



The Modes of Constitutional Analysis: Structuralism (Part 7)

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This Legal Sidebar Post is the seventh in a nine-part series that discusses certain “methods” or “modes” of analysis that the Supreme Court has employed to determine the meaning of a provision within the Constitution. (For additional background on this topic and citations to relevant sources, please see CRS Report R45129, *Modes of Constitutional Interpretation*.)

One of the most common modes of constitutional interpretation is based on the Constitution’s structure. Drawing inferences from the Constitution’s design gives rise to some of the most important relationships the Constitution establishes—the relationships among the three branches of the federal government (commonly called *separation of powers* or *checks and balances*); the relationship between the federal and state governments (known as *federalism*); and the relationship between the government and the people. Two basic approaches seek to make sense of these relationships.

The first, known as *formalism*, **posits** that the Constitution sets forth all the ways in which federal power may be shared, allocated, or distributed. This approach focuses on the structural divisions in the Constitution with the idea that close adherence to these rules is required to achieve the preservation of liberty. An example of the use of this form of structuralism as a mode of interpretation is found in *Immigration and Naturalization Service v. Chadha*. In that case, the Court held that one house of Congress could not by resolution unilaterally curtail the executive branch’s statutory authority to allow a deportable alien to remain in the United States. The Court examined the Constitution’s structure and noted that, under the Bicameralism and Presentment Clauses in Article I, Sections 1 and 7, laws with subject matter that is “legislative in character or effect” require passage by a majority in both houses and presentment to the President for his signature or veto. The Court wrote: “It emerges clearly that the prescription for legislative action in [Article I, Sections 1 and 7 of the Constitution] represents the Framers’ decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.” Viewing the exercise of the one-house veto in *Chadha* to be of a legislative nature, the Court concluded that the structural relationships the Constitution established between the legislative and executive branches forbid the “one-House legislative veto.” As demonstrated in *Chadha*, a formalist approach to separation-of-powers questions rejects not only looking to post-ratification historical practices as a guide for determining constitutional meaning, but also eschews balancing tests that weigh the degree of interference with one branch’s powers.

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By contrast, a second form of structural reasoning known as *functionalism* takes a more [flexible approach](#), emphasizing the core functions of each of the branches, and asking whether an overlap in these functions upsets the equilibrium the Framers sought to maintain. An example is the Court’s opinion in [Zivotofsky v. Kerry](#). In that case, the Court held that the President has the exclusive power to recognize formally a foreign sovereign and its territorial boundaries, and that Congress could not effectively require the State Department to issue a formal statement contradicting the President’s policy on recognition. In so holding, the Court stated that the President should have such exclusive power because the nation must have a “single policy” as to which governments are legitimate, and that additional pronouncements from Congress on the issue could result in confusion. The Court thus adopted a functionalist approach by considering the practical consequences of allocating the power of recognition between the legislative and executive branches, ultimately concluding that the President alone should exercise that power.

A further illustration of the distinction between formalism and functionalism in a separation-of-powers case is [Morrison v. Olson](#). In *Morrison*, the Court upheld against constitutional challenge provisions in the Ethics in Government Act of 1978 that allowed for appointment of an “independent counsel to investigate and, if appropriate, prosecute certain high-ranking Government officials for violations of federal criminal laws.” The Attorney General could remove the independent counsel only for “good cause,” a legal standard that provided the special prosecutor with significant independence from the President and his officers. In a 7-1 decision, the Court employed a functionalist approach and held the Act did not violate constitutional separation-of-powers principles by sufficiently interfering with the President’s executive authority under Article II. The Court determined the limited nature of the special prosecutor’s jurisdiction and authority meant that the position did not “interfere impermissibly with [the President’s] constitutional obligation to ensure the faithful execution of the laws.” Justice Antonin Scalia, the sole dissenter, adopted a formalist approach, arguing that the majority failed to adhere to the strict allocations of power the Constitution establishes among the branches of government. Justice Scalia wrote that the independent counsel provisions deprived the President of “exclusive control” over the exercise of “purely executive powers” (e.g., investigation and prosecution of crimes) by vesting them in the independent counsel, who was not removable at will by the President.

Proponents of structuralism note that it is a method of interpretation that considers the Constitution’s entire text rather than a particular part of it. As a consequence, some proponents argue that structuralist methods produce clearer justifications for decisions that require interpretation of vague constitutional provisions and their application to particular factual circumstances than textualism alone. Some argue that structuralism provides a firmer basis for personal rights than other modes of interpretation, like [textualism](#) or [moral reasoning](#). For example, in [Crandall v. Nevada](#), the Court struck down a state law imposing a tax on people leaving or passing through the state. The Court inferred an individual right to travel among the states from the structural relationship the Constitution establishes between citizens and the federal and state governments. While the Constitution does not specifically provide for a right to travel among the states, because citizens of the United States might need to travel among the states to exercise other constitutional rights, the Court inferred a right to travel from the Constitution viewed in its entirety. As a result, some structuralists argue that this method of interpretation provides a more firm basis to establish key constitutional rights, like the right to travel, than other modes of constitutional interpretation.

Some scholars maintain that interpretations based on structuralism are more difficult for judges to apply and for citizens to understand than arguments based on other modes of interpretation. In addition, many believe that determinations about the proper structure established by the Constitution are often subjective. While Professor Charles Black argued that structure was the most important mode of constitutional interpretation, another prominent commentator, Professor Alexander Bickel, argued that the approach provides “no firm basis for personal rights” because personal rights are considered to derive from the “structure of citizenship” and are therefore “vulnerable to the [government’s] desire for power and its ability to manipulate the relation between citizen and state.”

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