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Gary S. Lawson

Boston University School of Law

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OPTIMAL SPECIFICITY IN THE LAW OF SEPARATION OF POWERS: THE NUMEROUS CLAUSES PRINCIPLE¹

Gary Lawson*

In *Separation of Powers as Ordinary Interpretation*,² Professor John Manning levels a broad, and largely justified, criticism against both formalist and functionalist approaches to separation of powers cases, at least as those approaches are frequently employed by jurists.³ Manning points out that each methodology's adherents often commit a "generality-shifting" error that can either overstate or understate the specificity with which the Constitution addresses various separation of powers problems. Manning urges everyone to reason from the constitutional text rather than from free-floating principles or purposes, in much the same manner as, and for essentially the same reasons that, modern methods of statutory interpretation center primarily on textual analysis. The constitutional text contains numerous clauses regarding the structure and operations of the federal government, which resolve structural issues with widely varying degrees of specificity, and to try to impose theoretical preconceptions about separation of powers onto those resolutions risks undoing the Constitution itself. One can believe (perhaps even correctly) that the Constitution's prescribed degree of specificity in any given instance might be suboptimal from some external perspective, but that normative stance is not an *interpretative* ground for ignoring the Constitution's numerous separation of powers clauses. Accordingly, I will call Manning's text-based approach to the separation of powers "the numerous clauses principle."

So framed, I think that Manning is absolutely right. It makes no interpretative sense to read some principle of "optimal specificity" into the Constitution to displace the varied principles of specificity reflected in the many clauses and combinations of clauses that comprise the actual document. Manning is correct that practitioners of both functionalism and formalism are susceptible to this "optimal specificity" fallacy,

¹ With apologies to Tom Merrill, Henry Smith, and a lot of old Roman property lawyers.

* Professor of Law and Michaels Faculty Research Scholar, Boston University School of Law.

² John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939 (2011).

³ Manning is primarily discussing formalism and functionalism as they appear in judicial opinions. See *id.* at 1949. Academic separation-of-powers theories may or may not be equally subject to Manning's criticisms. In all likelihood, the more closely that an academic theory tries to track real-world case law, the more prone it will be to committing generality-shifting errors, if only through inadvertent incorporation. So those of us who blithely ignore the real world are probably safe.

and his simply outstanding article should serve as a warning to the entire separation of powers community.

Nonetheless, keeping entirely within the realm of ordinary interpretation, one can find a formalist baby in there with the generality-shifting bathwater. There is no overarching constitutional principle of “optimal specificity,” but that does not mean that there cannot be other overarching principles that are fairly derivable from the text and are therefore consistent with the “numerous clauses principle.” Manning does not directly dispute this claim; indeed, he affirmatively invites formalists to spell out the textual and historical principles that they believe ground any propositions about the separation of powers that are not traceable to specific constitutional provisions. At a number of points in his discussion, however, he intimates a strong skepticism about finding any such propositions of consequence.⁴ In Part I of this commentary, I explain why I think that the Constitution is a bit more informative about the range of permissible governmental structures than Manning appears to believe. In Part II, I address a potential problem that Manning might have with his primary target audience, which is real-world lawyers and judges rather than academics. When judges apply functionalist or formalist reasoning to decide cases, they may be engaging in a qualitatively different activity than Manning assumes, and his careful interpretative analysis may therefore be largely beside the point.

I. HIDDEN ABSTRACTIONS

Suppose that in any case currently pending on the Supreme Court’s docket, before a decision is rendered Congress passes and the President signs a statute that proclaims: “In docket number xx-xxxx, the Supreme Court shall declare the plaintiff [or defendant] to be the winner.” The Supreme Court possesses the “judicial Power”⁵ to decide the case, but Congress (subject to the presentment requirement⁶) has power “to make all Laws which shall be necessary and proper for carrying into Execution” its own powers plus “all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”⁷ The statute instructing the Court how to decide the case is, so argues Congress, enacted “for carrying into Execution” the judicial power. There is no specific clause in the Constitution that explicitly addresses the relationship between Congress

⁴ See, e.g., *id.* at 1947–48.

