

⁸³ *Id.* at 25.

⁸⁴ The Seitz opinion ignores myriad reasons why Congress would not retaliate against such executive actions. See Turley, *Constitutional Adverse Possession*, *supra* note 3 (manuscript at 48); see also Chief Justice John Marshall, *A Friend of the Constitution No. V*, in JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 184, 190-91 (Gerald Gunther ed., 1969) (“The peculiar circumstances of the moment may render a measure more or less wise, but cannot render it more or less constitutional.”).

⁸⁵ Turley, *Constitutional Adverse Possession*, *supra* note 3 (manuscript at 25).

⁸⁶ Notably, while dismissing the congressional interests in confirmation authority, OLC stresses the separation of powers dangers in limiting a president's recess appointment in any way. *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. O.L.C. 1, 16 (2012) (“[To] completely prevent the President from making recess appointments in situations where the Senate is as a practical matter unavailable would do even more to ‘disrup[t] the proper balance between the coordinate branches,’ and ‘intrud[e] upon’ the President's constitutional prerogatives.” (internal citations omitted) (quoting *Morrison v. Olson*, 487 U.S. 654, 695 (1988); *Loving v. United States*, 517 U.S. 748, 757 (1996))).

emphasis on separation principles, a classic feature of functionalist analysis. For example, Seitz cites the Pay Act⁸⁷ as an example of “congressional acquiescence to recess appointments” because it permitted for some recess appointees.⁸⁸ Seitz’s opinion thus suggests that the existence of such measures should satisfy critics that the expansion of recess appointment authority does not create a power imbalance between the executive and legislative branches by concentrating authority in favor of the executive branch.

The Seitz opinion would allow open circumvention of Senate opposition to a nominee even during a session – directly contradicting the Framers’ explicit rationale for the Recess Appointments Clause. Even with the Framers’ assurance that the Clause addressed only the Senate’s absence during long recesses, some delegates forewarned that a President might ultimately claim the right to control parts of the government with a succession of unilaterally appointed officials.⁸⁹ The functionalist rationale underlying Seitz’s opinion makes such motivations irrelevant and relies on the existence of checks and balances to answer separation concerns. While this interpretation emphasizes the needs of modern agencies to expediently fill open positions, it does not consider the ways in which those agencies have altered the balance between the two political branches and how that altered balance should affect the interpretive analysis.

II. RECESS APPOINTMENTS IN THE AGE OF REGULATION

It is not surprising that the ever-broadening interpretations of the Recess Appointments Clause have tended to emerge during periods of intense political division.⁹⁰ If these interpretations are opportunistic, it is suggested, they are responses to obstructionism. Advocates of broader executive power cite the increasing use of confirmation power to enforce raw political or ideological agendas by blocking otherwise qualified nominees. Certainly the Richard Cordray appointment fits this narrative: An exceptionally well-qualified nominee who is barred by a filibuster as a pawn in a larger struggle between Republican Senators and a Democratic President. However, this narrative fails

⁸⁷ 5 U.S.C. § 5503 (2012).

⁸⁸ Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions, 36 Op. O.L.C. 1, 7 (2012). Notably, while citing the Act as support for her interpretation of the Clause, Seitz notes later that she has serious “concerns about the constitutionality of the Pay Act.” *Id.* at 17 & n.20.

⁸⁹ Thus, St. George Tucker observed that a President could just keep making these appointments in open defiance of the Senate. ST. GEORGE TUCKER, VIEW OF THE CONSTITUTION OF THE UNITED STATES 279-80 (Liberty Fund 1999) (1803).

⁹⁰ For a discussion of the negative effects of party divisions in Congress, see, for example, David A. Moss, *Fixing What’s Wrong with U.S. Politics*, HARV. BUS. REV., Mar. 2012, at 134, 134 (“Research on the American political system shows that the Congress now is more divided than ever, pulled apart by two starkly different conceptions of government.”).

to account for the countervailing reduction of congressional power in the rise of the administrative state.

Scholars have written extensively on the growth of administrative agencies in the United States and the ways in which that growth has fundamentally altered the constitutional structure and function of the federal government.⁹¹ The “age of regulation” has shifted the governmental center of gravity such that administrative agencies now perform myriad functions that were once performed by the executive and legislative branches jointly.⁹² Of course, both branches have, to some extent, willingly ceded their authority to the fourth branch, in part because of practical constraints on resources such as staff, time, and subject-matter expertise.⁹³

Congress has largely adopted a passive role during the shift of authority to the fourth branch under George W. Bush and Barack Obama. The two houses have only limited time and staff to deal with issues before the agencies. There is also a view that agencies are superior to either Congress or the White House in deciding many specialized questions of regulations, with greater expertise and experience in given areas.⁹⁴ This expansion of power is coupled with the rise of independent agencies. Headed by multimember boards and commissions, these agencies shift power away from the legislature, and in some cases, away from the White House itself. Functionalists do not believe that this shift necessarily threatens the balance of power between the two

⁹¹ See, e.g., LAWRENCE C. DODD & RICHARD L. SCHOTT, CONGRESS AND THE ADMINISTRATIVE STATE 1 (1979) (“A distinguishing feature of political life in twentieth century America has been the spectacular growth of the functions and services provided by our national government.”); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994); Peter B. McCutchen, *supra* note 5; Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1 (1983).

⁹² Turley, *supra* note 5, at C1.

⁹³ Professor David Rubenstein has offered six reasons for the shift of decisionmaking to agencies:

First and foremost, Congress is “handicapped in its lawmaking function by the Constitution’s requirements that identical legislation be passed by both houses and presented to the President for potential veto.” . . . Second, the sheer size of the regulatory domain staked by Congress makes it increasingly difficult for Congress to decide all the necessary details. . . . Agencies offer the resources [needed to collect and digest relevant information] that Congress, by comparison, lacks. Third, concerns of “political expediency” might lead Congress to leave discreet or difficult policy choices to regulators, while taking credit for more broadly worded symbolic legislative gestures. Fourth, legislators may perceive delegation as a solution to legislative impasse. Fifth, Congress may delegate because of its inability to foresee issues that may later arise in implementing a statute. Sixth, Congress may delegate out of naked recognition that agency officials may be better suited to formulate sound public policy.

David S. Rubenstein, *Delegating Supremacy?*, 65 VAND. L. REV. 1125, 1142-43 (2012) (footnotes omitted).

⁹⁴ *Id.* at 1142.

branches, at least insofar as the agencies are truly independent, and thus no net increase in power accrues to either branch.⁹⁵ Notably, however, this view does not take into account the other purpose of the division of powers – to promote majoritarian compromise among factional groups. It can be argued that agencies do not benefit particular factional interests but rather rely on agency expertise to achieve majoritarian benefits. Yet certain independent agencies may, by the nature of their mandate, favor particular developmental or business interests. What is clear, however, is that administrative agencies change the model of factional compromise in the Madisonian system. Indeed, they have been accused of paying lip service to stakeholder participation and adjudicatory standards⁹⁶ despite statutorily required procedures.⁹⁷ As governance decisions have shifted to the fourth branch, agencies have developed both judicial and legislative characteristics.⁹⁸ For example, administrative agencies have adopted town-hall-style events and other

⁹⁵ Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1200 (2000) (“[B]oth sides believe that there must be less interactive communications between the President and his staff and his ‘independent’ appointees, and more freedom by such appointees to reach their own decisions without direct consultation with Administrative policymakers.”).

⁹⁶ Lisa Blomgren Bingham argues:

The existing legal framework of collaborative governance within the executive branch provides no mandate or right to participate except (1) notice and comment rulemaking (APA); (2) transparency or observation (FOIA and Sunshine Acts); and (3) miscellaneous dispersed public involvement mandates for specific agencies. There is discretion at the federal level to use collaborative processes under the rubric of negotiated rulemaking or dispute resolution, but there is no clear agency authority to provide for more public participation, collaboration, or deliberative practice than required by law. This ambiguity pits public involvement champion against more risk-averse agency legal counsel. Agency willingness and infrastructure for collaborative governance are mixed. On the federal level, the Open Government Directive is a step forward, but it focuses primarily on transparency and online input, not ongoing stakeholder collaboration or in-person deliberative public participation.

Lisa Blomgren Bingham, *The Next Generation of Administrative Law: Building the Legal Infrastructure for Collaborative Governance*, 2010 WIS. L. REV. 297, 348; see also Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073 (2005) (arguing that accountability “is intrinsically bureaucratic or administrative in character”).

⁹⁷ See Edward L. Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044, 1050 (1984) (“[A]dministrative agencies were granted two other types of power that raised procedural due process issues. First, agencies could make rules governing the substance of their adjudicative decisions. Second, agency adjudicative powers included decision making about matters that had never before been adjudicated by courts, but that resembled judicial adjudications in certain ways.”). These participatory and due process rights are protected by a range of federal statutes, including but not limited to the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706 (2012), Freedom of Information Act (FOIA), *id.* § 552, and the Government in the Sunshine Act, *id.* § 552b.

⁹⁸ See *City of Arlington v. FCC*, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting).

mechanisms designed to solicit citizen input.⁹⁹ The result is that agencies now hold legislative-like meetings, leading to the issuance of new law in the form of regulations that in turn are often the subject of administrative proceedings when citizens or stakeholders raise objections. On a practical level, agencies are essentially a functioning tripartite system within a single fourth branch of government. Yet those with the greatest voice remain organized interests represented by lobbyists and large organizations.¹⁰⁰ This reality stands in stark contrast to that envisioned by the Framers,¹⁰¹ which facilitated reconciliation of rivaling views through compromise rather than by the grace of a meritocracy or bureaucracy, depending on one's view.¹⁰²

The administrative state also includes a host of "czars" or bureaucrats who are vested with authority over whole areas of the government from health care

⁹⁹ Professor Lisa Bingham offers an excellent examination of these new administrative devices and systems. See Bingham, *supra* note 96, at 297. These new approaches include the "America Speaks 21st Century Town Meeting" model under which agencies hold events that have the same appearance as the town halls used by Presidents and members of Congress. See *Engaging Citizens in Governance*, AM. SPEAKS, <http://americaspeaks.org/services/engaging-citizens> (last visited May 23, 2013) ("The 21st Century Town Meetings are powerful and engaging meetings that articulate the group's priorities on critical organization, local, state or national policies."). Yet, these events only involve a few thousand citizens and do not represent a significant level of participatory process. Professor Bingham reports that agencies that have held American town hall meetings "report that [agency] counsel advised this method is inappropriate for rulemaking because it is impossible to capture all the simultaneous dialogue comments of thousands of people in the rulemaking record." Bingham, *supra* note 96, at 316.

¹⁰⁰ See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1684-85 (1975) (observing that critics have frequently argued that "agencies unduly favor organized interests, especially the interests of regulated or client business firms and other organized groups at the expense of diffuse, comparatively unorganized interests such as consumers, environmentalists, and the poor"). Many judges and scholars have stressed the risk of "agency capture" developing between regulators and the regulated industries. Indeed, the less deferential approach of courts tended to reflect a suspicion of the favoritism shown by regulators. Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1043 (1997) ("[T]he courts' assertiveness during the period from roughly 1967 to 1983 can be explained by judicial disenchantment with the idea of policymaking by expert and nonpolitical elites. . . . The principal pathology emphasized during these years was 'capture,' meaning that agencies were regarded as being uniquely susceptible to domination by the industry they were charged with regulating.").

¹⁰¹ Chief Justice Roberts observed the fundamental change in his recent dissent in *City of Arlington*, 133 S. Ct. at 1878 ("The Framers could hardly have envisioned today's 'vast and varied federal bureaucracy' and the authority administrative agencies now hold over our economic, social, and political activities.").

¹⁰² See Rubenstein, *supra* note 93, at 1129 ("The framers never intended that policy choices of unelected administrative bureaucrats would reign supreme over state law. Indeed, the thought of this undoubtedly would have been a deal breaker at the Constitutional Convention.").

to intelligence to job creation.¹⁰³ While there is no statutory definition or recognition of “czar” positions, they are ubiquitous in the government.¹⁰⁴ Often, the positions are merely titular and occupied by previously confirmed officials. As such, they are not particularly problematic. Some czar positions, however, are occupied by individuals who were never confirmed by the Senate and report only to the President.¹⁰⁵ These positions represent the ultimate decoupling of executive offices from congressional oversight. As noted by Senator Robert C. Byrd in a 2009 letter to President Obama, “White House staff have taken direction and control of programmatic areas that are the statutory responsibility of Senate-confirmed officials.”¹⁰⁶ The trend toward such independent and unconfirmed überadministrators accelerated under both

¹⁰³ This includes Professor Cass Sunstein as “Regulatory Czar.” Professor Sunstein was actually the Administrator of the White House Office of Information and Regulatory Affairs (OIRA), which is part of the Office of Management and Budget – an ill-defined office that allowed him to assume a broader title in the Obama Administration. Professor Sunstein, who stepped down in 2012, was criticized for his policies in favor of unilateral or expanded executive power, including his support for military commissions, his proposed “cognitive infiltration” of suspicious Internet posters, his support of warrantless searches, his proposed “Ministry of Truth” for the Internet, and other policies. This record has led some to decry Professor Sunstein and his expansive views of executive power. *See, e.g.*, John M. Broder, *Powerful Shaper of U.S. Rules Quits, Leaving Critics in Wake*, N.Y. TIMES, Aug. 4, 2012, at A1; Glenn Greenwald, *The Horrible Prospect of Supreme Court Justice Cass Sunstein*, SALON (May 26, 2010), http://www.salon.com/2010/03/26/court_3; Terry Krepel, *Sunstein Internet Control Falsehood Migrates to Fox*, MEDIAMATTERS FOR AM. (May 18, 2010), <http://mediamatters.org/research/2010/05/18/sunstein-internet-control-falsehood-migrates-to/164950> (discussing Sunstein’s “Ministry of Truth”).

¹⁰⁴ In 2009, this list included individuals in positions either created by Congress or confirmed by Congress (Shared), and those created unilaterally by the President (Unilateral). This created positions included the Afghanistan “Czar” (Unilateral), AIDS “Czar” (Unilateral), Auto Recovery “Czar” (Unilateral), Border “Czar” (Shared), Car “Czar” (Unilateral), Central Region “Czar” (Unilateral), Domestic Violence “Czar” (Unilateral), Drug “Czar” (Shared), Economic “Czar” (Unilateral), Energy and Environmental “Czar” (Unilateral), Faith-Based “Czar” (Unilateral), Great Lakes “Czar” (Unilateral), Green Jobs “Czar” (Unilateral), Guantanamo Closure “Czar” (Unilateral), Health “Czar” (Unilateral), Information “Czar” (Shared), International Climate “Czar” (Unilateral), Mideast Peace “Czar” (Unilateral), Pay “Czar” (Unilateral), Regulatory “Czar” (Shared), Science “Czar” (Unilateral), Stimulus Accountability “Czar” (Unilateral), Sudan “Czar” (Unilateral), TARP “Czar” (Shared), Terrorism “Czar” (Unilateral), Technology “Czar” (Shared), Urban Affairs “Czar” (Unilateral), Weapons “Czar” (Shared), and WMD Policy “Czar” (Unilateral). *See President Obama’s ‘Czars,’* POLITICO (Sept. 4, 2009, 1:43 PM), <http://www.politico.com/news/stories/0909/26779.html>.

¹⁰⁵ *See generally Examining the History and Legality of Exec. Branch “Czars”: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 111th Cong. 1 (2009).

¹⁰⁶ Letter from Robert C. Byrd, Senator, to Barack Obama, President (Feb. 23, 2009), *quoted in* John Bresnahan, *Byrd: Obama in Power Grab*, POLITICO (Feb. 25, 2009, 10:34 AM), <http://www.politico.com/news/stories/0209/19303.html>.

President George W. Bush and President Barack Obama. It threatens to establish the very model of government the Framers rejected: a type of imperialism, couched in democracy.¹⁰⁷

This model provides the “all-purpose means by which the American Presidency [may] dissemble its purposes, bury its mistakes, manipulate its citizens and maximize its power.”¹⁰⁸ This trend accelerated under President Obama and through the radical expansion of executive power that realizes a more Nixonian model of inherent presidential powers.¹⁰⁹ Under this model, the Chief Executive claims largely unchecked powers that include the right to take the country to war without congressional authorization,¹¹⁰ the right to kill citizens without judicial review,¹¹¹ and the right to refuse to enforce federal laws.¹¹² Such extreme powers are generally delegated to subordinates to be exercised within the sole discretion of an agency.¹¹³ The President can now avoid even the pretense of a recess appointment by selecting “czars” to positions that would engender considerable debate in Congress. The prior positions given “special envoys” and “special representatives” have been

¹⁰⁷ See Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789, 1812 (2010) (“The modern President is far more powerful, and has far more resources at his disposal, than the Framers could possibly have imagined.”).

¹⁰⁸ ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 329 (1973).

¹⁰⁹ Jonathan Turley, Op-Ed., *Inauguration a Triumph of Hope over Experience*, USA TODAY (Jan. 21, 2013, 2:33 PM), <http://www.usatoday.com/story/opinion/2013/01/21/obama-inauguration-liberal-hope/1851919> [hereinafter Turley, *Inauguration*]; Jonathan Turley, Op-Ed., *Nixon Has Won Watergate*, USA TODAY (Mar. 26, 2013, 6:14 PM), <http://www.usatoday.com/story/opinion/2013/03/25/nixon-has-won-watergate/2019443> [hereinafter Turley, *Nixon Has Won Watergate*].

¹¹⁰ The Author represented both Democratic and Republican Members of Congress who challenged the claim of President Obama that he could unilaterally wage attacks on Libya’s capitol, armed forces, and reigning regime. Complaint, *Kucinich v. Obama*, 821 F. Supp. 2d 110 (D.D.C. June 15, 2011) (No. 11-01096), available at <http://jonathanturley.files.wordpress.com/2011/06/libyan-complaintpdf.pdf>. The refusal of courts to rule on these rivaling interpretations of the Constitution led to continuing uncertainty over the relative powers of the branches. This in turn, as with the appointments controversy, has prolonged controversies and undermined perceived legitimacy in the use of war powers. In other words, the courts’ refusal to resolve the disputes has made the system worse, not better.

¹¹¹ See Jonathan Turley, Op-Ed., *Ten Reasons We’re No Longer the Land of the Free*, WASH. POST, Jan. 15, 2012, at B01; Jonathan Turley, *Obama’s Kill Doctrine*, FOREIGN POL’Y (Mar. 6, 2012), www.foreignpolicy.com/articles/2012/03/06/obama_s_kill_doctrine.

¹¹² Jonathan Turley, *Obama Administration Declares It Will Not Deport Young Illegal Immigrants*, JONATHANTURLEY (June 18, 2012), <http://jonathanturley.org/2012/06/18/obama-administration-declares-no-policy-not-to-deport-young-illegal-immigrants>.

¹¹³ James P. Pfiffner, *Constraining Executive Power: George W. Bush and the Constitution*, 38 PRESIDENTIAL STUD. Q. 123, 139 (2008) (“The implications of these sweeping claims to presidential authority are profound and undermine the very meaning of the rule of law.”).

expanded to “czar” status, effectively making them unconfirmed ambassadors. The Afghanistan Czar, for example, represents the United States in critical discussions over the progress of the war and the direction of Afghan-U.S. relations.¹¹⁴

Putting aside the super-heated and sometimes exaggerated rhetoric over such czars,¹¹⁵ they are emblematic of the trend toward greater independence and insularity of the fourth branch.¹¹⁶ It is no accident that Richard Nixon created the longest-running czar position: the Drug Czar. When compared with the “Imperial Presidency” of President Obama,¹¹⁷ however, Nixon’s dream of an “Imperial Presidency” seems almost quaint.¹¹⁸ The adoption of a broader interpretation of the Recess Appointments Clause has coincided with this general shifting of power to administrative agencies.¹¹⁹ For those who view the

¹¹⁴ Hillary Rodham Clinton, Sec’y of State, U.S. Dep’t of State, Remarks Announcing the Appointment of Special Envoy for Middle East Peace and Special Representative for Afghanistan and Pakistan (Jan. 22, 2009), *available at* <http://www.state.gov/secretary/rm/2009a/01/115297.htm>.

¹¹⁵ *See, e.g.*, 155 CONG. REC. H10504 (daily ed. Oct. 6, 2009) (statement of Rep. John Carter) (“[We] now have more czars by twofold than the Romanovs in all the history of Russia.”).

¹¹⁶ The use of these positions to assume powers normally wielded by Senate-confirmed officials raises obvious constitutional concerns, even from those who are critical of long delays in confirmations. *See, e.g.*, Anne Joseph O’Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 930-31 (2009) (“To the extent that these White House assistants make decisions that otherwise would be left to agency officials, they may be functioning as officers and thereby violating the Appointments Clause.”).

¹¹⁷ *See generally* CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY 9 (2007); A. Michael Froomkin, *The Imperial Presidency’s New Vestments*, 88 NW. U. L. REV. 1346, 1350-66 (1994).

