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Formalism, Functionalism, Ignorance, Judges

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FORMALISM, FUNCTIONALISM, IGNORANCE, JUDGES

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Almost 25 years ago I arrived in the Solicitor General's office just as the Justice Department's brain trust–Attorney General Levi, Solicitor General Bork, and Assistant Attorney General (Office of Legal Counsel) Scalia–concluded, in common with almost all of their predecessors in this century, that the "legislative veto" of administrative regulations violates the Bicameralism and Presentment Clauses of the Constitution. Edward Levi set out to obtain a judicial decision, a process that led to *Chadha*[1] a decade later. Because we expected this issue to land quickly in the Supreme Court, the Solicitor General's office was involved from the start; anyway, no one would have dreamed of taking a position without consulting Robert Bork. His successors Wade McCree and Rex Lee were to play equally large roles before *Chadha* came to be.

The legislative or one-house veto presented a test of the difference between formal and functional analysis. You remember these statutes: if Agency X issues Rule Y, it shall not take effect if one house (two houses, one committee, etc.) disapproves in Z days. Several clauses bear on this, starting with Article I, Section 1:

> All legislative Powers herein granted shall be vested in *a Congress* of the United States, which shall consist of a Senate *and* a House of Representatives.

The power is in "Congress", not any house or committee. Then there are the two presentment components, Article I, Section 7, Clauses 2 and 3:

> Every Bill which shall have passed the House of

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1. INS v. Chadha, 462 U.S. 919 (1983).

> Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have Originated....
>
> Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representative may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

To sum up, Congress acts by agreement of its houses, following which the President can sign or veto. The "legislative veto" statutes reversed this, allowing the President to issue rules unless one house disapproved. But these bits of ancient text just represent the formal Constitution, and the Founders (including that Madison fellow) wanted to let society work things out. Both Founding Father Madison and President Madison were willing to endorse what worked in practice, which is why President Madison signed the bill chartering the second Bank of the United States even though, when he was Representative Madison, he voted against establishment of the first bank, stating that Congress lacked the constitutional power to create banks.

Bob Bork had lunch with his assistants almost every day, and the legislative veto came up. I still recall the gist of those conversations. They went like this:

> E: The Constitution requires the concurrence of two houses and the President. If the President proposes a rule and one house (or even a committee chairman with blocking power) does not go along, then concurrence is lacking. Why isn't this the sort of consensus test the Constitution envisages, even if not the exact form (given origination in the executive)?
>
> B: That's not what the Constitution says.
>
> E: The administrative state not only is constitutionally questionable but also stifles free enterprise. Legislative vetoes rein in the agencies. Shouldn't we welcome this development–which also promotes constitutional values by enlarging the legislative role?

B: That's not what the Constitution says.

E: The only way to make government work in a modern economy is to write vague statutes and allow gap-filling by rules. But the agencies may get captured by interest groups; a legislative veto makes the general delegation possible while avoiding the bad side effects.

B: That's not what the Constitution says.

And this conversation occurred on the Court too, with Chief Justice Burger taking Bork's part, and Justice White in dissent taking mine–though no claim to authorship or causation is made or implied!

These days I continue to have the same conversation, usually with my clerks in chambers. The argument will go something like:

C: Allowing the Attorney General to control the criminal prosecution of another cabinet member would create an unacceptable conflict of interest. Prosecutors should be, and usually are, disinterested. In order to preserve that vital functional component, it is desirable to have independent counsels appointed by a court. The possibility of executive removal if an independent counsel runs amuck adequately preserves the role of the President even if the President and the Senate have been excluded from the appointment process.

E: That's not what the Constitution says!

It wasn't *Chadha* that changed my mind and converted me to the Levi-Bork-Scalia perspective on function versus form. It was a recognition that the Constitution *is* form; an appeal to "function" is a claim that something else would be *better* than the Constitution, which may be true but nevertheless isn't an admissible argument about interpretation of the structure we have.