⁵ U.S. CONST. art. III, § 1.

⁶ See *id.* art. I, § 7, cls. 2–3.

⁷ *Id.* art. I, § 8, cl. 18.

and the Supreme Court with respect to the manner in which cases are decided. Is the law constitutional?

The answer (“no!”) seems, and is, obvious. But articulating *why* the obvious answer is correct is not so simple — unless one is willing to give some serious content to the Necessary and Proper Clause and the Vesting Clauses, which is precisely the path that Manning seems reluctant to pursue. One could find such a statute unconstitutional because it is not “necessary . . . for carrying into Execution” the judicial power, because it is not “proper for carrying into Execution” the judicial power, or because it is not really “for carrying into Execution” the judicial power at all. To invoke any of these reasons, however, entails giving a measure of bite to the Necessary and Proper Clause (and, either derivatively or principally, the Article III Vesting Clause) that goes beyond the more specific “numerous clauses” in the Constitution addressing governmental structure. One must read into the Constitution some hidden abstractions that impose at least some substantive limitations on the ability of Congress to structure governmental institutions.

One could, of course, deny that the Necessary and Proper Clause has any such bite and affirm that Congress can indeed tell courts how to decide specific cases — and presumably tell the President as well how to conduct specific investigations and prosecutions. But while it is more than a bit unseemly for me, of all people, to try to dissuade anyone from adopting implausible-sounding positions, any such position sounds implausible. It is theoretically possible to read the “judicial Power” as the power to decide cases in accordance with such traditionally accepted methods as the courts see fit to adopt *provided* that Congress does not directly prescribe an outcome in the particular case (and similarly to read the “executive Power” as a presumptive power to control investigations and prosecutions unless specifically directed otherwise by Congress), in which case my hypothetical statute would pose no problem, as Congress would simply be implementing that particular conception of the “judicial Power.” It is very difficult, however, to read the Constitution as a whole, to consider how that document would have been understood by a reasonable observer at the time of ratification, and then to conclude that it allows Congress to control the decisionmaking processes of the other departments.

It is difficult even when one considers that the drafters and ratifiers *could* have inserted, but did not insert, a specific provision forbidding direct congressional interference with the decisionmaking of other departments, and *could* have inserted, but did not insert, a generalized “separation of powers clause” analogous to those included in some other founding-era American constitutions. Certainly, as Manning repeatedly emphasizes, the specificity of many of the provisions in the Constitution counsels against readily reading nonspecified restrictions into the document. By the same token, however, the textual requirement

that congressional laws implementing federal powers be objectively (and not just in the judgment of Congress) “necessary and proper for carrying into Execution” those powers counsels against giving Congress a blank check to control the decisions of other actors.⁸ Nor is there much point in specifying indirect mechanisms for protecting decisional independence, such as guarantees against diminishment in salary⁹ and limitations on congressional removal,¹⁰ if there is no underlying decisional independence to protect. And if the Necessary and Proper Clause is a reflection of fiduciary or agency norms, so that Congress must legislate for the other departments as a fiduciary must act for its principal,¹¹ that consideration also suggests strongly that Congress should facilitate rather than dictate the exercise of functions by the other departments. Thus, using nothing more dramatic than ordinary principles of interpretation, the most likely conclusion is that a reasonable observer in 1788 would have found that Congress does not have the power to tell the courts and the President how to do their respective constitutional jobs (and vice versa).

I have elsewhere, following the lead of Professor Martin Redish,¹² called this notion the principle of “decisional independence.”¹³ There is no express “decisional independence clause” in the Constitution similar to the Appointments Clause or the Presentment Clause. But the absence of such an express clause does not mean that there is no “decisional independence clause” — it just means that it is not necessarily similar to those other clauses, in the sense that it is implicit rather than explicit. The obvious textual home for such a hidden abstraction is either the requirement in the Necessary and Proper Clause that laws for executing federal power be “necessary and proper” for that purpose or the definitions of “executive Power” and “judicial Power” in the Article II and Article III Vesting Clauses (or perhaps all of the above). For my purposes, it does not really matter where one locates the principle of decisional independence as long as it is located somewhere.

