A Critical Take on Separation-of-Powers Formalism

BIJAL SHAH*

ABSTRACT

Formalism has come to dominate both legal scholarship and judicial decisionmaking that bears on the separation of powers. Today's constitutional law scholars and the Supreme Court characterize formalism's preferred interpretive methodologies—originalism and textualism—as rigorous and reliable, and argue that these approaches can serve progressive aims. This invited symposium contribution considers the value of these formalist approaches from the perspective of critical legal theory. First, this essay observes that originalism and textualism fall short of neutrality, objectivity and determinacy, thus reinforcing critical legal studies' skepticism of formalism. In addition, this piece suggests that these interpretive methods are inconsistent with critical legal studies' emphasis on social change. Notably, this piece continues the author's work of integrating the insights of critical theory into structural constitutionalism and administrative law.

* * *

Formalists assert that the Constitution's vesting clauses create a clear, complete division of federal governmental authority,[1] and that this structure provides fortification against governmental tyranny.[2] Consequently, formalist adherence to a strict separation between each of the three federal branches is animated by the idea that their power is granted and constrained by readily ascertainable and enforceable rules of law or constitutional requirements. More specifically, as Rebecca Brown explains, "[t]hose who espouse the formalist view of separated powers . . . posit that the structural provisions of the Constitution should be understood solely

* Professor of Law and Provost Faculty Fellow; Boston College Law School.

1. Ronald J. Krotoszynski, Jr., *Transcending Formalism and Functionalism in Separation-of-Powers Analysis: Reframing the Appointments Power After* Noel Canning, 64 DUKE L.J. 1513, 1527 (2015) ("Formalism generally relies on the Constitution's allocation of particular powers and duties to create mandatory lines of demarcation that federal courts must strictly enforce . . . ."); Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CALIF. L. REV. 853, 857–58 (1990) ("Formalists treat the Constitution's three 'vesting' clauses as effecting a complete division of otherwise unallocated federal governmental authority among the constitutionally specified legislative, executive, and judicial institutions.").

2. THE FEDERALIST NO. 47, at 324 (James Madison) (Jacob E. Cooke ed., 1961) ("The accumulation of all powers legislative, executive, and judiciary in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."); Krotoszynski, Jr., *supra* note 1, at 1527 ("[N]either the reallocation of a power from one branch to another (aggrandizement), nor efforts to deny a power given to a particular branch without reallocating it (encroachment), should be tolerated.").

by their literal language and the drafters' original intent regarding their application."[3]

Simply put, separation-of-powers "formalism is inextricably tied to both textualism and originalism."[4] "Originalism specifies the point in time and space at which the values of the relevant interpretative variables are to be determined"[5] and, for separation-of-powers formalists, "it is sufficient to fix that time and space as 'the late eighteenth century in America.'"[6] In addition, "[t]extualism declares that the meaning of the Constitution is to be found exclusively in the document's text and structure, and any inferences to be drawn therefrom."[7] In this way, "formalists attempt to ensure that exercise of governmental power comports strictly with the original blueprint laid down in [A]rticles I, II, and III of the Constitution."[8]

Originalism and textualism have overwhelmed discourse in constitutional law, and the Supreme Court now relies on these methodologies extensively,[9] laboring under the belief that these approaches lend "clear, self-evident answers" to essential legal questions.[10] Scholars even advocate for the progressive possibilities of formalism.[11] And yet, it is far from certain that formalist approaches are neutral and objective. Furthermore, for those who abide by formalism, "the means has become too important and the end not important enough."[12] In the past, even when formalism led to determinacy in judicial decision-making,[13] possible benefits to the public were "sacrificed" to the "objective of determinacy."[14] Today, formalism

---

3. Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1523 (1991).

4. *Id.* at 859–60 (arguing that formalism "is an application of originalist textualism to questions of constitutional structure.").

5. Lawson, *supra* note 1, at 859.

6. *Id.*

7. *Id.*

8. Brown, *supra* note 3, at 1524.

9. *See* Andrea Scoseria Katz & Noah A Rosenblum, *Removal Rehashed*, 136 HARV. L. REV. F. 404, 404 (2023) (noting that over the last decade, the Supreme Court "has committed itself to a simplistic originalist theory of interpretation") (citations omitted); Harvard Law School, *The 2015 Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE, at 08:29 (Nov. 25, 2015), https://youtu.be/dpEtszFT0Tg (featuring the now well-known declaration by Justice Elena Kagan that "[w]e're all textualists now").

