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Prolegomenon to Any Future Administrative Law Course: Separation of Powers and the Transcendental Deduction

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PROLEGOMENON TO ANY FUTURE ADMINISTRATIVE LAW COURSE: SEPARATION OF POWERS AND THE TRANSCENDENTAL DEDUCTION

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Federal constitutional law has a way of worming itself into just about every crevice of the law school curriculum. Civil Procedure students grapple with the Due Process Clauses, Property students ponder the Takings Clause, and Torts students must reckon with issues of federal preemption and legislative power. But few courses outside the mainstream Constitutional Law curriculum require as much sustained attention to constitutional issues as does Administrative Law.[1] Administrative Law courses typically involve an extensive study of procedural due process.[2] They also engage, at least peripherally, in some of the most fundamental and long-lived constitutional controversies in the law of federal jurisdiction, ranging from the law of standing,[3] to the permissible scope of adjudication by non-Article III bodies,[4] to the extent of Congress's power to insulate governmental decision making from judicial review.[5] Most importantly, Administrative Law is the primary curricular vehicle for exploring what can loosely be called separation of powers law: the law governing the structure of, and the allocation of authority among, the various institutions of the national government. It would be remarkably easy to spend the entire course on these topics, and it is remarkably

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1. Note to Criminal Procedure mavens: I said "few courses," not "no courses." You folks win hands down. *See* William J. Stuntz, *Self-Incrimination and Excuse*, 88 COLUM. L. REV. 1227, 1295 n.250 (1988) ("Criminal procedure courses spend the bulk of a semester (sometimes a year) on constitutional restraints on state investigation and prosecution of crime.").

2. *See, e.g.*, GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 357–498 (2d ed. 2001); PETER L. STRAUSS ET AL., GELLHORN AND BYSE'S ADMINISTRATIVE LAW 767–901 (10th ed. 2003).

3. *See, e.g.*, Friends of the Earth, Inc. v. Laidlaw Envtl. Services, Inc., 528 U.S. 167 (2000); Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

4. *See, e.g.*, Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986). For a recent summary of the chaos in this field, and a noble and impressive (even if ultimately unpersuasive) attempt to resolve it, see James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643 (2004).

5. *See, e.g.*, Webster v. Doe, 486 U.S. 592 (1988).

difficult to conduct an Administrative Law class that does not spend a sizable percentage of its allotted time on such constitutional issues.

My focus in this Article is on how to teach the law of separation of powers in Administrative Law courses. This task poses a number of significant pedagogical puzzles for teachers and students alike. In terms of case outcomes, how does one explain to students that the President must be able to remove at will the postmaster (first class) of Portland, Oregon,[6] but need not be able to remove at will a special prosecutor who, in her defined sphere of jurisdiction, exercises more power than does the Attorney General of the United States?[7] How does one explain that a special trial judge of the United States Tax Court, who merely assists the regular Tax Court judges in their duties, is an "Officer[] of the United States"[8] under the Appointments Clause[9] but that an administrative law judge, whose word is binding law unless it is reversed by the head or heads of an agency, is not?[10] And how does one explain that the Seventh Amendment's ringing declaration of the right to jury trial in suits at common law[11] does not apply as long as Congress makes the "suit" triable before a politically controllable administrative tribunal rather than a real court?[12]

The methodological puzzles are even more vexing. How does one explain why the Supreme Court in one breath mechanistically applies the text of constitutional provisions, with apparent disdain for arguments based on the consequences of such wooden textualism,[13] and in the next breath fluidly applies consequentialist arguments, with apparent disdain for the constitutional text?[14] It is particularly challenging when the Court manages to employ both methodologies in cases decided on the same day of the same term.[15]

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

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

8. U.S. CONST. art. II, § 2, cl. 2.

9. Freytag v. Comm'r, 501 U.S. 868, 876–92 (1991).

10. Landry v. FDIC, 204 F.3d 1125, 1133–35 (D.C. Cir. 2000).

11. U.S. CONST. amend. VII.

12. Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442, 455 (1977).

13. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 134 (1976):

> We are also told . . . that Congress had good reason for not vesting in a Commission composed wholly of Presidential appointees the authority to administer the Act, since the administration of the Act would undoubtedly have a bearing on any incumbent President's campaign for re-election. . . . [S]uch fears, however rational, do not by themselves warrant a distortion of the Framers' work.

14. *See, e.g.*, Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 847–48 (1986):

> [R]esolution of claims such as Schor's cannot turn on conclusory reference to the language of Article III. Rather, the constitutionality of a given congressional delegation of adjudicative functions to a non-Article III body must be assessed by reference to the purposes underlying the requirements of Article III. This inquiry, in turn, is guided by the

These two methodologies for deciding separation-of-powers issues—the first focusing heavily on deductive arguments from text and the latter focusing heavily on arguments from practical consequences—are often described, respectively, as "formalism" and "functionalism." Perhaps the biggest challenge in separation-of-powers doctrine is providing useful accounts of these methodologies and of the circumstances under which they are likely to appear. And perhaps the biggest challenge in teaching separation-of-powers law is communicating to students something useful about these methodologies in one segment of one class day. It is an important challenge, because if one can understand the current domain of each methodology, one can go a long way toward understanding the otherwise bizarre pattern of case outcomes that one observes.

The first task is to construct useful definitions of formalism and functionalism. That task is made especially difficult by the notorious inability of self-proclaimed advocates of those approaches, in both the courts and the academy, to reach anything resembling a consensus about the correct understanding of those approaches—not to mention the obscurity that often reigns over particular definitions. Teachers and students in a one-semester Administrative Law course do not have the time to engage in detailed philosophical and jurisprudential parsing of dozens of conflicting definitions of poorly identified methodologies. Is there any way of cutting through the chaos in one class session or less without doing a severe injustice to either approach?

I believe so, though full disclosure demands the following admission: I am a committed (and many would say fanatical) formalist and thus am not a neutral observer of the methodological debate that I am about to describe. I consider the following account accurate and objective, but readers can make up their own minds.

The Constitution of 1788,[16] as amended, is a set of instructions about how to set up and operate a government. The people who drafted and ratified the document no doubt had expectations (possibly conflicting, possibly overlapping) regarding the likely consequences of following those instructions. But there is a conceptual difference between the instructions on the one hand and the consequences, or expectations of consequences, of following those instructions on the other. It is true that consequences or expectations might well play a role in *interpreting* or *understanding* the instructions, but that still

> principle that "practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III."

(citations omitted).

15. *Compare id.* at 847–48, 851, *with* Bowsher v. Synar, 478 U.S. 714, 726–34 (1986).

16. At least part of the Constitution became law for nine states on June 21, 1788. Gary Lawson & Guy Seidman, *When Did the Constitution Become Law?*, 77 NOTRE DAME L. REV. 1, 1 (2001).

leaves room for a clear distinction between the instructions and the consequences.

Formalism chooses the instructions rather than the consequences or expectations as the starting point for reasoning about federal governmental structure. Formalism takes the provisions of the Constitution of 1788 as the major premises of reasoning about separation of powers and tries to deduce from those premises subsidiary propositions about the constitutionality of various institutions and practices. Formalism thus follows what ordinary people, uncorrupted by advanced degrees, would likely regard as the standard model of constitutional reasoning: take the Constitution of 1788, place it alongside the governmental institution in question, and determine whether the latter is consistent with the former. The Constitution of 1788 is the starting point in this reasoning. It is the baseline against which modern institutions and practices must be judged. In principle, any modern institution is fair game for invalidation under a formalist approach. In practice, virtually the entire structure of the modern administrative state is either suspect or flagrantly unconstitutional under any plausible formalist account.[17]

Functionalism reverses the order of the argument. Functionalism starts with the constitutionality of some important subset of modern institutions as the major premise of constitutional argument about governmental structure. Propositions about these institutions serve functionalism as postulates—that is, as propositions that *must* be accepted as true by any viable constitutional theory. There are three, and perhaps four, such propositions that together constitute the basic contours of functionalism:

1. The federal government has near-plenary regulatory power, or at least enough regulatory power to reach manufacturing, contracting, and most economic activity.