⁸ One could easily construct horrific hypotheticals in which Congress tells the courts how to decide cases involving Congress’s own powers.

⁹ See U.S. CONST. art. II, § 1, cl. 7; *id.* art. III, § 1.

¹⁰ See *id.* art. II, § 4; *id.* art. III, § 1.

¹¹ There is very strong evidence, from several different and discrete directions, that the Necessary and Proper Clause embodies precisely such a set of fiduciary norms. See generally GARY LAWSON, GEOFFREY P. MILLER, ROBERT G. NATELSON & GUY I. SEIDMAN, *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* (2010) (identifying the fiduciary origins of the Necessary and Proper Clause in background principles of agency law, administrative law, and corporate law).

¹² Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 *MERCER L. REV.* 697, 699 (1995).

¹³ Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 *CONST. COMMENT.* 191, 205 (2001).

Of course, to acknowledge the existence of such a principle is not to acknowledge any particular conception of the principle's scope. There is a lot of distance between saying that Congress cannot tell the federal courts how to decide specific cases and saying that Congress cannot give an executive officer some measure of tenure or that Congress cannot tell courts what kinds of evidence they can consider when making findings of fact. Even if I am right that the Constitution does contain an abstract "separation of powers clause" of sorts, that says nothing about how broadly or deeply that hidden abstraction limits Congress's power to structure the government. All true. Manning is right to challenge overbroad claims that cannot be traced, through ordinary interpretation, to the constitutional text. My narrow point is only that ordinary interpretation does not necessarily lead to the conclusion that the only limitations on Congress's power to structure the federal government are the Constitution's specific "numerous clauses." And notice that in order to validate the principle of decisional independence, one does not need to invoke any grand underlying conception of the separation of powers that necessarily commanded a consensus during the founding era. Manning has aptly demonstrated (as have others before him) that it is very unlikely that any such consensus existed.¹⁴ The principle of decisional independence, at least in its most obvious applications, appears to be a principle upon which all plausible theories of separated powers that could conceivably have driven the federal Constitution would converge.¹⁵

Nothing that I have said thus far is inconsistent with the main thrust of Manning's article. Indeed, Manning does not even insist that formalists are necessarily wrong when they contend, as do virtually all of them, that the President has an unlimited constitutional power to remove executive officials.¹⁶ He contends only that they often assume their case too quickly without mustering the necessary proof that such a proposition is derivable from the text through ordinary interpretation.

Nonetheless, lying fairly shallowly beneath the methodological surface are some substantive assumptions about the appropriate role of hidden abstractions in resolving separation of powers problems. Manning appears to be generally dubious about the use of such abstractions for at least two reasons, one of which I think is wrong and one of which I think is right but which points to a very different, and very serious, practical problem with Manning's project.

¹⁴ Manning, *supra* note 2, at 1993–2005.

¹⁵ Whether the principle, once validated, is limited in scope only to its most obvious applications or whether it can then be extended to applications that would not necessarily fall within an overlapping consensus is a key question of interpretative theory that I do not pursue here.

¹⁶ I am officially agnostic on that question.

First, Manning invokes what amounts to a burden-of-proof rule against those who would use the bare Vesting Clauses or Necessary and Proper Clause as checks on Congress's power to structure the government: "If a piece of implemental legislation does not contradict a particular understanding of the 'executive' or 'judicial' powers, then constitutional interpreters have no basis for displacing the Congress's default authority under the Necessary and Proper Clause to compose the government."¹⁷ On two separate occasions, Manning remarks that one "cannot beat something with nothing,"¹⁸ meaning that the burden is on the opponent of congressional legislation to show that such legislation violates some textually derivable separation of powers limitation.¹⁹ I beg to differ.

