# *NLRB v. Noel Canning:* The Separation-of-Powers Dialogue Continues

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## I. Introduction

In *National Labor Relations Board v. Noel Canning*, the Supreme Court unanimously invalidated President Obama's 2012 recess appointments to the National Labor Relations Board (NLRB).[1] Under the Recess Appointments Clause, the president has authority to "fill up all vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."[2] Writing for a five-justice majority, Justice Stephen Breyer concluded that the president's authority under that clause was constrained by, among other things, the Senate's "authority . . . to determine how and when to conduct its business."[3] If the Senate is in session—or its break in business is not sufficiently long—the president has no constitutional authority to make recess appointments. Thus, because the president's 2012 recess appointments were made during an "[in]substantial" break in Senate business, all nine justices agreed that "the President lacked the power to make the recess appointments here at issue."[4]

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[1] NLRB v. Noel Canning, 134 S. Ct. 2550 (2014).

[2] U.S. Const. art. I, § 2, cl. 3.

[3] Noel Canning, 134 S. Ct. at 2574.

[4] *Id.* at 2557; see also *id.* at 2591–92 (Scalia, J., concurring in the judgment).

Broadly stated, *Noel Canning* involved a structural tension between the executive branch—which operates continuously—and the legislative branch—which operates periodically in sessions separated by recesses. On one hand, the Appointments Clause grants the Senate authority to participate in the appointment of executive officers—and to prevent such appointments by withholding its advice and consent.[5] On the other side of the ledger, however, the Recess Appointments Clause permits the president to appoint executive officers unilaterally for limited periods when the Senate is in recess.[6]

In *Noel Canning*, the Court unanimously reaffirmed the structural relationship between the Appointments and Recess Appointments Clauses. As Alexander Hamilton made clear in Federalist 67, while the latter serves as a narrow, "auxiliary method of appointment," the former's requirement of advice and consent remains "the general mode of appointing officers of the United States."[7] On the basis of that structural logic, the Court concluded that the president could not utilize the recess-appointments power in a way that circumvented the Senate's power of advice and consent. Otherwise, the recess-appointments exception would swallow the advice-and-consent rule.

Despite the unanimity of the Court's holding, however, the majority and concurring opinions differed greatly in their respective methodologies. For Justice Breyer and those members of the Court joining his opinion, the Recess Appointments Clause was to be read broadly in light of its functional purposes of ensuring convenient executive administration. For Justice Antonin Scalia and the three justices joining his concurrence, the clause's text was dispositive and its purposes largely irrelevant. Like other structural features of the Constitution, Justice Scalia argued, the Recess Appointments Clause was not a generic "good government" provision; it was instead one component of a carefully calibrated division of authority designed to ensure the liberty of citizens—not the efficiency of government.

This article discusses the origins of the *Noel Canning* litigation and evaluates the significance of the Court's decision. In analyzing the majority and concurring opinions, the article shows not only that

[5] U.S. Const. art. I, § 2, cl. 2.

[6] U.S. Const. art. I, § 2, cl. 3.

[7] The Federalist No. 67 (Alexander Hamilton).

the debate between Justices Breyer and Scalia continues long-standing jurisprudential conversations regarding separation-of-powers principles, but also that both opinions highlight important, underexamined features of that dialogue. Indeed, just as Howard Bashman predicted in the pages of this journal last year, *Noel Canning* provides a "noteworthy opportunity for comparing and contrasting the justices' varied approaches to constitutional construction."[8]

Part II lays out the origins of the *Noel Canning* litigation and the relevant legal background. Part III provides an overview of the Court's decisions, describing the analyses and conclusions of the majority and concurring opinions. Part IV analyzes the key constitutional themes in the *Noel Canning* opinions, situating them within broader conversations about the division of federal power and the role of text and history in constitutional law. Finally, Part V discusses the implications of the *Noel Canning* decision. Ultimately, this article argues that the Court reached the correct result in *Noel Canning* and that the case provides unique insight into the Constitution's separation of powers.

## II. Background

### *A. Factual Background*

The events underlying *Noel Canning* began on January 4, 2012, when President Obama made three recess appointments to the National Labor Relations Board.[9] Like many others in the modern era, each of those appointments filled a vacancy that arose during a session of the Senate rather than "during the Recess." But, unlike any other recess appointment in American history, these occurred during a three-day period falling between so-called "pro forma" sessions of the Senate.

The Senate convened pro forma sessions on January 3 and 6, 2012, pursuant to its formal adjournment order entered in December 2011. Under that order, the Senate agreed to meet every three days between December 17, 2011, and January, 20, 2012, in pro forma sessions in

[8] See Howard J. Bashman, Looking Ahead: October Term 2013, 2012–2013 Cato Sup. Ct. Rev. 393, 394–95 (2013).

[9] The president also recess-appointed Richard Cordray to the Consumer Financial Protection Bureau on January 4, 2012. See, e.g., Nat'l Bank of Big Spring v. Lew, 958 F. Supp. 2d 127 (D.D.C. 2013).

which "no business" would be conducted.[10] But although it agreed to avoid official action at these pro forma sessions, the Senate remained fully capable of performing its duties under its rules of procedure. Not only did the Senate's rules permit legislative business during these pro forma sessions,[11] but the Senate in fact passed tax-related legislation during its pro forma session on December 23, 2011.[12]

The Senate's pro forma sessions, moreover, not only possess the functional characteristics of "normal" sessions, but also have historical pedigree and constitutional justification. As a functional matter, the Senate regularly passes legislation and confirms nominees through the same procedures available during pro forma sessions. Because the Senate possesses a presumptive quorum at all times—regardless of a session's length—many of its legislative acts occur via unanimous consent.[13] Historically, while such meetings have been more prevalent in recent years, the Senate has employed pro forma sessions since at least the "Renovation of the Hall" in 1854, when it met every three days without conducting business so that renovations to the Senate Chamber could be completed.[14] Pro forma sessions also serve an important constitutional function as well. Because the Constitution's Adjournments Clause prohibits one chamber of Congress from adjourning for more than three days without the consent of the other,[15] the Senate has often used pro forma sessions to keep its breaks in business under three days.[16] And, as the Senate did in January 2012, it has occasionally utilized pro forma sessions in order to satisfy its obligations under the Twentieth Amendment—which requires Congress to meet every year at noon on January 3 to mark

[10] 157 Cong. Rec. S8783–84 (daily ed. Dec. 13, 2011).

[11] See Floyd M. Riddick, Riddick's Senate Procedure 1038 (Alan S. Frumin ed., 1992).

[12] See The Temporary Payroll Tax Cut Continuation Act of 2011, Pub. L. No. 112-78, 125 Stat. 1281 (2011).

[13] See, e.g., Elizabeth Rybicki, Cong. Research Serv., Senate Consideration of Presidential Nominations: Committee and Floor Procedure 9 (2013) ("Most nominations are brought up by unanimous consent and approved without objection . . . .").

[14] See, e.g., Cong. Globe, 33d Cong., 1st Sess. 1347 (1854).

[15] U.S. Const. art. I, § 5, cl. 4.

[16] Indeed, this was the very reason for the Senate's 1854 pro forma sessions. The House would not consent to an adjournment exceeding three days in order to complete renovations and therefore the Senate met in pro forma sessions in order to ensure the constitutionality of its processes. See, e.g., Cong. Globe, 33d Cong., 1st Sess. 1347 (1854).

the beginning of a new session, "unless they shall by law appoint a different day."[17]

But despite the Senate's presumptive availability between December 17, 2011, and January 20, 2012, the administration concluded that it was not "bound by the Chamber's own understanding of [its] pro forma sessions."[18] Rather, in the administration's view, the president had discretion to determine the nature of the Senate's operations and to determine whether the Senate was in session or in recess for purposes of the recess-appointments power. Deeming the Senate's pro forma sessions illegitimate, and accordingly deciding for itself that the Senate was in recess, the administration went forward with its recess appointments on January 4, 2012.

The unprecedented nature of the administration's action, however, drew widespread objection. Many questioned not only the political legitimacy of the president's recess appointments, but also their constitutionality. As Richard Epstein wrote in January 2012, "it is for the Senate and not for the President to determine whether the Senate is in session," and therefore the Senate's pro forma sessions precluded the existence of a Senate recess and rendered the president's appointments unconstitutional.[19] The administration and its supporters, however, remained steadfast in their view that the appointments were fully consistent with "the text of the Constitution and precedent and practice thereunder."[20]

As that controversy persisted, the newly recess-appointed NLRB members began hearing and deciding cases within days of receiving their commissions. One of the earliest cases they decided involved the Noel Canning Corporation of Yakima, Washington ("Noel Canning"). Although the recess-appointee NLRB did not oversee Noel Canning's September 2011 hearing, that incarnation of the board did issue a formal order against Noel Canning, finding it guilty of

[17] U.S. Const. amend. XX, § 2.