¹¹⁸ Turley, *supra* note 5, at C1. While Members of Congress were once known for defending the institutional powers of the legislative branch regardless of the party affiliation of the President, Congress is now characterized by leaders who follow political, as opposed to institutional, affiliations. Thus, Democrats denounced the abuses of the Bush Administration, MAJORITY STAFF OF H.R. COMM. ON THE JUDICIARY, 111TH CONG., REINING IN THE IMPERIAL PRESIDENCY: LESSONS AND RECOMMENDATIONS RELATING TO THE PRESIDENCY OF GEORGE W. BUSH (Comm. Print 2009), but remained silent as the Obama Administration embraced and expanded many of the same policies. Likewise, Democrats objected to the circumvention of the confirmation process under the Bush Administration but not under the Obama Administration. *See, e.g.*, Press Release, Senator Dianne Feinstein, Senate Reverses Administration Effort to Circumvent Senate Confirmation Process for U.S. Attorneys (Mar. 20, 2007), *available at* <http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=7103fbb9-03cf-0ff1-fe09-c220c06d728b>.

¹¹⁹ This shift has been recognized by justices commonly faced with agency-made as opposed to congressionally made law. *See INS v. Chadha*, 462 U.S. 919, 985-86 (1983) (White, J., dissenting) (“For some time, the sheer amount of law – the substantive rules that

separation of powers as protecting both individual rights and the tripartite structure,¹²⁰ this expansion of power is a realization of the fears of the earliest advocates of the separation of powers doctrine, such as Marchamont Nedham.¹²¹ Nedham traced the demise of earlier empires to the gradual concentration of powers:

[T]heir Emperors . . . durst not at first turn both these Powers into the Channel of their own unbounded Will; but did it by degrees, that they might the more insensibly deprive the people of their Liberty, till at length they openly made and executed Laws at their own pleasures . . . and so there was an end of the Roman Liberty.¹²²

As the center of gravity has shifted to administrative agencies, there has been a greater concentration not only in the executive branch, but also in a part of that branch that is increasingly insulated from congressional and public oversight due to deferential judicial doctrines like the *Chevron* doctrine.¹²³ Despite this shift, courts have not shown increased vigilance in reinforcing structural elements in the system through more formalistic approaches to controversies like recess appointments. The proper level of agency deference was recently the subject of a dissent by Justice Antonin Scalia in *Decker v. Northwest Environmental Defense Center*.¹²⁴ In *Decker*, the Court ruled in favor of an interpretation by the Environmental Protection Agency (EPA) regarding the need for a National Pollutant Discharge Elimination System (NPDES) permit for logging operation runoff.¹²⁵ Justice Scalia alone dissented,¹²⁶ taking issue with the majority's decision to "give effect to a

regulate private conduct and direct the operation of government – made by the agencies has far outnumbered the lawmaking engaged in by Congress through the traditional process.”)

¹²⁰ This certainly comes close to the view that the separation of powers doctrine has a normative validity in itself, a major critique of formalism. See, e.g., RONALD DWORKIN, *LAW'S EMPIRE* (1986). However, the broad and often subtle benefits of divided government are clearly manifest in Madison's writings and motivate many scholars who still adhere to a more rigid separation of the branches in areas like recess appointments and war powers. See Turley, *supra* note 55 (manuscript at 38-40).

¹²¹ Marchamont Nedham, *The Excellencie of a Free-State (1656)*, in 1 THE FOUNDERS' CONSTITUTION: MAJOR THEMES 314 (Philip B. Kurland & Ralph Lerner eds., 1987).

¹²² *Id.* at 315.

¹²³ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). This deferential approach was counterbalanced in some cases by the "hard look" doctrine of cases like *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983), and *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

¹²⁴ 133 S. Ct. 1326, 1339 (2013) (Scalia, J., dissenting).

¹²⁵ *Id.* at 1338 ("The preamendment version of the Industrial Stormwater Rule, as permissibly construed by the agency, exempts discharges of channeled stormwater runoff from logging roads from the NPDES permitting scheme.").

¹²⁶ Justice Scalia's warning in *Decker* obviously fell on deaf ears, and he later led a surprising expansion of unilateral agency power in *City of Arlington, Tex. v. FCC*, 133 S.

reading of EPA's regulations that is not the most natural one, simply because EPA says that it believes the unnatural reading is right."¹²⁷ Citing fundamental separation of powers principles and quoting Montesquieu, Justice Scalia objected that the Court "[f]or decades, and for no good reason, . . . [has] been giving agencies the authority to say what their rules means, under the harmless-sounding banner of 'defer[ring] to an agency's interpretation of its own regulations.'"¹²⁸ Justice Scalia lamented that the practice, commonly referred to as *Seminole Rock*¹²⁹ or *Auer*¹³⁰ deference, creates an incentive for agencies to issue vague rules and provides agencies with "a dangerous permission slip for the arrogation of power."¹³¹ Quoting Montesquieu and separation principles, Justice Scalia drew a comparison between the effect of *Chevron* in limiting congressional aggregation and *Auer*.¹³² With respect to *Auer*, which recognized deference to regulations rather than statutes, Justice Scalia notes that agencies have maximized their own power through vague rules and retroactive interpretations.¹³³ The combination could not be more troubling. Executive agencies wielding greater discretionary and unilateral authority are led by officials appointed without congressional consent. Whatever the functionalist view of government, it is not that shared by the Framers and contemplated by the Vesting Clauses of the Constitution.¹³⁴ Rather, it was a warning that took hold among the Framers who sought to

Ct. 1863 (5th Cir. 2012), as discussed below. *See infra* notes 205-15 and accompanying text.

¹²⁷ *Decker*, 133 S. Ct. at 1339 (Scalia, J., dissenting).

¹²⁸ *Id.* (alteration in original) (quoting *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2265 (2011) (Scalia, J., concurring)).

¹²⁹ *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

¹³⁰ *Auer v. Robbins*, 519 U.S. 452 (1997).

¹³¹ *Decker*, 133 S. Ct. at 1341 (Scalia, J., dissenting).

¹³² *Id.* ("While the implication of an agency power to clarify the statute is reasonable enough, there is surely no congressional implication that the agency can resolve ambiguities in its own regulations. For that would violate a fundamental principle of separation of powers – that the power to write a law and the power to interpret it cannot rest in the same hands. 'When the legislative and executive powers are united in the same person . . . there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.'" (quoting MONTESQUIEU, *THE SPIRIT OF THE LAWS* bk. VI, ch. 6, at 151-52 (O. Piest ed., T. Nugent trans., 1949))).

¹³³ *Id.* ("But when an agency interprets its *own* rules – that is something else. Then the power to prescribe is augmented by the power to interpret; and the incentive is to speak vaguely and broadly, so as to retain a 'flexibility' that will enable 'clarification' with retroactive effect.").

¹³⁴ The Framers were heavily influenced by writers like Montesquieu who warned that "constant experience shews us, that every man invested with power is apt to abuse it; he pushes on till he comes to the utmost limit. . . . To prevent the abuse of power, 'tis necessary that by the very disposition of things power should be a check to power." MONTESQUIEU, *THE SPIRIT OF THE LAWS* 1977, *supra* note 56, at 200.

establish the separation needed to avoid concentrations of power, including the division of the appointment and confirmation process.

When viewed from the standpoint of Congress, the new age of regulation and rise in executive power has left it in a subordinate position. While Congress holds the power of the purse, the exercise of that power to cut off funding to agencies that administer critical social programs or perform critical social functions is considered by many to be the ultimate “nuclear option.” The shared appointment power, by contrast, offers Congress a less drastic method by which it may express its opposition to presidential power or policy. While the Senate threatened to withhold funds from CFPB, it first used its confirmation authority to try to force the President to the negotiation table on the structure and function of CFPB.¹³⁵ Many scholars and politicians argue that it is improper for Congress to block confirmation of a qualified nominee simply to push for a change in executive policy.¹³⁶ The Senate has been known to reject or filibuster qualified nominees based entirely on ideology or to stop business during tension with the White House.¹³⁷ In the Cordray controversy, for example, the Senate’s decision to block confirmation was tied directly to its opposition to the Bureau he had been appointed to lead.¹³⁸ Indeed, the Cordray nomination fits neatly within the construct of a response by Congress to the fear of unchecked administrative power in an executive agency, including control of the appropriation of funds. With the reduction of congressional control over federal regulatory decisionmaking, Congress has turned to confirmations as a vehicle to influence agency policy and operations. Thus, in 1998, when Congress moved to make the Federal Election Commission’s General Counsel subject to the advice and consent of the Senate, it did so not because of any specific concerns over any specific appointee, but because it was generally unhappy with the work and structure of that agency.¹³⁹

Despite the role that the confirmation power plays as a check on executive authority, some courts have tolerated executive efforts to evade the confirmation process. An interesting example is found in *Fritts v. Kuhl*,¹⁴⁰

¹³⁵ In 2013, the Senate relented in its opposition to the Cordray nomination and confirmed him as part of a deal to avoid the “nuclear option.” Alexander Bolton, *Deal: Nuclear Option Averted as GOP Blinks*, HILL (July 17, 2013, 8:30 PM), <http://thehill.com/blogs/floor-action/senate/311279-reid-signals-deal-on-filibuster>.

¹³⁶ See, e.g., Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935-2000*, 61 OHIO ST. L.J. 1361, 1437 (2000).

¹³⁷ See, e.g., Felicia Sonmez, *Senate Republican Filibuster Blocks Obama D.C. Circuit Nominee Caitlin Halligan*, WASH. POST (Dec. 6, 2011), http://www.washingtonpost.com/blogs/2chambers/post/senate-republican-filibuster-blocks-obama-dc-circuit-nominee-caitlin-halligan/2011/12/06/gIQAtp6nZO_blog.html.

¹³⁸ See Turley, *Constitutional Adverse Possession*, *supra* note 3 (manuscript at 32).

¹³⁹ Breger & Edles, *supra* note 95, at 1202 (“In 1998, congressional dislike of the Federal Election Commission led to an effort to split off that agency’s General Counsel, making him an advice and consent appointee of the President . . .”).

¹⁴⁰ 17 A. 102 (N.J. Sup. Ct. 1889).

where the New Jersey Supreme Court followed what it viewed as the federal model in granting the chief executive broad use of recess appointments to counter legislative opposition to a candidate. The New Jersey Supreme Court affirmed the power of then-governor Joseph Bloomfield to make the recess appointment of Richard S. Kuhl to the office of president judge, even though the governor had done so in a flagrant attempt to circumvent a State Senate that had previously declined to confirm Kuhl's appointment.¹⁴¹ The vacancy occurred on February 15, 1888, and the governor nominated Kuhl on March 1.¹⁴² On March 20, however, the Senate "refused to consent," thereby denying Kuhl's confirmation.¹⁴³ The State Senate remained in session until March 30, during which time the governor made no further nomination.¹⁴⁴ In the meantime, the Chief Justice of the State Supreme Court appointed a judge to handle cases until a nominee could be confirmed.¹⁴⁵ Thus, there was no exigency in the appointment. Nevertheless, after the State Senate recessed on April 7, the governor appointed Kuhl to fill the vacancy.¹⁴⁶ The New Jersey Supreme Court upheld the appointment despite the governor's use of the recess appointments power to negate the State Senate's decision.¹⁴⁷

The rise of the administrative state has magnified the problems created by cases like *Fritts*. Our current federal government is different not only from what the Framers knew at the time of the ratification but also from what any Framers would imagine.¹⁴⁸ Indeed, to the extent that the Framers envisioned a massive federal government, they did so in the context of a warning, and in the case of people like George Mason, as a basis for opposition to the Constitution.¹⁴⁹ A simple review of the size of the federal government provides a clear example of its transformation. In 1790, the federal government had

¹⁴¹ *Id.* at 102.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 108.

¹⁴⁸ *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 755 (2002) ("The Framers, who envisioned a limited Federal Government, could not have anticipated the vast growth of the administrative state. Because formalized administrative adjudications were all but unheard of in the late 18th century and early 19th century, the dearth of specific evidence indicating whether the Framers believed that the States' sovereign immunity would apply in such proceedings is unsurprising." (citation omitted)).

¹⁴⁹ O'Connell, *supra* note 116, at 923 (2009) ("The country essentially started with Departments of War, Navy, State, and Treasury, the Attorney General, and the postal service. There are now fifteen cabinet departments and dozens of other agencies, including the National Security Agency ('NSA'), the Environmental Protection Agency ('EPA'), and the Securities and Exchange Commission ('SEC'). The current federal workforce – excluding government contractors, government grantees, and military personnel – has more than 2.5 million employees." (footnote omitted)).

1000 nonmilitary members.¹⁵⁰ From 1861 to 1867, the “first year in which the war could be eliminated as a major economic factor, the federal budget had grown almost fivefold, [from \$78 million] to \$376.8 million.”¹⁵¹ In 1962, the federal government had 2,515,000 members.¹⁵² In 2010, it had 2,840,000 members.¹⁵³ The sharpest growth occurred after the Civil War and World War II.¹⁵⁴ Today we have 15 departments, 69 agencies,¹⁵⁵ and 383 nonmilitary sub-agencies.¹⁵⁶ The shift of effective lawmaking authority and adjudicatory authority to agencies is staggering:

In 2007, Congress enacted 138 public laws. By contrast, in that same year, federal agencies finalized 2926 rules, of which 61 were labeled as major regulations. In a similar period, Article III and bankruptcy judges conducted about 95,000 adversarial proceedings, including trials, while federal agencies completed over 939,000 such proceedings, including immigration and social security disputes.¹⁵⁷

The degree of this fundamental change in the federal system is evident in the Cordray controversy. The Senate’s refusal to confirm Cordray had more to do with the Senate’s opposition to the sweeping powers granted to the new CFPB than it did any actual opposition to Cordray himself, who was generally held in high regard.¹⁵⁸ The Dodd-Frank Act created sweeping authority for the

¹⁵⁰ See VOLKOMER, *supra* note 45, at 231; Colin Campbell, *The Complex Organization of the Executive Branch: The Legacies of Competing Approaches to Administration*, in THE EXECUTIVE BRANCH 243 (Joel D. Aberbach & Mark A. Peterson eds., 2005).

¹⁵¹ Richard Rabinowitz, *The Legacy of the Civil War*, NAT’L PARK SERVICE 3, <http://www.nps.gov/features/waso/cw150th/reflections/legacy/page3.html> (last updated Feb. 11, 2011).

¹⁵² *Data, Analysis & Documentation, Historical Federal Workforce Tables*, OFF. PERSONNEL MGMT., <http://www.opm.gov/feddata/HistoricalTables/TotalGovernmentSince1962.asp> (last visited May 14, 2013) (presenting data of total end-of-year civilian employment of full-time permanent, temporary, part-time, and intermittent employees).

¹⁵³ *Id.*

¹⁵⁴ Rabinowitz, *supra* note 151, at 3 (“The [Civil] [W]ar’s most immediate legacy was growth.”). Nevertheless, it was Woodrow Wilson who most embraced bureaucracies as a superior form of government. Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 207 (1887) (defending bureaucratic policymaking as impartial).

¹⁵⁵ *Independent Agencies and Government Corporations*, OFF. PERSONNEL MGMT., <http://www.usa.gov/Agencies/Federal/Independent.shtml> (last updated Apr. 29, 2013) (providing links to federal government agencies).

¹⁵⁶ *Federal Agencies List*, OFF. PERSONNEL MGMT., <http://www.opm.gov/Open/Apps/Agencies> (last visited May 14, 2013) (providing a list of federal agencies, including archived material).

¹⁵⁷ O’Connell, *supra* note 116, at 936.

¹⁵⁸ Jim Puzzanghera, *Senate Clears Way for Cordray Confirmation as Consumer Bureau Chief*, L.A. TIMES (July 16, 2013), <http://articles.latimes.com/2013/jul/16/business/la-fi-mo-richard-cordray-consumer-financial-protection-bureau-filibuster-confirmation-20130716> (commenting that Cordray “generally has drawn bipartisan praise for his work as director”

“orderly liquidation” of financial institutions.¹⁵⁹ Not only were Republicans concerned about undefined core terms like “financial stability,” but they were also concerned about the abridgment of access to the courts and the ability to appeal agency decisions.¹⁶⁰ Of course, these terms were approved by Congress and thus previously subject to the legislative process.¹⁶¹ But the Act shifted an extraordinary degree of rulemaking authority to agencies with little real involvement of Congress, with an estimated 243 new rulemakings to be promulgated by eleven different agencies affecting trillions of dollars. The Cordray nomination provided a vehicle for forcing the White House to reach a compromise with the legislature on this agency’s new powers and the rules it could be expected to promulgate.¹⁶² Once Cordray had been confirmed, the ability of the Senate to exact such concessions would be greatly reduced.

of CFPB).

¹⁵⁹ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (stating that the purpose of the Act is “to provide for orderly liquidation of any such company under title II”).

¹⁶⁰ Todd Zywicki, *The Consumer Financial Protection Bureau: Savior or Menace*, 81 GEO. WASH. L. REV. 856, 859-65 (2013).

¹⁶¹ Even the enactment of clear statutory language no longer guarantees enforcement at the agency level. In a series of troubling decisions, the President has decreed that federal statutes shall not be enforced, despite the President’s obligation to “take Care that the Laws be faithfully executed” U.S. CONST. art. II, § 3, cl. 4. These decisions affect areas of law ranging from immigration to same-sex marriage to Internet gambling, and Congress has objected that such policies effectively negate federal legislation. See *The President’s Constitutional Duty to Faithfully Execute the Laws: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. (2012) (statement of Jonathan Turley, Professor, The George Washington University Law School). These orders range from the Obama Administration’s decision not to defend the Defense of Marriage Act, Letter from Eric H. Holder, Jr., Attorney Gen., U.S. Dep’t of Justice, to John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011) (on file with author), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>, to outright nonenforcement orders, such as the Administration’s ban on the deportation of some illegal immigrants. Julia Preston & John H. Cushman Jr., *Obama to Permit Young Migrants to Remain in the U.S.*, N.Y. TIMES, June 16, 2012, at A1. The result is an effective veto over unduly enacted legislation, including legislation that the President himself may have signed into law.

¹⁶² While legislative changes to alter the powers of such an agency may not be politically or practically possible, a nomination can allow for an immediate dialogue on such issues with the White House. This can also be extremely important for minority parties, like Republicans in the current Senate, in that it may afford minority parties enough votes to filibuster but not enough to force an overhaul of an agency. Such major legislative changes take time and occur in cycles of often five or ten years with approval of core statutory authorizations. Given the size of the administrative state, it is difficult for such overhauls to be inserted into legislative calendars that are already crowded with agency controversies and reauthorizations.

While the Framers were familiar with British ministries' and colonies' charter governments,¹⁶³ the writings on government that Framers like Madison were familiar with did not discuss anything that even approximates the administrative state we have today.¹⁶⁴ What they discussed is the need for the branches to rest in rough equipoise in power of governance, each with the interest and ability to protect its own constitutional powers. In *The Federalist No. 51*, Madison explains the essence of the separation of powers doctrine – and each branch's expected defense of its constitutional prerogatives and privileges:

But the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition.¹⁶⁵

The Framers placed their hopes for stability of the constitutional system on government officials acting to jealously protect the authority of their respective branches (or “departments”) of government. It was assumed that this would be the case even where a President of the same party was threatening legislative authority – institutional interests would work to maintain the balance of the system. The Framers were heavily influenced by writers like Montesquieu, who viewed government as ideally divided to avoid concentrations of power that brought instability and abuse.¹⁶⁶ Such concentrated power often results in the loss of liberty, an issue that Montesquieu and others have addressed.¹⁶⁷ There is, however, a belief that divided or separated forms of governance lead to better decisions and more stable systems. Separation was the solution to the concentration of power that threatened liberty as well as good government values.¹⁶⁸ It is not simply a protection of liberty. The separation of powers

¹⁶³ Indeed, scholars have argued that much of the separation of powers doctrine has been viewed as an implied rejection of the British model of governance. See, e.g., William S. Livingston, *Britain and America: The Institutionalization of Accountability*, 38 J. POL. 879, 880 (1976) (“[A] number of quite fundamental institutions in the American system marked a direct reaction against things British, and were adopted by the Americans as a means of avoiding problems which they perceived as prompted by British error.”).

¹⁶⁴ See *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1878 (5th Cir. 2012).

¹⁶⁵ THE FEDERALIST NO. 51, *supra* note 51, at 340-41 (James Madison).

¹⁶⁶ Turley, *supra* note 55 (manuscript at 16).

¹⁶⁷ *Id.*

¹⁶⁸ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (stressing that the separation of powers is meant to achieve an efficient and workable government); see also Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1340 (2001) (“[T]he Constitution ‘reserves substantive lawmaking power to the states and the people both by limiting the powers assigned to the federal government and by rendering that government frequently incapable of exercising

doctrine assigns tasks to each branch based on their respective strengths and expertise. It maximizes the participatory and deliberative aspects of government – bringing different voices and constituencies to bear on a given question. It guarantees a greater level of acceptance – and thus stability – within the system by broadening the base of decisionmaking. It also reinforces collateral values like federalism.¹⁶⁹ The separation of powers doctrine was an imperative in its own right not because of an inherent desire for divided government, but because it was viewed as a necessary safeguard to the natural encroachment and corruption of power.¹⁷⁰ While some scholars like Paul Verkuil¹⁷¹ and Rebecca Brown¹⁷² have tied their interpretive approaches to individual rights, separation values are designed to achieve a more comprehensive and organic design that protects both individual rights and what was viewed as an optimal form of governance. Clearly, this structure protects both federalism and individual rights as important objectives. Those using “a higher objective that separation of powers may serve,”¹⁷³ however, tend to fall into indeterminate functionalist problems.

