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CHARACTERIZING POWER FOR SEPARATION-OF-POWERS PURPOSES

Tuan N. Samahon *

Every separation-of-powers case quickly encounters a fundamental threshold inquiry that remains surprisingly difficult, even after almost 230 years of practice under the United States Constitution: what is the nature—legislative, executive, or judicial—of the contested power exercised? The three cognate vesting clauses in Articles I, II, and III use these undefined terms as if they are intended to have substantive, separate content.[1] This tripartite division, which is inefficient by design,[2] is built into our constitutional system to safeguard individual liberty by assuring that powers to legislate, execute, and adjudicate the laws do not all fall into a single set of (potentially) oppressive hands.[3] In many separation-of-powers cases, whether the challenged institutional arrangement has honored that principle turns on the categorization or characterization of the powers at stake.

To appreciate how characterization of power can quickly turn a case upside down, consider three scenarios in which this fundamental concern about the nature of the power being exercised became quite apparent:

* Professor of Law, Villanova University, Charles Widger School of Law. The author presented a version of this article during the *University of Richmond Law Review*'s Symposium: Defining the Constitution's President Through Legal & Political Conflict (Oct. 27, 2017). I thank Todd Aagaard for his comments and Stephanie Mersch for her research assistance.

1. *Compare* U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress . . . ."), *with id.* art. II, § 1, cl. 1 ("The executive Power shall be vested in a President . . . ."), *and id.* art. III, § 1 ("The judicial Power . . . shall be vested in one supreme Court . . . .").

2. *See* INS v. Chadha, 462 U.S. 919, 944 (1983) ("Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government . . . .").

3. THE FEDERALIST NO. 47, at 249 (James Madison) (George W. Carey & James McClellan eds., 2001) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.").

1. When the United States Tax Court ("Tax Court"), staffed by judges who lack Article III tenure, enters judgment against a taxpayer, does it exercise a portion of the judicial power of the United States, such that it would be problematic for the President to have power to remove its judges? If the Tax Court's adjudicative function represents a "quasi-judicial" exercise of executive power, there is no constitutional difficulty. But if the Tax Court's adjudication represents an exercise of judicial power by officers not cloaked in Article III tenure, it surely violates the separation of powers.

2. What if the President (or his delegate) declines, on grounds similar to those recently rejected by Congress, to enforce laws against classes of persons who meet certain equitable criteria? If the President merely executed the law in a "quasi-legislative" vein by promulgating prospectively applicable rules that regulate a group of persons by class, his action is permissible, assuming not otherwise limited or qualified by the Constitution. But if the President exercised legislative power by directing his delegate to create law, it is an impermissible aggrandizement at the expense of Congress's legislative power.

3. When Congress grants the President the ability to cancel items of spending, has it impermissibly granted him power to participate in the lawmaking process, or is the cancellation function better understood simply as delegated discretion authorizing him to execute spending laws? If Congress delegated discretion to the executive to act, the cancellation power will withstand scrutiny under the Supreme Court's delegation jurisprudence. If, however, Congress has granted the President a role in legislating, the cancellation authority violates the requirements of bicameralism and presentment.

In each case, the dispute's resolution substantially turns on how the Court characterizes the action in question. Categorization or characterization of such disputed actions for separation-of-powers purposes, however, is subject to competing judicial approaches, which are colored by contested separation-of-powers and jurisprudential motivations. Given the importance of characterization, this article offers a brief overview of how the Justices of the Supreme Court have characterized power for separation-of-powers purposes. Part I highlights four competing approaches to power characterization by reviewing illustrative separation-of-powers cases where the disposition turned on power categorization. Part II assesses the influence the late Justice Scalia exercised over the Court's power

characterization jurisprudence and cautions against oversimplification of the characterization inquiry.

I. THE APPROACHES TO CHARACTERIZATION

The Justices of the Supreme Court have engaged a variety of approaches to characterize contested power, including tests that: (1) principally emphasize the disputed function itself, (2) prioritize the formal identity of the officer, (3) look to the pragmatic effects of the power, and (4) question whether functions can ever be suitably categorized.

A. *Approach 1: Function-Based Characterization*

The first approach to answering the characterization question engages a *function-based definition* that attempts to capture the range of activities variously characterized as "legislative," "executive," and "judicial" powers. Proponents of this method, such as Chief Justice Warren Burger in *Bowsher v. Synar*[4] or *INS v. Chadha*,[5] and Justice Harry Blackmun in *Freytag v. Commissioner*,[6] would argue that these fundamental constitutional words inherently entail functional, substantive content and are not merely formal labels.[7] Therefore, categorization turns on the functions or activities that an officer performs. For example, the judicial power might be defined as carefully applying legal principles to facts on an impartial, disinterested, case-by-case basis in a procedurally thick adversarial proceeding that results in a judgment that will bind the parties and is not subject to revision by other governmental actors.

Function-based attempts to characterize power as "executive" or "legislative" are not always wholly satisfactory where the definitions of the powers are anemic. Consider *Bowsher v. Synar*, where the Court's function-based approach to characterizing the power in question dictated the case's outcome.[8] Under the Gramm-Rudman-

4. 478 U.S. 714, 734 (1986).

5. 462 U.S. at 951 ("[T]he powers delegated to the three Branches are functionally identifiable.").

6. 501 U.S. 868, 878 (1991).

7. Tuan Samahon, *Blackmun (and Scalia) at the Bat: The Court's Separation-of-Powers Strike Out in* Freytag, 12 NEV. L.J. 691, 701–02 (2012).

8. 478 U.S. at 734.