10. *See* Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 493 (1987) (providing examples of Supreme Court decisions that "treated the text of the Constitution and the intent of its drafters as if they supplied clear, self-evident answers to the problem at hand.").

11. *See*, *e.g.*, Katie Eyer, *Textualism and Progressive Social Movements*, 3/12/24 U. CHI. L. REV. ONLINE 1 (2024) (suggesting that textualism can benefit progressive movements); Andrea Scoseria Katz, *The Lost Promise of Progressive Formalism*, 99 TEX. L. REV. 679 (2021) (advocating for a formalist approach to progressive constitutionalism); *cf.* Jessica A. Clarke, *Sex Discrimination Formalism*, 109 VA. L. REV. 1699 (2023) (arguing that civil rights advocates should consider the benefits of formalism).

12. Brown, *supra* note 3, at 1525 (noting that for "the formalist school," unfortunately, "the 'forest' of individual liberty is often lost in the 'trees' of absolute fealty to the Framers' words").

13. *See id.* at 1525–26 (noting that formalist Justice Scalia appeared, early in his tenure as a Justice, to be concerned "with forcing the Court to adhere to bright-line rules to foster predictability and restraint in judging").

14. *C.f. id.* at 1525–26 (mentioning the "liberty that separation of powers theoretically protects" as a possible casualty of determinacy).

seems to emphasize particularized methods of interpretation at the expense of good outcomes.

Critical legal theory offers a corrective. Critical legal studies (or "CLS"), for instance, was perhaps "the first radical legal theory that placed the conceptualization of domination and the imperative of its unmaking centerstage—where both ought to remain today."[15] Moreover, "[i]f CLS has a single rallying cry it is a rejection of formalism," based in the view that "the suggestion that the law can be neutral and apolitical [is] only slightly less absurd than the suggestion that a judge can transcend his own social and political context."[16] In addition, CLS is sensitive to "'law's inherent tendency towards indeterminacy.'"[17] Ultimately, CLS proposes that claims of legal formalism and objectivism are untenable in light of critical theorists' values and interest in social change.[18]

This essay, invited by the GEORGETOWN JOURNAL OF LAW & PUBLIC POLICY symposium on equity and the administrative state, suggests that separation-of-powers formalism is troubling from the perspective of CLS. More specifically, this piece casts doubt on originalism's and textualism's claims of neutrality and draws attention to their tendency toward indeterminacy. In addition, it raises concerns about whether these methodologies obscure substantive judicial preferences, possibly to the detriment of the public good. Note that this work expands on the author's scholarship integrating the insights of critical theory into administrative law and the separation of powers,[19] in the spirit of reviving critical legal theory in response to contemporary problems.[20]

---

15. Samuel Moyn, *Reconstructing Critical Legal Studies*, 134 YALE L.J. (forthcoming 2024) (manuscript at 4); *see also* Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 674 (1983) [hereinafter Unger, *The Critical Legal Studies Movement*] (asserting that mainstream legal thought remains "one more variant of the perennial effort to restate power and preconception as right"); *see, e.g.*, ROBERTO MANGABEIRA UNGER, FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY (1987); Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 58 (1984).

16. Jonathan Turley, *The Hitchhiker's Guide to CLS, Unger, and Deep Thought*, 81 NW. U. L. REV. 593, 600-601 (1987).

17. Bijal Shah, *A Critical Analysis of Separation-of-Powers Functionalism*, 85 OHIO ST. L.J. 1007, 1022 (2024) (citations omitted).

18. *See* Unger, *The Critical Legal Studies Movement*, *supra* note 15, at 564–73.

19. *See e.g.*, Bijal Shah, *Administrative Subordination*, 91 U. CHI. L. REV. (forthcoming 2024) [hereinafter Shah, *Administrative Subordination*] (applying a critical approach to the study of the federal bureaucracy); Shah, *supra* note 17 (beginning the work of integrating the insights of critical theory into functionalist approaches to the separation of powers); Bijal Shah, *Deploying the Internal Separation of Powers Against Racial Tyranny*, 116 NW. U. L. REV. ONLINE 244, 244 (2021) [hereinafter Shah, *Against Racial Tyranny*] (incorporating critical race theory into a discussion about presidentialism and the "internal" separation of powers within the executive branch); Bijal Shah, *Toward a Critical Theory of Administrative Law*, YALE J. REG. NOTICE & COMMENT (Jun. 30, 2020), https://www.yalejreg.com/nc/toward-a-critical-theory-of-administrative-law-by-bijal-shah/ [https://perma.cc/H2EU-6GUP] (reprinted in 45 ADMIN. & REG. L. NEWS 10 (2020)) (observing the lack of critical race perspectives in administrative and separation of powers law).