The Framers were familiar with the threat of overbearing departments and expansive executive power. Earlier Congresses fought regularly with departments on domestic and international matters.¹⁷⁴ These disputes, however, generally involved direct policies of the President that were being carried out by his immediate cabinet subordinates. Today, Presidents do not and cannot truly monitor the millions of agency decisions made each year. The inability of the President and Congress to review these decisions creates questions of

them.”); John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 899 (2004) (discussing several interests that separation of powers serves).

¹⁶⁹ See Clark, *supra* note 168, at 1340.

¹⁷⁰ There is clearly a great divide among legal academics in what we see in the language and structure of the Constitution. Where some hear a strong message of separation of powers, others hear silence:

One scanning the Constitution for a sense of the overall structure of the federal government is immediately struck by its silences. Save for some aspects of the legislative process, it says little about how those it names as necessary elements of government – Congress, President, and Supreme Court – will perform their functions, and it says almost nothing at all about the unelected officials who, even in 1789, would necessarily perform the bulk of the government’s work.

Strauss, *supra* note 26, at 597.

¹⁷¹ See, e.g., Paul R. Verkuil, *Separation of Powers, The Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 310 (1989) (“[B]y interpreting the provisions of the Bill of Rights, the Court can apply the rule of law, and its conflict of interest concerns, to the executive branch, because that branch is usually the one that affects individual rights and interests.”).

¹⁷² See, e.g., Brown, *supra* note 6, at 1514 (“[T]he structure of the government is a vital part of a constitutional organism whose final cause is the protection of individual rights.”).

¹⁷³ *Id.* at 1520.

¹⁷⁴ See, e.g., J. C. A. STAGG, *MR. MADISON’S WAR: POLITICS, DIPLOMACY, AND WARFARE IN THE EARLY AMERICAN REPUBLIC, 1783-1830* (1983).

accountability in a system of checks and balances.¹⁷⁵ This shift in the center of gravity in the system also presents a different concern from many past functionalist works, which focus on Congress and the extent of congressional authority under the Necessary and Proper Clause.¹⁷⁶ Functionalism concepts underlie broader assertions of executive power that present a far greater threat to the functioning of the three branches in the modern context. Indeed, given the aggregation of power by the executive branch, Congress must assert its authority to restore proper balance to the system. The new reality of the administrative state was described by the United States Court of Appeals for the District of Columbia in *Appalachian Power Co. v. Environmental Protection Agency*,¹⁷⁷ where the court found that an EPA guideline violated the agency's rulemaking process as outlined in the Administrative Procedure Act (APA). The court stated:

The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in the regulations. One guidance document may yield another and then another and so on. Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities. Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations.¹⁷⁸

Even with the Court's requirement that the agency go through the rulemaking process to protect the interests of citizens and stakeholders, such notice and comment involves a narrow range of participation and would certainly not be viewed as dialogic, let alone transformative, in terms of factional interests in a Madisonian sense.

Given the discretion afforded agencies, which are protected in the judicial system under such decisions as *Chevron*,¹⁷⁹ *Dominion*,¹⁸⁰ and *Lane*,¹⁸¹ the

¹⁷⁵ Turley, *supra* note 5, at C1.

¹⁷⁶ See, e.g., Manning, *supra* note 11, at 1943 (“[F]unctionalists believe that Congress has substantially free rein to innovate, as long as a particular scheme satisfies the functional aims of the constitutional structure, taken as a whole.”).

¹⁷⁷ 208 F.3d 1015, 1028 (D.C. Cir. 2000) (“[States] may not, on the basis of EPA’s [broad rule interpretation], require in permits that the regulated source conduct more frequent monitoring of its emissions than that provided in the applicable State or federal standard.”).

¹⁷⁸ *Id.* at 1020.

¹⁷⁹ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (“[C]onsiderable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer.”).

¹⁸⁰ *Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12, 16 (1st Cir. 2006)

confirmation of agency and sub-agency heads is one of the most direct ways for Congress to try to influence or curtail governmental decisions. Congress's direct hold over agency and sub-agency heads is limited to the critical decision of confirmation. While Congress may engage in informal consultation, it does not have a formal voice in the selection of a nominee or in the retention of a confirmed official. As Alexander Hamilton observed in *The Federalist No. 66*, "[t]here will, of course, be no exertion of *choice* on the part of the Senate. . . . [T]hey can only ratify or reject the choice of the President."¹⁸²

An alternative to the outright rejection of a nominee or a filibuster is the much-used "senatorial hold" or "blue slip," which allows a single Senator to delay confirmation of a nominee for any reason permitted under Senate rules.¹⁸³ It is a system rife with abuse but routinely practiced by members of both major parties. Such holds, which often go undisclosed to the public,¹⁸⁴ are greater cause for concern than a filibuster insofar as they give Senators a degree of power that runs against the grain of Article I and has no foundation in the text or underlying intent of that Article.¹⁸⁵ A filibuster or the blocking of a nominee, by contrast, is often based on a generally held opposition by a large number of Senators.¹⁸⁶

Consider again the Cordray controversy. Republican Senators objected that, even when measured against the modern administrative models, CFPB had

("[An] agency's reasonable interpretation [of the law] be accorded deference if there is any ambiguity as to [Congressional] intent." (quoting Citizens Awareness Network, Inc. v. United States, 391 F.3d 338, 348 n.4 (1st Cir. 2004))).

¹⁸¹ Lane v. U.S. Postal Serv., 964 F. Supp. 1435, 1437 (D. Nev. 1996) ("[W]here Congress has delegated a policy decision to an agency, separation of powers concerns make it inappropriate for a court to substitute its judgment for that of the agency.").

¹⁸² THE FEDERALIST NO. 66, *supra* note 51, at 438 (Alexander Hamilton).

¹⁸³ See, e.g., Ira R. Allen, *White House Asks End to Appointee "Backlog,"* WASH. POST, Oct. 9, 1985, at A17 (discussing Senator Byrd's placing of a hold on "thousands" of nominees to protest President Reagan's use of recess appointments). One of the most extreme examples of this tactic was the global hold placed by Senator Jesse Helms as Chair of the Senate Foreign Relations Committee on 493 of President Clinton's ambassadorial and foreign relations nominees. MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS 65 (2000) ("As the powerful chair of the Senate's Foreign Relations Committee, Helms controlled the scheduling of confirmation hearings for these nominations and refused to schedule any hearings because of foreign policy and other disagreements with the administration.").

¹⁸⁴ See Jonathan Turley, Op-Ed., *Seeing Red over Blue Slipping*, L.A. TIMES (May 16, 2001), <http://articles.latimes.com/2001/may/16/local/me-64023> ("For decades, the Senate has used [the blue-slipping] power to create a nonpublic system that gave individual senators tremendous discretionary power.").

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* ("The Constitution gives the president the sole discretion of making nominations and gives the Senate the power of 'advise and consent' in approving or rejecting them.").

been afforded a surprising degree of independence.¹⁸⁷ Much of the criticism focused on the Financial Stability Oversight Council within the Bureau, and the fact that the Bureau receives its funding directly from the Federal Reserve and not through the appropriations process.¹⁸⁸ The scheme thus threatened to circumvent Congress's power of the purse and its ability to use that power to register its opposition to executive action or policy. The Senate responded by using its confirmation power to delay Cordray's confirmation and thus express its displeasure with the scheme. In opposing Cordray's confirmation, the senate gained leverage with which to force the White House to compromise on matters of conflict between the branches. So long as an agency's unprecedented level of independence remains problematic in the eyes of the Senate, that body retains a legitimate interest in resisting any confirmation to fill that agency's director position.

Consider also the Obama Administration's insistence that the President can order attacks on another nation's armed forces or its capital without a declaration or authorization of war.¹⁸⁹ Courts have refused to rule on whether such orders violate the Constitution, generally rejecting challenges for lack of standing.¹⁹⁰ The Senate, however, were it to disagree with the Administration's position, would have few opportunities to express its disagreement other than through use of its confirmation power to delay confirmation of officials such as the Secretary of Defense.¹⁹¹ Even threats to withdraw funds from military operations have been met with arguments that there are limits on such actions when they would interfere with a President's executive functions.¹⁹² At the very least, such "nuclear options" present other costs on functioning of the government and protection of troops.

Of course, one could argue that, once Congress approves an agency or bureau, the Senate's refusal to confirm a top official constitutes obstruction of the inherent functions of the executive branch. Yet this argument ignores the fact that the President may appoint temporary officials to oversee agency

¹⁸⁷ Lisa M. Fairfax & Arthur E. Wilmarth, Jr., *Striking the Right Balance: Investor and Consumer Protection in the New Financial Marketplace*, 81 GEO. WASH. L. REV. 663, 666 (2013).

¹⁸⁸ *Presidential Authority*, 125 HARV. L. REV. 2057, 2152 (2012).

¹⁸⁹ See *supra* note 110 and accompanying text.

¹⁹⁰ The Author was lead counsel in the latest such challenge, *Kucinich v. Obama*, 821 F. Supp. 2d 110, 115-25 (D.D.C. 2011) (dismissed for lack of standing). The need to use confirmation authority in such disputes would be reduced if members were allowed standing in such cases – a position the Author has long supported. See *Campbell v. Clinton*, 203 F.3d 19, 21 (D.C. Cir. 2000), *cert. denied*, 531 U.S. 815 (2000).

¹⁹¹ It is doubtful that the Senate could, for example, withhold funds for military operations. See, e.g., Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander in Chief*, 80 VA. L. REV. 833, 916 (1994) ("The only qualification on [the effect of Congressional withdrawal of war funds] is that it could not deny the President the discretion to conduct a safe and orderly withdrawal of U.S. troops.").

¹⁹² *Id.*

operations and carry out executive branch orders until permanent officials are confirmed.¹⁹³ It is certainly true that such temporary status is difficult. A political appointee can only assume an acting position until the end of the next session of the Senate or until another individual is nominated, confirmed, and permanently appointed to the position.¹⁹⁴ Despite such limitations, career officials will carry out the orders of the Administration and agencies continue to function in such circumstances.¹⁹⁵

One could also argue, as the court in *McCalpin v. Dana*¹⁹⁶ held, that any separation of powers concerns that arise as a result of executive and legislative branch jousting during the confirmation process are of no moment. Under the *Dana* court's view, the President's recess appointment power and the Senate's confirmation power stand on equal ground in confirmation disputes, such that judicial intervention is not proper.¹⁹⁷ That premise, however, is flawed. First, the power to appoint does not presume confirmation. To the contrary, the reliance on confirmation was intended to make the President dependent on Congress to achieve such appointments as part of the shared power in the tripartite system of government. Second, the branches do not stand in equipoise when a president manufactures a "vacancy" or a "recess" and uses such claims as a pretext for exercising the recess appointment power. The recess appointment power, so used, exceeds the authority the Constitution grants to a president. Finally, it is curious for a court to claim that it should not intervene in a dispute because parties have claimed powers or rights. The point of

¹⁹³ See HOGUE, *supra* note 23, at 4 (2012) ("A recess appointment expires at the end of the Senate's next session or when an individual (either the recess appointee or someone else) is nominated, confirmed, and permanently appointed to the position, whichever occurs first.").

¹⁹⁴ *See id.*

¹⁹⁵ Mary L. Clark, *Advice and Consent vs. Silence and Dissent? The Contrasting Roles of the Legislature in U.S. and U.K. Judicial Appointments*, 71 LA. L. REV. 451, 470 (2011) ("Neither historically nor currently has there been a formal role for Parliament in judicial appointments.").

¹⁹⁶ No. 82-542 (D.D.C. Oct. 5, 1982), *vacated as moot sub. nom. McCalpin v. Durant*, 766 F.2d 535 (D.C. Cir. 1985).

¹⁹⁷ *Id.* at 14 ("[T]here is no reason to believe that the President's recess appointment power is less important than the Senate's power to subject nominees to the confirmation process."). In later vacating the *Durant* case for mootness, the United States Court of Appeals for the District of Columbia picked up on this theme of leaving the branches to work out such differences – though reversing the possible basis for judicial intervention:

With the political branches engaged in these thrusts and parries, we did not rush to judgment. Although we did not regard the case as off limits to the judiciary, we hesitated to resolve a conundrum Congress had become aware of and was best suited to address in the first instance. . . . We leave to the classroom and commentary further discourse on this case and on the significance for our constitutional order of recess appointments that linger beyond brief terms and appropriations riders legislators rush into service to contain perceived executive excesses.

Durant, 766 F.2d at 537-38 (footnote omitted) (citations omitted).

judicial review is precisely to settle such disputes.¹⁹⁸ Either the power was exceeded or it was not. By ruling in such cases, the court reaffirms lines of constitutional authority.

The growth of the administrative state has often been cited as necessitating the adoption of a more functionalist approach to the separation of powers doctrine, which advocates argue would allow for greater flexibility and efficiency in government.¹⁹⁹ The formalist approach to separation of powers, so the argument goes, is simply too rigid to meet the demands of a modern federal government.²⁰⁰ The New-Deal era brought to Washington a cadre of reformers who saw government in more scientific than political terms – and saw politics as a cause of many social failures and ills.²⁰¹ The rise of the fourth branch required a degree of insulation from the political branches.²⁰² No statement better reflected this new model than Franklin Roosevelt’s boast that “[t]he day of enlightened administration has come.”²⁰³ These reformers saw the complexity and urgency of federal programs as requiring greater agency independence. Their view, however, could find little support in traditional notions of the separation of powers doctrine.²⁰⁴ Thus, a new, functionalist interpretation of the separation of powers doctrine would be essential to the growth of the administrative state.

¹⁹⁸ See Bradford P. Wilson, *Separation of Powers and Judicial Review*, in SEPARATION OF POWERS AND GOOD GOVERNMENT 63, 63 (Bradford P. Wilson & Peter W. Schramm eds., 1994) (addressing “the constitutional legitimacy of judicial review” and “discuss[ing] the more fundamental principles and characteristics of modern republican constitutionalism before taking up the derivative question of judicial power”).

¹⁹⁹ See generally Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987) (discussing the considerations that went into developing the separation of powers doctrine).

²⁰⁰ As observed above, however, the Court continues to fluctuate between formalist and functionalist approaches, and continues to emphasize the structural provisions under a separation of powers approach. See, e.g., *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 276 (1991) (“If the power is executive, the Constitution does not permit an agent of Congress to exercise it. If the power is legislative, Congress must exercise it in conformity with the bicameralism and presentment requirements of Art. I, § 7.”).

²⁰¹ This of course included many lawyers who came to Washington as reformers with the New Deal. PETER H. IRONS, *THE NEW DEAL LAWYERS* 3 (1982).

²⁰² See generally Strauss, *supra* note 26, at 578-79 (“[T]he rigid separation-of-powers compartmentalization of governmental functions should be abandoned in favor of analysis in terms of separation of functions and checks and balances.”).

²⁰³ Franklin D. Roosevelt, *Campaign Address on Progressive Government*, in 1 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, THE GENESIS OF THE NEW DEAL 1928-1932, at 742, 752 (1938).

²⁰⁴ See Sunstein, *supra* note 199, at 447 (“[B]y evading the traditional safeguards [of the system of separation of checks and balances], the New Deal reformers heightened the potential for abuses that the traditional system was designed to check.”).

III. JUDICIAL ABDICATION AND THE FAILURE OF FUNCTIONALISM

The failure of functionalism to deal with aggregation of power in the federal agencies is particularly evident in the arguments before the Supreme Court in *City of Arlington v. FCC*, in which FCC argued that it was entitled to *Chevron* deference with respect to its interpretation of not only federal laws but also the scope of its own jurisdiction.²⁰⁵ As with the conflict in *Bond v. United States*,²⁰⁶ the agency in *City of Arlington* sought to expand its jurisdiction outside the constraints of federalism. FCC argued that such jurisdictional interpretations should be subject to the generous two-step inquiry of *Chevron*.²⁰⁷ It has long been understood that the “precondition to deference under *Chevron* is a congressional delegation of administrative authority.”²⁰⁸ Justice Antonin Scalia reaffirmed not just *Chevron* but also the power of federal agencies to defend themselves against those who would seek to limit their authority.²⁰⁹ Justice Scalia insisted that to limit agency power in today’s world on such questions due to the fears of “excessive agency power . . . would

²⁰⁵ *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1866 (5th Cir. 2012) (“[The Court] consider[s] whether an agency’s interpretation of a statutory ambiguity that concerns the scope of its regulatory authority (that is, its jurisdiction) is entitled to deference under [*Chevron*].”).

²⁰⁶ See *infra* notes 299, 320, 322, and accompanying text (discussing federalism and the implications on individual rights).

²⁰⁷ *City of Arlington*, 133 S. Ct. at 248 (“Applying *Chevron*, the Court of Appeals . . . held that ‘the FCC’s interpretation of its statutory authority’ was a permissible construction of the statute.”).

²⁰⁸ *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990). The same emphasis can be seen in the Court’s decision in *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001), where the Court found *Chevron* deference appropriate “when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law.” See Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 812 (2002) (“At the most general level, *Mead* eliminates any doubt that *Chevron* deference is grounded in congressional intent.”).

²⁰⁹ See *City of Arlington*, 133 S. Ct. at 1874-75. Indeed, Scalia saw the very attempt to cabin the power of agencies on such jurisdictional questions in starkly conspiratorial terms:

The false dichotomy between “jurisdictional” and “nonjurisdictional” agency interpretations may be no more than a bogeyman, but it is dangerous all the same. Like the Hound of the Baskervilles, it is conjured by those with greater quarry in sight: Make no mistake – the ultimate target here is *Chevron* itself. Savvy challengers of agency action would play the “jurisdictional” card in every case. Some judges would be deceived by the specious, but scary-sounding, “jurisdictional” – “nonjurisdictional” line; others tempted by the prospect of making public policy by prescribing the meaning of ambiguous statutory commands. The effect would be to transfer any number of interpretive decisions – archetypal *Chevron* questions, about how best to construe an ambiguous term in light of competing policy interests – from the agencies that administer the statutes to federal courts.

Id. at 1872-73 (citation omitted).

be replaced by chaos.”²¹⁰ This view was not shared by the dissenting justices, who Chief Justice John Roberts stressed were only maintaining a principle that “[a] court should not defer to an agency until the court decides, on its own, that the agency is entitled to deference.”²¹¹ What was most compelling in the decision was how Chief Justice Roberts framed the dissent in separation terms, recognizing the new threat posed by the rise of the administrative state:

The accumulation of these powers in the same hands is not an occasional or isolated exception to the constitutional plan; it is a central feature of modern American government. . . . It would be a bit much to describe the result as “the very definition of tyranny,” but the danger posed by the growing power of the administrative state cannot be dismissed.²¹²

City of Arlington was a defining – or redefining – moment for the Court. Some 210 years ago, the Court drew a line in the constitutional sand against executive and legislative encroachment into judicial authority in *Marbury v. Madison*.²¹³ Yet, *City of Arlington*, the Court affirmed the authority of an agency to expand its own authority with little judicial recourse. The suggestion that Congress can always check agencies through legislative action ignores the reality of modern government, for to do so, Congress must countermand jurisdictional claims – a daunting prospect with dozens of agencies interpreting their own jurisdiction in myriad ways across thousands of different statutes. These decisions on jurisdiction will be made initially in the relatively closed environs of agency decisionmaking. The incentive to expand jurisdiction for agencies is obvious in many areas, and with *Chevron* deference, the power will shift the center of gravity in the tripartite system even further toward this new branch. An interpretation based on the separation of powers doctrine favors a “default position” against such delegated authority.²¹⁴ Instead, the decision reduces the legislative branch to a corrective institution in monitoring and adjusting jurisdictional excesses.²¹⁵ The decision in *City of Arlington* circumvents a nondelegation doctrine that guarantees “important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will.”²¹⁶

²¹⁰ *Id.* at 1874.

²¹¹ *Id.* at 1877.

²¹² *Id.* at 1878-79.

²¹³ 5 U.S. (1 Cranch) 137 (1803).

²¹⁴ See Adrian Vermeule, *Introduction: Mead in the Trenches*, 71 GEO. WASH. L. REV. 347, 348 (2003) (criticizing *Mead* for establishing a “default rule . . . against delegation. . . . [in cases in which] *Chevron* deference is not due”).

²¹⁵ One difference in this role is that it not only moves the original decision to a more insulated forum but also insulates members of Congress, who can avoid unpopular decisions by simply not correcting agency decisions.

²¹⁶ *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring).