Hollings Act ("Act"), Congress attempted to reduce and eventually to eliminate annual federal budget deficits over a five-year period by setting progressively lower maximum deficit amounts until the deficit was eliminated.[9] To reach this target, the Congressional Budget Office ("CBO") within the legislative branch, and the Office of Management and Budget ("OMB") within the executive branch were to independently estimate the projected federal budget deficit for the next fiscal year.[10] When the deficit exceeded a targeted limit by a statutorily specified sum, the directors of CBO and OMB would independently compute the budget cuts necessary at the individual program level to fall beneath the maximum deficit amount and would report their estimated deficit and budget cut calculations to the Comptroller General ("CG").[11] In turn, the CG, taking the executive and legislative branch estimates, would resolve any differences and present his own conclusions to the President, who then was obligated to mandate sequestration of the specified spending, barring any congressional intervention that reduced spending below the deficit ceiling.[12] The CG, a long-standing legislative office, had always been subject to removal for cause by a joint congressional resolution, which hypothetically afforded a measure of congressional control.[13] The Act's challengers argued that the CG's new reporting power was *executive*, not legislative, and violated the separation of powers by authorizing a congressional officer, subject to congressional control, to wield executive power.[14] If the Court were to have characterized the CG's reporting power as "legislative," then congressional control of the CG would have presented no constitutional difficulty.[15]

Chief Justice Warren Burger, writing for the majority, accepted the challengers' characterization of the reporting power as "execution of the law."[16] Curiously, Burger explained that the CG's power was executive because the CG "must exercise judgment concerning

9. *Id.* at 717.
10. *Id.* at 718.
11. *Id.*
12. *See id.*
13. *Id.* at 727–28, 730.
14. *Id.* at 732–33.
15. Very likely, however, the Court would have had (eventually, with a ripe challenge) to confront the real constitutional problem presented by the Act, namely, that the President would be compelled to execute the sequester of funds consistent with the CG's report. For the argument's elaboration, see E. Donald Elliott, *Regulating the Deficit After* Bowsher v. Synar, 4 YALE J. REG. 317, 320, 329–32 (1987).
16. *Bowsher*, 478 U.S. at 733.

facts that affect" the Act's application and must interpret the Act "to determine precisely what budgetary calculations are required," which are decisions "typically made by officers charged with executing a statute."[17] As one commentator observed, this *ex ante* function-based definition of executive is curious; one could understand "interpreting law and applying it to facts [as] the essence of a judicial, not an executive function."[18] Thus, the definition was both "utterly vapid and without content."[19] Suffice it to say, the *ex ante* definition of function has not been terribly successful in developing persuasive accounts of the substantive content of the three branches' respective powers.

In *Freytag v. Commissioner*, the Supreme Court rejoined the characterization debate in the context of a challenge to the authority of the Tax Court.[20] Characterization of power was central to the Supreme Court's analysis.[21] A taxpayer challenged an adverse ruling by a special trial judge ("STJ") of the Tax Court by objecting to the constitutional validity of the STJ's appointment by the Chief Judge of the Tax Court.[22] If the STJ lacked a valid appointment, as fruit of the poisonous tree, the judge's ruling would be invalid too. Under the excepting provision of the Appointments Clause, Congress may opt out of the advice and consent appointment process and vest the sole power to appoint inferior officers in the heads of executive departments or in the "Courts of Law."[23] By statute, Congress authorized the Chief Judge of the Tax Court to appoint STJs.[24] If the Supreme Court could fairly characterize the Chief Judge of the Tax Court as either a head of an executive department or a part of the Courts of Law, the appointment was valid.[25]

All the Justices on the Court agreed the appointment was valid, but their rationales sharply split at a fundamental level. Was the chief judge an officer exercising executive power and therefore a head of an executive department or an officer exercising a portion of the judicial power and therefore a part of the Courts of Law? The

17. *Id.* at 732–33.
18. Elliott, *supra* note 15, at 324–25.
19. *Id.* at 326.
20. *See* 501 U.S. 868, 872 (1991).
21. *See id.* at 877–92.
22. *Id.* at 872.
23. U.S. CONST. art. II, § 2, cl. 2.
24. I.R.C. § 7443A(a) (2012 & Supp. IV 2013–2017).
25. *See Freytag*, 501 U.S. at 877–78.

Court was sharply divided over the type of power exercised by the Tax Court. Justice Blackmun, writing for the five-Justice majority, thought the Chief Judge of the Tax Court was properly understood as a part of the Courts of Law because the Court exercised the judicial power: "The Tax Court exercises judicial, rather than executive, legislative, or administrative, power."[26]

To reach his conclusion, Justice Blackmun approached the case with a functional definition of judicial power. The Tax Court exercises "judicial power" by fulfilling its congressionally anointed function of interpreting and "apply[ing] the Internal Revenue Code in disputes between taxpayers and the Government."[27] The Tax Court is judicial because the "adjudicative body" exercised only powers that are "quintessentially judicial in nature."[28]

These "quintessentially judicial" functions—that is, the functions most perfectly or ideally representative of the judicial power—included construing statutes and agency regulations and not making "political decisions."[29] Its functions and role "closely resemble[d] those of the federal district courts" and the Tax Court "exercise[d] its judicial power in much the same way as the federal district courts exercise theirs."[30] It has the "authority to punish contempts by fine or imprisonment," "grant certain injunctive relief," "order the Secretary of the Treasury to refund an overpayment," "subpoena and examine witnesses," "order production of documents, and administer oaths."[31] In characterizing the power exercised, Justice Blackmun compared the Tax Court to an undisputed exemplar of the judicial power of the United States—the United States District Courts—and selected those features that he thought embodied the essence of judicial power, namely, the ability to adjudicate and authorize remedies.[32] This focus on function isolated the essence of the judicial power as adjudication, a power that the Tax Court also exercises. In short, Justice Blackmun in *Freytag* employed a judicialized version of "the Duck Test" in looking to function: if it looks like a judge, swims like a judge, and quacks like a judge, it is probably a judge.