20. *See* Moyn, *supra* note 15 (advocating for the reconstruction of radical legal theories in the vein of CLS); Shah, *supra* note 17, at 1009-1010 (explaining that "the idea that the separation of powers could have a distinct value-laden framing of its own has remained underexplored and has not yet been

First, this essay highlights the arbitrariness of originalists' preferred time frame and essential documents, including the way that they exclude the perspectives of minorities and women; the lack of specificity in textualism; and the prominence of both approaches in conservative political movements. Second, it both suggests that a formalist approach to the separation of powers may exacerbate unfairness in public administration and observes that the Supreme Court seems willing to engage in the instrumentalist implementation of formalist interpretative methods, including both originalism and textualism, in order to discourage administrative policies in the public interest. This piece ends with the observation that, despite the fact that separation-of-powers formalists and critical theorists share some anxieties about bureaucratic domination, formalism seems insufficient to spark social change.

* * *

As observed by CLS, formalism is characterized by "the belief that society can resolve disputes according to a value-neutral system of rules and doctrine."[21] Accordingly, those who promote a formalist view of the separation of powers assert that the best way to understand the structural provisions of the Constitution includes first, by the drafters' original intent regarding their application—that is, originalism—and second, by their literal language—or textualism.[22] Because of their belief in the inherent supremacy and objectivity of originalist and textualist interpretation, formalists ostensibly give little or no weight to custom, the influence of changed circumstances, or broad objectives such as good government.[23]

More specifically, formalists characterize originalism as a rigorous methodology for parsing constitutional structure.[24] They also argue that originalism in the separation-of-powers context "does not typically raise concerns about the oppression of minorities or other disadvantaged groups the way that it does in some individual rights areas."[25] In addition, "[p]roponents of textualism point to the simplicity and transparency of an approach that focuses solely on the objectively

integrated with critical theories, which evaluate and seek to shape legal systems and institutions in order to foster liberation and equity").

21. Turley, *supra* note 16, at 600.

22. *See supra* notes 3-8 and accompanying text.

23. *See* Krotoszynski, Jr., *supra* note 1, at 1527–28 (noting that "formalism tends to prioritize close textual readings of the Constitution over constitutional conventions developed through consistent practice over time."); Sunstein, *supra* note 10, at 493 ("Formalist decisions are premised on the beliefs that the text of the Constitution and the intent of its drafters are controlling and sometimes dispositive, that changed circumstances are irrelevant to constitutional outcomes, and that broader 'policy' concerns should not play a role in legal decisions."); Brown, *supra* note 3, at 1523 ("Those who espouse the formalist view of separated powers [give] little or no weight to the influence of changed circumstances or broad objectives such as good or efficient government.").

24. Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 778 (2022) ("Originalism is often promoted as a better way of getting constitutional answers.").

25. *See*, *e.g.*, Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 416 (2012).

understood meaning of language independent of ideology and politics."[26] Indeed, textualism's advocates claim that it furthers both "objectivity" and "political neutrality."[27] Textualists assert that their methodology promotes determinacy as well.[28]

From a CLS perspective, such claims of objectivity and lucidity merit further observation.[29] Empirical evidence suggests that originalism is not, in fact, "orthodox," in that it has not "always been our law."[30] Rather, today's originalism was built by conservative actors and institutions, "partly as an expression of reactive conservative opposition to perceived defects of 'the New Deal settlement' in law and politics and the [apparent] rights-creating excesses of the Warren Court."[31] Furthermore, scholars assert that originalism, as applied, is based in incorrect historical facts[32] and fails to incorporate relevant sources of law or legal practice.[33]

---

26. CONG. RSCH. SERV., R45129, MODES OF CONSTITUTIONAL INTERPRETATION 7 (2018) (citing LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: RIGHTS, LIBERTIES, AND JUSTICE 26 (8th ed. 2013)).

27. Cary Franklin, *Living Textualism*, 2020 SUP. CT. REV. 119, 122.

28. *See* Jesse S. Cross, *Where Is Statutory Law?*, 108 CORNELL L. REV. 1041, 1043–44 (2023) ("Textualists have long contended that their methodology has a host of virtues, arguing that it tethers statutory interpretation to bicameralism and presentment, promotes public notice of the law, and minimizes the judicial role in statutory cases.").

29. *See supra* notes 15-18 and accompanying text.