[18] Lawfulness of Recess Appointments during a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions, Op. O.L.C. 1, 20 (2012) ("OLC Memo").

[19] Richard Epstein, The Constitution Is Clear on Recess Appointments, Ricochet (Jan. 5, 2012), http://ricochet.com/archives/the-constitution-is-clear-on-recess-appointments/ (last visited July 30, 2014).

[20] OLC Memo at 23; see also Laurence H. Tribe, Games and Gimmicks in the Senate, N.Y. Times, Jan. 5, 2012, at A25.

alleged unfair labor practices.[21] Shortly thereafter, Noel Canning appealed the NLRB's decision to the U.S. Court of Appeals for the D.C. Circuit.

*B. Procedural Background*

*1.* Noel Canning *in the D.C. Circuit*

On appeal to the D.C. Circuit, Noel Canning argued that the president's NLRB appointments violated the Recess Appointments Clause, and accordingly the NLRB lacked jurisdiction to issue a binding order against Noel Canning. Under the Supreme Court's 2010 decision in *New Process Steel*, the NLRB must have a lawful, three-member quorum in order to exercise jurisdiction.[22] But because these recess appointments were not made "during the Recess of the Senate," and because the vacancies at issue had not "happen[ed] during the Recess," the board issuing the order against Noel Canning comprised only *one* lawfully appointed member. As a result, Noel Canning argued that the unconstitutionality of the January 4, 2012, recess appointments divested the NLRB of jurisdiction and thus the board's order was *ultra vires* and unenforceable.[23]

The D.C. Circuit unanimously agreed with Noel Canning's originalist construction of the recess-appointments power.[24] As the court explained, "the Recess of the Senate" referred to the formal recess that takes place between formal sessions. It did not include informal, intra-session breaks in Senate business, even if those periods qualified as recesses in a colloquial sense. Moreover, the clause requires that the relevant vacancy must "happen during the Recess," which meant that it must arise during the same inter-session recess in which it is filled. In sum, because the Senate had been in an intra-session recess on January 4, 2012, and because the vacancies predated that recess, the president was without authority to make these unilateral appointments. The panel thus unanimously invalidated the NLRB appointments, and accordingly determined that the board

[21] See Noel Canning, 358 NLRB No. 4 (Feb. 8, 2012).

[22] See New Process Steel L.P. v. NLRB, 130. S. Ct. 2635 (2010).

[23] Joint Brief of Petitioner, Noel Canning v. NLRB., 705 F.3d 490 (D.C. Cir. 2012) (No. 12-1115).

[24] Noel Canning v. NLRB, 705 F.3d 490 (D.C. Cir. 2013).

lacked a jurisdictionally necessary quorum when issuing its order against Noel Canning.

The D.C. Circuit's analysis of the Recess Appointments Clause, however, differed from that of its sister circuits in earlier cases. Beginning with the Second Circuit's decision in *United States v. Allocco* in 1962, federal appellate courts had largely deferred to presidents on their use of the recess-appointments power, holding in essence that the text of the clause must yield to executive practices and "the orderly functioning of the government."[25] In *Evans v. Stephens*, the Eleventh Circuit sitting en banc went so far as to accord a presumption of constitutionality to all presidential uses of the recess-appointments power.[26]

But things changed following the D.C. Circuit's opinion in *Noel Canning*. In a series of related cases, a number of courts—including the Third and Fourth Circuits—held the president's January 4 recess appointments unconstitutional.[27] And while other circuits either avoided the constitutional issue or were constrained by precedent to decide the matter differently, it was clear that the tide shifted in the wake of the D.C. Circuit's decision.[28] As a result of these mounting challenges, the government sought a writ of certiorari from the Supreme Court in *Noel Canning*.

*2.* Noel Canning *in the Supreme Court*

*Certiorari Stage*. In its certiorari petition, the government initially sought review of only two questions: whether the recess-appointment power must be exercised during an inter-session recess, and whether the vacancy in question must arise during the same recess

[25] See United States v. Allocco, 305 F.2d 704, 710–11 (2d Cir. 1962); see also Evans v. Stephens, 387 F.3d 1220 (11th Cir. 2004) (en banc); United States v. Woodley, 751 F.2d 1008 (9th Cir. 1985) (en banc); Mackie v. Clinton, 827 F. Supp. 56, 57 (D.D.C. 1993); Staebler v. Carter, 464 F. Supp. 585 (D.D.C. 1979).

[26] See Evans, 387 F.3d at 1222.

[27] See, e.g., NLRB v. Enter. Leasing Co. Se., LLC, 722 F.3d 609 (4th Cir. 2013); NLRB v. New Vista Nursing & Rehab., 719 F.3d 203 (3d Cir. 2013).

[28] See, e.g., D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 350–51 (5th Cir. 2013); Kreisberg v. HealthBridge Mgmt., LLC, 732 F.3d 131, 137 (2d Cir. 2013); Ambassador Servs., Inc. v. NLRB, 544 F. App'x 846, 847 (11th Cir. 2013) (per curiam).

in which it is filled.[29] Noel Canning did not oppose the government's request for certiorari, but it did ask the Court to consider a third question: "Whether the President's recess-appointment power may be exercised when the Senate is convening every three days in pro forma sessions."[30]

Although the D.C. Circuit had not addressed that issue, it provided an independent basis for affirmance. If the Senate's periodic pro forma sessions counted as constitutionally legitimate "sessions" of the Senate, then the January 4 appointments were unconstitutional regardless of the Court's resolution of the other issues. Even if the recess-appointments power extended to pre-recess vacancies, and even if it extended to both inter- and intra-session recesses, a three-day break in Senate business did not count as a "Recess of the Senate" within the meaning of the clause.

Ultimately, the Court granted certiorari on June 24, 2013. Rejecting the government's request to ignore Noel Canning's question regarding pro forma sessions, the Court asked the parties to address three issues: (1) whether the president's recess-appointment power may be exercised during a recess that occurs within a session of the Senate, or is instead limited to recesses that occur between sessions of the Senate; (2) whether the president's recess-appointment power may be exercised to fill vacancies that exist during a recess, or is instead limited to vacancies that first arose during that recess; and (3) whether the president's recess-appointment power may be exercised when the Senate is convening every three days in pro forma sessions.[31]

*Merits Briefing*. On the first question, the government argued that the "the term 'recess' . . . applie[d] to both inter- and intrasession recesses," based on its "plain meaning," the "central purposes" of the Recess Appointments Clause, and what it viewed as a robust history of executive practices and the "long-settled equilibrium between the political Branches."[32] On the second question presented, the govern-

[29] Petition for Certiorari at I, NLRB v. Noel Canning, 134 S. Ct. 2550 (2014) (No. 12-1281).

[30] Brief of Respondent on Petition for Certiorari at i, 9, NLRB v. Noel Canning, 134 S. Ct. 2550 (2014) (No. 12-1281).

[31] See NLRB v. Noel Canning, 133 S. Ct. 2861, 2861–23 (2013).

[32] Brief for the Petitioner at 7–8, NLRB v. Noel Canning, 134 S. Ct. 2550 (2014) (No. 12-1281).

ment contended that "the Clause's reference to 'Vacancies that may happen during the Recess of the Senate'" was "ambiguous," and thus the Court should construe it broadly to include vacancies that arise during the recess in which they are filled, as well as vacancies that arise before a recess while the Senate is still in session.[33] According to the government, the broader reading was not only consistent "with long-settled practice," but also "best served" the "Clause's purposes" by "ensur[ing] a genuine opportunity at all times for vacancies to be filled, even if only temporarily."[34] On the final question, the government contended that the Senate's pro forma sessions could not "extinguish the President's express constitutional authority to make recess appointments."[35] Rather, in the government's view, "[w]hen the Senate is absent in fact but present only by virtue of a legal fiction," the president may make unilateral appointments "when the Senate is unavailable to provide its advice and consent and there are vacancies that the public interest requires to be filled, even if only on a temporary basis."[36]

Noel Canning and its amici, by contrast, contended that the government's position would "eradicate all meaningful limits on the President's recess-appointments power."[37] It would do so by permitting unilateral appointments "(1) *whenever* the President deems appropriate, so long as he believes there has been a 'cessation' in the Senate Session (or, perhaps, a cessation exceeding three days); (2) to fill *whatever* office the President chooses, no matter how long vacant; and (3) *regardless* of whether the Senate is convening regularly."[38] On the first question, Noel Canning argued that, by linking "the Recess" and "the Session," "the Clause makes clear that the President may make unilateral appointments only during 'the Recess' between enumerated Senate 'Sessions.'"[39] On the second question, Noel Canning contended that "the text means what it says: The vacancy must 'happen during'—*i.e.*, arise during—the Recess." The

[33] *Id.*

[34] *Id.* at 8.