It is a basic principle of epistemology that he who asserts the existence of something bears the burden of proof.²⁰ In the context of a government of limited and enumerated powers, that means that the burden of proof is always, at least initially, on the proponent of federal governmental power to show that the acting institution of the national government has the enumerated authority to perform the act in question.²¹ It is therefore incumbent upon Congress, whenever it acts to structure the federal government, to show that each and every portion of each and every statute is affirmatively "necessary and proper for carrying into Execution" some federal power. If there is indeterminacy about the appropriate scope of that clause, any such indeterminacy cuts *against* rather than *for* claims of legislative power. How deeply it cuts depends upon the standard of proof to which proponents of federal power should be held. There are many possible standards of proof that one could adopt: do exercises of authority under the Necessary and Proper Clause have to be validated beyond a reasonable doubt, is it sufficient that they be non-laughable, or is the appropriate degree of proof somewhere in between? Neither Manning nor I have any great

¹⁷ Manning, *supra* note 2, at 2005.

¹⁸ *Id.* at 1986 n.244, 2005.

¹⁹ *Cf. id.* at 2024 (noting that a court inclined to invalidate a practice on separation of powers grounds should ask "whether a *specific* historical understanding of the theory and practice of legislative power would preclude that form [of legislative action]").

²⁰ There is good warrant for this principle. The existence of any entity has consequences, and one can look for those consequences as evidence of the entity's existence. Nonexistence, however, does not always have consequences, so the absence of evidence is *prima facie* proof of nonexistence. There is obviously much more that needs to be said about any such general principle, but that would require a separate article — and probably an article written by a philosopher rather than by me.

²¹ For a more extended discussion of this proposition, see Gary Lawson, *Legal Indeterminacy: Its Cause and Cure*, 19 HARV. J.L. & PUB. POL'Y 411, 424–28 (1996).

desire to engage that problem here.²² For my purposes, it is enough simply to point out that proponents rather than opponents of federal power bear the burden of indeterminacy in the scope of enumerated federal power, however heavily that burden weighs. The constitutional rule for legislative regulation of other departments is: when in doubt, don't. Accordingly, a background norm of separation, which Manning rightly identifies as part of the formalist superstructure, can be derived from the Constitution's baseline burden-of-proof rules even in the absence of some overarching theoretical conception that can fairly be said, as an interpretative matter, to inform the document.

Manning's concerns about burdens of proof suggest a second, related concern about reading content into the Constitution's vague structural clauses that Manning does not expressly advance but which someone sympathetic to his approach could easily put forth: doesn't the formalist project imply a relatively freewheeling judicial power to second-guess the political departments on matters of structure? Manning repeatedly points out that advocates of an abstract separation of powers principle typically are reluctant to spell out details.²³ Before courts declare statutes unconstitutional and refuse to treat them as law, wouldn't it be a good idea for them to have something a bit more substantial to go on than a hidden abstraction about separation of powers buried in the Vesting Clauses or Necessary and Proper Clause plus a generalized burden-of-proof norm?

For those of us who focus solely on interpretation and are not particularly concerned with how or whether our interpretative conclusions translate into real-world adjudication, those kinds of questions are non sequiturs. What matters is constitutional meaning, not how judges should behave. But I strongly doubt whether I am Manning's target audience. His article is addressed primarily to judges, and to academics who seek to influence judges in the real world, and in that context concerns about judicial role are quite pertinent and even dominant. And that is the second potential weak spot in Manning's armor: Manning is setting forth an agenda for the use of constitutional *interpretation* in the service of constitutional *adjudication*, and it is doubtful at best whether constitutional adjudication, at least in the separation of powers world, always or even frequently has much to do with interpretation. His arguments are most effective against the people who are least likely to pay them heed. Or so I will now suggest.

²² I have preliminarily engaged it elsewhere. See Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859 (1992). Hopefully, someone a lot smarter than I am will eventually give the topic the book-length treatment that it deserves.

²³ See, e.g., Manning, *supra* note 2, at 2023 n.414.