30. *See* Kevin Tobia, Neel U. Sukhatme & Victoria Nourse, *Originalism as the New Legal Standard? A Data-Driven Standard* (Aug. 25, 2023) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4551776 [https://perma.cc/TQM4-SHSP].

31. *See* Richard H. Fallon, Jr., *Selective Originalism and Judicial Role Morality*, 102 TEX. L. REV. 221, 233 (2023) ("A self-conscious originalist school of constitutional interpretation developed only during the 1970s and 1980s); Calvin TerBeek, *"Clocks Must Always Be Turned Back":* Brown v. Board of Education *and the Racial Origins of Constitutional Originalism*, 115 AM. POL. SCI. REV. 821, 822 (2021) ("Political originalism was the collective work of, among many others, Barry Goldwater, *National Review*, James Kilpatrick, and conservative media impresarios Dan Smoot and Clarence Manion. It was *these* actors and institutions who first devised the content of what conservative legal elites in the Department of Justice and legal academy would call 'originalism.'") (emphasis in original); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 562–65, 568–69 (2006) (characterizing the Supreme Court's application of originalism as a means to enact "contemporary conservative political values" into law).

32. "Originalists say our law depends on facts about the past. Nonoriginalists respond that these facts are unknown to us [and] that lawyers and judges are bad at doing history." Sachs, *supra* note 24, at 778; *see*, *e.g.*, Joseph Blocher & Brandon L. Garrett, *Originalism and Historical Fact-Finding*, 112 GEO. L.J. 699, 729 (2024); Jed Handelsman Shugerman, *Vesting*, 74 STAN. L. REV. 1479, 1490 (2022); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 279 (2021); Jed Handelsman Shugerman, *Presidential Removal: The* Marbury *Problem and the Madison Solutions*, 89 FORDHAM L. REV. 2085, 2091–92 (2021); John Mikhail, *Does Originalism Have a Natural Law Problem?*, 39 L. & HIST. REV. 361, 361–62 (2021); Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1261–62 (2019).

33. For example, "[o]riginalism's insistence on an original meaning has often translated into the attempt to extract *an* original meaning from potentially divergent strands of common law." Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 562 (2006) (emphasis in original) (suggesting that originalism fails both to incorporate the common law of the colonial time period and to grapple with divergent, but equally authoritative, understandings of law that existed during that time); *see also* Krotoszynski, Jr., *supra* note 1, at 1527–28 (noting that "strong formalists would permit recourse to historical practice only as a means of ascertaining the 'original intent' of the Framers, and not as a means of supplementing or displacing that intent."). "This tendency manifests itself within

The legitimacy of originalism is weakened, as well, by the fact that it focuses on how the founders conceived of power, thus privileging the views of only powerful individuals during an era of widespread and systematic omission of racial minorities and women from democratic process, which entailed their exclusion from the drafting of the Constitution itself.[34] An originalist approach to the separation of powers could demonstrate an intertwining of the concepts of liberty and equality,[35] but likely only as these concepts pertain to those who had a claim to personhood at the time—namely white men.[36] As it now stands, this methodology prioritizes historical understandings of what constitutes governmental oppression over the realities of today's societal and institutional power imbalances.[37]

Likewise, "critics charge that textualism is not a neutral method of interpretation" either.[38] "Not too long ago, textualism was an insurgent methodology" that, like originalism,[39] "took shape. . .as part of a campaign by Reagan-era conservatives to develop 'antidotes to the 'judicial activism' of the Warren and Burger Courts.'"[40] Furthermore, textualism was "strongly associated with Reagan and Bush judges."[41] Cary Franklin argues that, as a result, "textualism is no more capable of providing a neutral truthmaker or of cabining the influence of evolving social values than any other leading method of statutory interpretation."[42] Scholars have noted as well that textualism may be applied inconsistently and without clarity,[43] including with a willingness to abandon stare decisis.[44] Arguably, textualism "is insensitive to the actual workings of

---

particular cases when originalists maintain the univocality of the common law against other Justices' protestations that the record is hardly monolithic." Meyler, *supra*, at 562.

34. *See* Joy Milligan & Bertrall L. Ross II, *We (Who Are Not) the People: Interpreting the Undemocratic Constitution*, 102 TEX. L. REV. 305, 305 (2023) ("How should we interpret a Constitution that was not written for us? For most of American history, 'We the people' excluded women and racial minorities.").

35. *See* James S. Liebman & Brandon L. Garrett, *Madisonian Equal Protection*, 104 COLUM. L. REV. 837, 862 (2004) ("What Madison meant by 'justice' was the protection of 'minority' groups against systematic 'oppression' or 'tyrann[ization]' by more powerful groups acting through the political process and the government.").