[35] *Id.* at 9.

[36] *Id.* at 11.

[37] Brief for Respondent at 1–2, NLRB v. Noel Canning, 134 S. Ct. 2550 (2014) (No. 12-1281).

[38] *Id.* (emphasis in original).

[39] *Id.* at 6.

government's contrary reading "erases 'may happen during' from the Clause, while contravening the uniform understanding of the framers."[40] Finally, the Senate's pro forma sessions were not, as the government suggested, "constitutional nullities." They were instead official meetings "at which the Senate could and did conduct official business," and therefore the three-day break between the pro forma sessions was—as the government conceded—insufficient to "'trigger the President's recess-appointment authority.'"[41]

*Oral Argument*. On January 13, 2014, the Court held argument in *Noel Canning*. During oral argument, several themes emerged that would feature prominently in the Court's ultimate decision. The first involved competing characterizations of the clause's purpose as well as the substantive aims of the Constitution's tripartite structure.[42] The government argued, as it had in its briefs, that the recess-appointments power was a "safety valve" designed to "protect the Executive against encroachment by the legislature."[43] On that view of the clause's purpose and functional properties, Solicitor General Donald Verrilli argued that Noel Canning's interpretation "would diminish presidential authority in a way that is flatly at odds with the constitutional structure the Framers established."[44]

Justice Breyer, however, appeared skeptical of the government's safety-valve characterization. "I can't find anything," he exclaimed, "that says the purpose of this clause [h]as anything at all to do with political fights between Congress and the President."[45] "To the contrary," Justice Breyer went on, "Hamilton says that the way we're going to appoint people in this country is Congress and the President have to agree."[46] But reaching "that agreement" is "a political problem, not a constitutional problem."[47] The pace of the subsequent

[40] *Id.* at 6–7.

[41] *Id.* at 7 (quoting the Govt's Brief at 18).

[42] See, e.g., Transcript of Oral Argument at 3, 21–24, 31–34, 48–49, 64–65, 71–72, NLRB v. Noel Canning, 134 S. Ct. 2550 (2014) (No. 12-1281). Justice Breyer, for one, was particularly concerned with the "purpose" of the clause and the "practicalities" of the parties' interpretations. See *id.* at 49.

[43] *Id.* at 21, 22.

[44] *Id.* at 3.

[45] *Id.* at 31.

[46] *Id.*

[47] *Id.*

questioning prevented the solicitor general from fully answering these issues. But the message was clear: Justice Breyer harbored serious doubts that the clause was a safety valve designed "to allow the President to try to overcome political disagreement."[48]

Picking up on Justice Breyer's line of questioning, Noel Canning's counsel, Noel Francisco of Jones Day, characterized the clause as an auxiliary method of appointment and disputed the notion that the clause's purpose was to permit the president to fill vacancies any time the Senate was unavailable. Rather, Francisco argued, the "full purpose of the clause" was "to ensure that the President could not easily do an end-run around advice and consent."[49] After all, the clause embodies a "contingent power that arises only when the Senate triggers it"[50]—and thus, "the one thing that the President may not do is force the Senate to act against its will."[51] Regardless of the practical inefficiencies of the advice-and-consent rule, Francisco argued, the Court should "enforc[e] the strictures of the Constitution"[52] and reject the government's attempt to "creat[e] a unilateral appointments power available for every vacancy at virtually any time with advice and consent to be used only when convenient to the President."[53]

The second theme pervading the *Noel Canning* argument involved the proper approach to interpreting the Constitution when the document's text conflicts with purportedly entrenched government practices. Early in the argument, for example, Justice Scalia pointedly asked the solicitor general: "What do you do when there is a practice that . . . flatly contradicts a clear text of the Constitution? Which . . . of the two prevails?"[54] The underlying premise of Justice Scalia's question, which he made explicit moments later, was that it simply cannot be the case that "if you ignore the Constitution . . . often enough, its meaning changes."[55]

[48] *Id.* at 32.

[49] *Id.* at 60.

[50] *Id.* at 54; see also *id.* at 52, 60.

[51] *Id.* at 42.

[52] *Id.* at 65–67.

[53] *Id.* at 41.

[54] *Id.* at 6.

[55] See, e.g., *id.*

In response, Verrilli offered a nuanced, if somewhat evasive, answer. Initially, he responded that "the practice has to prevail."[56] But after additional questioning from the bench he attempted to clarify his answer. He argued that, "in this situation, the meaning of the clause . . . has been a matter of contention since the first days of the Republic," and thus this is not a case in which clear constitutional text is pitted against a contrary historical practice.[57] But even if the text were clear, the solicitor general further clarified, "the practice should govern" when, as here, "the practice go[es] back to the founding of the Republic."[58]

By contrast, Noel Canning's counsel offered a dramatically different answer to a variant of the same question. When asked by Justice Samuel Alito what the Court should do if "a 200-year-old consistent practice" contradicted clear constitutional text, Francisco responded "that the language has to govern."[59] And when pushed further by Justice Elena Kagan, he made clear the structural and normative premises for privileging the text over the practice. "The political branches of the government," he argued, "have no authority to give or take away the structural protections of the Constitution."[60] Rather than "exist[ing] to protect the Senate from the President or the President from the Senate," the Constitution's structural edicts are "liberty-protecting provisions that protect the people from the government as a whole."[61] Therefore, Francisco contended, "if the Constitution is quite clear as to what those structural protections are, but the political branches . . . have conspired to deplete them, that is illegitimate, and it should be rejected by this Court."[62]

While these were not the only noteworthy colloquies that occurred at oral argument in *Noel Canning*,[63] they are important to understanding the decision the Court ultimately rendered. In the justices'

[56] *Id.*

[57] *Id.* at 6–8.

[58] *Id.* at 8.

[59] *Id.* at 42–43.

[60] *Id.* at 44.

[61] *Id.*

[62] *Id.* at 44–45.

[63] Another critically important discussion surrounded the issue of the Senate's institutional autonomy. See *id*. at 22, 25–28, 38–39, 42, 57, 67–70. That issue is discussed more fully in Part V.A.1.

questions and the advocates' answers, one can see that the fulcrum of the dispute in *Noel Canning* was an overlapping series of tensions between text and formalism, on the one hand, and historical practice and functionalism on the other.

## III. The Court's Decision in *Noel Canning*: An Overview

On the next-to-last day of the October 2013 term, the Supreme Court issued its decision in *Noel Canning*, unanimously holding that the president's January 4, 2012, recess appointments were unconstitutional.[64] The case produced two opinions. Justice Breyer wrote for a five-justice majority, which included Justices Anthony Kennedy, Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan. Justice Scalia, however, wrote an opinion concurring only in the judgment, which was joined in full by Chief Justice John Roberts as well as Justices Clarence Thomas and Samuel Alito.

In the majority's view, the president exceeded the bounds of his authority under the Recess Appointments Clause, because the January 4 recess appointments were not made during "the Recess" of the Senate. Because the Senate's pro forma sessions on January 3 and January 6 were legitimate meetings of that legislative body, and because three days is simply too short a period to count as a "Recess" for purposes of the clause, the president had no authority on January 4 to appoint executive officers without the advice and consent of the Senate. In so holding, the Court adopted Noel Canning's position on the third question presented—the same question Noel Canning had requested the Court to address in seeking certiorari.

Justice Scalia, however, took a different approach to reaching the same ultimate conclusion. Although he did not squarely address Noel Canning's position on pro forma Senate sessions, Scalia reasoned that the January 4 appointments were unconstitutional first and foremost because they were inconsistent with the "key textual limitations" in the Recess Appointments Clause.[65] A close examination of the text, he contended, revealed that the president's power to make unilateral appointments exists only when the Senate is in a formal, inter-session recess and the vacancy filled arose *during* that same recess. In *Noel Canning*, Justice Scalia concluded that neither

[64] NLRB v. Noel Canning, 134 S. Ct. 2550 (2014).