The *City of Arlington* decision offers a striking example of judicial abdication. The relative passivity of courts in enforcing lines of separation has changed the balance and structure of modern American government. While the Framers did not fully envision the modern administrative state they did foresee the need for flexibility. Accordingly, they allowed ample room for changes within the tripartite system and the protections of checks and balances. For example, the Framers included an Excepting Clause allowing “the Congress . . . by Law [to] vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”²¹⁷ Thus, the Framers specifically gave Congress the power to add “room at the elbows” in the appointment of inferior officers. Congress had only to be convinced to exercise that power. The clarity of the Excepting Clause helps to structure the political debate and sets the state for compromises on the appointment of inferior officers. It is the willingness of the courts to enforce the specific language of that Clause that allows for such structural integrity. It is precisely the lack of that judicial enforcement that has robbed the Recess Appointments Clause of its integrity – and left negotiations between the branches unstructured and unpredictable.²¹⁸

The functionalist defense of expanded use of the recess appointments power tends to emphasize flexibility and equity. Functionalists’ arguments focus mainly on the changing character and size of the federal government, as well as on a modern political system that is wrought with deadlocks and delays. For many legal academics, there is a general preference for (if not an identification with) federal agencies that address social problems in an apolitical and analytical fashion. Congress is often viewed as harassing agencies and resisting good policy and science in areas like global warming and pollution abatement.²¹⁹ The increasing power of federal agencies, however, also represents a shift of power to the executive branch.²²⁰ This shift could not have occurred without the passivity and implicit acquiescence of the judicial branch.²²¹ In some ways, the judicial avoidance of recess appointment controversies is a de facto realization of Jesse Choper’s “judicial abdication

²¹⁷ U.S. CONST. art. II, § 2, cl. 2.

²¹⁸ See Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. REV. 2029, 2033 (2011) (“In deferring repeatedly to agencies in individual rights cases, the Court, despite bold pronouncements of judicial supremacy elsewhere, has at times effectively, if perhaps unwittingly, surrendered to agency bureaucrats its self-appointed prerogative of declaring constitutional meaning.”).

²¹⁹ Turley, *President as Ruler*, *supra* note 3, at 7A.

²²⁰ As a longtime critic of the American political parties, the Author shares many of these criticisms. See Jonathan Turley, Op-Ed., *The Framers Can Help Us*, L.A. TIMES, Feb. 11, 2010, at A19 (“Many of our current problems are either caused or magnified by the stranglehold the two parties have on our political system.”).

²²¹ The war-powers controversy shows the same dysfunctional effect of judicial avoidance wherein courts have refused to intervene on questions of undeclared wars. See *supra* note 110 and accompanying text.

model.”²²² Choper maintains that “the ultimate constitutional issues of whether executive action (or inaction) violates the prerogatives of Congress or whether legislative action (or inaction) transgresses the realm of the President should be held to be nonjusticiable, their final resolution to be remitted to the interplay of the national political process.”²²³ Choper argues that each branch has “an impressive arsenal of weapons” with which it can require the other branches to observe constitutional dictates.²²⁴ This ample array of weaponry is combined, according to Choper, with “tremendous incentives jealously to guard its constitutional boundaries and assigned prerogatives against invasion by the other.”²²⁵

The problem with this theory, however, is that there is no real way to measure its descriptive accuracy. With the exception of an insurrection, it is difficult to see how Choper would determine the benefits or costs of such an approach. The system continues to function, but it does not function well to the extent that the branches engage in unilateral action and employ retaliatory tactics. As will be discussed below, functionalist theories have served to decouple the branches and to make them less mutually dependent. As Madison observes, “the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained” without these interconnected procedures.²²⁶ The system of checks and balances is compromised when a President can appoint officials regardless of senatorial opposition – leaving the Senate with only ineffective means of retaliation.

A. *Separation of Powers Versus Checks and Balances*

Functionalists tend to eschew the separation of powers doctrine and instead rely heavily on alternative forms of checks and balances. Scholars such as Kathleen Sullivan simply dismiss the continuing import of separation of powers doctrine and argue that congressional assertions of authority should be viewed on the basis of “demonstrated social benefits” as opposed to structural concerns.²²⁷ Such views reflect faith that the system of checks and balances

²²² JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* 260 (1980) (discussing the role of the judiciary and how few questions related to the separation of powers doctrine reach the courts for resolution).

²²³ *Id.* at 263.

²²⁴ *Id.* at 275.

²²⁵ *Id.* For another criticism of this approach, see Sunstein, *supra* note 199, at 495 (describing formalism, the Holmesian approach, and functionalism as different approaches to implementing the separation of powers doctrine).

²²⁶ THE FEDERALIST NO. 48, *supra* note 51, at 324 (James Madison).

²²⁷ Kathleen M. Sullivan, Comment, *Dueling Sovereignties: U.S. Term Limits, Inc. v. Thornton*, 109 HARV. L. REV. 78, 93-94 (1995) (“Congress’s choice of demonstrated social benefits should prevail over ‘wholly chimerical’ scenarios of threats to the separation of powers, as long as the policies underlying the original structure are satisfied.” (footnotes

alone achieves the primary purpose of the separation of powers doctrine: protection against the diminishment of individual rights and loss of liberty. As Peter Strauss has stressed:

So long as separation of powers is maintained at the very apex of government, a checks-and-balances inquiry into the relationship of the three named bodies to the agencies and each other seems capable in itself . . . of preserving the framers' vision of a government powerful enough to be efficient, yet sufficiently distracted by internal competition to avoid the threat of tyranny.²²⁸

This view is problematic for several reasons. First, the system of checks and balances that functionalists advance has not served to preserve the Framers' vision with respect to appointments. Second, the separation of powers doctrine, insofar as it guards against the concentration of power in any one branch, protects liberty more subtly than does a doctrine that is focused only on "demonstrated social benefits."²²⁹ The gradual aggregation of power over a long period of time can be difficult to discern. The separation of powers doctrine is meant to maintain bright lines specifically to avoid this kind of gradual distortion of the constitutional structure. Unfortunately, years of judicial avoidance have blurred these lines.²³⁰ The history of recess appointment battles belies the suggestion of courts that judicial passivity works to the benefit of the system, and the suggestion that these disputes are ultimately worked out ignores the reality of appointment cases. Presidents have succeeded because, in the absence of judicial review, Congress has few options. Courts have allowed a simple matter of constitutional interpretation to fester for decades, inviting the branches to engage in tit-for-tat politics.

Some draw a sharp distinction between the separation of powers doctrine and the system of checks and balances.²³¹ Indeed, functionalists tend to believe that it is the system of checks and balances – rather than any strict separation of powers – that protects the underlying functions of the branches. This distinction is less clear, however, from the relevant provisions of the Constitution.²³² Madison himself tended to treat the two as almost synonymous

omitted)).

²²⁸ Strauss, *supra* note 26, at 639.

²²⁹ Sullivan, *supra* note 227, at 93.

²³⁰ With respect to federalism, commentators have also criticized judicial avoidance. *See, e.g.,* Bradford R. Clark, *The Supremacy Clause as a Constraint on Federal Power*, 71 GEO. WASH. L. REV. 91, 112 (2003) ("[J]udicial review under the Supremacy Clause reinforces the constitutional separation of powers because it prevents Congress from authoritatively judging the scope of its own powers.").

²³¹ *See, e.g.,* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 356-58 (6th ed. 2009).

²³² The *Canning* decision is fairly typical in that it blends the two concepts to find that intrasession appointments run counter not just to the language but also to the purpose of the Recess Appointments Clause:

Allowing the President to define the scope of his own appointments power would

when discussing their shared purpose of preventing the concentration or aggregation of power. Madison stressed that “unless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires . . . can never in practice be duly maintained.”²³³ Madison’s statement may suggest an inherent conflict: “separation of powers” implies rigid lines of separation, while “checks and balances” refers to shared powers and procedural interaction. Framers like Madison, however, did not view separation in such strict terms.²³⁴ Instead, the Framers opted for a blend of separated and shared functions. The purpose of both the separation of powers doctrine and the system of checks and balances was to prevent individuals or branches from aggregating power. Once one accepts that the two principles are aimed toward achieving the same objective, as suggested by Madison, the distinction between the separation of powers doctrine and the system of checks and balances loses much of its meaning. Consider the appointment and confirmation powers, which have elements of both purposes. These powers have classic characteristics of a system of checks and balances: both the executive and legislative branches have a say in the selection of officials.²³⁵ The Supreme Court has also recognized the Appointments Clause and the Recess Appointments Clause as classic examples of instances in which the Framers sought to draw bright lines of separation.²³⁶

eviscerate the Constitution’s separation of powers. The checks and balances that the Constitution places on each branch of government serve as “self-executing safeguard[s] against the encroachment or aggrandizement of one branch at the expense of the other.” An interpretation of “the Recess” that permits the President to decide when the Senate is in recess would demolish the checks and balances inherent in the advice-and-consent requirement, giving the President free rein to appoint his desired nominees at any time he pleases, whether that time be a weekend, lunch, or even when the Senate is in session and he is merely displeased with its inaction. This cannot be the law. The intersession interpretation of “the Recess” is the only one faithful to the Constitution’s text, structure, and history.

Canning v. NLRB, 705 F.3d 490, 504-05 (D.C. Cir. 2013) (citation omitted).

²³³ THE FEDERALIST NO. 48, *supra* note 51, at 324 (James Madison).

²³⁴ See FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 258-60 (1985) (observing that the Constitution “abandoned” a doctrine of total separation of powers).

²³⁵ Thomas O. Sargentich, *The Contemporary Debate About Legislative-Executive Separation of Powers*, 72 CORNELL L. REV. 430, 435-38 (1987) (“Such checks, to be sure, will take different forms. Some – such as the Senate’s advice and consent to presidential nominations of officers of the United States – will serve as an external, interbranch limit. Such a constraint directly advances the main theory of checks and balances among the different branches.”).

²³⁶ This point was made by the Supreme Court in *Freytag v. Commissioner of Internal Revenue*:

The roots of the separation-of-powers concept embedded in the Appointments Clause are structural and political. Our separation-of-powers jurisprudence generally focuses on the danger of one branch’s aggrandizing its power at the expense of another branch.

The functionalist emphasis on a system of checks and balances over the separation of powers doctrine reflects a view that the former are more flexible and indeterminate than the latter.²³⁷ Even assuming that the line between the two concepts is as clear as functionalists suggest, the constitutional provisions that provide for checks and balances are designed to maintain the balance of powers among the branches – not simply to divvy up the different tasks of governance. All too often, functionalists refer to “checks and balances” as meaning simply that each of the branches has the ability to respond to perceived intrusions on its powers.²³⁸ This is akin to refusing to have a court declare a violation of a financial law because consumers can show their displeasure through the market system. It is not enough to say that there are options available to Congress in the broad interrelationship of the branches. Bright lines are often efficient elements in both markets and politics insofar as they structure transactions and create both stability and predictability in such systems. Such bright lines, however, necessitate judicial review and remedy.

When a President makes a recess appointment, there are two distinct powers at play: the President’s power to appoint and the Senate’s power to confirm. Regardless of whether one views the issue as implicating the separation of powers doctrine or the system of checks and balances, the circumvention of either power upsets the balance of the branches and allows the aggrandizement of one branch at the expense of the others. To permit either the President or the Senate to deny the other the ability to exercise a delegated power is to compromise the balance of power that ensures that neither branch aggregates power. Such concerns are magnified in the age of regulation. This view, however, is not shared by scholars who view federal agencies as necessarily outside of the interrelations of the branches. Peter Strauss, for example, has suggested that “we give up the notion that [the Constitution] embodies a neat division of *all* government into three separate branches,” observing that the Constitution speaks only of “those actors occupying the very apex of government,” namely the executive, legislative, and judicial branches.²³⁹ By

The Appointments Clause not only guards against this encroachment but also preserves another aspect of the Constitution’s structural integrity by preventing the diffusion of the appointment power.

501 U.S. 868, 878 (1991) (citation omitted).

²³⁷ Strauss, *supra* note 26, at 578 (“Unlike separation of powers, however, the checks-and-balances idea does not suppose a radical division of government into three parts, with particular functions neatly parceled out among them. Rather, the focus is on relationships and interconnections, on maintaining the conditions in which the intended struggle at the apex may continue.”).

²³⁸ See, e.g., *id.* at 642-43 (equating the functionalist outlook with abuse of discretion review).

²³⁹ *Id.* at 667 (emphasis added) (“[W]e can achieve the worthy ends of those who drafted our Constitution only if we give up the notion that it embodies a neat division of all government into three separate branches, each endowed with a unique portion of governmental power and employing no other. That apportionment was made, but it was

first dispensing with the assumption of strict separation, such an approach allows the fourth branch to operate more like an English ministry with insulated operations. Yet administrative agencies are not always neutral actors entirely or mostly free from executive and legislative branch influence. In carrying out executive policy, they can be subject to a tremendous amount of executive branch direction and influence.²⁴⁰ This in turn further magnifies the importance of the Senate's power to confirm or deny nominees to lead these agencies.²⁴¹ The President's power to appoint and the Senate's power to confirm are not equally threatened in deadlocks over nominees. For if the President fails to secure the confirmation of a nominee, he is not thereby denied the ability to exercise his constitutional power to enforce and administer the laws. Agencies may continue to carry out executive orders with acting heads and officials.²⁴² If the President is allowed to use his recess appointment authority to circumvent the Senate's confirmation power, the latter power can be denied for years, if not altogether, with regard to a particular office. The Senate's confirmation power, it must be remembered, is designed to provide more than the mere right to approve Presidential appointees; it is intended to give the Senate a voice in determining who should assume some of the highest offices in government.²⁴³

made only as to those actors occupying the very apex of government—Congress, President, and Supreme Court. The remainder of government was left undefined . . .”).

²⁴⁰ This includes not just the White House but also supervisory offices like the Office of Management and Budget (OMB). Alan B. Morrison, Commentary, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1071 (1986) (“To end this process, Congress should step in and prevent OMB intervention in agency rulemaking by precluding OMB from carrying out the functions that it has assumed under . . . Executive Orders.”); see also Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533, 546-52 (1989) (outlining the history of presidential oversight of agency rulemaking).

²⁴¹ This is the inverse of the danger perceived by functionalists, who believe that the real problem is Congress's usurpation of the executive branch's powers:

The important constraint on Congress's ability to structure the work of law-administration lies in the need to perpetuate the tensions and interactions among the three named heads of the Constitution. Whatever arrangements are made, one must remain able to characterize the President as the unitary, politically accountable head of all law-administration, sufficiently potent in his own relationships with those who actually perform it to serve as an effective counter to a feared Congress. The central inquiry is to identify those relationships that are necessary, either to conform with the constitutional text or to preserve the possibility of the President's continuing effectiveness. Since this inquiry remains entirely sensible in the face of the realities of contemporary government – and indeed the political counterweight idea has lost none of its compulsion for us – the checks-and-balances approach remains a useful tool for analyzing and suggesting possible limits on Congress's ability to structure the administrative process.

Strauss, *supra* note 26, at 597.

²⁴² See *supra* note 193 and accompanying text.

²⁴³ The power of confirmation was viewed in the earliest days of the Republic as creating

Strauss's challenge to the "neat division" of power in the tripartite system may be more compelling as it applies to the rise of the fourth branch. While agencies carry out executive branch policies, they can no longer be viewed as a simple extension of presidential powers. This is particularly true of the independent agencies. Because these agencies carry out laws created by Congress – and remain critical in the achievement of the original purposes of those laws – the increased independence of agencies also increases the importance of confirmation as a vehicle for influencing the work of agencies. It is not merely a check on a President's power but rather a means to ensure that the administration of laws remains consistent with their original purpose. The Framers could not have envisioned the rise of the fourth branch, but they clearly understood the importance of confirmation in giving Congress a voice in the administration of laws. Rather than rendering the doctrine outmoded, the rise of the fourth branch makes the separation of powers doctrine even more important – this is particularly true in light of the executive branch's abuse of its appointment power.²⁴⁴

B. *The Failure of Functionalist Checks in Recess Appointment Controversies*

The controversy over recess appointments offers a unique context to examine and compare the different functionalist theories and the viability of

a mutual decisionmaking process to select the best people for top positions. Thus, when the Senate rejected President Washington's nomination of Benjamin Fishbourn for Naval Officer of the Port of Savannah, it was based on the simple stated fact that the Senators "preferred another candidate for the position." MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS* 63-65 (2000); see also *supra* Part I.

²⁴⁴ In his dissenting opinion in *NLRB v. Enterprises Leasing Co. Southeast, LLC*, No. 12-1514, 2013 WL 3722388 (4th Cir. July 17, 2013), Judge Diaz argued to uphold the recess appointments of President Obama while narrowing the purpose of the Appointments Clause and the role of the Senate to merely deterring favoritism in the appointment of officials:

The Framers no doubt intended the Senate to play a significant role in the process, but its duty primarily was to ferret out appointments doled out based upon favoritism or corruption, and certainly not to weigh the executive's policy choice and impede the selection to an extent that risks shutting down entire agencies of the government. As Hamilton described it, "[The Senate] would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity."

Id. at *170 (Diaz, J., dissenting). Judge Diaz' reliance on Hamilton's statement is misplaced. While the Senate could block favoritism or corruption, the Appointments Clause notably lacks limitations on the grounds for denying consent. It is unclear why with such a clean division between nomination and confirmation under the Constitution Judge Diaz sees evidence that "the Framers intended to place the power of appointment chiefly in the President." *Id.* If this is the case, the Framers chose a curious way to go about establishing this division, as they placed the Senate squarely in the path of any appointment and required the President to convince the Senate to consent to the President's choices for high-ranking officials.

the system of checks and balances as an alternative to judicial relief. This is an area where courts have largely abandoned formalist analysis in favor of functionalist approaches that emphasize the ability of the political system to address conflicts over recess appointments as opposed to more strict judicially enforced lines of separation. As courts have drifted further from formalist interpretations of the separation of powers, recess appointments have become more transparently opportunistic. Since the Recess Appointments Clause has become untethered from its original meaning and purpose, the fight between the branches has devolved into unprincipled political bickering.

The tit-for-tat politics over confirmations arises because of the practical unavailability of judicial action. Choper's solution is akin to having kids work things out in schoolyard fights.²⁴⁵ If there is a bully on the playground, the teachers must draw the line between acceptable and unacceptable conduct rather than rely on survival of the fittest to determine the outcome. Accordingly, the judiciary must set the structural space for political discourse and compromise by enforcing the separation of powers doctrine that underlies our tripartite system of government. Otherwise, might governs right in such constitutional disputes.²⁴⁶ Moreover, as discussed below, Congress's "impressive arsenal of weapons," as Choper describes it, is actually far more limited than is often presumed by those who rely generally on the system of checks and balances.²⁴⁷

Functionalists defend a more expansive interpretation of the Recess Appointments Clause by emphasizing three themes. They argue that greater flexibility reflects a change in the model of government, recess appointments are essential to effective government in times of sharp political divisions, and the system of checks and balances provides Congress sufficient means with which to respond to abusive appointments. These claims, however, are difficult to square with the actual record of recess appointments.

²⁴⁵ See *supra* notes 222-24 and accompanying text (describing Choper's view that disputes between the President and Congress are nonjusticiable).

²⁴⁶ This in turn violates the separation of powers doctrine. See Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1690 (1984) ("The framers' hostility toward naked preferences was rooted in the fear that government power would be usurped solely to distribute wealth or opportunities to one group or person at the expense of another. The constitutional requirement that something other than a naked preference be shown to justify differential treatment provides a means, admittedly imperfect, of ensuring that government action results from a legitimate effort to promote the public good rather than from a factional takeover." (footnote omitted)); see also Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 446 (1989) ("The basic case for judicial review depends on the proposition that foxes should not guard henhouses.").

²⁴⁷ CHOPER, *supra* note 222, at 275; see *supra* notes 222-24 and accompanying text (describing Choper's view of relations between Congress and the President).

1. The New Model of Government Rationale

A common functionalist view is that changes in the character of government and politics necessitate a more flexible approach to separation of powers questions.²⁴⁸ Expanded executive power is viewed as a necessity to get things done in the era of deadlocked politics and extensive administrative regulation.²⁴⁹ Yet the ability of a President to make recess appointments and the frequency of such appointments do not correlate with greater government efficiency. Instead, recess appointments are commonly marked by retaliatory politics and result in appointments that are viewed by many as illegitimate.²⁵⁰ Moreover, the record of recess appointments does not clearly support the notion that the rise of federal agencies has produced a greater need for such appointments.