36. *See* Milligan & Ross, *supra* note 34, at 306–307 (noting that women and people of color "were never the people . . . indeed, we were not understood to be fully human, at least in the sense that white men capable of exercising political, legal, and civil rights were deemed to be.").

37. *See* Shah, *Against Racial Tyranny*, *supra* note 19, at 251.

38. Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 265 (2020).

39. *See supra* note 31 and accompanying text.

40. Franklin, *supra* note 27, at 120 (citations omitted); *id*. at 121-22 ("Textualism has long been associated with political conservatism: it is the Federalist Society's methodology of choice; [and] its most prominent champions include Justice Antonin Scalia and other famous conservative jurists . . . .").

41. Orin S. Kerr, *Shedding Light on* Chevron*: An Empirical Study of the* Chevron *Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 28 (1998).

42. Franklin, *supra* note 27, at 121–22.

43. *See*, *e.g*., Cross, *supra* note 28, at 1044 (observing the indeterminacy and difficulty of locating the "text" in textualism).

44. *See* Anita S. Krishnakumar, *Textualism and Statutory Precedents*, 104 VA. L. REV. 157, 185 (2018).

Congress, overly rigid, or (conversely) overly malleable,"[45] and is therefore vulnerable to manipulation.

These days, originalism and textualism suffer, too, from a reputation as "a cover for conservative politics."[46] Textualism, in particular, has been observed "to produce legal outcomes consistent with conservative policy preferences"[47] and accused of use as a "smokescreen by conservative judges to reach ideologically acceptable outcomes."[48] These critiques of originalism and textualism suggest that these methodologies "as employed by the courts in contested cases, rarely produce[] determinate answers and thus chiefly serve[] to obscure value judgments."[49]

The instrumental use of formalist methodologies may lead to unfairness in administration or exacerbate harm to the public, a matter of concern for CLS.[50] First, the Supreme Court has deployed both originalism and textualism to dismantle structures of administrative independence in order to strengthen presidential power over agencies.[51] The resulting increase in political control over administration is likely to have a negative impact on the neutrality and quality of agency policy- and decision-making, which in turn may harm individuals

45. Grove, *supra* note 38, at 265.

46. *See* Sachs, *supra* note 24, at 778 (discussing originalism); *see also* Margaret H. Lemos, *The Politics of Statutory Interpretation*, 89 NOTRE DAME L. REV. 849, 901 (2013) ("[T]extualism has become a conservative brand . . . . The strength of the brand is reinforced by what we observe in the practice of textualism: we see conservative judges advocating the methodology, and we see those same judges reaching conservative results in most cases.").

47. Franklin, *supra* note 27, at 121–22; *see also* Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823, 828–29 (2006) ("[A]s an empirical matter, the more conservative justices (Justices Antonin Scalia and Clarence Thomas) have embraced 'plain meaning' approaches and the more liberal justices have not."); Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 373 (2005) ([T]oday's textualists tend to be politically conservative . . . .").

48. Grove, *supra* note 38, at 265-66.

49. *See* Neil H. Buchanan & Michael C. Dorf, *A Tale of Two Formalisms: How Law and Economics Mirrors Originalism and Textualism*, 106 CORNELL L. REV. 591, 620 (2021); *see also id.* at 620–40 (arguing in depth that textualism and originalism are highly manipulable).

50. *See supra* notes 15-18 and accompanying text.

51. *See*, *e.g.*, SEC v. Jarkesy, 603 U. S. __ (2024) (letting stand the Fifth Circuit's decision that among other matters, the text of Article II of the Constitution does not allow for-cause removal protections for administrative law judges whose agency heads are also protected by for-cause removal provisions); Collins v. Yellen, 141 S. Ct. 1761 (2021) (holding that a for-cause restriction on the president's power to remove the Federal Housing Finance Agency director violates the separation of powers, resulting from the application of *Seila Law*); United States v. Arthrex, Inc., 141 S. Ct. 1970 (2021) (holding that appointment by the Secretary of Commerce of administrative patent judges with final decision-making authority violates the separation of powers, based in a textualist reading of Article II); Seila Law, LLC v. CFPB, 140 S. Ct. 2183 (2020) (holding that leadership of the Consumer Financial Protection Bureau (CFPB) by a single agency head with for-cause removal protection violates the separation of powers, in part because the CFBP diverges from "historical practice"); Lucia v. SEC, 138 S. Ct. 2044 (2018) (holding that Securities and Exchange Commission administrative law judges are "officers of the United States," subject to the Constitution's appointments clause, based in a originalist and textualist reading of Article II).