2. Congress has near-plenary power to delegate its near-plenary legislative power to other actors.

3. Congress may combine legislative, executive, and judicial functions in a single administrative entity.

4. It is permissible to insulate administrative decision makers from political influence.

Together, these propositions define the modern administrative state. If one rejects any of these propositions, one will inflict major damage on modern institutions of governance. If Congress is limited only to regulation of "Commerce among the several States" (where "Commerce" means

17. *See* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994); 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, 11 (1994).

"Commerce" and not "all gainful economic activity"),[18] and/or cannot issue vacuous commands to administrators but must itself make the important legislative decisions,[19] and/or cannot allow administrative bodies freedom to cross the lines among legislative, executive, and judicial power, then nothing remotely resembling modern administrative government could survive. Everybody knows this.[20] It is less clear that rejection of the fourth principle—insulation of administrators from political control—is absolutely necessary to modern governance. If independent agencies were ruled unconstitutional tomorrow, it would require some reworking of modern institutions, but the world as we know it would go on. But the first three propositions are clearly constitutive of modern American government, and the fourth is long enough established to merit at least an honorable mention.

For functionalists, these propositions, and the modern institutions that they validate, are the baseline against which the Constitution, or at least constitutional theory, must be judged. Any theory of constitutional interpretation, either in general or of a particular clause, that challenges these basic postulates and thus leads to the invalidation of a substantial portion of the modern administrative state is by definition wrong under functionalism. The whole point of functionalism, in other words, is to provide a constitutional justification for the modern administrative state. The constitutionality of the basic institutions of modern governance is the starting point of functionalist constitutional argument rather than a testable, and possibly false, conclusion. This explains why functionalism is so hard to pin down as a methodology. It is not in fact a single methodology (though various functionalists might indeed be committed to various methodologies that are consistent with, though not entailed by, functionalism), but it is instead a set of *conclusions* about what *must* be constitutionally permissible.

Although ordinary people, again uncorrupted by advanced degrees, might find it odd to reason backwards from conclusions to premises, academics with corrupting degrees a' plenty will recognize this approach from numerous other contexts. Many theologians do not consider God's goodness to be an open question. They take God's goodness as a given, and if there seems to be

18. *See generally* Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847 (2003); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001).

19. *See generally* Gary Lawson, *Discretion As Delegation: The "Proper" Understanding of the Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235 (2005); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002).

20. For a refreshingly frank admission, see *Mistretta v. United States*, 488 U.S. 361, 372 (1989) ("[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.").

evidence that calls this goodness into question, the evidence must be made to conform to the theory of God rather than vice versa.[21] In the realm of epistemology, Immanuel Kant did not ask *whether* it was possible to have the kind of knowledge of mathematics and physics that ordinary people regard as uncontroversial but rather took such knowledge as a starting point.[22] In a move known as the transcendental deduction, he then sought to construct a theory of knowledge that showed *how* such knowledge was possible.[23] More recently, the same methods, with some modest modifications, were employed by John Rawls to try to legitimate the modern welfare state. For Rawls, the legitimacy of the redistributive state is (at least in the first instance) a premise rather than a conclusion of political theory—the task of political theory is to explain *how* that conclusion is validated.[24] Under this approach, the cherished beliefs of Ivy League liberals are not objects of investigation that might actually prove to be wrong, but they are instead the standards by which theories must be judged (though if the only theory that will yield such beliefs is just too absurd even for the sensibilities of Ivy League liberals, that sends us into "reflective equilibrium," where the Ivy League liberal must ultimately decide wherein truth resides).[25]

Functionalism similarly starts with a specific conclusion—the basic institutions of the modern administrative state are constitutional—and then seeks to build a theory around that conclusion. Any theory that does not yield that particular conclusion is by definition a bad constitutional theory. There is ample precedent in the history of thought for this mode of reasoning. That does not make it *good* reasoning, but it does establish at a minimum that it is not *bizarre* or *inexplicable* reasoning.