Not surprisingly, the rate of recess appointments has steadily risen as interpretations of the Recess Appointments Clause have expanded the President's authority to use the power. This rise in recess appointments does not appear correlated with the size of federal agencies. Even while dealing with the exigencies of the New Deal and World War II, President Franklin Roosevelt made only 89 recess appointments.²⁵¹ Likewise, during the Vietnam

²⁴⁸ What is often missing in functionalist defenses of broad recess appointment powers is a clear definition of what the precise function is. For example, in Judge Diaz' dissent in the recent Fourth Circuit ruling, he advocates for a functionalist interpretation but seems to merely define the function as appointing officials during any period of absence of the Senate. *NLRB v. Enter. Leasing Co. Se., No. 12-1514*, 2013 WL 3722388, at *170 (4th Cir. July 17, 2013) (Diaz, J., dissenting). Judge Diaz does not articulate a logical necessity for making a recess appointment during a three-day intrasession break. He merely declares that the majority fails to use "the purpose of the clause as our lodestar." *Id.* at *177. Judge Diaz offers the following conclusory view:

Viewed in this practical light, the Recess Appointments Clause sheds the ambiguity of its text in favor of a meaning that promotes its core function. I would therefore hold that "the Recess" refers to recesses generally, no matter the type, as long as the Senate is not engaged in its regular business and is unable to perform its constitutional duty of providing advice and consent on the President's nominees.

Id.

²⁴⁹ See, e.g., Dean Alfange, Jr., *The Supreme Court and the Separation of Powers: A Welcome Return to Normalcy?*, 58 GEO. WASH. L. REV. 668, 670-71 (1990) (claiming that judicial enforcement of formalism would make "workable government . . . much more difficult").

²⁵⁰ See generally Ryan C. Black et al., *Assessing Congressional Responses to Growing Presidential Powers: The Case of Recess Appointments*, 41 PRESIDENTIAL STUD. Q. 570 (2011).

²⁵¹ Memorandum from Henry B. Hogue et al., Cong. Research Serv. 22-28 (Feb. 4, 2013), available at <http://democrats.edworkforce.house.gov/sites/democrats.edworkforce.house.gov/files/documents/112/pdf/Recess%20Appointments%201981-2013.pdf>; *Total Recess Appointments, by President, 1933-2010*, U.S. SENATE (July 6, 2010), <http://www.senate.gov/artandhistory/history/resources/pdf/TotalRecessAppointments1933-present.pdf>; see also Alexander I. Platt, Note, *Preserving the Appointments Safety Valve*, 30 YALE L. & POL'Y

War of the Kennedy and Johnson Administrations, there were only 53 and 36 appointments, respectively.²⁵² Presidents Ford and Carter made 12 and 68 recess appointments, respectively.²⁵³ Beginning with the Regan Administration, however, recess appointments skyrocketed. President Ronald Reagan made 232 recess appointments, President George H.W. Bush made 78, President Bill Clinton made 139, President George W. Bush made 171, and President Barack Obama had made 26 as of early 2013.²⁵⁴ The size of the government did not grow by over three-hundred percent from the Carter Administration to the Reagan Administration, as would be necessary to account for this increase in appointments strictly on the basis of an increase in the size of the federal government. Likewise, the government did not shrink by three-hundred percent from the Reagan Administration to the first Bush Administration. The rate of appointments therefore does not appear to be the result of the size or demands of federal government.

The problem is measuring functionalist success. Modern presidents continue to circumvent the Senate and the Republic did not fall. It is hard, however, to review the exponential rise in recess appointments and conclude that the system is working better than it did under earlier, more restrained presidents. As broader interpretations of the Recess Appointments Clause have given way to greater use of the recess appointment power, Presidents have been increasingly able to cut off debate with the Senate and end the dialogue that the Constitution intended between the two parties. The recess appointment power obviates the need for the President to compromise with the Senate on appointees, but does so at the expense of their ability to compromise on agency policy. By circumventing the Senate, the President merely postpones the resolution of such divisions. Left unresolved are the underlying political and policy disagreements, which the President's unilateral action tends to reinforce.

2. The Political Necessity Rationale

The history of recess appointments challenges the general assumption of many functionalists that modern government requires more flexible rules or even the abandonment of the separation of powers doctrine. This rationale is based on the same views advancing the new government model rationale.

REV. 255, 258 n.12 (2011). Some of these recess appointments involved the racial tensions of desegregation. For example, consider President Kennedy's appointment of Thurgood Marshall to the Second Circuit Court of Appeals. Richard L. Revesz, *Thurgood Marshall's Struggle*, 68 N.Y.U. L. REV. 237, 237 (1993). Marshall received his recess appointment shortly after his nomination was submitted to the Senate for confirmation. *Id.* Southern Senators initially opposed his nomination but the Senate ultimately confirmed him in 1962. *Id.* at 237-49. He was later nominated by President Lyndon Johnson and confirmed by the Senate to serve as Solicitor General and was subsequently confirmed to the Supreme Court in 1967. *Id.* at 263-64 (describing Johnson's appointments of Marshall).

²⁵² See Hogue et al., *supra* note 251; see also Platt, *supra* note 251, at 258 n.12.

²⁵³ See Hogue et al., *supra* note 251; see also Platt, *supra* note 251, at 258 n.12.

²⁵⁴ See Hogue et al., *supra* note 251; see also Platt, *supra* note 251, at 258 n.12.

Central to this rationale is the idea that political divisions produce inefficient and sometimes harmful delays, prompting Presidents to fill positions to keep the government working effectively.²⁵⁵ Yet there is little support for the view that a majority of modern-day recess appointments are in fact made for this reason. Divisive politics and political stalemates are hardly modern realities. The Framers were quite familiar with deep political antagonism in the eighteenth century, when the Federalists and Jeffersonians demonstrated open hatred and distrust for one another.²⁵⁶ Such divisions are simply a reality of a functioning representative political system and reflect core divergent views among the populace. It is not clear why forcing the President to make the case for appointments to an opposing party is not considered a stabilizing force in a divided country.

Historically Presidents have sought to resolve disputes over appointees with their opposition. In the last few decades, presidents have routinely been forced to make the case for an appointee to a hostile Senate. Since 1945, the party occupying the White House has been in the minority in the Senate forty-six percent of the time, or in 16 out of 35 Congresses.²⁵⁷ Moreover, only 5 times since 1945 has the party in control of the White House held a filibuster proof majority of 60 members in the Senate.²⁵⁸ Thus, in 29 out of 34 Congresses

²⁵⁵ See *supra* note 89 and accompanying text (describing obstructionism in response to appointments). While congressional obstruction is well documented, it is also true that some Presidents intentionally leave positions vacant when they oppose the work of an agency or office. President Ronald Reagan was widely criticized for refusing to nominate officials to agencies that did work that he disliked. JUDITH E. MICHAELS, *THE PRESIDENT'S CALL: EXECUTIVE LEADERSHIP FROM FDR TO GEORGE BUSH* 102 (1997) (describing President Reagan's failure to nominate individuals for positions at the Department of Health and Human Services).

²⁵⁶ The open animosity in this period was captured in Thomas Jefferson's letter to John Taylor on June 4, 1798, wherein he counseled "a little patience, and we shall see the reign of witches pass over, their spells dissolve, and the people, recovering their true sight, restore their government to its true principles." R.B. BERNSTEIN, *THOMAS JEFFERSON* 124-25 (2003).

²⁵⁷ See *Party Division in the Senate, 1789—Present*, U.S. SENATE, http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm (last visited July 28, 2013). These included the 80th, 84th, 85th, 86th, 91st, 92nd, 93rd, 94th, 100th, 101st, 102nd, 104th, 105th, 106th, 107th, and 110th Congresses. *Id.*

²⁵⁸ See *id.* Filibusters have been a part of the dynamic of Senate votes since 1790. Geoffrey R. Stone, *A 'Nuclear' Attack on the Constitution*, CHI. TRIB., May 1, 2005, at 11. Just as the Senate is given the authority to confirm nominees, it has the inherent right to set the rules and procedures for such votes. The occasional claim that recess appointments are justified when a nominee has a majority of votes (but is blocked by a filibuster) is little more than a rationalization for circumventing the constitutional process. Filibusters can be rightfully questioned in terms of their countermajoritarian impact on legislation and confirmations. See *id.* It is precisely that countermajoritarian function, however, that makes recess appointments a critical check on and balance for substantial – albeit minority – interests in the system. *Id.* ("The filibuster was first used to block a judicial nominee in 1881, when it was invoked against Rutherford B. Hayes' nomination of Stanley Matthews to

since 1945, a President has faced a Congress with a sufficient number of members not belonging to that President's party to either vote down a nominee outright or filibuster the nomination. The difference came down to presidential preference in seeking compromise or circumvention vis-à-vis the Senate. For example, President George W. Bush's party controlled the Senate for two congresses and the opposing party was in control for the other two congresses. During his terms in office, President Bush made 171 recess appointments, of which 141 were intrasession appointments.²⁵⁹ Ronald Reagan had the same mix of party control but made 243 recess appointments.²⁶⁰ Since 1945, a politically divided government has been the rule, not the exception.²⁶¹ Yet not every president has found it necessary to invoke the Recess Appointments Clause in order to circumvent a hostile Senate.²⁶²

Although the Framers intended the Appointments Clause to encourage compromise and consensus, modern Presidents hold out recess appointments as badges of honor in refusing to compromise with opponents in the Senate.²⁶³ The record also shows, however, that Presidents can simply choose to circumvent the Senate – denying any opportunity to reach a compromise. Indeed, Presidents can use the recess power to demonstrate their commitment to an agenda regardless of the opposition in Congress. President Reagan was unwilling to reach a compromise with Congress under the original limits of the Recess Appointments Clause. The Reagan Administration was marked by a high degree of antagonism with Congress and unilateral agency actions taken in defiance of Congress. A more limited recess appointment power would not have mitigated the sharp division that characterized past political periods; however, it may have required greater cooperation and communication

the U.S. Supreme Court. . . . From 1950 to 2000, the filibuster was used at least 17 times in the context of judicial nominations, most famously in the successful effort of Republicans to derail President Lyndon B. Johnson's nomination of Abe Fortas as chief justice in 1968.”)

²⁵⁹ OFFICE OF THE HISTORIAN, U.S. SENATE, STATISTICAL STUDY 5 (2008).

²⁶⁰ *Id.*

²⁶¹ One such example is *New Process Steel, L.P. v. NLRB*, where the court nullified NLRB's orders because it lacked a quorum. 130 S. Ct. 2635, 2638 (2010). The lack of a quorum was the result of Majority Leader Harry Reid's use of pro forma sessions to block any recess appointments by then President George W. Bush. See *infra* note 272 and accompanying text; see also O'Connell, *supra* note 116, at 937-46 (discussing the negative effects of vacancies in agencies).

²⁶² For example, during President Clinton's two terms in office, from 1993 to 2001, the opposing Republican Party controlled three out of four Senates. See *Party Division in the Senate*, *supra* note 257. Despite this opposition, President Clinton made a relatively modest 139 recess appointments, far less than President Reagan's record setting 232 recess appointments, even though President Reagan enjoyed party control over three out of four Senates during his two terms in office. See *id.*

²⁶³ See, e.g., Warren Vieth, *Bush Steps Around Senate, Names Bolton U.N. Envoy*, L.A. TIMES, Aug. 2, 2005, at A1 (observing that President Bush made recess appointment to stand up to “delaying tactics” in Washington).

between the branches. Congress used a variety of tools to strike back at the Reagan Administration for circumventing the confirmation power.²⁶⁴ The widespread use of recess appointments only worsened the antagonism between the branches where President Reagan extensively used what is now viewed as a readily available and unilateral option.

Modern Presidents generally justify recess appointments – including intrasession appointments – by citing a desire to overcome congressional gridlock or political opposition to their policies or appointees.²⁶⁵ Yet overcoming opposition in the Senate was never the purpose of the Recess Appointments Clause. To the contrary, the Clause was designed to force dialogue and compromise and was intended only for circumstances in which the Senate was physically unavailable to give its consent. The use of the recess appointment power to circumvent the Senate creates an avenue for unilateral (and often deeply contested) presidential appointees. Many Presidents have elected to find compromise in nominees either because of their acceptances of limits on the recess power or in an effort to achieve comity. Thus, President Richard Nixon made only 41 recess appointments.²⁶⁶ Likewise, while President Roosevelt made only 89 appointments over 12 years in office, his successor made 195 recess appointments in only 8 years in office.²⁶⁷ The increase in recess appointments reflects a new presidential preference and not a new political reality in the country. Modern Presidents have made unilateral appointments a viable option for dealing with a hostile Senate.

3. The Checks and Balances Rationale

The controversy over recess appointments also presents challenges for commentators like Choper who argue that such conflicts can be resolved in the “interplay” between the branches.²⁶⁸ Madison and others established the structure for the tripartite system to allow for ambition to counteract ambition.²⁶⁹ Yet to the extent the judiciary abstains from intervening in disputes between the executive and legislative branches, the two are left to act in a formless space like uncontrolled or dissipated explosions of energy. The point of forcing the executive and legislative branches to work within sessions of Congress (with a limited exception for intersession recesses not punctuated

²⁶⁴ J. Gregory Sidak, *The President's Power of the Purse*, 1989 DUKE L.J. 1162, 1196 (discussing means of congressional retaliation against President Reagan).

²⁶⁵ The Fourth Circuit rejected President Obama's argument that “the growing animosity between the Executive and Legislative Branches” justified his recess appointments by reasoning that he could not use “political gridlock” to alter the meaning of these provisions. *NLRB v. Enter. Leasing Co. Se.*, No. 12-1514, 2013 WL 3722388, at *39 (4th Cir. July 17, 2013).

²⁶⁶ See Platt, *supra* note 251, at 258 n.12.

²⁶⁷ *Id.*

²⁶⁸ See *supra* notes 222-23 and accompanying text.

²⁶⁹ See THE FEDERALIST NO. 51 *supra* note 51, at 341 (James Madison).

by pro forma sessions) is to give each branch limited options for coming to agreement within a defined time period. Although Congress has ways of retaliating for abusive recess appointments, none of these options offers a workable approach for dealing with *regular* circumvention of the Senate.

Congress has sought through the years to curtail Presidents' use of the Recess Appointment Clause to circumvent the confirmation process. Despite these efforts, the problem has only worsened. These measures have not deterred past administrations. On occasion, Members of Congress have sought to reach agreements with presidents to avoid these confrontations. For example, Senator Robert C. Byrd was legendary for his defense of congressional authority and the separation of powers doctrine. During President Reagan's terms in office, Senator Byrd reached an agreement with the President to avoid such appointments.²⁷⁰ Despite this agreement, however, President Reagan still made 232 recess appointments during his two terms.²⁷¹ These efforts to agree to self-imposed limitations on the basis of comity have not been successful and have been largely set aside during periods of intense partisanship.

Congress's most obvious defensive measure is holding pro forma sessions to prevent the President from triggering the recess appointment option. This was the approach of Senate Majority Leader Harry Reid in 2007, when he announced that the Senate would be "coming in for pro forma sessions during the Thanksgiving holiday to prevent recess appointments."²⁷² While this practice has been denounced as an artificial and even ridiculous display,²⁷³ the departure from the plain meaning of the Recess Appointments Clause and the resulting circumvention of Congress has compelled it. Notably, President George W. Bush respected the line drawn by the Senate and did not make recess appointments between the pro forma sessions in November 2007 and the end of his presidency. There is no reason to think that the Framers would have found pro forma sessions to be any less ridiculous than many find them today. For their part, Presidents have engaged in equally ridiculous practices. In December 1903, for example, President Theodore Roosevelt used the ultratechnical claim of a "constructive recess" to make more than 160 recess appointments in between the close of one session of Congress and the opening of the next.²⁷⁴

²⁷⁰ 145 CONG. REC. 29,915 (1999) (statement of Sen. Inhofe) (discussing how Senator Byrd obtained a written agreement from President Reagan not to make recess appointments).

²⁷¹ See Hogue et al., *supra* note 251.

²⁷² 153 CONG. REC. 31,874 (2007) (statement of Sen. Reid).

²⁷³ See *supra* note 80 and accompanying text (describing the view of the Obama Administration on pro forma sessions).

²⁷⁴ Henry B. Hogue, *The Law: Recess Appointments to Article III Courts*, 34 PRESIDENTIAL STUD. Q. 656, 671 (2004). Likewise, President Harry S. Truman used the two days between sessions of the 80th Congress to make a recess appointment for Oswald Ryan

Both President Roosevelt's "constructive recess" of a few seconds and President Obama's recess of a few days lack even the pretense of necessity. Neither Roosevelt nor Obama could credibly claim that their recess appointments were prompted by the threat of "public inconvenience[]," as Maclaine suggested.²⁷⁵ Rather they were obvious moves for political expediency. While Steiz and OLC dismissed the pro forma sessions as absurd, they did little to acknowledge the absurdity of the President asserting that the country could not wait for him to have the advice and consent of a Senate that would reconvene in a matter of days.

The insufficiency of informal agreements or defensive scheduling inevitably leads to the classic use of the power of the purse. Congress can clearly use its control over appropriations to discourage abusive recess appointments.²⁷⁶ One such law, the Pay Act, denies federal salaries to recess appointees appointed to vacancies that existed during the session of Congress immediately preceding the recess.²⁷⁷ Many officials, however, come from successful partnerships and business careers that make federal salaries only marginally important. Indeed, many expect to take a considerable pay cut by assuming public office. Moreover, with Presidents making hundreds of such appointments during their terms in office, the process of passing retaliatory measures that apply to each and every officeholder can be difficult. Such measures also assume that Congress has sufficient independence from a President to retaliate with salary limitations. It is common for a President's party to control or hold sufficient votes in one or both Houses to frustrate such measures. Indeed, judicial avoidance or abstention allows Presidents to wield unchecked power during periods of political domination – the very time when structural limits and the counterbalancing of opposing views are most needed.

The increasingly broad interpretations of the Recess Appointments Clause have left the border between the branches dangerously undefined and have repeatedly resulted in a game of chicken between the President and the Senate. The debate over power conferred by the Recess Appointments Clause has largely followed the passing partisan interests of the time.²⁷⁸ What is needed is

to the Civil Aeronautics Board after his prior term expired. HOGUE, *supra* note 23, at 10.

²⁷⁵ *Speech by Mr. Maclaine, supra* note 49, at 135.

²⁷⁶ For example, Congress has included provisions in specific bills barring the payment of salaries to individuals appointed without a vote of Congress. *See, e.g.*, Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 709, 121 Stat. 1844, 2021 (prohibiting payment from being given to nominees who were rejected).

²⁷⁷ 5 U.S.C. § 5503(a) (2012) (prohibiting payment to recess appointees). Congress, however, created exceptions to this rule if the vacancy occurred within thirty days of the end of the prior session or a nomination for the position was pending at the time that Congress went into recess. *Id.* Additionally, the rule did not apply if a nomination was rejected within thirty days of the end of the session and another person received the recess appointment. *Id.* The law, in the Author's view, captures the spirit of the Clause even if it is more liberal than the view originally put forward by Attorney General Randolph.

²⁷⁸ For example, it was Senator Byrd, a Democrat, who challenged President Reagan's

a consistent, bipartisan effort to protect the institutional authority of Congress. Presidents have claimed the ability to use a recess of any length to make a recess appointment that could conceivably last up to two years if the President makes the appointment in the middle of a session.²⁷⁹ Thus, a President in the final two years of his or her term in office could largely dispense with the inconvenience of confirmations – the ultimate example of an exception swallowing a rule. The maximum period of a recess appointment happens to be almost the average time for the service of confirmed nominees.²⁸⁰

The realities of nomination fights belie functionalist claims that the power of the purse is sufficient protection for the system. The denial of salaries is only effective to the extent that such a salary is essential to the official. Congress's power of the purse is not as effective at combatting abusive recess appointments as functionalists commonly argue. Moreover, a President can influence his own party members to block such retaliatory efforts through filibusters or other means. One possible alternative would be to threaten the future prospects of nominees, instead of trying to deter Presidents, Congress could focus on the individual official's rational self-interest. For example, the Senate could refuse to confirm any appointee who has previously accepted a recess appointment. Even if a President were willing to appoint a nominee for such a short term, most nominees would likely be reluctant to place themselves on the list of barred nominees. As shown with the blue-slipping tradition,²⁸¹ the Senate has the ability to maintain informal rules that mutually benefit both parties. To be effective, a bar on nominees should extend to any nominee who receives a recess appointment after being previously submitted to Congress in the earlier session.²⁸² Such a policy, however, would only be as effective as

use of recess appointments, while Senator Inhofe, a Republican, who blocked President Clinton's appointees. See 145 CONG. REC. 29,915 (1999) (statement of Sen. Inhofe).

²⁷⁹ For example, Teddy Roosevelt's 1903 recess appointment of Dr. William D. Crum as Collector of Customs in Charleston, South Carolina lasted for two years. Willard B. Gatewood, *Theodore Roosevelt and Southern Republicans: The Case of South Carolina, 1901-1904*, 70 S.C. HIST. MAG. 251, 263-64 (1969). This is far longer than anticipated by the Framers. See, e.g., *Statement of James Madison at Virginia Ratification Convention*, in 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 332, 409-10 (Jonathan Elliott ed., Philadelphia, Lippincott 2d ed. 1836) ("There will not be occasion for the continual residence of the senators at the seat of government. . . . It is observed that the President, when vacancies happen during the recess of the Senate, may fill them till it meets.").