[65] *Id.* at 2591–92 (Scalia, J., concurring in the judgment).

precondition of the recess-appointments power was satisfied. First, the Senate was not in the midst of an inter-session recess on January 4, 2012, because the break in business between January 3 and 6 did not fall between formal enumerated sessions of the Senate. Second, as a factual matter, neither side could dispute that the NLRB vacancies at issue arose long *before* the Senate's informal break between January 3 and 6, 2012. Although Scalia responded to the majority's arguments grounded in custom and historical practices, his opinion found the text of the clause conclusive.

## IV. Constitutional Themes in *Noel Canning*

The justices' resolution of the critical interpretive questions in *Noel Canning* reveals a great deal about constitutional interpretation in general and separation-of-powers jurisprudence in particular. This part outlines two overarching themes that pervade the majority and concurring opinions in *Noel Canning*. First, the opinions vivify and complicate the tension between functionalist and formalist approaches to deciding separation-of-powers issues. Second, the opinions highlight the role of written and unwritten sources of law in constitutional adjudication.

### *A. Separation of Powers: Functionalism and Formalism*

As a matter of doctrine and theory, questions about the Constitution's separation of powers are generally approached from either a *functionalist* or a *formalist* perspective.[66] Although the terminology varies, functionalist approaches typically decide separation-of-powers questions by evaluating the purposes of the power at issue and the relative competencies of the competing branches. By contrast, a formalist approach decides such disputes principally according to the literal terms of the Constitution, drawing structural inferences where appropriate but generally limiting itself to textual considerations.

Both on and off the bench, Justices Scalia and Breyer have been important participants in this debate. A self-identified pragmatic–purposivist, Justice Breyer has long adhered to the functionalist

[66] See, e.g., John F. Manning, Separation of Powers as Ordinary Interpretation, 124 Harv. L. Rev. 1939, 1942 (2011).

program in deciding separation-of-powers cases.[67] Whether concurring, dissenting, or writing for a majority of the Court, Justice Breyer's approach to such questions can best be described as flexible, embodying a general reluctance to articulate strict rules when differentiating among the federal branches.[68] Only when governmental action "embodies risks of the very sort that our Constitution's 'separation-of-powers' prohibition seeks to avoid," Justice Breyer has written, should the Court hold such action unconstitutional—and even then only if there are no "offsetting . . . safeguards" to "minimize those risks."[69]

Justice Scalia, on the other hand, is the Court's most ardent separation-of-powers formalist.[70] In a series of forceful and influential opinions, Justice Scalia has articulated a vision of the Constitution's structure as embodying bright-line prophylactic rules that demand rigorous and consistent judicial enforcement.[71] In contrast to the pragmatism of Justice Breyer, Justice Scalia has stressed that "the separation of powers doctrine is a structural safeguard rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified."[72] Although practical considerations "may be appropriate at the margins, where the outline of the framework itself is not clear," courts must not "treat the Constitution as though it were no more than a generalized prescription that the functions of the Branches should not be commingled too much."[73]

[67] See, e.g., Stephen Breyer, Making Our Democracy Work: A Judge's View 73–75, 81–82 (2010); Stephen Breyer, Active Liberty: Interpreting Our Democratic Constitution 128 (2007).

[68] See, e.g., Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010) (Breyer, J., dissenting).

[69] See, e.g., Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 245–46 (1995) (Breyer, J., concurring in the judgment).

[70] See Antonin Scalia, Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Law, in A Matter of Interpretation: Federal Courts and the Law 3, 25 (Amy Gutmann, ed. 1997) ("Of all the criticisms leveled against textualism, the most mindless is that it is 'formalistic.' The answer to that is, *of course it's formalistic*! The rule of law is *about* form. . . . Long live formalism. It is what makes a government a government of law and not of men.") (emphasis in original).

[71] See, e.g., Plaut, 514 U.S. at 239–40 (maj. op.); Morrison v. Olson, 487 U.S. 654, 711, 733 (1988) (Scalia, J., dissenting).

[72] Plaut, 514 U.S. at 239.

[73] Mistretta v. United States, 488 U.S. 361, 426–27 (1989) (Scalia, J., dissenting).

In *Noel Canning*, the contrast between the justices' jurisprudential approaches stood out in bold relief. As Section 1 explains, in many respects, the majority and concurring opinions in *Noel Canning* illuminate the distinction between functionalism and formalism. But as Section 2 demonstrates, the opinions also show that the distinction between functionalism and formalism represents more of a spectrum than a dichotomy.

*1. Exposing the Functionalism–Formalism Distinction*

Although Justices Breyer and Scalia ultimately reached the same conclusion in *Noel Canning*, their opinions illuminate the sometimes sharp rhetorical and substantive divide between functionalist and formalist approaches to separation-of-powers issues. Take, for example, the opinions' varied approaches to construing the key phrases of the Recess Appointments Clause. As noted, the first question before the Court involved the meaning of the clause's term "Recess." The government contended that "the Recess" included any substantial break in Senate business, regardless of whether the break fell between formal sessions. Noel Canning, on the other hand, construed the term according to its plain text, arguing that "the Recess" included only the formal break between enumerated sessions of the Senate.

Adopting a functionalist approach, Justice Breyer disagreed with the D.C. Circuit and Noel Canning's interpretation of the clause. Instead, he found the phrase linguistically ambiguous and concluded that the clause's underlying purposes called for a "broader," more "functional" interpretation. Characterizing the recess-appointments power as "ensur[ing] the continued functioning of the Federal Government when the Senate is away," Justice Breyer reasoned that the term "Recess" "should be practically construed to mean a time when the Senate is unavailable to participate in the appointments process."[74] After all, he wrote, the Senate "is equally away during both an inter-session and an intra-session recess," and its "capacity to participate in the appointments process has nothing to do with the words it uses to signal its departure."[75] Rejecting "the formalistic approach that Justice Scalia endorsed," Justice Breyer interpreted the

[74] Noel Canning, 134 S. Ct. at 2561, 2563–64, 2566 (2014) (maj. op.).

[75] *Id.* at 2561, 2563.

recess-appointments power to include both inter-session recesses as well as those intra-session recesses having "substantial length."[76]

Justice Scalia, however, rejected what he described as the majority's "vague, unadministrable limits."[77] For him, the text of the clause unambiguously limited the president's power to inter-session recesses. As Noel Canning had argued in its briefs, the Recess Appointments Clause "uses the term 'Recess' in contradistinction to the term 'Session,'" thus conveying that these are "mutually exclusive, alternating states."[78] The key flaw of the majority's construction, Justice Scalia wrote, was that it read the Constitution's structural provisions "on the narrow-minded assumption that their only purpose is to make the government run as efficiently as possible."[79] Indeed, in contrast to Justice Breyer's functionalist emphasis on workable government, Justice Scalia stressed that the text of the Recess Appointments Clause must be construed in light of the Constitution's central reason for separating federal powers—which in Justice Scalia's view was individual liberty and not governmental "[c]onvenience and efficiency."[80]

A similar dispute arose over the meaning of the clause's language specifying when the vacancies must "happen." As noted, the clause authorizes the president to fill "vacancies that *may happen during* the Recess." A key question in *Noel Canning* was whether that language extended only to vacancies that arose *during* a recess, or whether it also included those that arose *before* but *persisted during* a recess.

In answering that question, Justice Breyer again relied on functional considerations. Given the clause's purpose of ensuring executive efficiency in the absence of the Senate, Justice Breyer concluded that pre-recess vacancies should fall within the ambit of the clause. Otherwise, he wrote, a critically important executive office would remain empty—and thus "paralyze a whole line of action"—simply because it became vacant "too soon before the recess . . . for the President to appoint a replacement."[81] Although Justice Breyer candidly

[76] *Id.* at 2561, 2563–64.

[77] *Id.* at 2595 (Scalia, J., concurring in the judgment).

[78] *Id.* at 2596.

[79] *Id.* at 2597.

[80] *Id.* (internal quotation marks and citation omitted).