Does that mean that, for functionalists, every institution of the modern administrative state is by definition constitutional? Not at all. It means only that certain core institutions of the modern administrative state such as a national government of near-plenary powers, the permissibility of broad delegations to agencies, and the combination of legislative, executive, and judicial functions in administrative agencies are off the table. These institutions are constitutional by definition, literally by definition, as they

21. Note to philosophers of religion who consider this a gross mischaracterization of the complex enterprise of theodicy: Yes, yes, but remember that we have to teach this stuff in one class session or less, so get over it.

22. *See* IMMANUEL KANT, PROLEGOMENON TO ANY FUTURE METAPHYSICS 22–23 (Lewis White Beck ed. 1950).

23. Note to epistemologists who object to a one-sentence definition of one of the most complex constructs in the history of thought: Yes, yes, but remember that we have to teach this stuff in one class session or less, so get over it.

24. *See* JOHN RAWLS, A THEORY OF JUSTICE 19–21, 579–80 (1971).

25. *See id*. at 47–50.

define the practical meaning of the Constitution. But other, less fundamental institutions can be unconstitutional under functionalism if they are inconsistent with either the logical implications of the core institutions, the text of the Constitution, or whatever is regarded as relevant for constitutional meaning when the integrity of modern governance is not at stake. For instance, functionalists can agree wholeheartedly with formalists that Congress cannot directly appoint executive officials.[26] This conclusion in no way threatens the basic integrity of modern administrative governance, and it does not call into question the legitimacy of the core institutions of the modern state. Functionalists might even be able to agree with formalists that the legislative veto is unconstitutional.[27] Invalidating the legislative veto certainly sent shockwaves through the government, but it did not seriously threaten the integrity of the basic institutions of modern governance. The administrative state trundles along with or without legislative vetoes. Indeed, legislative vetoes might even be inconsistent with the core premises of modern governance if one regards them as an undue extension of political influence into the agency process. Functionalists, it seems to me, can go either way on the legislative veto and still be good functionalists. Finally, functionalists need not object to the Supreme Court's recent modest revival of the doctrine of enumerated powers. Rulings that Congress cannot enact the Violence Against Women Act[28] or the Gun-Free School Zones Act[29] simply do not affect the missions of mainstream federal agencies as long as the holdings are confined to the periphery of non-economic activity, as they seem to be thus far. If the Court were once again to hold that manufacturing is not commerce within the meaning of Article I, section 8,[30] that would be inconsistent with functionalism, but no one expects any such thing to happen.

The mystery of the Supreme Court's apparent vacillation between formalism and functionalism can now be solved. There is no vacillation. The Court is solidly, consistently, unshakably functionalist. When the basic institutions of modern administrative governance are at stake, the Court closes ranks and hurls the constitutional text into the Potomac River. When subsidiary institutions are at stake, the various Justices are free to indulge their own interpretative preferences, which for some involve deductive application of textual instructions and for others involve reasoning from consequences. One can, if one wishes, use "formalism" and "functionalism" to describe the various methodological approaches at work in these subsidiary cases—as long

26. *See generally* Buckley v. Valeo, 424 U.S. 1 (1976).
27. *See generally* INS v. Chadha, 462 U.S. 919 (1983).
28. United States v. Morrison, 529 U.S. 598 (2000).
29. United States v. Lopez, 514 U.S. 549 (1995).
30. United States v. E.C. Knight Co., 156 U.S. 1, 12–13 (1895).

as one does not try to put such cases in the same category as those that challenge basic institutions of governance.