facing administrative oversight and statutory enforcement.[52] For example, maximizing political appointees' influence over administrative adjudicators is likely to increase the adjudicators' incentives for deciding in favor of the agency, at the expense of the individuals seeking benefits or relief.[53] In at least some situations, this may render it more difficult for under-empowered communities with fewer resources to obtain fair process and just outcomes in administrative adjudication.[54]

Second, the Supreme Court sometimes chooses to overlook its commitments to originalism and textualism in order to reach preferred results. Richard Fallon argues that the Supreme Court practices "selective originalism," based on the observation that the originalist Justices will sometimes set aside originalism and instead rest their decisions based partly on their policy preferences.[55] One example relevant to the separation of powers is that, "[w]ith the concurrence of the originalist Justices," the Court allows "adjudication by administrative agencies based on the parties' consent without substantial inquiry into how consent might have mattered to the Founding generation."[56] This furthers the Court's ostensible goal of allowing agencies to take on adjudicative responsibilities that would otherwise fall to the Article III judiciary, notwithstanding the possible harm to petitioners' rights or autonomy to seek redress in the federal courts.[57]

Likewise, as Benjamin Eidelson and Matthew Stephenson observe, the textualist Justices will sometimes put textualism on the back burner in order to reinforce certain legal or ideological frameworks or values (referred to as "substantive canons"), such as federalism and constraint of the administrative state, that are by

---

52. *See* Bijal Shah, *The President's Fourth Branch?*, 92 FORDHAM L. REV. 499, 524–36 (2023) [hereinafter Shah, *The President's Fourth Branch?*]; Bijal Shah, *Executive Influence on Federal Administrative Adjudication,* in A GUIDE TO FEDERAL AGENCY ADJUDICATION 407-409 (Graboyes, ed., ABA Book Publishing 3rd ed.) (2023).

53. *See* Alan B. Morrison, *Who Favors Making ALJs At-Will Employees?*, PENN. REG. REV. (Oct. 2, 2023) (noting that expanding political influence over administrative adjudication also increases "the power of agency heads at the expense of the individuals and companies that they regulate"); *see also* Rebecca S. Eisenberg & Nina A. Mendelson, *The Not-So-Standard Model: Reconsidering Agency-Head Review of Administrative Adjudication Decisions*, 75 ADMIN. L. REV. 1, 5-6 (2023) ("Advocates of decisional independence and insulation of agency adjudicators have long identified the risk that adjudicators might otherwise unfairly favor agency enforcers, a risk that is aggravated by political control of adjudication decisions.").

54. *See*, *e.g.*, Shah, *The President's Fourth Branch?*, *supra* note 52, at 535 (suggesting that "the immigration context serves as a cautionary tale for the possible fallout of *Jarkesy*" by illustrating how politicized administrative adjudication has harmed noncitizens seeking relief from deportation); Shah, *Procedural Administrative Discretion* (work in progress) [hereinafter Shah, *Procedural Discretion*] (arguing, among other things, that bureaucratic discretion to omit many facets of administrative procedure has a negative impact on petitioners with fewer resources to seek fair process in the immigration and workers' rights contexts) (on file with author); *see generally*, Eisenberg & Mendelson, *supra* note 53 (discussing the hazards of agency head review of administrative adjudication in the wake of *Arthrex*).

55. Fallon, *supra* note 31.

56. *Id*. at 250-51 (citations omitted).

57. *See generally* Shah, *Procedural Discretion*, *supra* note 54.

nature extratextual.[58] Recently, the Supreme Court engaged in what might be called selective textualism in the separation-of-powers context. More specifically, the Court was willing to depart from textualism to establish the new "major questions" doctrine, leading to the suppression of policies that would have benefited the public.[59]

The major questions doctrine was once tied to *Chevron* deference, invoked rarely, and even applied to empower an agency to act, as opposed to constrain its policymaking power.[60] The doctrine is now a stand-alone "test" under which "the Court will not sustain a major regulatory action unless the statute contains a clear statement that the action is authorized."[61]

> Under the [new major questions] doctrine, judges viewing agency actions must determine if a challenged agency initiative presents a "major question" by reviewing its novelty (or lack thereof) and political and economic significance. If an executive branch policy raises a "major question," the agency must point to highly specific statutory authorization for its action [or the court will find the action to be unauthorized by statute].[62]