26. *Id.* at 890–91.
27. *Id.* at 891.
28. *Id.* (citations omitted).
29. *Id.*
30. *Id.*
31. *Id.*
32. *See id.*

Similar to *Bowsher* and *Freytag*, the resolution of *Clinton v. City of New York*[33] turned on whether a disputed spending cancellation function was characterized as an exercise of legislative or executive power. The Line Item Veto Act of 1996 granted the President authority to cancel limited, particular types of authorized budgetary spending.[34] The Solicitor General characterized the "cancellations" as "merely exercises of discretionary authority granted" to the President's office.[35] They were merely presidential execution of delegated discretionary authority. Cancellations were, "in practical effect, no more and no less than the power to 'decline to spend' specified sums of money, or to 'decline to implement' specified tax measures."[36] Justice Stevens, writing for the majority, rebuffed this characterization of the cancellation power, which was actually legislative in function, involving presidential lawmaking outside of the "single, finely wrought and exhaustively considered, procedure" specified in Article I, Section 7.[37] The majority held that two presidential cancellations violated the Presentment Clause, because, legally and practically, "the President has amended two Acts of Congress by repealing a portion of each."[38] Justice Stevens conceptualized this presidential authority as involvement in the legislative process and entailing "repeal of statutes."[39]

Justice Stevens refused the President's effort to equate cancellation with the execution of delegated authority, relying on a function-focused approach to characterization. He thought the authorized cancellations closely resembled lawmaking and the authorizing procedure closely resembled rewriting of the Article I, Section 7 lawmaking process, *not* execution under delegated authority. Unlike delegation, the exercise of cancellation power did not depend on any factual contingency or any previously non-existing condition.[40] The Line Item Veto Act created no presidential duty to cancel spending if any particular factual contingency were

33. 524 U.S. 417 (1998).

34. *Id*. at 436.

35. *Id*. at 442.

36. Brief for the Appellants at 40, *Clinton v. City of New York*, 524 U.S. 417 (No. 97-1374).

37. *Clinton v. City of New York*, 524 U.S. at 439–40 (quoting INS v. Chadha, 462 U.S. 919, 951 (1983)).

38. *Id*. at 421, 438.

39. *Id*. at 438 (quoting *Chadha*, 462 U.S. at 954).

40. *Id*. at 443.

presented.[41] Moreover, exercise of cancellation power *rejected*, rather than advanced, subsequent congressional spending policy judgments.[42]

Justice Scalia and the dissent thought that the legislative-sounding "title of the Line Item Veto Act . . . succeeded in faking out the" majority by falsely suggesting the President was exercising legislative rather than executive power.[43] Instead, Justice Scalia thought the cancellation function concerned only a pedestrian congressional delegation of executive discretion in law execution.[44] "[T]here is not a dime's worth of difference between Congress's authorizing the President to *cancel* a spending item, and Congress's authorizing money to be spent on a particular item at the President's discretion."[45] This functional similarity between cancellation and impoundment failed to persuade Justice Scalia that legislative, rather than executive, power was at stake. As will be seen, the presidential identity of the canceling authority was paramount to Justice Scalia in characterizing the power as "executive." For the Hamiltonian Justice, the power was executive and the Court's history of relative deference with respect to delegation of discretion to the executive counseled restraint in judicial review.[46]

B. *Approach 2: Formal Identity of the Officer*

The second approach categorizes power based on the *formal identity of the officer* undertaking the activity. Justice Scalia's concurrence in *Freytag v. Commissioner*[47] suggests this approach. This position might be motivated by formalist scruples about predictability and the rule of law,[48] maintaining independent spheres of

41. *Id.* at 443–44.

42. *Id.* at 444.

43. *Id.* at 469 (Scalia, J., dissenting).

44. *Id.*

45. *Id.* at 466.

46. Indeed, Professor Steven Calabresi hailed *Clinton v. City of New York* as a resurrection of the non-delegation doctrine. *See* Steven G. Calabresi, *Separation of Powers and the Rehnquist Court: The Centrality of* Clinton v. City of New York, 99 NW. U.L. REV. 77, 85–86 (2004).

47. 501 U.S. 868, 911 (1991) (Scalia, J., concurring).

48. *See generally* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176 (1989).

action, and legitimating modern administrative innovations in light of an eighteenth-century Constitution.

Justice Scalia characterized the power exercised by the Tax Court as *executive*, not judicial. To explain his characterization, Justice Scalia critiqued the majority's function-based approach, which interpreted "judicial power" as merely "the power to adjudicate in the manner of courts."[49] Instead, Justice Scalia suggested that adjudication was not the defining aspect of judicial power, but merely a mode of decision-making commonly associated with the courts, but by no means unique to them. "It is no doubt true that all such bodies 'adjudicate,' *i.e.*, they determine facts, apply a rule of law to those facts, and thus arrive at a decision. But there is nothing 'inherently judicial' about 'adjudication.'"[50] By critiquing the majority's characterization as improperly equating adjudication with judicial power, Justice Scalia deemphasized inquiry into the judicial officer's function. Thus, even if the United States District Courts adjudicate, that does not mean that adjudication by the Tax Court is also exercising judicial power. Justice Scalia declined to offer any functional account of what lies at the core of an exercise of the judicial power.

Instead, Justice Scalia offered an alternative, bright-lined, formal test for characterizing power that looks to the formal identity of the actor by considering the office's characteristics. "[G]iven the performance of adjudicatory functions by a federal officer, it is *the identity of the officer*—not something intrinsic about the mode of decisionmaking or type of decision—that tells us whether the judicial power is being exercised."[51] Thus, Justice Scalia did not need to inquire into the intrinsic or essential nature of the Tax Court's power; he looked to the officer's identity. But how did Justice Scalia ascertain the identity of the officer, whether legislative, executive, or judicial? He considered the formal characteristics of the office. Whether an adjudicative decision maker is exercising executive or

49. *Freytag*, 501 U.S. at 908 (Scalia, J., concurring).