[81] See *id.* at 2568 (internal quotation marks omitted).

acknowledged that this broader interpretation threatened to nullify the Senate's power of advice and consent, he nevertheless found that reading "most accordant with the Constitution's reason and spirit."[82]

In Justice Scalia's view, however, the "original understanding of the Clause" refuted Justice Breyer's construction.[83] According to Founding-era sources, Justice Scalia argued, "vacancies *happen during* the Recess of the Senate" when they "*arise during* the recess in which they are filled."[84] While it is possible for the word "happen" to have different meanings in different contexts, a "vacancy" is "a state of affairs that comes into existence at a particular moment in time."[85] Therefore, it does not "happen" in the same way that an "ongoing activity or event" "happens" "for as long as it continues."[86]

The majority's contrary construction, he concluded, was not only "inconsistent with the Constitution's text and structure," but also disturbed "the balance the Framers struck between Presidential and Senatorial power."[87] That strictly delineated division of authority—giving the Senate control over the president's appointments and recess-appointments powers—was "not a bug to be fixed by this Court" but rather "a calculated feature of the constitutional framework."[88] Even if "clumsy" and "inefficient," the majority's failure to enforce that framework "undermin[ed] respect for the separation of powers."[89]

*2. Complicating the Functionalism–Formalism Distinction*

The *Noel Canning* opinions, however, were not in all respects paradigmatically functionalist or formalist decisions. Justice Breyer's majority opinion, for instance, at times challenged the distinction between formalism and functionalism in drawing on the "purpose of the Clause" while also expressly constraining that "function[al]"analysis to the text of the Constitution's structural

[82] See *id.* at 2568–69 (internal quotation marks omitted).

[83] *Id.* at 2607 (Scalia, J., concurring in the judgment).

[84] *Id.* at 2598, 2606 (emphasis added).

[85] *Id.* at 2606 & n.8.

[86] *Id.*

[87] *Id.* at 2606.

[88] *Id.* at 2598, 2606.

[89] *Id.* at 2598, 2607, 2618.

provisions.[90] The majority's resolution of the pro forma sessions issue exemplifies this blending of methodologies.

As discussed, Noel Canning asked the Court at the certiorari stage to address the question of whether the Senate's pro forma sessions on January 3 and 6, 2012, constituted legitimate sessions of the Senate, such that the president could not make recess appointments during the three-day period between the sessions. The issue ultimately proved dispositive for the following reasons. In order for the Court to decide whether the break in Senate business between January 3 and January 6 counted as a "Recess" within the meaning of the clause, it had to determine the significance of the Senate's pro forma sessions held on those days. If those meetings were legitimate "sessions" of the Senate, the "period between January 3 and January 6 was a 3-day recess, which is too short to trigger the President's recess-appointment power."[91] But if those meetings were *not* legitimate sessions, "then the 3-day period was part of a much longer recess during which the President *did* have the power to make recess appointments."[92]

The Court adopted the former position, advocated by Noel Canning.[93] Rejecting the government's "functional" argument to the contrary, the majority reasoned that pro forma sessions "count as sessions" when "the Senate sa[ys] it was in session," regardless of "what the Senate actually does (or here, *did*) during its *pro forma* sessions."[94] More specifically, Justice Breyer held that, "for purposes of the Recess Appointments Clause, the Senate is in session when it says it is, provided that, under its own rules, it retains the capacity to transact Senate business."[95]

In one sense, Justice Breyer's logic tracks his pragmatic, functionalist philosophy. Indeed, for mostly purposive reasons, Justice Breyer stopped short of endorsing the position that the Senate is in session *any* time it says it is. Instead, he concluded that, although

[90] *See id.* at 2573–77 (majority op.).

[91] *Id.* at 2574.

[92] *Id.* at 2574 (emphasis added).

[93] Justice Scalia did not squarely address the legitimacy of pro forma sessions. See *id.* at 2617 (Scalia, J., concurring in the judgment).

[94] *Id.* at 2574–76 (majority op.) (emphasis in original).

[95] *Id.* at 2574.

the Constitution formally delegated broad "authority to the Senate to determine how and when to conduct its business," the Senate "is not in session" when it "is without the *capacity* to act under its own rules"—even if the Senate itself declares otherwise.[96] Between December 2011 and January 2012, Justice Breyer observed, not only was the Senate perfectly *capable* of conducting business, but it also in fact *did* conduct official business during its pro forma sessions—passing a bill at one meeting and receiving messages from the president at another. Hence, because the Senate was functionally capable of acting, it was in session for purposes of the Recess Appointments Clause.

But in important respects, Justice Breyer's resolution of the pro forma sessions issue was deeply formalistic. For one thing, Justice Breyer's standard for determining when the Senate is in session was derived from—even if not compelled by—constitutional text and structure, as well as original understandings of parliamentary autonomy. Regardless of the Constitution's purposes, the majority suggested, the document's text and structure have always been understood to provide the Senate "wide latitude" to determine its own rules of procedure.[97] In analyzing those provisions, Justice Breyer expressed comparatively less concern over the deeper purposes of the Constitution's division of federal power, and comparatively greater interest in simply determining how the Constitution's *text* divided that power among the branches.

Similarly formalistic was the majority's indifference toward the potential consequences of its decision. In the majority's view, even if the Constitution did not give the president tools of his own for waging inter-branch conflict—which it does[98]—"serious institutional friction" and its accompanying civic costs were not concerns to be addressed through the recess-appointments power.[99] Instead, as he had indicated at oral argument, Justice Breyer viewed "friction between the branches [as] an inevitable consequence of our

[96] *Id.* at 2575.

[97] *Id.*

[98] See, e.g., U.S. Const. art. 11, § 3 (providing that, when the House and Senate disagree "with Respect to the Time of Adjournment, [the President] may adjourn them to such Time as he shall think proper").

[99] Noel Canning, 134 S. Ct. at 2577.

constitutional structure."[100] Therefore, when "judicial interpretation and compromise among the branches" fail to resolve political differences, the "constitutional balance" is not preserved by rewriting the Constitution but by channeling the resolution of such disputes to "the ballet box."[101] This line of formalistic, "damn the torpedoes"[102] analysis stands in sharp contrast to other portions of Justice Breyer's decision in which the majority relied expressly on consequentialist reasoning.[103]

Even more to the point was the substantial deference Justice Breyer's opinion accorded to the Senate's institutional prerogatives. As Frederick Schauer theorized, formalism's preoccupation with rules necessarily involves deference to rule makers.[104] Regardless of how the *applier* of the rule might view matters, a formalist approach to decisionmaking suppresses contrary impulses and defers to the judgment inscribed in the terms of the rule.

In *Noel Canning*, Justice Breyer echoed these formalist concerns when he reasoned that, because the Constitution "broad[ly] delegat[ed]" authority to the Senate to determine whether and when to have its sessions, it was institutionally unjustifiable for the Court to "engage in a more realistic appraisal of what the Senate actually did" during its pro forma sessions.[105] Not only do judges lack the epistemic resources to "easily determine such matters," he wrote, but close, ongoing scrutiny of the Senate's procedures would also "risk undue judicial interference with the functioning of the Legislative Branch."[106] Thus, by finding that the Constitution allocated to the Senate the authority to decide the validity of its own sessions, Justice Breyer's opinion exhibited formalism's tendency to "screen [ ] off" potentially relevant countervailing information.[107]

[100] *Id.*

[101] *Id.*

[102] Martin Shapiro, The Supreme Court and Constitutional Adjudication: Of Politics and Neutral Principles, 31 Geo. Wash. L. Rev. 587, 602 (1963).

[103] Noel Canning, 134 S. Ct. at 2577 (disagreeing with Justice Scalia's analysis because it "would render illegitimate thousands of recess appointments reaching all the way back to the founding era").

[104] See Frederick Schauer, Formalism, 97 Yale L.J. 509, 543–44 (1988).

[105] Noel Canning, 134 S. Ct. at 2576–77.

[106] *Id.* at 2575, 2577.

[107] See, e.g., Schauer, Formalism, *supra* note 104, at 510.

In seamlessly blending these functionalist and formalist rationales, Justice Breyer's opinion challenges the integrity of the distinction between formalism and functionalism. And inasmuch as functionalist interpretation involves an "all things considered" judgment of the best possible outcome in a particular case, there is nothing inconsistent about functionalist judges relying on formalist considerations. Indeed, if a strict, horizontal division of federal authority appears salient to a functional analysis of the relevant constitutional issues, then a rigid distinction between formalism and functionalism seems substantially less plausible in practice.

