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Separation of Powers: A New Look at the Functionalist Approach

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SEPARATION OF POWERS: A NEW LOOK AT THE FUNCTIONALIST APPROACH*

The Supreme Court has used two differing approaches in analyzing recent separation-of-powers issues: the functionalist and formalist methods. The Author analyzes the benefits and flaws of both approaches. In light of the goal of increasing interbranch negotiation over these issues as an alternative to litigating them, the Author advocates using the functionalist approach. The uncertainty of outcome inherent in the functionalist approach will lead to problem-solving negotiation between the branches, thus achieving the desired result.

THE SUPREME COURT of the United States has used two inconsistent methods of analysis to resolve constitutional separation-of-powers issues: the functionalist and formalist methods.[1] With the recent decision of *Morrison v. Olson*,[2] the Court appears to be reversing its trend toward a formalist method of analysis,[3] and returning to the functionalist approach.[4] This Note posits that the return to functionalism, as displayed by *Morrison*, is the correct choice — but not for any of the approach's previous rationales. Functionalism is the method of choice because of its positive effect on interbranch behavior. The inherent uncertainty of outcome that results from functionalism's balancing test encour-

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1. For a more complete discussion of the functionalist and formalist methods, see *infra* text accompanying notes 8-30.

2. 108 S. Ct. 2597 (1988); *see infra* note 4.

3. Strauss, *Formal and Functional Approaches To Separation-of-Powers Questions — A Foolish Inconsistency?* 72 CORNELL L. REV. 488, 516 (1987) [hereinafter Strauss, *Formal and Functional*]. For an example of the Court's use of the formalist approach, see *Bowsher v. Synar*, 478 U.S. 714 (1986).

4. *Morrison v. Olsen*, 108 S. Ct. 2597 (1988), represents a return by the Court to the functionalist approach. *Morrison* presented the question of the constitutionality of the independent counsel provisions of the Ethics in Government Act of 1978, 28 U.S.C. 49, 591 *et. seq.* (Supp. 1988). The Act contained a provision restricting the attorney general's power to remove the independent counsel to only those instances in which the attorney general can show "good cause." 28 U.S.C. 596(a)(1) (Supp. 1988). The Court used the functionalist method of analysis and concluded that the restriction did not impermissibly interfere with the President's exercise of "his constitutionally appointed functions." *Morrison*, 108 S. Ct. at 2620.

ages problem-solving negotiations between political actors,[5] rather than the unproductive positional bargaining that may result from the formalist approach.[6] Problem-solving negotiations help to ensure that political disputes are resolved in the political process, leaving the courts as a last-resort measure for times when the political processes break down. In addition, this Note answers the major criticism of the functionalist test: that it lacks any stable content and therefore is too malleable.[7]

The first section of the Note explains and illustrates the application of the formalist and functionalist tests. Section II then examines the perceived benefits and criticisms of each approach. The third section sets out the reasons for choosing the functionalist approach by examining its effects on interbranch behavior. The fourth and fifth sections address the concerns raised in section II in light of these effects on interbranch negotiations and behavior. Finally, section IV concludes that functionalism is the preferred method, because its effect on the relationship between the legislature and the executive helps to reach the goal of limited judicial involvement in legislative-executive disputes.

I. THE FUNCTIONALIST-FORMALIST DEBATE

During the past fifteen years, there has been renewed debate and concern over the separation of powers doctrine. The Supreme Court decisions in *United States v. Nixon*,[8] *Immigration & Naturalization Service v. Chadha*,[9] *Bowsher v. Synar*,[10] and now *Morrison v. Olson*,[11] have brought to the forefront the issues involved in resolving legislative-executive conflicts and the judiciary's role in this process.[12] In these cases, the Supreme Court has struggled with two inconsistent methods for resolving separation-of-powers

5. *See infra* note 62 and text accompanying notes 62-64.

6. *See infra* text accompanying note 61.

7. *See infra* text accompanying notes 74-77.

8. 418 U.S. 683 (1974) (Although this case involved an executive-judicial conflict, it is noted because of its use of the functionalist approach.).