50. *Id*. at 909. Similarly, there is nothing inherently executive about adjudication. In *Printz v. United States*, Justice Scalia critiqued the claim that Congress had commandeered state judges to perform an executive adjudicative function by doubting that adjudication is any more executive than it is legislative. 521 U.S. 898, 908 n.2 (1997). "[I]t is unreasonable to maintain that [ancillary tasks related to adjudication of citizenship applications] were unalterably executive rather than judicial in nature." *Id.* Modern regulatory agencies adjudicate, yet in doing so, they copy a mode of decision-making historically associated with courts, but no longer unique to them. *Id.*

51. *Freytag*, 501 U.S. at 911 (emphasis added).

judicial power turns on their attributes of office: do they "possess life tenure and a permanent salary"?[52] If not, they cannot exercise judicial power. Why not? Because circularly, only federal judges have life tenure and salary protection,[53] the power exercised by federal judges is the federal judicial power, and the federal judicial power is assigned to Article III federal judges. If an office lacks life tenure and salary protection, then the office must be exercising some other power, for example, executive or perhaps legislative power.[54]

In *Freytag*, Justice Scalia and the concurring Justices examined the characteristics of Tax Court judges to conclude they are not judicial officers.[55] The judges lack tenure during good behavior as they are removable for mere "inefficiency, neglect of duty, or malfeasance in office."[56] Justice Scalia noted the President holds the power to remove the judges and concludes, given the "here-and-now subservience" created by even qualified removal power, that the judges must exercise executive power.[57]

What is particularly striking for someone reading *Freytag* is that nine Supreme Court Justices disagreed on the characterization of power exercised by the Tax Court. On Justice Scalia's account, the mistake is understandable in one sense. As Justice Stevens put it in *Bowsher v. Synar*, "our cases demonstrate [that] a particular function, like a chameleon, will often take on the aspect of the office to which it is assigned."[58] Justice Scalia's answer to the conundrum, then, is not to consult an office's function in characterizing power.

Justice Scalia's critique of the function inquiry applies beyond *Freytag*'s narrow context of falsely equating adjudication with the judicial power. "'Adjudication' . . . is no more an 'inherently' judicial function than the promulgation of rules governing primary conduct

52. *See id*.

53. *See* U.S. CONST. art. III, § 1.

54. Justice Scalia would have rejected any characterization that the power was legislative, because Congress did not control the judges and the Tax Court judges were not themselves members of Congress.

55. *See Freytag*, 501 U.S. at 912.

56. *Id*. (quoting Bowsher v. Synar, 478 U.S. 714, 729 (1986)).

57. *See Bowsher*, 478 U.S. at 720.

58. *Id.* at 749 (Stevens, J., concurring).

is an 'inherently' legislative one."[59] Thus, like adjudication, "promulgation of rules governing primary conduct" is merely a mode of decision-making. It may be familiar to the legislative branch, but it is not unique to that branch and is not the *sine qua non* of that branch's constitutionally assigned power. Executive-branch agencies promulgating rules are not necessarily exercising non-executive power. Agencies may act prospectively with regard to classes of regulated parties in ways that would govern primary conduct. The United States Code ("U.S.C.") and the United States Code of Federal Regulations ("C.F.R.") are creatures of different powers—one an exercise of legislative power and the other an exercise of executive power. Apart from that difference, both regulate and govern parties' primary conduct, albeit at different levels of regulatory generality. Their character as legislative or executive is not because they differ inherently, but because officeholders with different office characteristics promulgated them. In fact, one could take C.F.R. provisions, submit them to the "single, finely wrought and exhaustively considered," procedure of Article I, Section 7 bicameralism,[60] where members of Congress with the formally designated characteristics of office vote,[61] and then submit it to presidential presentment, where, with formalist alchemy, executive power "lead" is transformed into legislative power "gold."

If Justice Scalia's insight about adjudication and rulemaking is correct with respect to the executive, it should have equal purchase when examined in the context of the other branches. In fact, adjudication does occur in Congress as a mode of decision-making. Article I explicitly authorizes the United States House of Representatives to adjudicate when it acts on a case-by-case basis to impeach officers.[62] Similarly, Article I authorizes the United States Senate to try cases when it sits as a court of impeachment to try and perhaps convict.[63] More generally, the House and Senate acting together adjudicate when they fact gather, engage in "legislative adjudication," and deliberate the equities of a private bill for the benefit of a named individual or individuals.[64] Thus, Congress exercises legislative power in enacting private bills but does so in a

59. *Freytag*, 501 U.S. at 910 (Scalia, J., concurring).

60. *See* INS v. Chadha, 462 U.S. 919, 951 (1983).

61. *See* U.S. CONST. art. I, § 2 (defining characteristics of office for members of the House of Representatives); *see also id.* art. I, § 3 (same, but for the Senate).

62. *See id.* art. I, § 2, cl. 5.

63. *See id.* art. I, § 3, cl. 6.

64. *See* Note, *Private Bills in Congress*, 79 HARV. L. REV. 1684, 1687 (1966).

mode of decision-making most familiar to that employed by judges sitting as a court of equity. Specific constitutional disabilities provided in Article I, Section 9, such as the Bill of Attainder and Ex Post Facto Clauses,[65] qualify the legislative vesting clause's grant of power and prevent Congress from acting quasi-judicially in ways that may injure individuals.[66]

Similarly, acting prospectively by reference to categories of persons or situations is not the defining attribute of legislative power. This mode of decision-making is merely "quasi-legislative." Beyond Justice Scalia's observation that this is why agencies can exercise rulemaking authority, Justice Scalia's modal analysis explains how the judiciary may possess congressionally delegated authority.[67] A court uses this method of decision-making when promulgating federal rules for civil procedure, evidence, and criminal law, or when setting forth advisory sentencing guidelines for exercises of judicial power.[68]

Justice Scalia's dissatisfaction with the majority's *Freytag* analysis has not remained merely a historical sidenote. The United States Court of Appeals for the District of Columbia Circuit resurrected the *Freytag* characterization issue in a challenge to the power of the Tax Court in *Kuretski v. Commissioner*.[69] In *Kuretski*, taxpayers challenged the validity of an adverse judgment of the

65. U.S. CONST. art. I, § 9, cl. 3.

66. *See, e.g.*, INS v. Chadha, 462 U.S. 919, 962 (1983) (Powell, J., concurring) ("[The framers'] concern that a legislature should not be able unilaterally to impose a substantial deprivation on one person was expressed not only in this general allocation of power, but also in more specific provisions, such as the Bill of Attainder Clause, Art. 1, § 9, cl. 3.").