Similar observations could be made with regard to the formalist model as well. As Professor Martin Redish has written, "It is not necessarily anomalous . . . to incorporate elements of common sense into an otherwise rigid formalist approach."[108] Indeed, although formalist separation-of-powers jurisprudence generally eschews functionalist concerns regarding flexibility, purposes, and consequences,[109] the formalist mode is nonetheless suffused with precisely those same considerations.[110]

In *Noel Canning*, Justice Scalia's dissection of the majority opinion illustrates at least two ways in which formalist separation-of-powers jurisprudence integrates functionalist logic. First, Justice Scalia argued that the vagueness of the majority's decision failed to constrain official behavior in predictable ways. For example, Justice Scalia reasoned that, even if his construction of the clause risked aggrandizing the president's power by allowing recess appointments "during very short inter-session breaks," his approach was functionally superior to the majority's in that it at least provided a definitional, rule-like principle for determining when the clause applies.[111] Under Justice Scalia's interpretation, there must "actually *be* a recess" "no

[108] Martin H. Redish, Separation of Powers, Judicial Authority, and the Scope of Article III: The Troubling Cases of Morrison and Mistretta, 39 DePaul L. Rev. 299, 315 (1990).

[109] See, e.g., Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 237 (1995) ("It is no indication whatever of the invalidity of [a] constitutional rule . . . that it produces unhappy consequences.").

[110] See *id.* at 240 (rejecting a "delphic alternative" standard because it would "prolong[] doubt and multipl[y] confrontation" among the political branches); see also Morrison v. Olson, 487 U.S. 654, 727 (1988) (Scalia, J., dissenting) (contending that "[t]he purpose of the separation and equilibrium of powers" is preserving individual liberty).

[111] Noel Canning, 134 S. Ct. at 2599 n.4 (Scalia, J., concurring in the judgment).

matter how short" before the recess-appointments power may be exercised.[112] By contrast, the majority's standard that a recess simply "be *long enough*," was, in Justice Scalia's view, too "indetermina[te]" to apprise relevant officials of the propriety of their conduct. As a result, he argued, the majority's standard was bound to produce unnecessary governmental instability and confusion.[113]

Second, Justice Scalia expressed concern over the long-term effects of the majority's decision on the equilibrium between the political branches. In criticizing what he called the majority's "adverse possession" theory of executive power—by which the executive branch could expand its power through a persistent pattern of constitutional violations—Justice Scalia worried that the majority had conferred on the executive an insuperable institutional advantage vis-à-vis the legislature.[114] Not only will the majority's decision, he wrote, "place on the Legislative Branch" an overly "excessive burden" in future "contests with the Executive over the separation of powers," but it also "all but guarantee[d] the continuing aggrandizement of the Executive Branch" by deferring too heavily to contested executive practice.[115]

On these points, Justice Scalia's critique of the majority decision in *Noel Canning* highlights formalism's pragmatic streak. Because formalism must contend with the inevitable imperfections of language and law, its focus on rules can never in practice be unyielding. And because formalism takes as a given that the Constitution separates powers to preserve liberty, its focus on text and structure necessarily involves a concern with the Constitution's purposes and the potential consequences of the Court's decisions. Justice Scalia's *Noel Canning* concurrence, therefore, illustrates that—in practice, if not in theory—the formalist decisionmaking model is appropriately inbued with certain pragmatic, functionalist concerns.

*3. Reconciling the Functionalism–Formalism Distinction*

The *Noel Canning* opinions thus highlight the blurry edges that separate functionalism and formalism in separation-of-powers

[112] *Id*. (emphasis in original).

[113] *Id.*

[114] Noel Canning, 134 S. Ct. at 2614–15.

[115] *Id.*

cases. On one hand, they illuminate clear differences between the two approaches, with Justice Breyer construing the Recess Appointments Clause in light of its "purposes" and "the actual practice of Government,"[116] and Justice Scalia by contrast interpreting the clause as part of "a system of 'carefully crafted restraints' designed to 'protect the people from the improvident exercise of power.'"[117] On the other hand, both opinions suggested that functionalism and formalism are not just two sides of the same coin but, in many ways, the *same* side of the same coin. Just as Justice Breyer's majority opinion integrated formalist logic into its otherwise functionalist methodology, so too did Justice Scalia rely on implicit functional reasoning in adhering closely to the Constitution's text and structure. In these ways, *Noel Canning* substantiates Professor William Eskridge's observation that "formalism cannot avoid functional inquires, any more than functionalism can avoid formalist lines."[118]

*B. Text and Practice*

Just as at oral argument, the *Noel Canning* opinions highlight a similarly complicated debate involving reliance on interpretive sources outside the text of the Constitution.[119] In one sense, there is overwhelming consensus in the legal community that extra-textual sources are legitimate bases for giving meaning to constitutional text. Judicial precedent and the *Federalist Papers* come to mind as uncontroversial examples. But beyond a limited range of canonical sources, the legitimacy of extra-textual materials and unwritten practices remains deeply contested insofar as they purport to be dispositive sources of law.

[116] Noel Canning, 134 S. Ct. at 2566 (maj. op.).

[117] See *id.* at 2610 (Scalia, J., concurring in the judgment) (quoting INS v. Chadha, 462 U.S. 919, 957, 959 (1983)).

[118] See William N. Eskridge, Jr., Relationships between Formalism and Functionalism in Separation of Powers Cases, 22 Harv. J.L. & Pub. Pol'y 21, 25 (1999).

[119] The literature on this issue is vast and diverse. See, e.g., Akhil Reed Amar, America's Unwritten Constitution: The Precedents & Principles We Live By (2012); see also Richard H. Fallon, Implementing the Constitution 111–26 (2001); Thomas C. Grey, Do We Have an Unwritten Constitution?, 27 Stan. L. Rev. 703 (1975); Stephen E. Sachs, The "Unwritten Constitution" and Unwritten Law, 2013 Ill. L. Rev. 1797 (2013).

Because there is no "Separation of Powers Clause,"[120] the debate over the written and unwritten Constitution is particularly acute in cases involving the appropriate division of federal authority.[121] While courts often resolve such questions by drawing structural inferences from the Constitution's text, they also rely in part on extra-textual or unwritten sources, like "historical understanding and practice,"[122] as well as "the 'settled and well understood construction of the Constitution.'"[123] Indeed, as Professor Ernest Young has observed, separation-of-powers disputes are not simply "a contrast between formalism and functionalism"—they also reflect "a contrast between exclusive reliance on the canonical Constitution and broader attention to other constitutive sources."[124]

In *Noel Canning*, the opinions of Justices Breyer and Scalia provided real-world insight on these issues. Section 1 discusses the ways in which the justices differed in their approach to extra-textual sources of interpretation. Section 2 analyzes a deeper connection and distinction between the opinions, showing that the justices did not simply rely on extra-textual information to resolve linguistic ambiguities—they also relied on such information to determine the existence or nonexistence of such ambiguity.

*1. Text and Practice in Resolving Ambiguity*

In his opinion for the majority, Justice Breyer made clear that unwritten "historical practice" would be given "significant weight" in "interpreting the [Recess Appointments] Clause."[125] In Justice Breyer's view, because the case "concern[ed] the allocation of power between two elected branches of Government," there was a greater, rather than lesser, need to rely on such extra-textual sources.[126] Indeed, "even when the nature or longevity of [an unwritten historical]

[120] See, e.g., Richard A. Epstein, The Classical Liberal Constitution: The Uncertain Quest for Limited Government 86–87 (2013).

[121] See generally Curtis Bradley & Trevor Morrison, Historical Gloss & the Separation of Powers, 126 Harv. L. Rev. 411 (2012).

[122] Printz v. United States, 521 U.S. 898, 905 (1997).

[123] Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3152 (2010).

[124] See Ernest A. Young, The Constitution Outside the Constitution, 117 Yale L.J. 408, 442 (2007).

[125] Noel Canning, 134 S. Ct. at 2559 (maj. op.) (emphasis omitted).