9. 462 U.S. 919 (1983) (finding a provision in the Immigration and Naturalization Act authorizing the House of Representatives to veto the decision of the Attorney General to suspend the deportation of an alien, by resolution, unconstitutional).

10. 478 U.S. 714 (1986); *see infra* note 21.

11. 108 S. Ct. 2597 (1988); *see supra* note 4.

12. For a general discussion of the separation-of-powers debate, see Sargentich, *The Contemporary Debate About Legislative-Executive Separation of Powers*, 72 CORNELL L. REV. 430 (1987).

disputes: the functionalist and formalist methods.[13]

A. The Functionalist Method

The functionalist approach is based on an interpretation of the Constitution that views the separate powers of the three branches of government as not intended to operate with absolute independence. The Court has stated that "[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."[14]

Emphasizing the checks and balances that operate between each branch,[15] a functionalist analysis begins by examining whether the act in question has impermissibly prevented one branch from accomplishing its constitutionally assigned functions. This involves a determination of what functions of each branch are involved with the disputed act and how they are realistically affected. For example, in *United States v. Nixon*,[16] the Court weighed the importance of the "general privilege of confidentiality of Presidential communications in performance of the President's responsibilities against the inroads of such a privilege on the fair administration of criminal justice."[17] It concluded that "the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the *basic function* of the courts."[18]

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13. *Id.* at 433.

14. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

15. The theory of checks and balances originates from the characterization of the Constitution as a scheme of separate powers devised to protect liberty. It assures that at least two branches of the federal government must cooperate before individual rights or needs can be affected, or the power of any one branch can be enlarged or reduced. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 18-22, 209-400 (2d ed. 1988) (discussing the independence and interdependence of the federal executive, legislative and judicial powers).

16. 418 U.S. 683 (1974). President Nixon refused to comply with a motion filed by the Watergate Special Prosecutor to compel the President to surrender tape recordings of his conversations with members of his staff. The President invoked a claim of executive privilege and refused to surrender the tapes.

17. *Id.* at 711-12.

18. *Id.* at 712 (emphasis added); *see also* Nixon v. Adm'r of Gen. Services, 433 U.S. 425, 441-46 (1976) (where the power of Congress to regulate public access to Executive Branch documents under the Presidential Recordings and Materials Preservation Act, 44

When determining whether the core function of a branch has been impermissibly interfered with, the functionalist test emphasizes flexibility and balancing by examining the entire framework of relationships between the branches.[19] This is perhaps the most difficult aspect of the functionalist test. Critics have shown that the functionalist advocates on the Supreme Court misapply the test by focusing their inquiry on a narrow set of relationships rather than on the entire framework of relationships between all relevant actors.[20]

Courts apply the functionalist approach to limit their role in resolving interbranch disputes. In *Bowsher*, Justice White argued in his dissent that "the role of this Court should be limited to determining whether the [challenged act] so alters the balance of authority among the branches of government as to pose a genuine threat to the basic division between the lawmaking power and the power to execute the law."[21]

He rejected the majority's position that Congress' removal power automatically made the Comptroller General an agent of Congress.[22] Justice White defined the issue in *Bowsher* in functionalist terms: "The question to be answered is whether the threat of removal of the Comptroller General for cause through joint resolution . . . renders the Comptroller sufficiently subservient to Congress that investing him with 'executive' power can be realistically equated with the unlawful retention of such power

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U.S.C. § 2107 (Supp. V 1987), was found to be not unduly disruptive of the functions of the Executive Branch).

19. *See* Strauss, *Formal and Functional*, *supra* note 3, at 520.

20. Professor Strauss has noted that:

> While [White] insists on functionalism [in *Bowsher*,] . . . he fails . . . to carry through with an inquiry addressed to the whole range of circumstances informing functional analysis. . . . [H]e looks *only* at the discharge provisions and not, as a functional analysis should insist, at how they sit in the general framework of relationships among the GAO [General Accounting Office], Congress, President, and courts.

Id.