67. Justice Scalia's dissent in *Mistretta v. United States* is consistent with delegations to the courts and his later articulated approach in *Freytag* of focusing on the formal identity of the officer when characterizing an exercise of power. Mistretta v. United States, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting). First, Scalia rejected equating the lawmaking function with the legislative power. "[A] certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action . . . ." *Id.* at 417 (emphasis omitted). Second, his opinion opposed the particular congressional delegation to the United States Sentencing Commission under the Sentencing Reform Act of 1984, because the Commission was neither a court composed entirely of Article III judges nor a body controlled by Article III judges. *Id.* at 413, 420–21. Accordingly, the Commission's promulgation of sentencing standards was not lawmaking discretion inhering in judicial action. *See id.* at 420.

68. *But see* Steven G. Calabresi et al., *The Rise and Fall of the Separation of Powers*, 106 NW. U.L. REV. 527, 527, 547–48, 548 n.84 (2012) (lamenting "deviations from a pure functional separation of powers," urging removal of the Supreme Court as a procedural rulemaker, and noting Justice Black's separation-of-powers objections to rule adoption).

69. 755 F.3d 929 (D.C. Cir. 2014). The author litigated this case.

Tax Court on the basis that the judgment was a product of a constitutionally flawed adjudication.[70] Tax Court judges, who under *Freytag*'s characterization exercise only a portion of the judicial power of the United States, are subject to removal by the President on qualified grounds.[71] Even qualified grounds for removal make removable officers here-and-now subservient to the removing officers.[72] In *Kuretski*, that meant the Tax Court judges exercising judicial power (per *Freytag*) were "here-and-now subservient" to the chief *executive* officer, the President.[73] This admixture of executive and judicial power would violate the separation of powers.

Rather than embrace this syllogism, the D.C. Circuit "underruled" the Supreme Court's *Freytag* majority.[74] It rejected the Supreme Court's *Freytag* characterization of the Tax Court's power.[75] *Freytag* said that the Tax Court exercised "a portion of the judicial power of the United States,"[76] but the D.C. Circuit read *Freytag* as offering merely a clause-bound interpretation of the meaning of "the Courts of Law" in the Appointments Clause,[77] i.e. the excepting provision concerned only a technical interpretive question about the method of appointment, unconnected to broader separation-of-powers concerns. The *Freytag* majority, however, characterized the Tax Court as exercising judicial power without restricting its analysis to the question of appointments: "By resolving these disputes, the court exercises a portion of the judicial power of the United States."[78] Moreover, the *Freytag* Court had indicated several times that it was offering a whole-Constitution analysis. This was so because "[t]he principle of separation of powers is embedded in the Appointments Clause."[79] *Freytag* interpreted the "Heads of Departments" language "in the Appointments Clause consistently with its interpretation in other constitutional provisions," comparing usage with other constitutional provisions.[80] Similarly, the Court acknowledged in its interpretation

70. *Id*. at 931–32.

71. I.R.C. § 7443(f) (2012 & Supp. II 2013–2015) (describing removal grounds as "inefficiency, neglect of duty, or malfeasance in office").

72. Bowsher v. Synar, 478 U.S. 714, 720, 728 (1986).

73. *Kuretski*, 755 F.3d at 938–39.

74. *See id*. at 940.

75. *See id*. at 932, 940.

76. Freytag v. Comm'r, 501 U.S. 868, 891 (1991).

77. *Kuretski*, 755 F.3d at 940–41.

78. *Freytag*, 501 U.S. at 891.

79. *Id.* at 882.

80. *Id*. at 886–87.

that it consulted the Constitution's cognate provisions to interpret the Appointments Clause's key terms.[81] Nonetheless, the D.C. Circuit wrote off *Freytag* as a clause-bound interpretation of the Appointments Clause, thereby distinguishing it and freeing itself to agree with Justice Scalia's concurrence's conclusion that the Tax Court exercised only *executive power*.[82] Accordingly, *Kuretski* concluded the case did "not involve the prospect of presidential removal of officers in another branch."[83] Having realigned the Tax Court's power as only executive, *not* judicial, the separation-of-powers problem vanishes. It is no constitutional defect that the President, in whom the executive power is vested, may remove officers who are characterized as exercising executive power.

C. *Approach 3: Historical-Based Induction*

Third, an *inductive approach* to characterizing power might accept that fundamental terms have content, but that they assume more specified meanings after actual practice governing has informed the terms. Rather than approach the characterization of powers by definitional deduction, power is characterized inductively from many individual historical cases of power's exercise. To categorize, the Court will generalize from the historical individual data points to determine whether the disputed exercise falls within a well-recognized domain traditionally characterized, variously, as legislative, executive, or judicial, or whether it is a novelty unsupported by past practice. Justice Robert Jackson partially captured this view when he said:

> The actual art of governing under our Constitution does not and *cannot conform to judicial definitions of the power of any of its branches* based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.[84]

Actual experience—historical exercises of power over time—rather than an *a priori* definition informs the Court's inquiry. Generally

81. *Id.* at 888–89.

82. *Kuretski*, 755 F.3d at 940–42.

83. *Id.* at 939.

84. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (emphasis added); *see also id.* at 610–11 (Frankfurter, J., concurring) (describing "gloss which life has written" on "the words of the Constitution," including "executive Power" (quoting U.S. CONST. art. II, § 1)).

speaking, an inductive approach is relatively deferential to the challenged federal governmental action, because its characterization of power allows functional arrangements justified over time by their demonstrated utility.