II. ADJUDICATION WITHOUT INTERPRETATION

Manning's project assumes that constitutional interpretation is directly relevant to constitutional adjudication — that the Constitution's meaning normatively should, and descriptively does, have strong influence on how cases are decided. His argument's effectiveness (though not necessarily its intellectual merit) depends on the proposition that insights about constitutional meaning, drawn from whatever perspective is thought to yield insights about constitutional meaning, are important for adjudicative theory.

So framed, the assumption seems trivial. People can and do disagree about interpretative theory — about both its fine points and its grosser points — but surely almost everyone agrees that adjudication ought to be based on whatever theory of interpretation they happen to adopt. And surely almost everyone agrees that when the Supreme Court decides separation of powers cases, it is engaging in some form of constitutional interpretation. One may utterly loathe the particular theory of interpretation applied in any particular case by any particular group of Justices, but it seems odd to question whether interpretation is actually happening.

I am not at all sure, however, to what extent interpretation and adjudication go together in real-world separation of powers litigation. There is at least some reason to think that both formalists and functionalists, when they are deciding cases, are not actually engaged in what either Manning or I would call interpretation. To be clear: I am not suggesting here that judges deciding separation of powers cases generally or often interpret poorly (though I am happy to suggest that elsewhere). I am suggesting that judges deciding separation of powers cases generally or often do not interpret at all. Interpretation simply is not an apt description of the activity or enterprise in which the Court frequently engages. Accordingly, arguments couched in terms of interpretative theory are unlikely to have a lot of traction in the real world.

If I doubt whether courts are interpreting when they decide cases, what exactly do I think that they are doing? The answer is: They are adjudicating. They are deciding cases. One way to decide constitutional cases, of course, is to interpret the Constitution and then use that interpretation to guide (or perhaps even dictate) the process of adjudication. But that is hardly the only way to adjudicate. One could perfectly well adjudicate without interpreting by, for example, deciding cases based on the identity of the parties, a coin flip, naked policy preferences, or a host of other decisionmaking methodologies that do not involve, in any significant way, interpreting the Constitution. If one is deciding cases by flipping coins, for instance, it will not be of any great consequence whether any particular method of interpreting the Constitution does or does not commit a generality-shifting fallacy. That fallacy might be important to scholars, and it might be important to (ac-

tual or hypothetical) judges who wish to adjudicate by interpreting, but it would not be important to judges who wish to adjudicate without interpreting.

Quite obviously, the Supreme Court does not decide separation of powers cases by flipping coins. Nor do I think that one can accurately describe the Court's work product by reference to the identity of the parties or naked policy preferences. But I am willing tentatively to suggest — not confidently to assert, but tentatively to suggest — that the best account of at least a good portion of separation of powers law results from adjudicative principles that are not interpretative. That does not mean that interpretation is irrelevant to the adjudicative process, but it does mean that interpretation may well be the handmaiden of adjudication rather than vice versa. To the extent that the Court's work product claims to involve interpretation, perhaps the interpretation is being driven by adjudication rather than the other way around.

As Manning observes, formalism and functionalism are both difficult to define with any precision.²⁴ There are a great many people who claim to be (or are claimed by others to be) adherents of these methodologies, and those people disagree among themselves along so many dimensions that, at best, the terms can serve only as broad umbrellas or family resemblances. Nonetheless, if one limits oneself to real-world decisionmaking, which is Manning's principal focus, one can fairly make some generalizations that capture at least much of what drives formalist and functionalist adjudication.

Functionalism is actually relatively easy to diagnose. Functionalist adjudication exists in order to validate the essential institutions of the modern administrative state. One should be clear about the cause-effect relationship that I am asserting. I am not claiming that functionalism, as an interpretative theory, has the effect of validating the administrative state (though that is trivially true). Rather, I am claiming that the validation of the administrative state is the conclusion, or rather the starting point, from which functionalism is derived. The contours of the administrative state are not shaped by functionalism; functionalism is shaped by the contours of the administrative state.

To be sure, few functionalists would put the point this bluntly. But I will stick my neck out and say that almost all functionalists will put the point more gently if pressed. It is commonplace for functionalists to say (quite correctly, as it happens) that formalism simply cannot describe the real world that we observe.²⁵ The obvious implication is

²⁴ See Manning, *supra* note 2, at 1949.