This test was established in *West Virginia v. EPA*,[63] which Adrian Vermeule centers to observe that the conservative Justices will avoid "originalism, textualism and judicial restraint" if it does not serve their purposes.[64] Indeed, the majority in this case, which included most of the self-proclaimed textualist Justices,[65] did not apply textualism to reach its decision that the Obama Administration's Clean Power Plan is not authorized by the Clean Air Act.[66] As Justice Elena Kagan declares in her *West Virginia v. EPA* dissent,

---

58. Benjamin Eidelson & Matthew C. Stephenson, *The Incompatibility of Substantive Canons and Textualism*, 137 HARV. L. REV. 515, 516–17 (2023) (noting that federalism and an interest in "restraining the administrative state" are "substantive canons," or rules of construction that advance values external to a statute).

59. *See* Biden v. Nebraska, 143 S. Ct. 2355, 2376 (2023) (Barrett, J., concurring) ("And I grant that some articulations of the major questions doctrine on offer—most notably, that the doctrine is a substantive canon—should give a textualist pause.").

60. Shah, *supra* note 17, at 1023-24.

61. *See* Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 264 (2022).

62. Peter M. Shane, *Unforgiven: The Supreme Court and the Student Loan Conundrum*, WASH. MONTHLY (July 7, 2023), https://washingtonmonthly.com/2023/07/07/unforgiven-the-supreme-court-and-the-student-loan-conundrum/ [https://perma.cc/BE6Q-BWPH].

63. West Virginia v. EPA, 597 U.S. 697 (2022).

64. Adrian Vermeule, *Text and "Context,"* YALE J. REGUL. NOTICE & COMMENT (July 13, 2023), https://www.yalejreg.com/nc/text-and-context-by-adrian-vermeule/ [https://perma.cc/XCC4-ZU4P] (suggesting that the new major questions doctrine is not textualist, to the extent it relies on either substantive values or a contextual reading of statutory law).

65. The only dissenting Justices in this case were Justices Kagan, Breyer, and Sotomayor. *See West Virginia v. EPA*, 597 U.S. at 753 (Kagan, J., dissenting).

66. *See* Bijal Shah, *Statute-Focused Presidential Administration*, 90 GEO. WASH. L. REV. 1165, 1193-94 (2022) (illustrating that the Court employed purposivism in *West Virginia v. EPA*); Shah, *supra* note 17, at 1025-28 (arguing that the new major questions doctrine, including *West Virginia v. EPA*, is a problematic example of functionalism).

> Some years ago, I remarked that "[w]e're all textualists now." It seems I was wrong. The current Court is textualist only when being so suits it. When that method would frustrate broader goals, special canons like the "major questions doctrine" magically appear as get out-of-text-free cards.[67]

The new major questions doctrine is, arguably, "a formalist attempt by the Supreme Court to impose a facsimile of a revived nondelegation doctrine,"[68] given that it requires clear authorization from Congress for agency action (and notwithstanding the limits to this strategy for overcoming congressional dysfunction).[69] At the very least, the majority seemed to rely on "separation of powers principles and [the Justices'] practical understanding of legislative intent,"[70] in their decision. Nonetheless, because this "clear statement" approach furthers the substantive values of the nondelegation doctrine, it is inconsistent with textualism.[71] Anita Krishnakumar accuses the Court of making its decision in *West Virginia v. EPA* on the basis of a "pragmatism" founded only in the Justices' own intuitions, which would seem to be inconsistent with a textualist approach as well.[72] As for the new major question's impact on justice, the Court has created a doctrine that empowers "more powerful groups to spark judicial activism against disfavored administrative policies" and that has thereby effected anti-majoritarian policies in the spheres of environmental protection, health, housing, and public funding for higher education.[73]

* * * *

---

67. *West Virginia v. EPA*, 597 U.S. at 779 (Kagan, J., dissenting) ("Today, one of those broader goals makes itself clear: Prevent agencies from doing important work, even though that is what Congress directed. That anti-administrative-state stance shows up in the majority opinion, and it suffuses the concurrence."); *see also Scalia Lecture*, *supra* note 9 (featuring Justice Kagan's initial declaration that [w]e're all textualists now").

68. Shah, *supra* note 17, at 1026 (citations omitted).

69. *Id*. at 1052.

70. Shah, *supra* note 67, at 1193 (quoting *West Virginia v. EPA*). *See also* Sohoni, *supra* note 62, at 262–63 ("[N]o one should mistake these cases for anything but what they are: separation of powers cases in the guise of disputes over statutory interpretation.").