Justice Frankfurter's opinion in *Youngstown Sheet & Tube Co. v. Sawyer* best embodies the inductive approach.[85] In *Youngstown*, the Court confronted an executive-legislative dispute in the context of the Korean War. Under President Truman's Executive Order 10340, Secretary of Commerce Charles Sawyer seized steel mills where unionized labor was threatening to strike after unsuccessful bargaining.[86] Secretary Sawyer directed the mill supervisors to keep running the mills.[87] In response, the mill companies sued to enjoin the seizure as authorized neither by the Constitution's grant of the executive power to the President nor by federal statute.[88]

To Justice Frankfurter, "the content of the three authorities of government is not to be derived from an abstract analysis."[89] Instead, "[d]eeply embedded traditional ways of conducting government . . . give meaning to the words," such as the words "the executive power."[90] This gloss helps give substantive content to the otherwise vague term "executive power."[91]

> [A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on "executive Power" vested in the President by § 1 of Art. II.[92]

Turning to historical practice, Justice Frankfurter surveyed relevant past instances of executive seizure to define the scope of executive power.[93] He deemed irrelevant those executive seizures authorized by statute or by independent constitutional powers, or those occurring during declared wars.[94] Justice Frankfurter con-

85. *Id*. at 593 (Frankfurter, J., concurring).
86. *Id*. at 583 (majority opinion).
87. *Id*.
88. *Id*.
89. *Id*. at 610 (Frankfurter, J., concurring).
90. *Id*.
91. *Id*. at 611.
92. *Id*. at 610–11 (quoting U.S. CONST. art. II, § 1).
93. *Id*. at 611–13.
94. *Id*.

sidered three seizures during a six-month period prior to the American entry into World War II.[95] He concluded the three seizures were "isolated" and failed to amount "in number, scope, duration or contemporaneous legal justification, to the kind of executive construction of the Constitution" that would constitute them as part of the executive power of the United States.[96] There were inadequate data points to inductively conclude that executive power encompasses executive seizures occurring without statutory or other independent constitutional authorization. Similarly, he noted that neither had Congress, by "long-continued acquiescence," approved non-statutorily authorized executive seizures as part of the executive power.[97]

Of course, emphasis on historical-based induction should not necessarily be taken as incompatible with constitutional formalism more generally. Formalism in examining historical precedents may inform how finely precedents are scrutinized in the inductive process. Agency adjudication over the course of a century might broadly suggest the propriety of executive case-by-case decision-making. But a particular historical pattern of requiring Article III adjudication when private rights are present would suggest a limitation on executive power and define over time the contours of what is encompassed by the judicial power of the United States.[98]

D. *Approach 4: Skepticism*

Finally, whether viewed as a separate approach or as merely a critique of the other approaches to characterizing power, the *skeptical approach*, such as expressed by Justice Stevens in *Bowsher v. Synar*, questions whether federal governmental powers can ever be adequately determined to enable a tripartite parceling of functions.[99] Concurring separately in *Bowsher*, Justice Stevens advanced a competing position on characterizing the CG's power that might be termed a skeptical approach to power characterization. Justice Stevens disagreed with the majority that the power the CG

95. *Id.* at 613.

96. *Id.*

97. *Id.*

98. *See, e.g.*, Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 561–62 (2007) (noting difficulty of "Platonic" idealism in characterizing adjudicative powers based on function and proposing instead that characterization of power should turn on the formal presence of core individual, private rights).

99. 478 U.S. 714, 749 (1986) (Stevens, J., concurring).

exercised could clearly be characterized as "executive" or otherwise.[100] Instead, Justice Stevens called it an "unstated and unsound premise that there is a definite line that distinguishes executive power from legislative power."[101] He posited "the exercise of legislative, executive, and judicial powers *cannot be categorically distributed* among three mutually exclusive branches of Government," because "governmental power cannot always be readily characterized with only one of those three labels."[102] Instead, Justice Stevens suggested a colorful simile of a "chameleon," which changes color to camouflage itself against a new background.[103] "[A] particular function, like a chameleon, will often take on the aspect of the office to which it is assigned."[104] This comparison suggests that characterizing power based on function might be a fool's errand, because the characterization of a function shifts depending on the background context of each new office.

Paradoxically, the skeptical approach to characterization might lead a jurist to adopt a formal identity-of-the-actor approach as a way to avoid indeterminacy and the confessedly difficult task of categorization. In *Freytag*, Justice Scalia referenced the skeptical approach and chameleon principle expressed by Justice Stevens.[105] Nonetheless, the suggestion did not move Justice Stevens, who joined the majority's categorization of the Tax Court's adjudicative function as representing an exercise of judicial power.

II. LIVING IN JUSTICE SCALIA'S WORLD

In reviewing these approaches to characterization of power, it is evident that Justice Scalia bequeathed an especially influential formalist separation-of-powers legacy to the Court's modern jurisprudence, especially as concerns the characterization of power.

The ascendance of Justice Scalia's approach to power characterization is visible in nondelegation cases. For example, in *Whitman*

100. *Id.* at 748.

101. *Id.*

102. *Id.* at 749 (emphasis added). Indeed, no less an authority than James Madison found the definitional task challenging. "Experience has instructed us, that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces, the legislative, executive, and judiciary . . . ." THE FEDERALIST NO. 37, at 182 (James Madison) (George W. Carey & James McClellan eds., 2001).

103. *Bowsher*, 478 U.S. at 749 (Stevens, J., concurring).