²⁵ See, e.g., Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions — A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 492 (1987).

that describing the real world that we observe is as or more important than interpreting the text. In the context of adjudication, the functionalist desideratum is to preserve the essential structure of modern administration. The legitimacy of near-plenary federal legislative power, broad delegations of that power under vacuous standards, and the combination of legislative, executive, and judicial functions in single agencies simply are not on the table for functionalists. Those institutions and mechanisms are the starting points for constitutional reasoning, not the end products of some interpretative endeavor. Functionalist theories of interpretation are crafted to yield these conclusions; the conclusions are not crafted from the theories. Perhaps the most obvious example from the case law is Justice Blackmun's frank acknowledgement that the Court's nondelegation 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."²⁶

I have elsewhere explored this idea of functionalism at greater length — and have suggested that the idea of constructing a theory to yield conclusions has quite an impressive intellectual pedigree across a wide range of disciplines.²⁷ It *does not* entail that interpretation plays no role in adjudication, nor does it entail that functionalists can never find institutions of modern administrative governance unconstitutional. It maintains only that over a reasonably broad range of especially important questions, interpretation follows adjudication rather than vice versa. In cases in which the basic institutions of modern governance, as opposed to collateral institutions such as the legislative veto,²⁸ are at issue, functionalist adjudication is driven by concerns about adjudication, not concerns about interpretation. Arguments grounded in interpretative theory are not relevant in that setting.

Even if my account of functionalism is correct, Manning's project has considerable significance for, and bite against, functionalists. Many separation of powers cases do not involve institutions basic to the administrative state, in the sense that if those institutions were declared unconstitutional, the essential structure of modern administration would not be torn asunder. In those cases, interpretation may

²⁶ *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

²⁷ Gary Lawson, *Prolegomenon to Any Future Administrative Law Course: Separation of Powers and the Transcendental Deduction*, 49 ST. LOUIS U. L.J. 885, 887–91 (2005).

²⁸ The legislative veto is "collateral" in the sense that basic institutions of modern administrative do not depend on it — as evidenced by the fact that the administrative state has done just fine without it. By contrast, if one were to hold that there could be no delegations of legislative power, or that the same body could not exercise legislative, executive, and judicial power simultaneously, modern administration could not survive.

very well play a crucial adjudicative role, so that arguments about proper interpretation are highly relevant. I mean only to say that the effective domain of Manning's project might be limited to a subset of the separation of powers disputes that arise. Within that domain, its power is considerable. Outside of that domain, its power is suspect.

What about formalists? What devious hidden adjudicative agenda do I accuse them of harboring?

As with functionalists, there is nothing either devious or hidden about the formalist adjudicative agenda. Formalism, as with much of originalism more generally, is often focused on, and perhaps motivated by, concerns about judicial discretion.²⁹ Formalism as a theory of adjudication may very well be, at least over a certain range, a mechanism for instantiating a theory of the judicial role.

The acid test for this hypothesis would be the nondelegation doctrine. When he was a law professor, Justice Scalia was a proponent of reinvigorating the nondelegation doctrine.³⁰ Since becoming a Justice, he has morphed into one of the Court's strongest *opponents* of applying the nondelegation doctrine,³¹ at least in that doctrine's traditional guise of purporting to limit the kind and quality of discretion that Congress can permissibly vest in executive and judicial actors.³² The reasons for his turnaround are quite apparent: "But while the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by courts."³³ In other words, Justice Scalia decides nondelegation cases in favor of the government primarily because of a theory of the judicial role, *not* primarily because of an interpretation of the Constitution. If Justice Scalia were a member of Congress, would he think it improper to vote against a vacuous bill on the ground that courts would have a hard time formulating manageable standards for overturning enacted legislation? I would surmise not; I can easily see Senator Scalia voting against the Clean Air Act on delegation grounds. If that surmise is correct, then adjudication is being driven by something other than interpretation.