²⁸⁰ See DAVID E. LEWIS, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS* 145 (2008) (stating that average tenure for Senate confirmed officials is twenty-four months); U.S. GEN. ACCOUNTING OFFICE, *POLITICAL APPOINTEES: TURNOVER RATES IN EXECUTIVE POSITIONS SCHEDULE REQUIRING SENATE CONFIRMATION* 3 (1994) (finding a turnover rate between two and three appointees per presidentially appointed position from 1981-1991 and an average tenure of 2.1 years).

²⁸¹ See Turley, *supra* note 184.

²⁸² While the Author's preference is to return to the original meaning of the Clause and

Members of Congress are principled and committed. Yet Congress has shown that, except when it comes to protecting the individual power of Senators to blue-slip nominees, it has little interest in maintaining policies of exclusion or denial of nominees on procedural grounds.

Of course, while not presenting a serious deterrent, any of these responses is better than no response, given Presidents' and past courts' reliance on historical practice.²⁸³ The best argument for a strong response like that proposed above can be found in Seitz and OLC's opinion, which cites the efforts of past Congresses to compromise with Presidents as evidence that Congress has acquiesced to the interpretations of the executive branch.²⁸⁴ A policy barring the worst forms of recess appointments should be reinforced by a commitment to use the power of the purse. The most obvious response is to tighten the limits under the Pay Act and bar the payment of a salary to anyone given an intrasession appointment. The Justice Department itself has observed that the Pay Act,²⁸⁵ by which Congress has sought to bar the pay of recess appointees in some circumstances, only applies so long as "the vacancy existed while the Senate was in session."²⁸⁶ The Act, therefore, does not apply to an appointment to fill a vacancy that first arises during a recess and is filled before the Senate returns.²⁸⁷ Consequently, a President can circumvent the Pay

its clarity, an argument could be made that, while congressional recesses are now shorter, the demands of government and the "public inconveniences" of vacancies are now simply different. Thus, there are always alternative avenues for reaching a type of détente between the branches and ending the recess wars. Congress could temper this rule with a formal waiver of the bar on confirmation if, before the end of the prior session, it passed a resolution acknowledging that certain nominees (who did not receive a final vote) could be legitimately given a recess appointment. This resolution would merely acknowledge that the nominees were not rejected (or filibustered) on the merits and Congress would not treat the appointment as a circumvention of its authority. Nothing would stop a President from making abusive appointments short of court challenges. If nominees were truly left unconfirmed due to administrative or logistical problems, the two branches could agree that those nominees would not be barred to any recess appointment. The point is that such an agreement would reflect that the recess appointment was not being used to circumvent opposition to the nominee.

²⁸³ See generally Turley, *Constitutional Adverse Possession*, *supra* note 3. As the Court has observed, "the separation of powers does not depend on the views of individual Presidents, nor on whether 'the encroached-upon branch approves the encroachment.'" *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3155 (2010) (quoting *New York v. United States*, 505 U.S. 144, 182 (1992)).

²⁸⁴ See *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. O.L.C. 1, 7 (2012) ("There is significant (albeit not uniform) evidence that the Executive Branch's view that recess appointments during intrasession recesses are constitutional has been accepted by Congress and its officers. Most relevant, in our view, is the Pay Act . . .").

²⁸⁵ 5 U.S.C. § 5503 (2012) (prohibiting payment of certain recess appointees).

²⁸⁶ *Id.* § 5503(a).

²⁸⁷ Memorandum from Daniel L. Koffsky, Acting Assistant Attorney Gen., to Attorney

Act by arranging for an official to resign during a recess – no matter how brief – and immediately appointing an individual to fill the position.

The Pay Act offers an alternative to the nuclear option of cutting off funding for an entire bureau or agency, though this option lacks any practical application. It is hardly feasible, for example, for Congress to cut off funding for an appellate court or EPA enforcement section. Congress could respond with targeted funding cuts in other parts of the government, yet such cuts would be attacked as gratuitous or would simply result in a shifting of discretionary funds to cover the shortfall. In the end, the most promising deterrent is the combination of a congressional rule of categorical rejection of nominees with an enhanced Pay Act. This deterrence can be further increased by slowing the confirmation process generally in response to an attack on congressional authority under Article I.

Although these measures may be specifically tailored to respond to the usurpation of confirmation authority, if history is any measure, they are unlikely to be a substitute for judicial intervention. In the context of a specific nomination like that of Cordray, they may also appear extreme. While functionalists have long advocated a more nuanced view of the separation of powers doctrine, this dispute shows the need for the bright-line rules that formalists have advocated.²⁸⁸ This is a case where “[g]ood fences make good neighbors,”²⁸⁹ and where retaliatory measures will not fill the vacuum created by judicial abstention.

IV. A SEPARATION-BASED APPROACH TO RECESS APPOINTMENTS

The foregoing history and analysis advances a separation-based interpretation of the Recess Appointments Clause, which reaches the same result in these disputes as some prior formalist approaches. Few, however, would argue that a pure formalist approach is warranted or even possible. Rather, both formalists and functionalists have moved gradually to the center of the debate in acknowledging that some core provisions of the Clause require relatively strict adherence while others reflect more shared and fluid powers.²⁹⁰

Gen. 183 (Aug. 31, 2001), *available at* <http://www.justice.gov/olc/2001/pres-auth-make-rec-ess-appt.pdf> (“[The Pay Act] does not reach a vacancy that first arises during a recess and is filled before the Senate returns.”).

²⁸⁸ Notably, this view is not accompanied by a view of standing which allows Members of Congress to defend their inherent powers. *See, e.g.*, *Raines v. Byrd*, 521 U.S. 811, 830 (1997) (holding that individual Members of Congress did not have a sufficient “personal stake” in the dispute and did not allege a sufficiently concrete injury to establish standing in their challenge to the Line Item Veto Act).

²⁸⁹ ROBERT FROST, *Mending Wall*, in *THE POETRY OF ROBERT FROST* 33 (Edward Connery Lathem ed., 1969).

²⁹⁰ This is perhaps the optimal resting point, according to Professor William Eskridge: [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

Still, functionalists tend to reject separation of powers doctrine principles in favor of reliance on a system of checks and balances.²⁹¹ In contrast, the separation-based interpretation that formalists advance would reinforce the authority of Congress, particularly in light of the increasing power of administrative agencies in the modern era.²⁹² Yet this presumption is misplaced in cases concerning the lines of separation of powers doctrine.²⁹³ Indeed, if one agrees with the foregoing analysis of the shift of power that occurred with the emergence of the new administrative state, the opposite presumption emerges.²⁹⁴ As the Court has noted, separation principles can often only be maintained with “high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict.”²⁹⁵ With particular reference to Congress in areas like federal appointments, the increase in regulatory authority in the federal system should increase, not decrease, the importance of the separation of powers doctrine. The general view that changing federal authority necessarily demands a more flexible use of powers ignores the continuing importance of the separation of

inquires, 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.

Eskridge, Jr., *supra* note 7, at 29.

²⁹¹ This does not mean that conflicts like those involving recess appointments will not lead some functionalists to render a decision enforcing a separate power. Rather, it ultimately falls to a presumption. Peter M. Shane, *Presidents, Pardons, and Prosecutors: Legal Accountability and the Separation of Powers*, 11 *YALE L. & POL’Y REV.* 361, 373 (1993) (“Such an approach need not deny that the Constitution vests certain irreducible powers in particular branches. It does, however, construe the element of irreducibility narrowly, and is guided by the general precept that constitutional ambiguities should be resolved to preserve the branches’ mutual accountability.”).

²⁹² See M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 16 (1967) (“The ‘separation of agencies’ . . . is an essential element in a theory which assumes that the government must be checked internally by the creation of autonomous centres of power that will develop an institutional interest.”). This Article does not embrace a “pure” form of separation as envisioned by Vile, but certainly a reinforcement of separation lines in light of the erosion under the administrative state.

²⁹³ This point was made in the Third Circuit ruling against the recess appointment in the Cordray controversy. *NLRB v. New Vista Nursing & Rehab.*, 719 F.3d 203, 240-41 (3d. Cir. 2013) (“[R]ecent practices cannot alter the structural framework of the Constitution. The Eleventh Circuit relied on a presumption that actions by the president are constitutional. We doubt that the presumption applies in separation-of-powers cases.”).

²⁹⁴ *Cf.* *United States v. Robel*, 389 U.S. 258, 276 (1967) (Brennan, J., concurring in result) (“Formulation of policy is a legislature’s primary responsibility . . . and to the extent Congress delegates authority under indefinite standards, this policy-making function is passed on to other agencies, often not answerable or responsive in the same degree to the people.”).

²⁹⁵ *Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211, 239 (1995).

powers' protection against the aggregation of power by Presidents – a trend that has grown with the favor of functionalist approaches from the war-powers debate to the recess appointment controversies. While this aggregation of executive power certainly makes governance move more smoothly, it represents a departure from what Madison referred to as “a principle in our constitution indeed in any free constitution, more sacred than another . . . that which separates the legislative, executive, and judicial powers.”²⁹⁶

A. *Judicial Abdication and Executive Aggregation*

A separation-based approach to recess appointments necessarily demands a greater role for the courts in policing the lines of separation. Indeed, the argument surrounding a separation-based approach bears a striking resemblance to the debate over the role of courts in federalism cases.²⁹⁷ Like the separation of powers doctrine, federalism is viewed as protecting more than simply a division of powers. As the Supreme Court has stressed, “[s]tate sovereignty is not just an end in itself: ‘Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.’”²⁹⁸ This includes the protection of individual rights.²⁹⁹

Moreover, the rise of the administrative state has had an equally inimical impact on federalism, with federal agencies asserting preemptive authority over state regulations.³⁰⁰ Like the separation of powers doctrine, federalism has faced diminishing levels of protection within the tripartite system.³⁰¹ With the

²⁹⁶ 1 ANNALS OF CONG. 604 (Joseph Gales ed., 1834) (statement of Rep. Madison on June 22, 1789).

²⁹⁷ A similar analogy can be drawn to courts' role enforcing the Supremacy Clause in the delineation of federalism lines. See Clark, *supra* note 230, at 92 (“[T]he Founders preferred to treat conflicts between state and federal law as judicial, rather than political questions. . . . [T]he Supremacy Clause reassured the states that courts . . . would keep the federal government within the bounds of its assigned powers.”).

²⁹⁸ *New York v. United States*, 505 U.S. 144, 181 (1992) (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)).

²⁹⁹ *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (“By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.”).

³⁰⁰ See Rubenstein, *supra* note 93, at 1129 (“The framers never intended that policy choices of unelected administrative bureaucrats would reign supreme over state law. Indeed, the thought of this undoubtedly would have been a deal breaker at the Constitutional Convention.”). For example, agencies like the Department of Homeland Security have claimed the right to preempt state laws governing chemical plant security. See Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695, 695 (2008).

³⁰¹ See Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 756 (2008) (“[T]ransferring preemption authority to agencies would increase the capacity of the legal system to displace state law, which would probably result in a further shift in the direction of more federal authority.”).

direct election of Senators under the Seventeenth Amendment³⁰² and the establishment of the federal income tax under the Sixteenth Amendment,³⁰³ the position of the states has been gradually weakened vis-à-vis the federal government. The judiciary's response has mirrored its response to appointments controversies. On the one hand, some scholars and judges believe that the political system is the primary protection for state authority and that the courts should assume a more passive role in policing the line between state and federal governments. Some law professors favor agency action based more on the informed judgment of experts than on that of Congress; those same professors often believe that national governmental authority produces more reasoned and redistributive policies than state governmental authority.³⁰⁴

On the other hand, as scholars have argued that problems over recess appointments will be worked out in the course of the political process between Congress and the executive branch, they have also expressed the same faith in the political process to control the outcomes of disputes between the federal government and the states.³⁰⁵ Thus, Herbert Wechsler has insisted that “the national political process in the United States—and especially the role of the states in the composition and selection of the central government—is intrinsically well adapted to retarding or restraining new intrusions by the [central government] on the domain of the states.”³⁰⁶ As with the separation of

³⁰² U.S. CONST. amend. XVII, § 1 (“The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years . . . [.]”).

³⁰³ U.S. CONST. amend. XVI (“The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.”).

³⁰⁴ Cf. Michael J. Klarman, *What's So Great About Constitutionalism?*, 93 Nw. U. L. REV. 145, 191 n.250 (1998) (noting the general support of liberals for national over state authority).

³⁰⁵ Indeed, some courts have insisted that they should not interpret the Constitution in anticipation of improper acts by Presidents. Madison adopted precisely that assumption in *The Federalist No. 51*, famously observing:

It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

THE FEDERALIST NO. 51, *supra* note 51, at 341 (James Madison). Yet, Judge Diaz in the chastised the majority for assuming the worst about the actions of Presidents: “Certainly, we should not ignore the possibility that the President might abuse his power to appoint officials in the manner suggested by the Employers here. But the majority appears eager to assume the worse from the nation’s chief executive.” *NLRB v. Enter. Leasing Co. Se.*, No. 12-1514, 2013 WL 3722388, at *179 (4th Cir. July 17, 2013) (Diaz, J., dissenting).

³⁰⁶ Herbert Wechsler, *The Political Safeguards of Federalism: The Rôle of the States in*

powers, Choper's view on federalism conflicts also relies on the political process: "[T]he constitutional issue whether federal action is beyond the authority of the central government and thus violates 'states' rights' should be treated as nonjusticiable, with final resolution left to the political branches."³⁰⁷ This is a position that has long appealed to functionalists on the Court.³⁰⁸

The Supreme Court's decision in *National Federation of Independent Business v. Sebelius*³⁰⁹ highlighted the extent to which some members of the Court have adopted Choper's view.³¹⁰ Criticizing the majority opinion on the interstate commerce problem as "formalistic," Justice Ginsburg described the majority's approach as unworkable in the modern era and said that federalism guarantees are adequately protected at the ballot box:

Supplementing these legal restraints is a formidable check on congressional power: the democratic process. As the controversy surrounding the passage of the Affordable Care Act attests, purchase mandates are likely to engender political resistance. This prospect is borne out by the behavior of state legislators. Despite their possession of unquestioned authority to impose mandates, state governments have rarely done so.³¹¹

In the view of Justices Ginsburg and Souter, the Framers never intended that courts police the federalism line, but rather made a "considered judgment that politics, not judicial review, should mediate between state and national interests."³¹² Proponents of this view, like proponents of a broad interpretation of the Recess Appointments Clause, see legislative action or inaction as indicative of Congress's acquiescence to their position.³¹³ Thus, "process

the Composition and Selection of the National Government, 54 COLUM. L. REV. 543, 558 (1954).

³⁰⁷ Jesse H. Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552, 1557 (1977).

³⁰⁸ See, e.g., *United States v. Morrison*, 529 U.S. 598, 641-44 (2000) (Souter, J., dissenting) (describing the Court's past formalistic approach to federalism as a "nearly disastrous experiment").

³⁰⁹ 132 S. Ct. 2566, 2609 (2012).

³¹⁰ The fact that this is the minority view on the question of interstate commerce provided little solace to federalism advocates after Chief Justice John Roberts found that the Affordable Care Act (ACA) violated federalism but nonetheless upheld the Act as a matter of federal taxation. The result was a constitutional Maginot Line – an impressive federalism citadel that is unassailable unless one simply goes around it. See Jonathan Turley, *Robert's Ruling Affects More than Health Care*, USA TODAY, June 29, 2012, at 11A ("[T]he biggest loser is federalism. Roberts lifted it up only to make it an exquisite corpse.").

³¹¹ *Sebelius*, 132 S. Ct. at 2624 (citation omitted).

³¹² *Morrison*, 529 U.S. at 647 (Souter, J., dissenting) (emphasizing "the importance of national politics in protecting the States' interests").

³¹³ Compare *id.* at 628 (Souter, J., dissenting) (offering the enactment of legislation as proof that Congress believes that the "facts support its exercise of the commerce power"), with *Evans v. Stephens*, 387 F.3d 1220, 1226 (11th Cir. 2004), *cert. denied*, 544 U.S. 942

federalists,” like functionalists in the recess appointment dispute context, view the judiciary’s proper role in resolving federalism disputes as a relatively passive one.³¹⁴ Others believe that, since the system is still based on federalism guarantees, courts should become more vigilant in “minding the line” and reinforce state authority through rigid limitations on federal encroachment. As demonstrated by the Rehnquist Court’s pursuit of substantive federalism, some jurists believe that the dearth of effective defensive tactics available to the states requires that the courts pay greater attention to maintaining the balance of power between the states and the federal government.³¹⁵ It is not surprising that scholars and judges who favor a process-federalism approach would tend to favor a more functionalist approach to recess appointments, while those who favor a more substantive federalism approach tend to favor a more rigid rule on recess appointments.³¹⁶

Yet the general erosion of state power in the United States suggests that the political process is not sufficient to safeguard federalism principles.³¹⁷ Just as the political process in the recess appointment area has tended to militate in favor of expanded executive power, the political process has done little to stymie the shift toward greater federal power and reduced state power. While

(2005) (finding evidence of “legislative acquiescence” and “implicit[] agree[ment]” to a broader interpretation of the Recess Appointments Clause in the enactment of legislation). In denouncing the formalistic approach of the majority, Justice Souter insisted that, “[t]he defect, in essence, is the majority’s rejection of the Founders’ considered judgment that politics, not judicial review, should mediate between state and national interests” *Morrison*, 529 U.S. at 627.

³¹⁴ William W. Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709, 1711-12 (1985) (describing “[the] death of federalism” as caused by “endless judicial passive acquiescences”); see generally CHOPER, *supra* note 222, at 171-259 (1980) (arguing that judicial review of federalism issues cannot be justified on the grounds that the issues at stake would not receive adequate consideration in the political process).

³¹⁵ Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459, 1462 (2001) (arguing for a more active role for courts in maintaining federalism guarantees). *But see* Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 215 (2000) (arguing that the political system sufficiently protects federalism).

³¹⁶ The Court’s recent decision on the ACA offers an interesting variation on this array of cases. Chief Justice John Roberts reaffirmed the need for the Court to maintain state authority in declaring that the law could not be based on the Commerce Clause. *Sebelius*, 132 S. Ct. at 2587 (“Allowing Congress to justify federal regulation by pointing to the effect of inaction on commerce would bring countless decisions an individual could potentially make within the scope of federal regulation, and—under the Government’s theory—empower Congress to make those decisions for him.”). He proceeded, however, to read the tax authority of Congress so broadly as to allow Congress to easily circumvent those federalism guarantees.

³¹⁷ Cf. Jonathan Turley, Op-Ed., *Is Health-Care Mandate Constitutional?*, USA TODAY (Mar. 31, 2010), http://usatoday30.usatoday.com/news/opinion/forum/2010-03-31-column31_ST_N.htm.

the Court claimed with great confidence in *Garcia v. San Antonio Metropolitan Transit Authority* that “state sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power,”³¹⁸ growing state dependence on federal funds suggests otherwise.³¹⁹ Of course, supporters of this view could argue, for example, that increased state dependence on federal funds merely represents the choices of the electorate. Yet this approach would also allow the effective loss of any meaningful state rights in the system if the political system should favor such a result. It would allow for the electorate to sacrifice the Constitution’s federalism design by default. This danger is exemplified in the case of *Bond v. United States*,³²⁰ currently before the Supreme Court. At issue in the case is whether Congress’s power vis-à-vis the states can be increased when the President enters into a treaty. Building on the ruling in *Missouri v. Holland*,³²¹ the Obama Administration has argued that Congress gains power to enact legislation when a treaty commits the United States to a certain course of action.³²² Taken to its logical extreme, the Administration’s position would appear to be that the federal government can bootstrap its way into areas of governance traditionally left to the states merely by agreeing to a treaty or treaties that “require” such encroachment.³²³

The increasing size and scope of the federal government exerts the same degree of transformative pressure on the separation of powers doctrine as it does on federalism. The courts could continue to hew to the process-based and largely passive approach that has characterized past decisions and will inevitably result in greater concentration of authority in the executive branch.³²⁴ A more sensible approach, however, would be to reinforce the separation of powers values by adopting a narrower and more rigid

³¹⁸ *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552 (1985).

³¹⁹ State dependence has continued to steadily increase to the point that federal funds now account for over thirty-four percent of state budgets. Tad Dehaven, *State Dependency on the Federal Government*, CATO (Jan. 23, 2012), <http://www.cato.org/blog/state-dependency-federal-government>.

³²⁰ 681 F.3d 149 (3d Cir. 2012), *cert. granted*, 133 S. Ct. 978 (2013).

³²¹ 252 U.S. 416, 432 (1920) (“If the treaty is valid there can be no dispute about the validity of the [implementing] statute under Article I, Section 8, as a necessary and proper means to execute the powers of the Government.”).

³²² *Bond*, 681 F.3d at 151-52 (“The government’s response has shifted over time, but it has been consistent in maintaining that the Act is a constitutional exercise of Congress’s authority to enact treaty-implementing legislation under the Necessary and Proper Clause.”).

³²³ HENRY ST. GEORGE TUCKER, LIMITATIONS ON THE TREATY-MAKING POWER, 130 (1915) (discussing the issues that later arose in *Holland* and observing that “[s]uch interpretation would clothe Congress with powers beyond the limits of the Constitution, with no limitations except the uncontrolled greed or ambition of an unlimited power”).