104. *Id.*

105. Freytag v. Comm'r, 501 U.S. 868, 911 (1991) (Scalia, J., concurring).

v. American Trucking Ass'ns, the nondelegation issue turned on whether authority to promulgate Clean Air Act national ambient air quality standards constituted delegation of legislative power or merely permissible discretion inhering in law execution.[106] Justice Scalia reiterated his view that the Court would not police delegations: "[W]e have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'"[107] Why did the Court's leading exponent of originalism embrace such a deferential stance? Justice Scalia's formal identity approach to power characterization animated it. After all, "[t]he essence of the nondelegation doctrine is at bottom the essence of the separation of powers: How do we tell what constitutional power an actor is deploying?"[108]

As Justice Alito explained in *Department of Transportation v. Ass'n of American Railroads*, "the formal reason why the Court does not enforce the nondelegation doctrine with more vigilance *is that the other branches of Government have vested powers of their own that can be used in ways that resemble lawmaking*."[109] Thus, because rulemaking and adjudication functions can simply reflect different modes of decision-making well within other branches' vested powers, their presence might prove nothing more than modal exercises of natively assigned power. The difficulty of deciding calls for deference. Similarly, in *Federal Maritime Commission v. South Carolina State Ports Authority*, Justice Breyer's dissent referenced Justice Scalia's modal explanation of "quasi" functions from *Freytag*.[110] "The terms '*quasi* legislative' and '*quasi* adjudicative' indicate that the agency uses legislative *like* or court *like* procedures but that it is not, constitutionally speaking, either a legislature or a court."[111]

106. 531 U.S. 457, 462, 474 (2001).

107. *Id.* at 474–75 (quoting Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)).

108. William K. Kelley, *Justice Scalia, the Nondelegation Doctrine, and Constitutional Argument*, 92 NOTRE DAME L. REV. 2107, 2119 (2017).

109. 575 U.S. __, __, 135 S. Ct. 1225, 1237 (2015) (Alito, J., concurring) (emphasis added).

110. 535 U.S. 743, 774 (2002) (Breyer, J., dissenting).

111. *Id.* The analytical clarity that Justice Scalia's approach brought to the Court's use of "quasi" did not always exist. Justice Robert Jackson lamented the incoherence suggested by the "quasi" qualification on powers: "The mere retreat to the qualifying 'quasi' is implicit with confession that all recognized classifications have broken down, and 'quasi' is a smooth cover which we draw over our confusion, as we might use a counterpane to conceal a disordered bed." FTC v. Ruberoid Co., 343 U.S. 470, 487–88 (1952) (Jackson, J., dissenting). The formalistic clarity might be helpful, but the reality of the mess is still there, out of sight.

Indeed, Justice Scalia's identity-of-the-officer approach provides a formalistic constitutional justification for the modern administrative state. Federal administrative agencies exercise only executive power in different "quasi" modes of decision-making. That justification, however, may promote form over substance. These accumulated functions are to be deemed only decisional cosmopolitanism, not Madison's nightmare of a monarch exercising all powers—legislative, executive, and judicial—even if their classically associated functions are held in one set of hands.

This accumulation of power is aided by tautological application of the identity-of-the-officer approach. Initially, Justice Scalia's concurring approach in *Freytag* was modestly offered as a necessary condition, that is, as a tool of exclusion, i.e., appropriate officer attributes "are necessary but not sufficient conditions for the exercise of federal judicial power."[112] This approach allowed one to conclude that a non-Article III adjudicator does *not* exercise a portion of judicial power of the United States, because only a judge with Article III tenure can exercise judicial power. The unstated premises of Justice Scalia's approach were that (1) the power at stake is fairly capable of being characterized as either executive or judicial power, and (2) there is a formal constitutional requirement that only holders of Article III tenure may permissibly hold judicial power. Thus, Article III tenure is a necessary condition for a federal officer to exercise a portion of the judicial power of the United States, but is insufficient to characterize disputed power as judicial. Under Justice Scalia's approach, it is possible that an Article III judge exercises some power other than judicial power, either by grant or delegation,[113] or by *ultra vires* non-judicial action.[114]

Later, however, Justice Scalia's *Freytag* approach became a simplified formal identity-of-the-actor test. For example, in *City of Arlington v. FCC*,[115] Justice Scalia, writing for the majority, lectured dissenter Chief Justice John Roberts on the position Justice Scalia

112. Freytag v. Comm'r, 501 U.S. 868, 909–10 (1991) (Scalia, J., concurring) (citing Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 264–65 (1990)).

113. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 415–23 (1989) (Scalia, J., dissenting).

114. *See, e.g.*, Obergefell v. Hodges, 576 U.S. __, __, 135 S. Ct. 2584, 2628–29 (2015) (Scalia, J., dissenting) (calling the majority's ruling a "naked judicial claim to legislative—indeed, *super*-legislative—power").

115. 569 U.S. 290 (2013).

had taken in *Freytag*, a case where Chief Justice Roberts had participated as counsel and had argued that the Tax Court exercised only executive power.[116] "Agencies make rules ('Private cattle may be grazed on public lands *X*, *Y*, and *Z* subject to certain conditions') and conduct adjudications ('This rancher's grazing permit is revoked for violation of the conditions') and have done so since the beginning of the Republic."[117] These observations are consistent with Justice Scalia's modal analysis in *Freytag*, which viewed rules and adjudication as modes or methods of decision-making not unique to other branches, and which dodged inquiry into a branch's intrinsic function.

In *City of Arlington* and elsewhere, however, Justice Scalia's *Freytag* approach became an even more hard-edged, formal rule than initially suggested in *Freytag*'s modest formulation.[118] This change resulted from Justice Scalia's jettisoning of his position's qualification that officer characteristics are merely "necessary" conditions to consider when characterizing power.[119] Instead, Justice Scalia elevated his officer identity test to a *sufficient* formalist inquiry for power characterization.[120] "These [agency] activities take 'legislative' and 'judicial' forms, but *they are exercises of*—indeed, under our constitutional structure *they must be exercises of*—*the* '*executive Power*.'"[121] Justice Scalia declared, without qualification, that agency activities "*are* exercises of . . . the executive power," rather than merely "may" be exercises of executive

116. Samahon, *supra* note 7, at 693–94.

117. *City of Arlington*, 569 U.S. at 304–05 n.4 (citation omitted) (citing U.S. CONST. art. II, § 1, cl. 1).