21. Bowsher v. Synar, 478 U.S. 714, 776 (1986). *Bowsher* involved a challenge to the constitutionality of the Gramm-Rudman-Hollings Act, 2 U.S.C. §§ 901-922 (Supp. V 1987), for deficit reduction. The Act provided that if the federal budget deficit exceeded the maximum amount set by the Act by more than a certain amount, the Comptroller General had the power to authorize across-the-board cuts to reach the prescribed levels. The Court struck down the Act as an unconstitutional attempt by Congress to retain removal authority, other than impeachment, over an officer entrusted with executive powers. *Id.* at 726-27.

22. *Id.* at 759 (White, J., dissenting).

by Congress itself . . . ."[23] After examining the practical effect of the removal power within the legislative-executive framework,[24] Justice White concluded that "[t]he power over removal retained by the Congress is not a power that is exercised outside the legislative process as established by the Constitution, nor does it appear likely that it is a power that adds significantly to the influence Congress may exert over executive officers . . . ."[25] Justice White therefore found the "threat to separation of powers . . . wholly chimerical."[26]

B. The Formalist Method

In contrast, the formalist approach is grounded upon the belief that separation of powers doctrine requires that each branch of government operate with and maintain maximum independence. Formalists argue that the government was divided into three branches to ensure against tyranny[27] and that the best way to maintain this protection is to enforce a strict division of labor between the branches.[28] Thus, the formalist approach seeks to re-

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23. *Id.* at 770.

24. Justice White explained that:

> The statute does not permit anyone to remove the Comptroller at will; removal is permitted only for specified cause, with the existence of cause to be determined by Congress following a hearing. Any removal under the statute would presumably be subject to post-termination judicial review to ensure that a hearing had in fact been held and that the finding of cause for removal was not arbitrary. These procedural and substantive limitations on the removal power militate strongly against the characterization of the Comptroller as a mere agent of Congress by virtue of removal authority. . . . [T]he substantial role played by the President in the process of removal through joint resolution reduces to utter insignificance the possibility that the threat of removal will induce subservience to the Congress.

Id. at 770-771 (citations omitted).

25. *Id.* at 771.

26. *Id.*

27. The *Bowsher* Court explained:

> Even a cursory examination of the Constitution reveals the influence of Montesquieu's thesis that checks and balances were the foundation of a structure of government that would protect liberty. The Framers provided a vigorous Legislative Branch and a separate and wholly independent Executive Branch, with each branch responsible ultimately to the people.

Id. at 722.

28. "The Constitution sought to divide the delegated powers of the new Federal Government into three *defined* categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility." Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 951 (1983) (emphasis added).

solve interbranch conflicts by drawing sharp boundaries between the branches and defining every act and actor in terms of each branch's "assigned responsibility."[29]

The majority's reasoning in *Bowsher v. Synar* typifies the formalist approach. In that case, the Court found that the statute at issue vested the Comptroller General with the executive power to interpret a law enacted by Congress. It also found that the Comptroller General is an agent of the legislature, because Congress can remove him or her for cause through a joint resolution. The Court then concluded that because the legislature may not vest executive powers in itself or its agents, the Comptroller General constitutionally may not exercise the executive powers granted in the statute.[30]

II. The Perceived Benefits and Flaws of Each Approach

The inconsistency in the Court's method of analysis reveals that both approaches have benefits as well as flaws. In order to understand the repercussions of choosing between the two methods, it is helpful to recognize that the two approaches represent a conflict frequently found in legal analysis between a predictable rule and an individualized decision, "between technical positivism and policy analysis."[31]

A. The Formalist Method

Proponents of formalism claim that the method attempts to draw clear lines, contributing to planning and stability, and thereby assures the rule of law. They argue that these clear lines reduce uncertainty in the resolution of interbranch conflicts.[32]

Such rules, however, create the hazard of inflexibility for each branch when it must deal with changing political realities. In fact, the formalist approach often ignores the reality of political relationships. Critics have noted that while the bright-line simplicity of formalism has understandable allure to judges trying to decide cases and guide future conduct, it is not "successful in

29. *Id.*

30. *Id.*

31. Strauss, *Formal and Functional*, *supra* note 3, at 512.

32. *Id.*; Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 625-26 (1984) [hereinafter Strauss, *The Place of Agencies*].