[126] *Id.* (emphasis omitted).

practice is subject to dispute, and even when that practice began after the founding era," he wrote, such practices are "an important interpretive factor," and one that should "inform [the Court's] determination of 'what the law is.'"[127]

Justice Scalia, by contrast, took a more circumspect view of judicial reliance on unwritten custom and practice. In keeping with his past decisions, Justice Scalia saw nothing per se illegitimate about an unwritten practice "guid[ing]" the Court's interpretation of the Constitution—so long as the relevant constitutional provision was "deeply ambiguous" and the practice at issue "has been open, widespread, and unchallenged since the early days of the Republic."[128] But "when the Constitution is clear," he stressed, the "historical practice of the political branches is irrelevant."[129] Because "the political branches cannot by agreement alter the constitutional structure," a "self-aggrandizing practice adopted by one branch well after the founding, often challenged, and never before blessed by this Court," cannot supplant the Constitution's "text, structure, and original understanding."[130]

These differing approaches played out in the resolution of the textual issues in *Noel Canning*. Take, for example, the way in which Justice Breyer construed the temporal meaning of "the Recess."[131] Because the text of the Constitution did not specify "how long a recess must be in order to fall within the Clause," Justice Breyer looked to, among other sources, extra-textual information regarding historical executive practices.[132] That history showed, in the majority's view, that presidents have generally not utilized the recess-appointments power during intra-session recesses lasting fewer than 10 days. Accordingly, the majority concluded, the Recess Appointments Clause presumptively applied only to inter-session recesses and intra-session recesses of 10 days or more. Put more succinctly, the majority read the meaning of the words in the Constitution to embody a presumptive time limit drawn in significant part from unwritten sources of customary practice.

[127] *Id.* at 2560.

[128] Noel Canning, 134 S. Ct. at 2594 & n.4 (Scalia, J., concurring in the judgment).

[129] *Id.* at 2600 (citing, inter alia, Alden v. Maine, 527 U.S. 706, 743–44 (1999)).

[130] *Id.* at 2600.

[131] *Id.* at 2565–66 (maj. op.).

[132] *Id.* at 2566–67.

Justice Scalia, however, disputed the majority's reliance on extra-textual sources. In his view, the majority's construction of the phrase "the Recess" amounted to "judicial adventurism."[133] Because there was "no textual basis whatsoever for limiting the length of 'the Recess'" in the way the majority did, Justice Scalia contended that the Court's reliance on unwritten "executive practice" was without constitutional basis.[134] After all, Justice Scalia asked rhetorically, if the Court was correct that "the Constitution's text empowers the President to make appointments during any break in the Senate's proceedings, by what right does the majority subject the President's exercise of that power to vague, court-crafted limitations with no textual basis?"[135] Regardless of the historical record, therefore, Justice Scalia concluded that the majority was not justified in diminishing the authority of future presidents based on nothing more than the voluntary self-restraint of their predecessors.[136]

Despite their methodological differences, however, Justice Breyer's and Justice Scalia's opinions share a common interpretive premise: when the text is clear, the text governs. For Justice Breyer, the text was not clear in *Noel Canning*—and therefore, supplemental materials were needed. For Justice Scalia, just the opposite was true. But that difference of opinion does not detract from the depth of the justices' agreement on first principles. Indeed, even the majority opinion, which Justice Scalia criticized for disregarding the Constitution's text, nevertheless invalidated the January 2012 appointments because the Senate was not in "Recess" (with a capital R) when they were made—a clear textual requirement of the clause. The majority never intimated that the appointments failed constitutional scrutiny simply because they departed from customary practices. In this way, *Noel Canning* suggests that—although textual reasoning is but one mode of constitutional analysis—it nevertheless remains first among equals.

*2. Text and Practice in Ascertaining Ambiguity*

The *Noel Canning* opinions also reveal a deeper respect in which extra-textual or unwritten sources of law influence constitutional

[133] *Id.* at 2600 (Scalia, J., concurring in the judgment).

[134] *Id.* at 2598, 2600.

[135] *Id.*

[136] *Id.*

interpretation. As Professors Curtis Bradley and Neil Siegel have recently argued, "the perceived clarity" of constitutional text is not simply "a product of traditional 'plain meaning' considerations."[137] Rather, just as the resolution of ambiguous constitutional language often relies on extra-textual sources, so too does the threshold determination of ambiguity depend on "a variety of other considerations," including those found beyond the document's text—for example, customary practice and historical development.[138]

Certain aspects of the opinions in *Noel Canning* lend credence to Bradley and Siegel's account of constitutional construction. For instance, in outlining the "background considerations" upon which he relied, Justice Breyer indicated that "historical practice" played a "significant" role in applying relevant norms and purposes, and not just in abstractly determining the proper allocation of power among the federal political branches.[139] Rather, Justice Breyer and the majority employed unwritten "historical practice" "in *interpreting* the Clause"—that is, ascertaining whether its "true construction" was evident from its "literal terms."[140]

To illustrate this point, consider also Justice Breyer's construction of the phrase "the Recess." In finding that language ambiguous, the majority looked beyond the Constitution's plain language, relying upon various Founding-era sources as well as the unwritten practices of the political branches throughout the 19th and 20th centuries.[141] Noting that, in its view, the modern-era executive branch had generally endorsed a capacious reading of the phrase, the Court deemed the "constitutional text . . . ambiguous" and consequently sought to resolve that ambiguity by further recourse to extra-textual materials.[142]

What is more, while Justice Scalia's interpretation of "the Recess" differed greatly from the majority's, he too relied on interpretive sources outside the text in finding that the clause was *not*

[137] See Curtis A. Bradley & Neil S. Siegel, Constructed Constraint and the Constitutional Text at 4, 64 Duke L.J. (forthcoming 2014).

[138] See *id.*

[139] Noel Canning, 134 S. Ct. at 2559 (maj. op.).

[140] *Id.* (emphasis altered) (internal quotation marks omitted).

[141] *Id.* at 2561 (internal quotation marks omitted).

[142] *Id.* at 2561, 2563.

ambiguous. But unlike the majority, Justice Scalia's reliance on extra-textual sources reflected his long-standing commitment to originalism. Whereas Justice Breyer relied substantially on contemporary unwritten practices, Justice Scalia looked primarily to pre-ratification materials or early post-ratification statements from knowledgeable authorities.[143] But while the *Federalist Papers* and the actions of the First Congress are virtually canonical, neither is embodied in the Constitution's text, and thus even Justice Scalia's careful, textualist opinion in *Noel Canning* ascertained the clarity of the text by looking beyond the four corners of the document.

Both opinions in *Noel Canning*, therefore, reflect an important truth about constitutional interpretation: on its own, the text is neither self-interpreting nor self-clarifying. Indeed, even for originalists, this is a commonplace.[144] In the same way that the text alone cannot establish its status as supreme law, neither can it independently establish the conditions of its own ambiguity. Such interpretive constraints instead arise from the context, shared meanings, and "norms of a highly specialized argumentative and adjudicative practice."[145] In this way, the practice and discipline of constitutional interpretation are themselves "a *structure* of constraints," in which "[i]nterpreters are constrained by their tacit awareness of what is possible and not possible to do," and "what will and will not be heard as evidence."[146]

## V. *Noel Canning*'s Implications

The implications of any Supreme Court decision are notoriously difficult to predict. Nowhere is this more true than in separation-of-powers cases.[147] Nonetheless, *Noel Canning* might carry important implications for separation-of-powers jurisprudence and the ongoing institutional dynamic between the president and the Senate.

[143] See *id.* at 2608 (Scalia, J., concurring in the judgment).

[144] See, e.g., Antonin Scalia, Is There an Unwritten Constitution?, 12 Harv. J.L. & Pub. Pol'y 1 (1989).

[145] Fallon, *supra* note 119, at 118.

[146] See Stanley Fish, Doing What Comes Naturally: Changes, Rhetoric, and the Practice of Theory in Literary and Legal Studies 98 (1989).

[147] See, e.g., Louis Fisher, The Legislative Veto: Invalidated, It Survives, 56 L. & Contemp. Probs. 273 (1993) (reporting that, even after *Chadha*, the "legislative veto continue[d] to thrive," and that over "two hundred new legislative vetoes ha[d] been enacted").

Section A synthesizes the separation-of-powers narrative in *Noel Canning*. Section B examines how that story may or may not affect related aspects of American law and whether the political branches will succeed in formulating new strategies to sustain or resolve their differences.

### *A. What Is the Take-Away from* Noel Canning*?*

Although it is too early to tell, history may end up viewing *Noel Canning* as merely a story about presidential usurpation. On that account, the case will add little to the separation-of-powers repertoire. Cases like *Bowsher v. Synar*, *INS v. Chadha*, *Plaut v. Spendthrift Farm*, among others, already make clear that one branch of the federal government may not "arrogat[e] power to itself" or "impair another in the performance of its constitutional duties."[148]

But in important respects, *Noel Canning* was not such a run-of-the-mill separation-of-powers case. Consider the nature of the president's 2012 recess appointments. While the Court was quite correct in holding those appointments unconstitutional, the president's action was not *simply* a case of the executive branch seeking to usurp authority entrusted to another branch. No one questioned whether the recess-appointments power was a presidential power, and few would question the president's responsibility to interpret the Constitution (even if wrongly). Rather, the distinguishing constitutional infirmity in *Noel Canning* was the president's independent appraisal—and unilateral disregard—of the legitimacy of the Senate's pro forma sessions.