118. *See id.*; *see also* Freytag v. Comm'r, 501 U.S. 868, 909–10 (1991) (Scalia, J., concurring).

119. *Compare City of Arlington*, 569 U.S. at 306–07, *with Freytag*, 501 U.S. at 909–10.

120. In another area of separation-of-powers jurisprudence, Justice Scalia similarly collapsed separate necessity and sufficiency inquiries into a single sufficient inquiry when determining what constitutes an "inferior," rather than a principal, officer. Originally, in his solo *Morrison v. Olson* dissent, Justice Scalia acknowledged that "it is not a *sufficient* condition for 'inferior' officer status that one be subordinate to a principal officer," while at the same time insisting that "it is surely a *necessary* condition for inferior officer status that the officer be subordinate to another officer." 487 U.S. 654, 722 (1988) (Scalia, J., dissenting). Yet, in *Edmond v. United States*, Justice Scalia, writing for the majority, stated that to be an "inferior officer" was to be "directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate," or what he subsequently called being a "subordinate." 520 U.S. 651, 663 (1997). Justice Souter, flagging Justice Scalia's departure from his *Morrison v. Olson* dissent, concurred separately to critique the oversimplification resulting from the collapse of the separate inquiries. *Id.* at 667–69 (Souter, J., concurring) (noting that subordination is necessary to "inferior officer status," but is not "a single sufficient condition").

121. *City of Arlington*, 569 U.S. at 304–05 n.4 (emphasis added).

power.[122] In fact, Justice Scalia said they "*must*" be exercises of executive power with a citation to the executive vesting clause, which identifies the actor—the President (or his delegates in the executive branch) as the salient consideration in the characterization of power.[123] Charitably read as consistent with his *Freytag* concurrence, Justice Scalia might be understood merely to say these agency acts "must" be exercises of executive power *if they are to be constitutionally* permissible, suggesting an unstated presumption that "[w]hen any Branch acts, it is presumptively exercising the power the Constitution has delegated to it."[124] Nonetheless, the opinion's unqualified language gives no indication that anything more than officer identity is required to characterize power.

That this approach bears a strongly pro-executive thumbprint is hardly a surprise; Justice Scalia pressed the gospel of a powerful President long before Lin Manuel Miranda ever popularized Hamilton and made being a Hamiltonian fashionable. Justice Scalia's former law clerks readily acknowledge the slant: "Scalia's leanings are almost always pro-executive power," reflecting his time working for the Office of Legal Counsel, which "left Scalia with a decided pro-executive power bias that always asserts itself in separation of powers cases."[125] This executive enthusiasm reinforces the direction of Justice Scalia's formalism, which favored the President's branch with the facile, truncated inquiry of the sufficient formal identity-of-the-officer test.

The terms "legislative," "executive," and "judicial" were clearly understood, as an original matter, to have substantive content.[126] Justice Scalia's originalism, however, creates tensions with his formalism and his preference for the executive.[127] Justice Scalia, usu-

122. *Id*.

123. *Id*. (citing U.S. CONST. art. II, § 1, cl. 1).

124. INS v. Chadha, 462 U.S. 919, 951 (1983).

125. Calabresi, *supra* note 46, at 83.

126. *See, e.g.*, 1 ANNALS OF CONG. 463 (1789) (Joseph Gales ed., 1834) ("[I]f any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws."); THE FEDERALIST NO. 78, at 402 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) ("[T]here is no liberty, if the power of judging be not separated from the legislature and executive powers." (quoting BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 154 (Thomas Nugent trans., 6th ed. 1792))).

127. *See* Saikrishna Bangalore Prakash, *A Fool for the Original Constitution*, 130 HARV. L. REV. F. 24, 26–27 (2016) (observing Justice Scalia's "penchant for rules sometimes seemed to get the better of his fidelity to the original Constitution" and citing Justice Scalia's "steadfast refusal" to police excessive legislative delegation); *see also* Steven G. Calabresi & Gary

ally associated with original public meaning originalism, which assumes the United States Constitution has a retrievable meaning, fixed at the time of ratification, admitted that his jurisprudence nonetheless had a pragmatic limitation because of his commitment to tradition and *stare decisis*. Unlike Justice Thomas and his expressed willingness to overrule precedent and return to first principles,[128] Justice Scalia confessed publically he was a "faint-hearted Originalist," (mostly) uninterested in upending the so-called "New Deal settlement" of the modern administrative state and its pro-executive terms.[129]

Unfortunately, Justice Scalia's approach to characterization modestly limited itself to squaring the contemporary administrative state with our eighteenth-century Constitution by using a fig leaf of nominal, formal compliance. Power characterization is rightly important, and Justice Scalia properly focused our attention on it. For originalists, however, Justice Scalia's approach to characterizing power ought to serve merely as a necessary starting line, not a sufficient finishing line.

Lawson, *The Rule of Law as a Law of Law*, 90 NOTRE DAME L. REV. 483, 484–85 (2014) (noting Justice Scalia's resistance in his *Mistretta v. United States* dissent to applying the non-delegation doctrine).

128. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 487 (2001) (Thomas, J., concurring) ("[T]here are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than 'legislative.' . . . On a future day . . . I would be willing to address the question whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers.").

129. Justice Scalia once described himself as a "faint-hearted" originalist who would depart from results that the constitutional interpretive theory would require in cases where the outcome would be morally objectionable. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989). Later, Justice Scalia repudiated "faint-hearted" originalism. *See, e.g.*, MARCIA COYLE, THE ROBERTS COURT: THE STRUGGLE FOR THE CONSTITUTION 165 (2013); Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG. (Oct. 6, 2013), http://nymag.com/news/features/antonin-scalia-2013-10/.