³²⁴ See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1443 n.71 (1987).

interpretation of the Clause in hold-over cases – consistent with the interpretation on intrasession and judicial appointments. This approach would likely reduce recess appointments to the levels seen before the 1980s. In the end, it would be wise for Congress to reduce the number of positions requiring Senate confirmation, but that remains a legislative question to be worked out between the branches.³²⁵ In the meantime, the courts need to facilitate the discussion by maintaining a structure and process that will allow for such conversations to take place.

Recess appointments show the need for a more active role for courts in policing the line between the two political branches. The general reliance on the system of checks and balances has proven both inefficient and destabilizing for the system. The idea that a passive judiciary would lead to interbranch compromise has proven a fallacy.³²⁶ Recess appointment controversies are growing and the branches have failed to work out their differences as functionalists had predicted. In the absence of judicial guidance, both branches continue to adopt transparently opportunistic and often hypocritical positions in the tit-for-tat politics over federal appointments.

The separation-based approach to recess appointments requires more than the reinforcement of terms like “recess” and “vacancies.” A natural reading of the language of the Clause offers ample support for the narrower meanings found in historical debates and writings, as shown in the *Canning*³²⁷ decision. The least-challenging issues for the courts should be intrasession appointments, which, as previously argued,³²⁸ are demonstrably at odds with the language and purpose of the Recess Appointments Clause. Intrasession appointments not only find no support in the language and history of the Recess Appointments Clause, but also fail to fit particularly well within any but the most extreme of functionalist approaches to interpreting the Clause. A President’s claim that it is necessary to act in a matter of days is transparently opportunistic and unsupportable. The honest claim is that a President is simply using a check-and-balance power – the thrust of the functionalist school.

³²⁵ While this Article draws an analogy to the English ministries in the growing independence of U.S. federal agencies, there remains a sharp contrast (even when factoring in the size differentials between the two countries) in the number of appointed positions between the two countries. Mark Eisen, Note, *Who’s Running This Place? A Comparative Look at the Political Appointment System in the United States and Britain, and What the United States Can Learn*, 30 B.U. INT’L L.J. 295, 300 (2012) (“Britain has just over 100 government appointees while the U.S. has over one thousand subject to Senate approval and many more not subject to confirmation.”).

³²⁶ In his concurrence in *NLRB v. Enterprises Leasing Co. Southeast, LLC*, Judge Duncan took the dissenting judge to task for “elevating the goal of ensuring the functioning of the government when the Senate is (ostensibly) unavailable to provide its advice and consent, and ignoring that of maintaining the separation of powers by cabining the President’s unilateral appointments power to limited circumstances.” *Id.* at 153.

³²⁷ 705 F.3d 490 (D.C. Cir. 2013).

³²⁸ See *supra* Part III.B.2.

This argument would have appealed to perhaps the single greatest functionalist on the modern Court, Justice Byron White, who argued in *INS v. Chadha*³²⁹ to uphold Congress's attempt to create a legislative veto.³³⁰ *Chadha*, at least on its surface, presented the Court with a problem that is the inverse of that which the recess appointment cases present. There, it was the executive branch challenging Congress's usurpation of an executive power. The majority drew a formalist line and declared that "[e]xplicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process."³³¹ Justice White, however, insisted that the legislative veto was merely "a means of defense, a reservation of ultimate authority necessary if Congress is to fulfill its designated role under Art[icle] I as the Nation's lawmaker."³³² In the same fashion, some have argued that intrasession appointments are a means to circumvent congressional obstruction and thereby faithfully execute federal law.³³³ However, even if one accepts the basis for judicial recess appointments and appointments to vacancies that predated a recess, intrasession appointments go far beyond a shield and act as a sword in usurping congressional power.³³⁴

Even if one were to approach recess appointments from a functionalist perspective, intrasession appointments are at odds with the foundation of functionalist theory. In these cases, the President is fashioning his own check on congressional authority where none existed under the Constitution. A reliance on checks and balances must necessarily guard against improvisation of new checks or balances. If one branch can improvise new powers, then the tit-for-tat politics of recess fights become dangerously unstable in the absence of an active judiciary. Moreover, the expectation that branches will work out their differences presumes some predictability of the options available to both sides. Otherwise, no agreement is likely because either side can simply claim a new power. Thus, Congress cannot claim the right to retroactively deny confirmation for an official or the right to create its own offices to dispense federal funds. Any compromise with the system is based on a sense of mutual dependence of the branches in achieving federal objectives.

³²⁹ 462 U.S. 919 (1983).

³³⁰ *Id.* at 967 (White, J., dissenting) ("The prominence of the legislative veto mechanism in our contemporary political system and its importance to Congress can hardly be overstated.").

³³¹ *Id.* at 945.

³³² *Id.* at 974.

³³³ See Editorial, *Recess Appointments May Be Over*, L.A. TIMES (Jan. 29, 2013), <http://articles.latimes.com/2013/jan/29/opinion/la-ed-recess-appointments-nlr-20130129> (supporting the claim of Presidents that recess appointments are needed to stop the "unjustified obstruction by a determined minority").

³³⁴ See *Chadha*, 462 U.S. at 974.

Finally, under the aggrandizement theory advanced by Justice White in his dissenting opinion in *Bowsher v. Synar*,³³⁵ intrasession appointments run afoul of limits on functionalism.³³⁶ In *Bowsher*, the Court invalidated the creation of the Comptroller General position under Gramm Rudman-Hollings – an official exercising executive powers but removable by Congress.³³⁷ Justice White asked whether, given that the triggering joint resolution could be vetoed by the President, the congressional act posed “a genuine threat of ‘encroachment or aggrandizement of one branch at the expense of another.’”³³⁸ Intrasession appointments are not subject to a countervailing power akin to a veto. Since these appointments can last a couple years (and beyond the average of a federal appointed term), Congress would not have an ability to block the appointment directly – leaving only retaliatory unconnected measures. While Justice White admittedly seemed to presume a particularly high standard for an impermissible intrusion,³³⁹ intrasession recess appointments constitute an aggrandizement of power by the executive branch breaking from the moorings of the text of the Recess Appointments Clause and claiming the right to unilaterally appoint officials in any break in congressional business. Intrasession appointments should therefore be viewed as incompatible with the constitutional structure, regardless of whether one takes a formalist or functionalist position.

B. *Canning and the Opportunity Lost in the D.C. Circuit*

The D.C. Circuit’s decision in *Canning v. NLRB*³⁴⁰ was relatively unique in that the court opted to use judicial review as it was intended to be used: to reinforce the separation of powers doctrine.³⁴¹ Noel Canning was a bottler and distributor of Pepsi-Cola products and qualified as an employer within the meaning of the National Labor Relations Act (NLRA).³⁴² After an administrative judge ruled against him, Canning filed exceptions to the judge’s

³³⁵ 478 U.S. 714 (1986).

³³⁶ The aggrandizement or aggregation concern was also cited in *Canning*, though the court did little to use the antiaggregation principle to structure its decision. *Canning v. NLRB*, 705 F.3d 490, 510 (D.C. Cir. 2013).

³³⁷ *Bowsher*, 478 U.S. at 736.

³³⁸ *Id.* at 770 (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976)).

³³⁹ *Id.* at 771 (looking for evidence of a threat that would “induce subservience to the Congress”).

³⁴⁰ 705 F.3d 490 (D.C. Cir. 2013).

³⁴¹ *Id.* at 503 (“To adopt the Board’s proffered intrasession interpretation of ‘the Recess’ would wholly defeat the purpose of the Framers in the careful separation of powers structure reflected in the Appointments Clause.”).

³⁴² National Labor Relations Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-169 (2006)) (“The term ‘employer’ includes any person acting in the interest of an employer, directly or indirectly . . .”).

findings. Those findings were subsequently affirmed by a three-judge panel.³⁴³ Canning then challenged, arguing that only two of the five members of the National Labor Relations Board (NLRB) were constitutionally appointed under the Recess Appointments Clause.³⁴⁴

Canning challenged President Obama's January 4, 2012 recess appointments on two grounds. First, he argued that the Senate was not in fact in recess at the time of the appointments.³⁴⁵ Second, he argued that the vacancies had not happened during a recess.³⁴⁶ While the court ultimately reached the correct result, holding that the intrasession appointments in question were unconstitutional, it did so for the wrong reasons. Moreover, the court failed to articulate a unified conception of the separation of powers doctrine. Though much of the *Canning* opinion consisted of conventional textual and historical analysis, the court attempted only briefly to tie this discussion to a more fundamental purpose. The court explained that the separation of powers doctrine is designed to protect individual rights, but does not describe how it achieves this purpose.³⁴⁷ This was a missed opportunity to create a holistic opinion tying recess appointments directly to the antiaggregation function of the separation of powers doctrine. The court could have laid the groundwork for a more coherent approach to a variety of questions on issues ranging from war powers to presidential privilege. Instead, it kept its focus too narrow: it missed the forest for the constitutional tree. The opinion would have been stronger had the court first placed the Clause within the antiaggregation framework of the tripartite system. This approach could have produced the same result without triggering Judge Griffith's objection in the concurrence that the opinion need not have resolved the question of the meaning of "happen to exist" after it already effectively resolved the case by ruling against intrasession appointments.³⁴⁸ Judge Griffith believed that the majority may have overreached when it answered this secondary question precisely because it focused so narrowly on the text of the Clause. Had the court started its analysis by articulating the purpose of the separation of powers doctrine to prevent the aggregation of power, it could easily have identified both the natural meaning and purpose of the Clause.

³⁴³ *Canning*, 705 F.3d at 499 ("It is undisputed that the Board must have a quorum of three in order to take action.").

³⁴⁴ *Id.* at 498-99.

³⁴⁵ *Id.* at 499.

³⁴⁶ *Id.*

³⁴⁷ *Id.* at 510 ("The Constitution's separation of powers features, of which the Appointments Clause is one, do not simply protect one branch from another. These structural provisions serve to protect the *people*, for it is ultimately the people's rights that suffer when one branch encroaches on another." (citation omitted)).

³⁴⁸ *Id.* at 515 ("I agree that the Executive's view that the President can fill vacancies that 'happen to exist' during 'the Recess' is suspect, but that position dates back to at least the 1820s, . . . making it more venerable than the much more recent practice of intrasession recess appointments.").

Canning may have made its greatest contribution by simply rejecting the Obama Administration's call for judicial avoidance. Yet the failure to recognize the antiaggregation purpose of the Clause within the overall separation of powers doctrine denied a badly needed foundation for a wide array of cases involving conflicts between the branches. Griffith was right that the court did not have to resolve the second question given its narrow analysis. However, Griffith was wrong that the question should not have been resolved in the case. The antiaggregation purpose of the separation of powers requires courts to play a critical stabilizing role that has been denied for years through acts of judicial avoidance. Courts justify the failure to act on standing or avoidance grounds, claiming that they are protecting the system from judicial activism or usurpation. Thus, in cases like the Libyan War challenge by certain Members of Congress,³⁴⁹ the judiciary allowed an alleged presidential usurpation of power to stand without a ruling on the merits – an executive aggregation of power purportedly allowed in order to avoid a judicial aggregation of power. The “case or controversy” requirement³⁵⁰ and standing principles protect against the encroachment of the courts into areas of executive and legislative enforcement. The dangers of aggregation, however, are not identical. Scholars have long argued against the narrow standing rulings of the courts, particularly in the denial of review for cases brought by Members of Congress.³⁵¹ A case or controversy exists when Members of Congress raise an allegation of an unauthorized war. For standing purposes, a Members of Congress's allegation that he has been denied his constitutional authority should be sufficient to constitute injury. In light of the antiaggregation purpose of the separation of powers doctrine, the lack of judicial review appears less an act of restraint and more an act of denial.³⁵²

³⁴⁹ See Turley, *supra* note 110.

³⁵⁰ U.S. CONST. art. III, § 2, cl. 1 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”).

³⁵¹ Members of Congress have pushed for judicial review as amici curiae in light of the Cordray controversy because they are effectively barred from directly seeking review. See Brief for Senate Republican Leader Mitch McConnell et al. as Amici Curiae Supporting Petitioner/Cross-Respondent, *Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013) (Nos. 12-1115, 12-1153); Brief for Speaker of the United States House of Representatives John Boehner as Amicus Curiae Supporting Petitioner, *Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013) (Nos. 12-1115, 12-1153).

³⁵² The analysis missing in *Canning* is found to some extent in the Third Circuit's decision in *NLRB v. New Vista Nursing & Rehabilitation*, 719 F.3d 203 (3d Cir. 2013).

Even without a stronger statement of separation principles and antiaggrandizement values, critics have criticized *Canning* for risking presidential backlash.³⁵³ For example, Adrian Vermeule argues that much of the *Canning* opinion is “myopic” and full of “exaggerations.”³⁵⁴ The criticism is notable for those who believe that the rationale for the decision was, if anything, too abridged. Yet Vermeule dismisses the court’s concerns of the usurpation of legislative authority as “hardly the stuff of which tyranny is made.”³⁵⁵ But then it is not at all clear what, in Vermeule’s view, is the stuff of which tyranny is made. The Framers viewed these provisions as creating a collective of antiaggregation measures. The tyranny that they feared was more incremental in nature: the gradual assumption of greater and greater power to the loss of the other branches or of the states. Tyranny, they might respond, is made precisely of the small stuff that Vermeule dismisses as of no concern. What is equally striking is the danger that Vermeule sees in the *Canning* decision. He warns that future Presidents may take a more aggressive approach to Congress in declaring nominees confirmed without a Senate vote:

Suppose that the combination of the filibuster, pro forma recess games, other obstructionist tactics in the Senate, and decisions like *Canning* eventually produce so much pent-up demand for reform of the appointments process that the President offers some radical reinterpretation of the Constitution, one that gives him substantially increased discretion over appointments. Ingenious commentators will supply such reinterpretations.³⁵⁶

Yet such a threat is hardly an answer to the court’s constitutional interpretation. There is always a risk of Presidents acting badly. It is hardly a compelling argument that attempting to limit presidential abuse could trigger

While exploring the same textual and historical evidence of meaning, the court tied the rejection of the recess appointments to antiaggrandizement values:

The lack of deference to executive and legislative judgments on these issues follows from the fact that “separation-of-powers jurisprudence generally focuses on the danger of one branch’s aggrandizing its power at the expense of another branch.” Giving deference to either branch is inconsistent with this concern because a presumption could prevent us from stopping one branch from “aggrandizing its power at the expense of another branch,” or ensuring that “the carefully defined limits on the power of each Branch” are not eroded. Our role as the “ultimate interpreter of the Constitution” requires that we ensure its structural safeguards are preserved. It is a role that cannot be shared with the other branches anymore than the president can share his veto power or Congress can share its power to override vetoes. This “requires that [we] on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch.”

Id. at 241 (citations omitted).

³⁵³ See, e.g., Adrian Vermeule, *Recess Appointments and Precautionary Constitutionalism*, 126 HARV. L. REV. F. 122 (2013).

³⁵⁴ *Id.* at 123.

³⁵⁵ *Id.* at 122.

³⁵⁶ *Id.* at 124.

worse presidential abuse. Moreover, any theory of confirmation without a Senate vote is demonstrably weak.³⁵⁷ If courts are willing to reject the judicial avoidance arguments that have characterized past recess appointment cases, such abusive interpretations should meet the same fate as the one that allowed for the appointment at issue in *Canning*. As history has demonstrated, decades of judicial avoidance has only allowed supporters of such aggrandizement to make specious arguments on basis of “historical practice.”³⁵⁸

The single most important structural function of the judiciary in the tripartite system is to maintain the balance of power. The danger of executive or legislative aggregation is far greater than the danger of judicial aggregation.³⁵⁹ In the context of separation conflicts between the executive and legislative branches, the “countermajoritarian problem” described by theorists like Alexander Bickel is less compelling as a basis for judicial avoidance.³⁶⁰ In separation conflicts, courts are performing their least dangerous function in reinforcing the constitutional process as opposed to directing outcomes or reviewing policy decisions. In *Canning*, the actual exceptions rejected by

³⁵⁷ See Matthew C. Stephenson, *Can the President Appoint Principal Executive Officers Without a Senate Confirmation Vote?*, 122 YALE L.J. 940 (2013). Professor Stephenson argues that “the Senate’s failure to act on the nomination within a reasonable period of time, despite good faith efforts of the nominee’s supporters to secure a floor vote, [should] be construed as providing the Senate’s tacit or implied ‘Advice and Consent’ to the appointment within the meaning of the Appointments Clause.” *Id.* at 946. Stephenson frames his analysis under a view of “congressional obstructionism” (particularly in the use of filibuster rules) while taking a far more sympathetic view of presidential power. *Id.* at 978-79. Putting aside the merits of the Senate’s long-maintained filibuster tradition, there is no basis in either the text or purpose of the Vesting Clauses to allow for de facto confirmations. Dismissing the ample constitutional history and language, Stephenson cites tort and contracts principles and the doctrine of *qui tacet consentire videtur* (one who keeps silent is understood to consent). *Id.* at 952. He argues that the meaning of “consent” can be judicially construed to include silence or inaction. *Id.* at 950-52. To do so would be to adopt a meaning that is facially at odds with not just the text but any reasonable interpretation of that term. Indeed, the theory is most striking in its dismissal of these rules as forcing compromises between the branches – a value that is now more important than ever with the rise of the fourth branch.

³⁵⁸ See Turley, *Constitutional Adverse Possession*, *supra* note 3 (manuscript at 4).

³⁵⁹ In the context of rulemaking in *Decker v. Northwest Environmental Defense Center*, 133 S. Ct. 1326 (2013), Justice Scalia made the analogous point that largely unchecked agency decisions present a greater danger than judicial interpretations rejected by agencies: “For as soon as an interpretation uncongenial to the agency is pronounced by a district court, the agency can begin the process of amending the regulation to make its meaning entirely clear.” *Id.* at 1341-42 (Scalia, J., dissenting in part).

³⁶⁰ BICKEL, *supra* note 15, at 16-17 (“The root difficulty is that judicial review is a counter-majoritarian force in our system [W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not [o]n behalf of the prevailing majority, but against it.”).

NLRB were entirely irrelevant to the court. The sole concern was the composition of the board on a constitutional level. There should be no place for “passive virtues” in such cases.³⁶¹ To enforce the antiaggregation function of the separation of powers doctrine is hardly countermajoritarian. Since such conflicts arise with the claim of subverting or circumventing the constitutional process, judicial review advances democratic norms. In this sense, it is closer to what John Ely referred to as “perfecting democracy” by reinforcing the representative political process.³⁶² While the result in *Canning* served to perfect democracy, the court missed the opportunity to explain the role of the judiciary in upholding the antiaggregation principles underlying the tripartite system.

C. *Reestablishing Separation Principles in Recess Appointments*

The antiaggregation purpose of the separation of powers doctrine offers a long-missing clarity in dealing with myriad issues under the Recess Appointments Clause. Pro forma sessions are an example of one such issue. The foregoing analysis is not meant to excuse the obvious artificial claim underlying most pro forma sessions of Congress. Such sessions have proven the most challenging issue for scholars because they are in many cases an overt effort to block the use of a President’s recess appointment power. While these sessions can have substantive legislative purposes,³⁶³ they are used openly to create the fiction of business. Courts are left with competing lies: Congress lies about being in session while the President lies about not being able to consult with Congress. This observation is not meant to condemn either branch. As Benjamin Disraeli noted, “[t]here are three kinds of lies – lies, damned lies, and statistics.”³⁶⁴ On the Disraeli scale of lying, recess lies would fall somewhere between lies and damn lies but well short of statistics.

The *Canning* court resolved what should have been a relatively easy interpretive question when it held that intrasession appointments violate Articles I and II of the Constitution.³⁶⁵ This result however is also compelled by the “tectonics” of the Madisonian system,³⁶⁶ which should have given the court greater clarity in reaffirming the Senate’s power to define when it is in session, including the right to designate pro forma sessions. To the extent that courts do not consider this question answered by the text of the Recess Appointments Clause, the default position under the separation of powers

³⁶¹ *Id.* at 111-98.

³⁶² JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 105 (1980).

³⁶³ See Turley, *Constitutional Adverse Possession*, *supra* note 3 (manuscript at 20-21).

³⁶⁴ 1 MARK TWAIN, *AUTOBIOGRAPHY* 246 (1924) (attributing the quote to Benjamin Disraeli).

³⁶⁵ *Canning v. NLRB*, 705 F.3d 490, 499 (D.C. Cir. 2013).

³⁶⁶ “Tectonics” is a term derived from modernist architect Mies Van Der Roe in reference to the “art of building.” See Turley, *supra* note 55.

doctrine should lead courts to enforce congressional pro forma sessions. Indeed, this view is consistent with the overall position of courts to leave internal schedules and procedures to Congress.³⁶⁷ The lack of such a foundation is precisely why these disputes have continued and why there remains uncertainty over lines of separation.