describing [the] bulk of government as it is."[33] One scholar has found that "[c]ourts have been able to reconcile the reality of modern administrative government and the strict separation-of-powers model . . . only by blind feats of definition. . . ."[34]

Formalism has also been criticized as constituting improper judicial activism in political disputes or issues of national policy that preferably are left to the elected branches.[35] Justice White voiced this criticism in his dissent in *Bowsher*:

> The Court, acting in the name of separation of powers, takes upon itself to strike down the Gramm-Rudman-Hollings Act, one of the most novel and far-reaching legislative responses to a national crisis since the New Deal . . . . [I question] the wisdom of the Court's willingness to interpose its distressingly formalistic view of separation of powers as a bar to the attainment of governmental objectives through the means chosen by the Congress and the President in the legislative process established by the Constitution.[36]

The flaw of improper judicial activism, as well as the inflexibility of the formalist approach, counterbalances the ease in decision-making that the clear-line drawing aspect of the formalist method produces.

B. The Functionalist Method

Perhaps functionalism's greatest perceived benefit is that its emphasis on checks and balances[37] reflects institutional realities. Functionalism looks at the total circumstances of each legislative-executive conflict, making it flexible enough to accommodate both government's and society's changing needs, while still protecting fundamental democratic principles.

Some argue, however, that functionalism contains an inherent tension.[38] While the functionalists criticize the formalists for rigid doctrinalism, the application of the functionalist test does require the assignment of some doctrinal content to the concept of checks and balances.[39] When faced with a legislative-executive conflict,

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33. *E.g.*, Strauss, *The Place of Agencies*, *supra* note 32 at 625.
34. *Id.*
35. Feld, *Separation of Political Powers: Boundaries or Balance?*, 21 GA. L. REV. 171, 216 (1986-87).
36. Bowsher v. Synar, 478 U.S. 714, 759 (1986) (White, J., dissenting).
37. Sargentich, *supra* note 12, at 439.
38. *Id.* at 439-40.
39. *Id.*

the functionalist approach requires a determination of what functions of each branch are involved, and how they are realistically effected.[40] Judges, therefore, must assign a value to each function so that they can balance the effect of the action at issue with the interests of each branch. These value judgments make the application of the functionalist test more difficult.

Commentators also question whether a functional analysis can provide a judicially manageable standard for resolving separation-of-power disputes.[41] This is because the test is viewed as being caught in a trap of indeterminacy and analytical manipulation.[42] The indeterminacy is blamed on the lack of perspectives or premises to guide the functionalist test's operation. The outcome of any balancing test depends on initial judgments concerning how the interests and values at stake in the contest are to be weighed. The notion of an ability to balance indicates that there is a prior common scale of values against which to compare competing claims.[43] Critics note that there is no such scale of values and standards that assigns weights to various branch functions, nor is there any guidance for courts when they examine the practical effect of a proposed action on the balance of power.[44] As a result, the functionalist test is viewed as being too malleable:[45] *depending on how one frames the balancing test*, the functionalist approach can yield conflicting but convincing results.[46]

In response to this problem, it is claimed that the functionalist test needs a framework of values assigned to core branch functions as well as empirical data concerning interbranch behavior to guide its application. At present, the test is viewed as only being able to guard against "a sudden demarche, but not against the step-by-step accretion of 'reasonable' judgments over time."[47] However, developing a framework by which to guide a functionalist analysis destroys one of its virtues, flexibility, by making it

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40. *See supra* text accompanying notes 14-26.

41. *See* Entin, *Separation of Powers, the Political Branches, and the Limits of Judicial Review*, 51 OHIO ST. L. REV. Issue I (in press 1990).

42. *Id.*

43. Sargentich, *supra* note 12, at 440.

44. *E.g.*, Entin, *supra* note 41.

45. *Id.*

46. *See infra* text accompanying notes 69-78 (recognizing and rebutting the argument). *Compare* Justice White's dissent in *Bowsher v. Synar*, 478 U.S. 759, 759-76 (1986) (illustrating the functionalist approach) *with* Strauss, *Formal and Functional*, *supra* note 3, at 519-20 (criticizing White's opinion as not broad enough).