²⁹ See Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 714 (2011) ("Originalism was born of a desire to constrain judges" (citation omitted)).

³⁰ See Antonin Scalia, *A Note on the Benzene Case*, REG., July-Aug. 1980, at 25.

³¹ See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001).

³² In *Mistretta v. United States*, 488 U.S. 361 (1989), Justice Scalia dissented from the Court's judgment that the United States Sentencing Commission could promulgate binding sentencing guidelines solely because the Commission had been given rulemaking authority divorced from any law-execution functions. See *id.* at 420-21 (Scalia, J., dissenting). As long as the agency's rulemaking or other interpretative activity is formally tied to some nominally executive task, however, Justice Scalia will not require Congress to cabin the agency's discretion with any particular degree of specificity. See *id.* at 415-16.

³³ *Id.* at 415.

To be sure, interpretation and adjudication might converge if the theory of adjudication was itself derived from interpretation. If, for example, the Constitution contained a “judicial restraint” clause (or a “judicial activism” clause), one could derive an adjudicative theory of the judicial role directly from interpretation. The Constitution, however, contains no such clauses. And to read one into the Constitution would be precisely the kind of move against which Manning has persuasively warned.

As with functionalists, it is surely not true that formalists decide every case based on noninterpretative considerations. To whatever extent interpretation drives formalist adjudication, Manning’s comments have serious implications for formalists. But to the extent that formalist adjudication drives interpretation, it is not clear that Manning’s project advances the ball. His calls for care and modesty in using hidden abstractions to invalidate laws are consistent with, and indeed strongly reinforce, a formalism that is driven by adjudicative concerns about an unduly active judicial role. But in that case Manning’s project is unnecessary, because formalists will already be doing, for their own reasons, what Manning prescribes.

Manning takes specific issue with the eagerness with which some formalists find unconstitutional any congressional limits on presidential removal power. Could not his words of caution serve to reign in formalist judges who are inclined to that particular generality-shifting move? Perhaps, but why do they make that generality-shifting move in the first place? If it is because of an interpretative conclusion, then they must indeed reckon with Manning’s challenge and explain more carefully the textual and historical basis for that conclusion. But perhaps a reason for advocating an absolute ban on removal limitations is not interpretative but adjudicative. Such a flat ban is easy to administer and thus minimizes judicial discretion. Judicial restraint, after all, can be measured in any number of ways, including but not at all limited to the number of times in which courts invalidate legislative action. A perfectly sensible metric for judicial restraint is how effectively judges bind their own discretion. A regime that strikes down a great many laws predictably and mechanically is, by some completely sensible metrics, more restrained than a regime in which laws are invalidated only occasionally but by a looser, less rule-bound process. Unless one takes the view that *no* limitations on removal are ever problematic, one must formulate some standard for determining which limitations are impermissible. If a formalist judge believes that any such standard is going to raise (perhaps less dramatically) the same kinds of concerns about manageability that worry Justice Scalia in the nondelegation context, then there are formalist reasons to adopt a hard-line no-limitation position, even if one believes in one’s heart of hearts that the interpretative case for such a position is weak.

The extent to which functionalists or formalists are actually driven by noninterpretative adjudicative considerations is difficult, and perhaps impossible, to determine.³⁴ It may well be that the range of cases in which interpretation plays no or only a modest role in decisionmaking is very small, in which case the significance of Manning's article will be commensurate with its intellectual heft. I generally try to avoid normative claims, but I will go out on a limb here and say, "I hope so."

³⁴ It gets even more difficult when one introduces precedent into the mix. Is precedent an interpretative or adjudicative consideration? It could in theory be either one, depending upon one's reasons for relying upon precedent. If one sees precedent as part and parcel of the "judicial Power," then reliance upon precedent is interpretative. If one instead sees it as a device for economizing on information or for constraining judicial discretion, it is an adjudicative tool not (necessarily) grounded in interpretation. A few hardy souls, of course, say it is none of the above. *See, e.g.,* Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1 (2007).