71. *See* Eidelson & Stephenson, *supra* note 59, at 518-519; Eric Berger, *Constitutional Conceits in Statutory Interpretation*, 75 ADMIN. L. REV. 479, 498 (2023); *see also id*. at 479 (suggesting that in "highly politicized cases" including *West Virginia v. EPA*, the Roberts Court has "brushed aside inconvenient statutory texts, focusing instead on background constitutional concerns").

72. Anita Krishnakumar, *What the New Major Questions Is* Not, 92 GEO. WASH. L. REV (forthcoming 2024) (manuscript at 43); *see also id*. at 46–47 (describing the new major questions doctrine as a "practical consequences" test with the clear statement rule "grafted" onto it to make it "appear more textualist").

73. Shah, *supra* note 17, at 1029-30 (citing new major questions cases including *West Virginia v. EPA* (stymieing important policy combatting climate change); *Biden v. Nebraska* ("asserting that the Biden Administration's student loan forgiveness plan fails under the major questions doctrine" at the particular expense of minority communities facing financial burdens); "Biden v. Missouri, 142 S. Ct. 647, 654 (2022) (ending the Medicare/Medicaid providers vaccine mandate); Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 664–65 (2022) (terminating the OSHA's vaccine mandate); and Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2490 (2021) (undermining the CDC's eviction moratorium" protecting vulnerable communities).

Overall, neither the underpinnings nor the selective application of formalist interpretive methodologies seems to bolster either the theoretical values or social advocacy championed by critical theory. And yet, it is worth noting that separation-of-powers formalism is consistent with the critical theoretical "fear that bureaucracy is a form of human domination."[74] More specifically, formalism in structural constitutionalism is marked by a distrust of contemporary lawmakers and a related concern that administrative discretion undermines the essentially protective goal of preserving liberty.[75] Arguably, it is a critical theoretical concern with institutional oppression[76] that provokes the formalist assertion, shared by many on the Supreme Court, that the administrative state is unconstitutional.[77]

Even if formalism shares critical theory's concerns about the potential for bureaucratic oppression, however, a key problem with formalism "lies in the fact that the very devices for restraining state power also tend to deadlock it."[78] As Roberto Mangabeira Unger has declared, to "secure freedom . . . [we] must provide ways to restrain the state without effectively paralyzing its transformative activities."[79] Unfortunately, formalism has fetishized a government of three ossified branches, frozen in time by originalism and textualism, and today's formalists have applied these methodological approaches without regard for their fundamental weaknesses and in order to defend conservative policies. As it stands, formalism does not appear to correct imbalances of power between the branches resulting, for instance, from the recent aggrandizement of power by the Supreme Court; to respond to governmental threats to liberty, including those that emanate from or judicial branch; or to further progressive change.

---

74. Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1277–78 (1984); *see also* Shah, *Administrative Subordination*, *supra* note 19 (investigating myriad ways in which administration state subordinates the interests of vulnerable people to its institutional commitments).

75. *See* Kathleen M. Sullivan, *Dueling Sovereignties:* U.S. Term Limits, Inc. v. Thornton, 109 HARV. L. REV. 78, 93 (1995) (noting that formalist judges worry about deferring too much to "fourth branches, 'junior-varsity Congress[es]'") (citing Justice Scalia). From this perspective,"[t]he values served by the separation of powers—fostering workable government while preserving liberty and preventing tyranny—[are] undermined by each deferential ad hoc judgment" made by bureaucratic administrators." *Id.*; *see also* Bijal Shah, *Congress's Agency Coordination*, 103 MINN. L. REV. 1961, 2047 n.410 (2019) (explaining the importance of the "fourth branch" concept to the separation of powers); Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 521 (1988) (noting that formalism purports to constrain administrative decisionmakers based on the rule of law).

76. *See* Moyn, *supra* note 15 (manuscript at 6) "Shah, *Administrative Subordination, supra* note 19".

77. "Led by Justice Thomas, with Chief Justice Roberts, Justice Alito, and now Justice Gorsuch sounding similar complaints, [anti-administrativists] have attacked the modern administrative state as a threat to liberty and democracy and suggested that its central features may be unconstitutional." Gillian Metzger, *Supreme Court—Foreword: 1930s Redux: The Administrative State Under Siege,* 131 HARV. L. REV. 1, 3 (2017); *see also* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994) ("The post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution.").

78. Unger, *The Critical Legal Studies Movement*, *supra* note 15, at 592 (speaking briefly to the power of critical legal studies to transform the structure of government).

79. *Id.*