47. Strauss, *Formal and Functional*, *supra* note 3, at 513.

more doctrinal and hence, formalistic.[48]

C. Reactions to the Formalist-Functionalist Debate

This analysis reveals that neither the functionalist nor the formalist method, as currently formulated, is wholly satisfactory. Some critics have advocated judicial abandonment of executive-legislative separation-of-powers issues, thereby leaving these issues to the political process.[49] They argue that the system of checks and balances gives the President and Congress sufficient control over each others' actions, making the system a self-correcting one.[50] In addition, control of each branch by the electorate makes judicial intervention unnecessary.[51] It is also thought that judicial intervention is unwise because it wastes the Court's political capital, exposes it to retaliation by the more powerful branches, and often has been counterproductive.[52]

These reasons are attractive on their face, especially when faced with the problem of finding a principled approach to resolve disputes between the political branches. But total abandonment by the courts in favor of the political process is not desirable. One commentator states that the idea that the political process can protect the constitutional balance of power in all cases "is deeply problematic in assessing relations among President, Congress, and Court."[53] The power of the electorate is viewed as being limited. The same commentator observed that:

> [E]lectoral forces [can] inhibit sudden, massive changes [in the balance of power between the branches], although in times of emergency . . . that may not be true. More significant may be the accretion of authority or practice in one or the other branch, to the point where intended capacity to function . . . as a check on the other branch, is substantially impaired.[54]

Thus, although interbranch disputes between the political branches ideally should be resolved in the political process, judicial intervention remains necessary. This Note, however, in keep-

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48. *See* Sargentich, *supra* note 12, at 441.

49. *E.g.*, J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 263 (1980).

50. *E.g.*, *Id.* at 273-76.

51. *E.g.*, *Id.* at 311-13.

52. *E.g.*, *Id.* at 314-15, 378-79.

53. Strauss, *Formal and Functional*, *supra* note 3, at 515.

54. Strauss, *The Place of Agencies*, *supra* note 32, at 620-21 n.194.

ing with the principle of judicial restraint, suggests that the judiciary should maintain a very limited role. Judicial intervention is appropriate only when the political process breaks down so that the system is no longer self-correcting. A need for intervention would occur, for example, when one branch gains power that may enable it to impair the capacity of another branch to act as a "check" against it.[55] In order to determine what type of intervention is preferred in the context of separation of powers questions, it is necessary to return to the formalist-functionalist debate to find a determinative factor that makes one approach superior. The method chosen should be the best approach for the Court when it *must* decide the outcome of a legislative-executive conflict, in addition to helping reach the desired goal of limited judicial involvement in such disputes.

III. THE ARGUMENT FOR FUNCTIONALISM

This Note proposes that the functionalist approach is the correct method of analysis precisely because of its criticized malleability. Indeterminacy of result in the judicial process encourages negotiations and compromise between the two political branches,[56]

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55. *See* Feld, *supra* note 35, at 206; Strauss, *The Place of Agencies*, *supra* note 32 at 620-21 n.194.

56. This proposition is based on the analysis of human behavior under conditions of uncertainty known as risk analysis. Under this analysis, individuals and, by analogy, institutions, fall into one of two categories: risk-aversive, and risk-takers. The risk-aversive actor seeks to minimize risk, or uncertainty of outcome, at all times. These individuals will accept outcomes which yield less satisfaction or utility in return for greater certainty. *See* H. VARIAN, MICROECONOMIC ANALYSIS 108 (1978). The risk-taker, on the other hand, is the classic gambler. The risk-taker perceives the value or utility of the desired outcome as greater than the cost of the risk or uncertainty. *Id.*