Thus, formalism and functionalism are distinguished more by their starting points than by the methods of reasoning that are employed once those starting points are established. So where do methods of reasoning fit in? To what extent are formalism and functionalism tied to more general theories of constitutional interpretation?

When discussing formalism, I have been careful to refer always to the "Constitution of 1788." Does that mean that formalism is necessarily an originalist position? The question is more complicated than it might first seem. Not all originalists are formalists, and not all nonoriginalists are functionalists (or, put another way, not all formalists are originalists and not all functionalists are nonoriginalists). Formalists and functionalists alike can be either originalist or nonoriginalist in their basic orientation. The fundamental question is whether they take the core institutions of modern administrative governance as an object or starting point of constitutional inquiry.

Justice Scalia, for instance, is properly classified as an originalist functionalist although he is generally regarded as an arch-formalist. His general interpretative orientation is originalist,[31] but he does not regard the constitutionality of basic institutions of modern administrative governance as open to inquiry. That is clear with respect to the nondelegation doctrine,[32] and he has indicated no desire to revisit the foundational cases for the modern expansion of federal power.[33] On the other side, Professor Martin Redish is a prime example of a nonoriginalist formalist. Professor Redish rejects originalism (or at least what he understands to be originalism)[34] while being willing to take on even the most established premises of modern administrative governance, such as the nondelegation doctrine[35] or the combination of functions within agencies.[36]

Of course, there is more than a small amount of contingent overlap between originalism and formalism on the one hand and nonoriginalism and

31. *See generally* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849 (1989).

32. *See* Whitman v. American Trucking Ass'ns, 531 U.S. 457 (2001); Mistretta v. United States, 488 U.S. 361, 415–16 (1989) (Scalia, J., dissenting).

33. In this respect, he is most unlike Justice Thomas, who is the lone current Justice who might properly be called a formalist. *See* Sabri v. United States, 124 S. Ct. 1941, 1949–51 (2004) (Thomas, J., concurring) (expressing doubts about the soundness of modern Commerce Clause jurisprudence); *American Trucking Ass'ns*, 531 U.S. at 487 (Thomas, J., concurring) (expressing willingness to reconsider the Court's nondelegation doctrine precedents).

34. MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 6–16 (1995).

35. *See id*. at 136–37.

36. E-mail from Martin Redish, Professor of Law, Northwestern University School of Law (Jan. 3, 2005) (on file with author).

functionalism on the other. From an originalist standpoint, the Constitution of 1788 was constructed precisely to prevent the emergence of anything resembling the modern administrative state. To get to where we are today required the systematic dismantling of virtually all of the structural provisions written into the original document. An originalist can be a functionalist only by choosing precedent over the Constitution (as has Justice Scalia) or by applying originalism badly. But there are plenty of originalists out there who are willing to do either or both of these things, so one cannot draw a direct line between originalism and formalism.

The relationship between nonoriginalism and functionalism is a bit more complicated, simply because "nonoriginalism" is not a theory of interpretation. It is a term that refers to a whole class of theories of interpretation that are united only by what they oppose. As Professor Redish demonstrates, one certainly can be a nonoriginalist formalist if one believes, for instance, that there are sound normative reasons, having nothing to do with any theory of original meaning, for adhering to the Constitution of 1788's basic structural scheme. In the real world, nonoriginalist formalists such as Professor Redish are very rare. But that is purely a contingent consequence of the interpretative theories that nonoriginalists select.

So yes, it is possible to say something useful about separation-of-powers doctrine in a fashion that is less daunting, even if only slightly so, than, for example, the *Critique of Pure Reason*.[37] The most important point to keep in mind about the story is that one has already gotten a very good peek at the ending.

37. IMMANUEL KANT, CRITIQUE OF PURE REASON (F. Max Müller trans. 1966).