The use of the three-day rule captures the sheer artificiality of the modern debate over recess appointments. By noting that Article I, Section 5 of the Constitution requires the consent of both houses for either house to adjourn for more than three days, the theory of the Obama Administration was that recesses of less than three days were not viewed by the Framers as significant.³⁶⁸ It was an opportunistic interpretation that supported recess appointments for extremely short recesses while professing to carry out the intent of the Framers. Just as three days do not represent a significant delay in the ability of Congress to respond to a nomination, a delay of a week is of no real significance – particularly given the long periods of consideration that are generally given to nominations.³⁶⁹ The rule is based on the most trivial aspect of recess provisions and ignores the separation of powers doctrine upon which the confirmation power is based. While some functionalists insist that courts lack the competence to intervene in these disputes, such functionalists feel comfortable with a rule that declares certain sessions to be “fake” and incapable of doing business. If there is one question in this area on which courts could legitimately defer to another branch, it is the question of how Congress defines its own schedule and sessions. Yet those who chastise the Senate for the artificiality of pro forma sessions, do not chastise the executive branch for the artificiality of its claim that it is necessary to act in a matter of days over nominations.

It can certainly be said that this becomes a contest of artificialities. Why is it better for the Senate to be able to maintain an artificiality over pro forma sessions rather than allow the President to feign an urgent need for an appointment during a brief recess? One reason is to maintain greater balance with the expansion of the administrative state.³⁷⁰ The more compelling reason, however, is that the division of nomination and confirmation powers was designed to force communication and compromise between the branches. That is achieved by enforcing Congress’s definition of “session,” while it is frustrated by expanding the President’s authority to circumvent Congress.

³⁶⁷ See, e.g., *Exxon Corp. v. FTC*, 589 F.2d 582, 590 (D.C. Cir. 1978) (“Although the courts will intervene to protect constitutional rights from infringement by Congress, . . . where constitutional rights are not violated, there is no warrant for the judiciary to interfere with the internal procedures of Congress . . .” (citations omitted)).

³⁶⁸ Turley, *Constitutional Adverse Possession*, *supra* note 3 (manuscript at 24-33).

³⁶⁹ Ryan Haggerty & Chad Yoder, *Building a Second Term*, CHI. TRIB., Apr. 12, 2013 at 15 (detailing how nominations in recent presidencies lingered for fifty to sixty days on average).

³⁷⁰ See *supra* notes 199-204 and accompanying text.

While functionalists often insist that recess appointments force Congress to deal with a President and counter modern tendencies toward deadlocked politics, there is little evidence that the threat of recess appointments accomplishes this goal.³⁷¹ To the contrary, both sides simply use the recess controversy to fuel their own partisan efforts with the electorate.

Pro forma sessions are a check-and-balance maneuver that usually appeals to functionalists. The executive branch was deemed the best branch for the nomination of officials while the Senate was given the sole authority of confirmation power. Within this structure, there remains a host of check and balance powers that can be used to influence or pressure other branches. Thus, two Houses of Congress are left to determine their own schedules and sessions. Faced with a President who will not yield on nominees, the Congress can respond by remaining in session to force the President to choose between compromising or relying on acting officeholders. The President in turn can use the considerable power of federal agencies to pressure or punish members in such a standoff. This level of tit-for-tat politics, under a separation-based rule, occurs within a more defined structure for deliberation, and ideally leads to compromise.

The same analysis brings greater clarity to the controversy over how to define “vacancy.” From the standpoint of the separation of powers doctrine, the meaning of “session” may be more important than the meaning of “vacancy,” in that the former delineates the basic structure for the triggering of the presidential power. Absent a concrete and defined meaning, the recess appointment power would substantially alter the original division of powers under the Recess Appointments Clause. This is particularly the case with intrasession appointments. The meaning of “vacancy,” however, is material to the system of federal appointments and confirmations functioning as intended within the construct of the separation of powers doctrine. One threshold question is the scope of the term and whether it applies to all vacancies, most notably judicial vacancies. While this question can be answered in the negative

³⁷¹ It is difficult to see how the threat of a recess appointment constitutes a significant threat to compel congressional concessions. In making the appointment, the President installs an acting official with lingering questions of his or her authority or longevity in office. In the words of then Senator Barack Obama, such nominees can be perceived as “damaged goods” and less effective due to such controversies and recess appointments. Angie Holan, *Comparing Obama’s Recess Appointment of Craig Becker with Bush’s Nomination of John Bolton*, POLITIFACT (Apr. 1, 2010), <http://www.politifact.com/truth-o-meter/statements/2010/apr/01/barack-obama/obama-recess-appointment-craig-becker-bush-john-bo>. In controversies like that concerning Cordray, the eventual confirmation was the result of a separate threat issued by the majority of Democratic Senators to change the Senate rules in order to kill the ability of the minority party to filibuster. Paul Kane & Ed O’Keefe, *As Senate Nears Filibuster Showdown, Reid Says Republicans Can Still Avoid Fight*, WASH. POST (July 15, 2013), http://articles.washingtonpost.com/2013-07-15/politics/40581474_1_reid-senators-republicans.

both through what Manning calls “ordinary interpretation”³⁷² as well as a separation- or formalist-based interpretation, it is the overwhelming view of courts and commentators that Presidents can appoint judges through the Recess Appointments Clause – a practice that has occurred from the early days of the Republic.³⁷³ Certainly from a historical-practice perspective, this is an interpretation that would seem iron plated by the consistent practices of Presidents starting with President George Washington.³⁷⁴

It is notable that the Framers were initially inclined to leave judicial nominations to the Senate, but later decided to give that authority to the President. Thus, there was already a concern that giving a President authority to appoint people for life provided too much power over the independent judiciary. Recess appointments become all the more troubling when a President circumvents confirmation and places an individual on the bench who is still beholden to the President and the Senate, given the need for renomination and confirmation to keep his job. This creates a fundamental problem of legitimacy for litigants appearing before the judge.³⁷⁵ The Ninth Circuit articulated the dangers this problem poses to the purposes of Article III in its decision in *United States v. Woodley*,³⁷⁶ in which the court warned of recess-appointed judges ruling “with one eye over his shoulder on Congress.”³⁷⁷

Such appointments have existed from the earliest period of the Republic.³⁷⁸ Indeed, the first five Presidents made thirty-one such appointments, including five to the Supreme Court.³⁷⁹ However, as previously discussed,³⁸⁰ these appointments were necessitated by the long congressional recesses that could interrupt appointments for up to nine months at a time. With a limited number

³⁷² Manning, *supra* note 11, at 1949.

³⁷³ *Id.*

³⁷⁴ Notably, Randolph’s objections to the Constitution focused in part on the use of recess appointments for judicial positions. Curtis, *supra* note 23, at 1772.

³⁷⁵ Notably, some of the judicial nominees blocked by the Senate were viewed as unqualified not simply by Senators but by the American Bar Association. That was the case with President George W. Bush’s nominee to replace Thomas Pickering (who was given a recess appointment to the Fifth Circuit). Michael Wallace received the relatively rare distinction of being named an unqualified nominee by the ABA. Editorial, *Help Wanted: Qualified Judges*, N.Y. TIMES (Aug. 15, 2006), <http://www.nytimes.com/2006/08/15/opinion/15tues1.html> (claiming that Wallace is not qualified because of his record on civil rights issues).

³⁷⁶ 751 F.2d 1008 (9th Cir. 1985) (en banc).

³⁷⁷ *Id.* at 1014 (quoting Professor Freund).

³⁷⁸ The Author has argued elsewhere against the use of historical practice in the interpretation of constitutional text as creating a type of constitutional adverse possession where mere repetition becomes evidence of meaning. See Turley, *Constitutional Adverse Possession*, *supra* note 3.

³⁷⁹ See *supra* note 251 and accompanying text.

³⁸⁰ See *supra* note 42 and accompanying text.

of federal judges (and a six-person Supreme Court), such extended vacancies presented a serious problem for the court system and civic order.³⁸¹ That is not the case today. Putting aside the fact that this problem no longer exists with the modern congressional schedule, the courts were wrong to allow the practice to take hold in the first place and historical practice does not legitimate that error.³⁸² Modern judicial recess appointments are often used as a form of retaliation against the Senate for refusing to confirm nominees.³⁸³ This not only puts the Recess Appointments Clause to an unintended use, but also undermines Article III's guarantee of an independent judiciary.³⁸⁴ The inherent danger of circumventing confirmation authority is magnified with judicial officers who are supposed to take the bench with the guarantee of lifetime tenure. Lifetime appointments are not simply to protect the judicial officers, but to protect the public from judges who rule under the threat of a President not renominating them for judicial appointment. Such judges are subject to attack in Congress as well as to withdrawal by Presidents for unpopular opinions. That individual is aware that any decisions rendered during the recess appointment could be used against him or her by the Senate on which he or she depends for confirmation. The judges are dependent on the continued satisfaction of the President as well as on the Senate in seeking a permanent position as an Article III judge. Judicial recess appointments present a different aggregation danger than contemporary executive branch appointments. Here, the circumvention of confirmation authority produces temporary judicial officers who are not constitutionally complete. These temporary judges lack the protection deemed essential for Article III status – life tenure. This protection is in turn essential to maintaining the separation needed to avoid aggregation of power.

A more challenging question arises with regard to the use of recess appointments for vacancies occurring during congressional sessions. Narrowly construing the language in the Recess Appointments Clause would reflect the reduced need for such appointments with the modern congressional schedule and reinforce the need for presidents to confer and compromise with Congress over the appointment of high-ranking executive officials. There is historical support for limiting appointment power to vacancies occurring during a recess and not preexisting vacancies. Alexander Hamilton stressed that “[i]t is clear,

³⁸¹ See *supra* notes 42-46 and accompanying text.

³⁸² See Turley, *Constitutional Adverse Possession*, *supra* note 3 (manuscript at 2).

³⁸³ President George W. Bush appointed U.S. District Judge Charles Pickering twice to the Fifth Circuit Court of Appeals. However, due to filibuster by Democrats, Pickering was never confirmed and his appointment ended two years later with his departure from the appellate court. Adam Liptak, *A Judge Appointed by Bush After Impasse in Senate Retires*, N.Y. TIMES, Dec. 10, 2004, at 22, available at <http://www.nytimes.com/2004/12/10/politics/10pickering.html>.

³⁸⁴ The problem of legitimacy is magnified by recess appointees who later leave the bench without confirmation – allowing a President to install a nonlife-tenured individual on an Article III court. See, e.g., *United States v. Woodley*, 751 F.2d 1008 (9th Cir. 1985).

that independent of the authority of a special law, the President cannot fill a vacancy which happens during a session of the Senate.”³⁸⁵ Senator Christopher Gore in 1814 stated the meaning of the Clause:

If the vacancy happens at another time, it is not the case described by the Constitution; for that specifies the precise space of time wherein the vacancy must happen, and the times which define this period bring it emphatically within the ancient and well-established maxim: “Expressio unius est exclusio alterius.”³⁸⁶

Other contemporary sources refer not only to vacancies that occur during recess but expressly excluded the possibility of waiting to fill a vacancy that arose during a previous session.³⁸⁷ Thus, both the language and the historical commentary support a more restrictive interpretation of when a vacancy arises under the Clause. This last controversy, however, offers the strongest basis for a functionalist argument. While Presidents could certainly engineer vacancies to open during recess, it would be practically difficult in most cases and could be thwarted by pro forma sessions. One of the most antifunctionalist aspects of the *Canning* decision is the Court’s rejection of a more flexible interpretation on this question.³⁸⁸

The problem with the holdover nominees is how to draw a line between those filibustered or blocked and those who simply remain in the system. The former group was, at a minimum, denied confirmation as a result of opposition even if they were not subject to a final up-or-down vote. The nominees were considered and did not achieve sufficient votes to secure confirmation. Their appointment under the Recess Appointments Clause therefore is an open circumvention of the Senate. The latter group has a stronger claim for appointment, particularly given the larger number of nominees today.³⁸⁹

In the absence of a viable bright-line rule, it would seem that holdover nominees as a group would have to be either fully eligible for recess

³⁸⁵ Letter from Alexander Hamilton to James McHenry (May 3, 1799), in 23 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 54, at 94.

³⁸⁶ 26 ANNALS OF CONG. 653 (1814).

³⁸⁷ *Canning v. NLRB*, 705 F.3d 490, 512 (D.C. Cir. 2013) (“[W]e hold that the President may only make recess appointments to fill vacancies that arise during the recess.”); *NLRB v. Enter. Leasing Co. Se.*, No. 12-1514, 2013 WL 3722388, at *179 (4th Cir. July 17, 2013).

³⁸⁸ *Id.* at 508 (“Our understanding of the plain meaning of the Recess Appointments Clause as requiring that a qualifying vacancy must have come to pass or arisen ‘during the Recess’ is consistent with the apparent meaning of the Senate Vacancies Clause.”).

³⁸⁹ The problem with the holdover nominees is how to draw a line between those filibustered or blocked and those who simply remain in the system. One such approach is to focus on nominees who have been reported out of Committee and subjected to a floor vote. Those nominees clearly failed to receive the sufficient votes for confirmation, and their selection for recess appointments would constitute a circumvention of the constitutional process. There are a host of nominees, however, who are kept in Committee by effective blocks by one of the parties.

appointments or barred on the grounds that the vacancies occurred during a congressional session. A court is thereby presented with a classic formalist versus functionalist choice. Functionalists would argue that the checks and balances discussed above militate heavily toward judicial abdication with regard to holdover nominees in intersession appointments. This approach is reinforced by the view that the new model of government requires greater power of a President to fill positions left vacant by the Senate to the detriment of federal policies and programs. Many functionalists view the Senate as inhibiting and harassing federal programs – impeding the public good for petty politics.³⁹⁰ Conversely, formalists would argue that the clear line barring vacancies occurring during a session would facilitate the obligation of the two political branches to reach a compromise on these positions.

In selecting a course between these two poles, the controversy involving holdover nominees raises the question of which approach most serves the purposes and functioning of the tripartite system. The shift of authority toward the fourth branch should militate against a broader definition of “vacancies.” If one were inclined to “perfect democracy” through an interpretation of the President’s appointment powers, it is difficult to see why an interpretation that cedes greater power to the President does the job. With little comparative control over the daily functioning of agencies in the federal system, forcing the President to deal with the Senate in the maximum number of high-level positions allows for a greater degree of representative democratic process.³⁹¹ In other words, the advent of the administrative state has reinforced rather than removed the original purpose of the Recess Appointments Clause. By hewing closely to the text and drawing a bright-line rule barring recess appointments to vacancies occurring during sessions, the courts would force the branches to work more closely in resolving disagreements on policy. There will still be tit-

³⁹⁰ Chief Justice Roberts may subscribe to the view that these recess appointments are properly used by a President as an option in facing an intransigent Congress. There was an interesting exchange in the oral arguments of the *New Process Steel* case between Chief Justice Roberts and then-Deputy Solicitor General Neal Katyal after Katyal explained the difficulty in securing confirmed positions on the NLRB:

Chief Justice Roberts: And the recess appointment power doesn’t work why?

Mr. Katyal: The – the recess appointment power can work in - in a recess. I think our office has opined the recess has to be longer than 3 days. And – and so, it is potentially available to avert the future crisis that – that could – that could take place with respect to the board.

Platt, *supra* note 251, at 293 (citing Transcript of Oral Argument at 50, *New Process Steel v. NLRB*, 130 S. Ct. 2635 (2010) (No. 08-1457)). It would be easy to read too much into such a passing remark, but Roberts’ immediate thought of recess appointment power as a response to the failure of Congress to approve NLRB members is worrisome for those seeking a narrow interpretation of the power and judicial enforcement of the Clause.

³⁹¹ It also allows the Senate to address other unilateral presidential actions, such as nonenforcement orders. *See supra* note 161. Faced with an agency that refuses to execute provisions of a federal law, for example, the Senate can choose to confirm officials with duties tied to the unenforced law.

for-tat politics to be sure, but recess appointments would not offer an avenue of circumvention.³⁹²

CONCLUSION

The continuing controversy over recess appointments offers an ideal context for exploring the underpinnings of functionalist theories as well as the impact of those theories in the changing interrelations of the branches in the constitutional system. Beneath this political controversy (with its shifting party alliances) rests a far more profound debate over the general approach to the interpretation of the Recess Appointments Clause³⁹³ and, by extension, the Constitution as a whole. Both formalists and functionalists can generally agree that the rise of the fourth branch has blurred the distinctions between the executive and legislative branches. The parties disagree, however, when it comes to what role the judicial branch should play in resolving interbranch disputes over recess appointees. As reflected in the few cases that address this interpretative question,³⁹⁴ there is a dominant functionalist view supporting a broad interpretation of the President's recess appointment powers. Functionalism is viewed as allowing a degree of flexibility to accommodate modern governance. The underlying assumption that the changing federal government requires a greater reliance on checks and balances and a diminished reliance on the separation of powers doctrine is often presented as self-evident. The recess appointment controversies, however, challenge this assumption in terms of the dysfunctional tit-for-tat politics that has characterized the modern period. The countervailing argument can be made for reinforcing separation principles to counteract this trend in resisting the aggregation of power in the executive branch. At a minimum, the fundamental change occurring in the balance of power in the federal branch (and between the federal and state governments) should not simply be established as a *fait accompli* by the combination of growing functionalist theories and a related preference for judicial avoidance.

Putting aside the relative clarity of the language and stated purpose of the Recess Appointments Clause, the evolution of its meaning offers an unsettling tale of how language can mutate under the pressures of politics and produce dysfunctional effects on the political system as a whole. There is relatively little attention given to the fact that provisions like the Recess Appointments Clause were designed to frame the political choices and interactions of the

³⁹² This would not create a one-sided advantage for Congress. Members of Congress have an interest in the functioning of agencies that is often ignored in functionalist works. Moreover, a President has ample discretion on the use of federal money and authority that has long been an inducement for compromise with members of Congress. The return to a more rigid recess rule would counteract the shift toward executive agencies that has been building dangerously for decades.

³⁹³ U.S. CONST. art. II, § 2, cl. 3.

³⁹⁴ See, e.g., *Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013).

executive and legislative branches. Much of the Madisonian system is directed at funneling factional and political pressures in ways to achieve compromise and defuse the aggregation of power. Indeed, past Presidents' ability to circumvent the Senate on issues of recess appointments reflects the aggregation of power with which the Framers were concerned. Presidents can effectively control both Houses of Congress, even with a vocal minority in opposition. The absence of effective judicial review has led to an absurd game of brinkmanship between the branches.

With the rise of the fourth branch,³⁹⁵ the latest recess appointment controversy³⁹⁶ transcends not only our immediate politics but also the Recess Appointments Clause. It is part of a congressional struggle to retain balance and power in the tripartite system despite the increasing exercise of independent decisionmaking by federal agencies. The Cordray appointment also comes with the rise of what some have called the "Imperial Presidency"³⁹⁷ under President Obama – a government characterized by expanding claims of unilateral and unchecked authority. With the growing concentration of powers in agencies and Presidents, the importance of these appointments takes on an even greater significance for interbranch balance. The separation-based approach of this Article is undeniably an effort to reinforce the specific powers of the legislative branch, which has lost considerable ground in the last few decades. As explored with the comparison to the federalism field,³⁹⁸ courts need to exercise greater authority in policing the separation lines of the branches and avoid the trend of erosion of legislative powers under functionalist interpretive approaches. This includes the rejection of historical practice arguments under which this and other provisions have been read as evolving in meaning with the recurrence of actions. Recess appointments vividly illustrate the public policy concerns raised by the shift to functionalist approaches to such conflicts between the branches. In the end, this shift toward the executive branch in appointments suggests that the imbalance between the branches is likely to become a permanent and self-perpetuating reality. As such, it may not matter if members of the legislative branch show greater "ambition" as described by Madison³⁹⁹ when they lack the opportunity to effectively apply it in this new government model.

Those concerned about the erosion of separation principles and the rise of executive power are often left in the same position as Woody Allen who once observed that, "I wish I could think of a positive point to leave with you."⁴⁰⁰

³⁹⁵ Turley, *supra* note 5.

³⁹⁶ *Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013).

³⁹⁷ *See supra* note 117 and accompanying text.

³⁹⁸ *See supra* Part III.A.

³⁹⁹ THE FEDERALIST NO. 51, *supra* note 51, at 341 (James Madison).

⁴⁰⁰ Julian Baggini, *Calm? Why Should I Be Calm?*, GUARDIAN, Mar. 3, 2009, at 4, available at <http://www.theguardian.com/lifeandstyle/2009/mar/03/anger-management> (internal quotation marks omitted).

He then asked if the crowd would “take two negative points” instead.⁴⁰¹ Scholars remain hopeful that in constitutional calculations – as in mathematical ones – the product of two negatives can make a positive. In this case, the rebalancing of power in the federal system would inevitably involve congressional delays in confirmations and judicial actions to deter the circumvention of Congress. However, the negatives of congressional opposition and judicial intervention can force the very dialogue and institutional settlement that is becoming so rare in modern government. While it would be gratifying to see the branches reach such accord in the interest of the Nation, two negatives will do in a Madisonian pinch.

⁴⁰¹ *Id.*