This Note argues that political institutions will be risk-averse when faced with the specter of judicial intervention by means of the functionalist test. Each branch will have a definite position that it wants the Court to vindicate. Each branch also sees the other branch's position as the opposite, an outcome that is viewed as unworkable. Therefore, the expected value of the desired outcome is high, but the cost of the bet, or the branch's cost if it loses the suit, may be much higher. This situation will motivate the legislature and the executive to negotiate to find a middle ground that is acceptable to both. In effect, each branch will accept an outcome with a lower utility (value) in order to avoid uncertainty. *See generally* GAME-THEORETIC MODELS OF BARGAINING 181-213 (A. Roth ed. 1985) (discussing the effect of an individual's change in risk aversion); R. LUCE & H. RAIFFA, GAMES AND DECISIONS § 2.4 (1957) (quantifying the likelihood of risk-taking behavior in general); M. SHUBIK, A GAME-THEORETIC APPROACH TO POLITICAL ECONOMY 15-24 (1984) (discussing the relationship between wealth and risk aversion); *Id.* at 605-20 (discussion of maximization in the socio-political context); J. VON NEUMANN & O. MORGENSTERN, THEORY OF GAMES AND ECONOMIC BEHAVIOR § 4.4 (3d ed. 1964) (economic analysis of the process of choosing among alternatives).

leaving the court's involvement as a true last-resort measure. In contrast, a formalist, bright-line approach to solving interbranch disputes encourages positional bargaining,[57] as each branch becomes convinced that it is on the proper side of the bright line. This positional bargaining leads to confrontation rather than compromise, and may force the Court to impose solutions to national policy disputes that are unsatisfactory to both branches. The effect of bargaining styles on the resolution of interbranch conflicts has been noted in a similar form, but it has not been applied to the formalist-functionalist debate.[58]

When the functionalist test is applied, the interests of each branch are weighed against their effect on the ability of another branch to carry out a constitutionally assigned function.[59] This encourages each branch not only to state clearly the vital interests at stake, but to conscientiously formulate arguments concerning the effect of the act in question on the constitutional scheme of checks and balances. The functionalist test, therefore, promotes independent legal interpretation. One scholar has noted that if "government officials regarded each branch's views on the separation of powers as 'law' for that branch — that is, as authoritative within the branch's jurisdiction — that attitude would help promote conscientious legal interpretation."[60]

In contrast, formalism, as applied, encourages each branch to undertake an inflexible "I'm right, you're wrong" analysis of sepa-

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57. Positional bargaining consists of successively taking and then giving up a series of positions. R. FISHER & W. URY, GETTING TO YES 1 (1982). Positional bargaining serves some useful purposes in negotiation. It informs the other side of what you want, provides a fall-back position in times of uncertainty, and eventually can produce the terms of an acceptable agreement. However, other methods of bargaining can serve these purposes without the disadvantages of positional bargaining. Positional bargaining

> fails to meet the basic criteria of producing a wise agreement, efficiently and amicably. When negotiators bargain over positions, they tend to lock themselves into those positions. The more you clarify your position and defend it against attack, the more committed you become to it. The more you try to convince the other side of the impossibility of changing your opening position, the more difficult it becomes to do so. Your ego becomes identified with your position. You now have a new interest in 'saving face' — in reconciling future action with past positions —making it less and less likely that any agreement will wisely reconcile the parties' original interests.

Id. at 4-5.

58. *See* Shane, *Legal Disagreement and Negotiation In a Government of Laws: The Case of Executive Privilege Claims Against Congress*, 71 MINN. L. REV. 461, 470, 484, 501 (1987) (effect of bargaining styles on resolution of executive privilege disputes).

59. *See supra* text accompanying notes 15-20.

60. Shane, *supra* note 58, at 501.

ration-of-powers issues. Each branch becomes preoccupied with labeling every act and actor so that they can be placed neatly in one of the branches of government, or with narrowing the previous formalist decision to its facts. In fact, one commentator notes that:

> [T]he branches tend more to intransigent 'positional' bargaining if their attitude is that only one correct version of [the] . . . law exists and each branch's position is the articulation of that law. Bargaining would be more productive if the branches believed that each branch had the authority to make law within its jurisdiction and that the aim of negotiation is not to settle on one legal view as binding on both parties. The branches should perceive themselves as negotiating an immediate, concrete problem. What government needs is a theory of bargaining that steers officials . . . away from the vindication of doctrinal principle and toward the reconciliation of institutional interests.[61]

One theory of bargaining that will promote the reconciliation of institutional interests without judicial involvement is problem-solving negotiation.[62] This Note posits that a functionalist approach toward resolving legislative-executive conflicts will create an incentive to implement problem-solving negotiation. The uncertainty of outcome in the functionalist test creates a disincentive for litigation and avoids the danger that "negotiations might bog down if the prospect of ultimate resort to the courts pushes the branches to view their positions as preludes to litigation, rather than as attempts to solve immediate problems reasonably."[63] In order to complete the analysis, however, it is necessary to address the previously mentioned criticisms and benefits of formalism and functionalism to dispel some notions that have been too easily accepted.