Having said that, I need to confess that my model judge, John Marshall, was of three minds about this issue. In *Marbury v. Madison*,[2] we see the formalist at work. Sure, it may be a great idea to give the Court original jurisdiction of mandamus cases that pose Great Affairs of State, such as Jefferson's effort to thwart the Midnight Judges. And Marbury may even have a

2. 5 U.S. (1 Cranch) 137 (1803).

right to relief, as Marshall says in the case. But the text will not bear that reading, because the original jurisdiction of the Court is limited to cases involving ambassadors and states. Would-be-judge Marbury was neither, and that is that. All form-and function deemed irrelevant.

Fifteen years later *McCulloch v. Maryland*[3] arrived at the Court. President Madison signed the bill establishing the second Bank, Maryland tried to tax it out of existence, and Marshall's Court confronted two questions: first, does Congress have the power to create the Bank, and, second, may states use domestic taxing powers to defeat a choice within Congress's power? There is no "bank clause" in the Constitution; financial intermediation is not a listed objective; and although banks are about money-over which there is national power-can it be said that creation of a bank is "*necessary* and proper" to implementation of that power? What is "necessary," anyway? *McCulloch* gave Marshall an opportunity to make a functional inquiry. He declined, saying that such choices are for Congress. The form of the Constitution would be respected, he said, by allowing the legislature to choose function; else real political decisions would be made by judges. So it turns out that the language of the Constitution is *not* the end of the inquiry.

What happened next in the case is that the Court forbade Maryland to collect its tax from the Bank, even though there is no language in the Constitution even arguably restricting states' power to tax federal instrumentalities, and the federal statute did not purport to preempt state taxes. Nonetheless the Court created what we now call the doctrine of intergovernmental tax immunity, limiting the power of any domestic sovereign to tax another or its agents. The holding came not from text but from constitutional structure and supposition; it was needed to make the venture work and was implied by the basic design.

This panel is not the place (and the organizers did not grant me the time) to defend any of these three approaches-form in *Marbury*, function (as the legislature sees it) when defining the scope of legislative powers, and function (as judges determine it) when inferring structural limits on state power. All three

3. 17 U.S. (4 Wheat.) 316 (1819).

remain core ingredients of our constitutional system. And the fact that all three were acknowledged by the Founders themselves (including those in Congress and on the Court) means that today we lack any neat separation between form and function, or any way to cabin constitutional debate. You can see this played out through the years.

- The Appointments Clause: the special prosecutor case[4] talks function, while the military judge[5] and Gramm-Rudman[6] cases talk form; for agencies, *Humphrey's Executor*[7] talks function and ratifies the Administrative State, while *Myers*[8] is all form.
- Presidential Powers: the *Steel Seizure* case[9] insists that the form of legislation be followed, while the *Iran Assets* case[10] and the many delegation cases are functional.
- The list can be extended indefinitely. Think of all the form vs. function debates for the bill of rights, or the functional nature of judicial review itself (is it the consequence of form, or a premise to make the government function well?).

Although I can't defend Marshall's distinctions in detail, I can at least defend the outline, which I think sound.

First, function governs the scope of legislative power because there is no good argument for judges to have the final word. Recall that judicial review is not created by the Constitution; it is inferred from structure. The key argument is that the Constitution is *law*, and a choice-of-law analysis prefers it to statutes. Thus when there is a real case and real law to apply, an ordinary application of the judicial function produces a determinate result. Constitution 1, Legislature 0. But when the text contains nothing but generalities–and the "necessary and proper" language is too vague to decide any actual dispute-resolution lies in the hands of the legislature. Anything else

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

5. Edmond v. United States, 117 S. Ct. 1573 (1997); Ryder v. United States, 515 U.S. 177 (1995); Weiss v. United States, 510 U.S. 163 (1994).

6. Bowsher v. Synar, 478 U.S. 714 (1986).

7. Humphrey's Executor v. United States, 295 U.S. 602 (1935); *see also* Wiener v. United States, 357 U.S. 349 (1958).

8. Myers v. United States, 272 U.S. 52 (1926).

9. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

10. Dames & Moore v. Regan, 453 U.S. 654 (1981).

transfers political power to people who do not stand for election, and thus would defeat the most profound premise of our constitutional order. Functional analysis, conducted through the political process, therefore sets the limits of legislative power. Only when Congress oversteps the formal limits on its power, as in *Lopez*[11] and *City of Boerne*[12] and the line-item veto case,[13] does a court intervene–and even then only to require observance to forms, not to prescribe the distribution or use of governmental power.

Second, form governs issues about the *structure* of government for the same reason function governs debates about the use of public power. The text of the Constitution is *about* structure–about form. Application of the *Marbury* principle means that rules for who appoints whom, and the like, must be applied mechanically. Anything else is faithless to the premise of constitutionalism. Judges can't pick and choose; otherwise why wouldn't *Marbury* itself have come out the other way? Everyone agrees with this for the First Amendment; it is true of the Constitution of 1787 as well as of the amendments to it.

But having said that arguments about wise policy just can't trump text, I do want to express considerable skepticism about these arguments on their own terms. Think of the arguments that I made to Solicitor General Bork about why the legislative veto would promote good government. These were lawyer's arguments–you'll notice that I took *both sides* of the debate about whether a larger government is better, arguing that the veto both makes it cheaper to legislate (so we'll have more good laws) and makes it harder (so we'll have fewer bad regulations). Lawyers often argue like this, but both propositions can't be right, and perhaps neither proposition is right.

Why should laws be good, or regulations bad? How structure affects the content of legal rules is a very tough question. It is the domain of the field known as public choice. Like most other sciences, public choice reaches conclusions that lay observers–and lawyers are lay observers for this purpose–

11. United States v. Lopez, 514 U.S. 549 (1995).
12. City of Boerne v. Flores, 117 S. Ct. 2157 (1997).
13. Clinton v. City of New York, 118 S. Ct. 2091 (1998).

find counterintuitive. For example, one conclusion is that the legislative veto enhanced the power of committees with agenda control, and therefore of interest groups, at the expense of the President, the public official with the broadest constituency.[14]

Think for a moment about the administrative state, constructed at some expense to presidential power. The "functional" argument advanced for agencies gives us a view of dedicated public servants, free from political influence, fearlessly carrying out the law wherever it leads. This romantic view is hard to defend today.[15] Agencies have their own agendas. It is not simply that they are captured by factions (or more likely are created to serve these groups). Agencies start pursuing their own agendas, with tunnel vision adherence to the goal of their statute at the expense of other, equally worthy objectives. Eliminating the President from the process does not make the agency stronger. Commissioners of the XYZ Agency have no power of their own. They can't threaten to veto a bill; they lack access to the levers that facilitate logrolling (no Commissioner can promise a Member of the House to sponsor a new dam in exchange for his vote on a proposed change to the copyright law); having access only to the trade press (that is, to the interest group press), they can't take their case to a national constituency.

What then is going on? An independent, which is to say a weaker, agency increases the *relative* strength of Congress. Subcommittee chairmen can dictate to commissioners in a way they cannot to Secretaries of Cabinet departments. Chairmen of committees and subcommittees are, on average, further from the median of national opinion than are Presidents, with their broader constituencies. Chairmen also have less constitutional license to govern. After all, the Constitution calls on Congress as an institution to legislate, not on single members to browbeat commissioners at hearings. James Madison and his colleagues got it right in prescribing a strong executive as an antidote to the baleful influence of faction. Functional

14. Instead of trying to document at length my assertions about public choice, I refer the reader to MAXWELL L. STEARNS, PUBLIC CHOICE AND PUBLIC LAW: READINGS AND COMMENTARY (1997), which is long enough to satisfy all needs.

15. *See* Frank H. Easterbrook, *"Success" and the Judicial Power*, 65 INDIANA L.J. 277 (1990); Frank H. Easterbrook, *Unitary Executive Interpretation: A Comment*, 15 CARDOZO L. REV. 313 (1993).

arguments are pale imitations of the theory articulated in Federalist No. 10 and underlying the real Constitution.[16]

Perhaps this is an excessively judge-o-centric view of the Constitution. You'll notice that I have used the nature of *Marbury's* rationale as the means to separate form from function. A professor-centric view might come out differently. So long as these issues are worked out in litigation, however, the dominant question should be whether there are rules, and this entails formalism.[17]

16. *See* Frank H. Easterbrook, *The State of Madison's Vision of the State*, 107 HARV. L. REV. 1328 (1994).

17. I develop this point at undue length in Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349 (1992).