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61. *Id.*

62. *Id.* at 501-42 (application of problem-solving negotiation to executive-privilege disputes). *See also* W. FISHER & M. URY, *supra* note 57, at 41-57.

> The basic problem in a negotiation lies not in conflicting positions, but in the conflict between each side's needs, desires, [and] concerns . . . . Such desires and concerns are [also termed] *interests* . . . . Reconciling interests rather than positions works for two reasons. First, for every interest there usually exist several possible positions that could satisfy it . . . . When you . . . look behind opposed positions for the motivating interests, you can often find an alternative position which meets not only your interests but theirs as well.
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> Reconciling interests rather than compromising between positions also works because behind opposed positions lie many more [common] interests than conflicting ones.

Id. at 43.

63. Shane, *supra* note 58, at 529.

IV. THE ARGUMENT AGAINST FORMALISM

Formalism, with its clear rules, is claimed to contribute "to planning, stability, even assurance that conduct can and will be governed by law."[64] The previous analysis of how bright-line rules affect interbranch relations reveals that this perceived benefit of formalism is questionable.[65] The words planning and stability connote acceptance, that all parties involved agree on what the law says and when it applies. A formalistic analysis, however, does not lend itself to acceptance. The parties may agree that if an executive act was exercised by a member of the legislative branch there would be a violation of the separation of powers. While this is clear, it does nothing to contribute to planning or stability. The two branches will now argue positionally either that the act is really a legislative act, or that the actor is really a member of the Executive Branch. With the discussions framed in this unproductive light, the prospect of judicial intervention grows.

It also is questionable whether formalism assures that conduct will be governed by law. It has been noted that bright lines invite evasion by their clarity.[66] Professor Strauss has stated:

> Much human wisdom is reflected in what is not our failure but our *unwillingness* to attempt a full definition of fraud; fraud inheres in the efforts to circumnavigate such definitions as there may be. And the drafters or interpreters of a Constitution, anticipating and even wishing continuing struggle and irresolution over the dispersion of political power, could easily foresee a corresponding difficulty arising out of the attempt to specify permitted allocations.[67]

Thus, formalism merely invites the parties to relabel acts to fit within the bright lines rather than reaching an agreement before litigation.

V. THE CRITICISMS OF FUNCTIONALISM REEXAMINED

The chief criticisms of functionalism can be successfully rebutted. As discussed earlier, functionalism is labelled an unworkable test because careful analysis of institutional behavior can

64. Strauss, *Formal and Functional*, *supra* note 3, at 512.
65. *See supra* notes 57-58 and accompanying text.
66. *See supra* text accompanying note 33.
67. Strauss, *Formal and Functional*, *supra* note 3, at 512.

lead to convincing but opposite conclusions.[68] *Bowsher v. Synar*[69] is an example. Justice White's functional analysis in his dissent in *Bowsher* concludes that the legislature's power of removal of the Comptroller General poses no practical threat of increasing Congress' power at the executive's expense.[70] First, no Comptroller General has ever been removed or threatened with removal. Second, removal is limited to a showing of cause, assuring that Congress cannot act on a whim. Third, because the Comptroller General has only one fifteen-year term of office, Congress has only a limited ability to influence his or her behavior without the carrot of reappointment.[71]

A functional analysis of *Bowsher* provided by Professor Strauss, however, reaches the majority's result.[72] Unlike Justice White, who focused solely on the removal procedures of the Gramm-Rudman-Hollings Act, Strauss undertook a broader functional analysis of the relationships between the Comptroller General and the three branches of government. He found that:

> The Comptroller General's relationships with the President, from the proposing of his appointment onward, are strikingly weaker than those that characterize other agencies; the President and the courts both are utterly divorced from participating in the control of the particular functions under review; and the relationship between Congress and the Comptroller General is far more embracive and proprietary than the relationships that characterize the rest of government. Here one could fairly describe Congress as having appropriated to itself the President's characteristic functions (and made nugatory those of the courts).[73]

These divergent results do not suggest, however, that functionalism is judicially unmanageable, or that a framework must be developed to guide the test's application. First, any balancing test is inherently malleable; the result rests on individual judgments rather than concrete rules. The contradictory results of Justice White's and Professor Strauss' functional analyses in *Bowsher*, therefore, may be explained by Justice White's incorrect decision

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68. *See supra* notes 41-46 and accompanying text.

69. 478 U.S. 714 (1986).

70. *Id.* at 776 (White, J., dissenting).

71. *Id.* at 770-75; *See* Entin, *supra* note 41; Strauss, *Formal and Functional*, *supra* note 3, at 501-02.

72. Strauss, *Formal and Functional*, *supra* note 3, at 519-20.

73. *Id.*

to focus solely on the removal issue, while Professor Strauss applied the functional test correctly.[74] Also, separation-of-powers issues always will require individual judgment at some level. One commentator notes that, "determining when the institutional capacities necessary to maintain the required tension among Congress, President, and Court have been threatened *will rarely be other than a difficult act of judgment.*"[75]

Second, a framework is not necessary for a functionalist test. The courts are prepared and competent to define the core functions of each branch and that is the only objective criteria necessary for the test. Any attempt to use empirical data on institutional relationships between the President and Congress would be problematic. Indeed, the determinative reason for choosing the functionalist approach is the effect of its inherent uncertainty of outcome on interbranch behavior. The more structure that is added to the analysis before it begins, the more predictable its outcome. This predictability then will decrease the incentive for productive negotiation, the desired effect on interbranch behavior.

Opposite results, as in *Bowsher*,[76] stem from framing the initial analysis differently — a decision to functionally evaluate one aspect of a relationship rather than the entire set of relationships. At most, the functionalist test could require that the initial analysis be framed as broadly as possible to guide its application, as illustrated by Professor Strauss.[77]

CONCLUSION

Given the renewed interest in legislative-executive separation-of-powers issues, as exhibited by *Morrison v. Olson*,[78] this Note

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74. *Id.* at 522.

75. *Id.* (emphasis added).

76. *See supra* text accompanying notes 70-73.

77. Strauss, *Formal and Functional*, *supra* note 3, at 520.

78. 108 S. Ct. 2597 (1988). *See supra* note 4. The *Morrison* Court used the functionalist method of analysis and held that Congress' ability to impose a "good cause" restriction on the President's power to remove an official did not depend on whether or not that official could be classified as "purely executive." Instead, the Court looked at the operation of the removal provision as a whole, and concluded that it did not "unduly trammel an executive authority," because the President retained ample authority to supervise and remove the independent counsel. *Id.* at 2616-19. In addition, the Court concluded that the Act as a whole did not violate the separation of powers because it did not undermine the powers of the Executive Branch, or disrupt the proper balance between coordinate branches by preventing the Executive Branch from accomplishing its constitutionally assigned functions. This again is a functionalist analysis because the Court did not simply stop the anal-

has sought to examine the functionalist-formalist debate in a new light. When the debate focuses on the effect of a judicial test on institutional behavior, functionalism is the preferred analysis. Its positive effect on interbranch relations furthers both the goal of limited judicial involvement and the larger ideal of a "workable government" by encouraging legislative-executive cooperation. Once these benefits are accepted, the perceived benefits of any formalist, bright-line test fall away, and the criticisms of judicial balancing assume less importance. This analysis illustrates that a seemingly arcane academic exercise can translate into a formula for practical government.

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ysis with a finding that Congress had acted so as to limit executive power. Instead, the Court inquired as to whether the Executive Branch retained sufficient control over the independent counsel to ensure that the "laws are faithfully executed." *Id.* at 2620-22.