In deciding that it had authority to independently evaluate and disregard the Senate's official actions, the administration violated the Constitution's separation of powers not necessarily by exercising another branch's powers but by impinging another branch's *right of self-definition*. Because that basic right is inexorably tied to the exercise of each branch's constitutional authority, any infringement of the right necessarily involves an infringement of the Constitution's structure. As the Court recognized long ago, the same separation-of-powers "principle that makes one master in his own house" also

[148] See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3156 (2010) (internal quotation marks omitted).

"precludes him from imposing his control in the house of another who is master there."[149]

The *Noel Canning* Court saw these issues clearly from the start. As several members of the Court noted at oral argument, not only has the Senate "an absolute right not to confirm nominees that the President submits,"[150] but there is "a long tradition of Congress defining what th[e] session is."[151] When dealing with the "considered judgment by both houses of the Legislative Branch as to" its own operations,[152] several justices indicated their view that "the question of how to define a recess really does belong to the Senate."[153]

Justice Breyer's majority opinion translated these concerns into law. On the unstated premise that no branch "should be dependent upon either of the other two in the exercise of ancillary powers and privileges logically related to its separate constitutional responsibilities,"[154] Justice Breyer held that "the Senate's own determination of when it is and when it is not in session" is entitled to "great weight."[155] Indeed, in "giv[ing] the Senate wide latitude to determine . . . *how* to conduct [its] session[s]," Justice Breyer correctly recognized that the constitutional structure requires each branch to respect the internal procedures of its "coequal and independent departments."[156]

Justice Breyer's concern, then, in *Noel Canning* was not simply with achieving a workable government or ensuring that each branch was able to perform its essential functions successfully. It was also about the authority of each branch to define its own institutional identity. In order for the Senate to remain the Senate—rather than an executive subordinate—it must be able to define authoritatively the terms of its own operation and the nature of its own collective judgments. Put differently, the president's authority and obligation to interpret

[149] Humphrey's Ex'r v. United States, 295 U.S. 602, 630 (1935).

[150] Tr. of Oral Arg., *supra* note 42, at 22 (question of Chief Justice Roberts).

[151] *Id.* at 27 (question of Justice Kennedy).

[152] *Id.* at 28 (question of Justice Kennedy).

[153] *Id.* at 39 (question of Justice Kagan).

[154] William W. VanAlstyne, The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause, 40 L. & Contemp. Probs. 102, 108 (1976).

[155] Noel Canning, 134 S. Ct. at 2574 (maj. op.).

[156] *Id.* (emphasis added).

the Constitution do not extend to matters that diminish the institutional autonomy of coordinate branches.

A simple counterfactual illustrates the point. Were the president able to trump the Senate's own determination of when it is or is not in recess, there is no principled reason for prohibiting the president from independently deciding, for example, whether the Senate has given its advice and consent under the Appointments Clause. Rather, if the executive branch may determine when the Senate is in recess, it could also decide—based on the passage of time, prolonged deliberation, or simple intransigence—that the Senate has impliedly consented to a particular nominee, and thus issue that individual an authoritative commission.[157] In either case, the president would be interpreting a structural provision that conditions presidential power on Senate action of some sort. And in either case, the president's judgment would marginalize the Senate's internal operation as a chamber of Congress and its collective judgments as a public law-making body.

Thus, *Noel Canning* can be read to stand for the proposition that, as a matter of separation of powers, each branch's constitutional authority is defined as much by *what* it does, as it is by its right to determine *when* and *how* it does what it does. On that reading, *Noel Canning* represents an important and unique addition to the separation-of-powers *corpus juris*.

### *B. What Is the Potential Impact of* Noel Canning*?*

#### *1. Noel Canning*'s Potential Impact on Past Agency Decisions

An obvious place to start in estimating *Noel Canning*'s institutional impact is with its effect on the past decisions of federal agencies in general and the NLRB in particular. As Roger King and I have written, the potential impact of the Court's decision in *Noel Canning* could be substantial—particularly for the NLRB.[158] Between January 2012 and August 2013, the NLRB "recess" appointees issued roughly

[157] At least one academic has advanced a qualified version of this argument. See Matthew C. Stephenson, Can the President Appoint Principal Executive Officers without a Senate Confirmation Vote?, 122 Yale L.J. 940 (2013).

[158] See, e.g., G. Roger King & Bryan J. Leitch, The Impact of the Supreme Court's *Noel Canning* Decision—Years of Litigation Challenges on the Horizon for the NLRB, Bloomberg BNA (June 26, 2014), www.bna.com/impact-supreme-courts-n17179891624.

700 reported and unreported decisions while sitting on quorum-less boards. Each of those decisions is arguably invalid and may have to be reconsidered by the NLRB. Additionally, a number of NLRB regional directors whose appointments were approved by the quorum-less 2012–2013 board may find their enforcement actions subject to collateral challenge. These are but a few of the potential consequences for the NLRB, independent of any peripheral effects on cognate federal agencies.

But the ominous prospect of the NLRB rehearing hundreds upon hundreds of past cases is not a foregone eventuality. For one thing, many past decisions that might warrant reconsideration will be mooted through settlement or the subsequent insolvency of the employer or union. And even for those cases that are still live, the NLRB can at least partly deflect *Noel Canning*'s impact by employing certain administrative practices and judicial doctrines.

First, the NLRB may attempt to retroactively authorize, or "ratify," its past decisions. Under Supreme Court doctrine, agencies may ratify unlawful past actions so long as they possessed authority to perform the ratified act both "at the time the act was done" and "at the time the ratification was made."[159] Although the NLRB has avoided this strategy in the past, its aversion to wholesale ratification may prove too costly in the wake of *Noel Canning*.[160]

Second, as Justice Scalia and the solicitor general noted at oral argument in *Noel Canning*,[161] the de facto officer doctrine may provide an important palliative. As the Court has explained it, the de facto officer doctrine "confer[s] validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment or election to office is deficient."[162] The doctrine "springs from the fear of the chaos that would result from multiple and repetitious suits challenging every action taken by every official whose claim to office could be open to question."[163] Accordingly, the de facto officer doctrine "seeks

[159] See FEC v. NRA Political Victory Fund, 513 U.S. 88, 98–100 (1994).

[160] See Paulsen v. All Am. Sch. Bus Corp., No. 13-CV-3762, 2013 WL 5744483, at *3–5 (E.D.N.Y. Oct. 23, 2013).

[161] Tr. of Oral Arg., *supra* note 42 at 5.

[162] Ryder v. United States, 515 U.S. 177, 180 (1995).

[163] *Id*.

to protect the public by insuring the orderly functioning of the government despite technical defects in title to office."[164]

What is more, the Court has already applied the de facto officer doctrine to insulate a recess appointment from collateral challenge, albeit more than a century ago.[165] In *Ex parte Ward*, an inmate challenged the legality of his detention by attacking the constitutionality of his sentencing judge's recess appointment. The Supreme Court rejected the inmate's suit. Under the de facto officer doctrine, the Court held that, although the vacancy filled by the judge did not "happen during" the Senate's recess, a judge is "an officer de facto" when the "*court* has jurisdiction" and "the proceedings are otherwise regular."[166] In such circumstances, "the validity of [the judge's] title" and "his right to exercise the judicial functions" may not be collaterally attacked.[167] Following *Ex parte Ward*, therefore, federal courts might reject collateral challenges to NLRB decisions so long as the agency itself had jurisdiction over the subject matter of the case and the proceedings were otherwise regular. Thus, although the NLRB likely has its work cut out for it following *Noel Canning*, the prediction that it will be paralyzed by a flood of litigants seeking reconsideration appears to be quite overstated.

*2. Noel Canning*'s Potential Impact on Senate Authority

To the extent *Noel Canning* emboldened presidential recess-appointment power, even if only symbolically, the Senate could push back in several ways. First and most obvious, Congress and the Senate could prevent the Recess Appointments Clause from ever being triggered by staying in session year-round or employing periodic pro forma sessions, as it did in January 2012. Such a course may be politically or practically infeasible in the long run, but as *Noel Canning* makes clear, nothing in the Constitution precludes the Senate from acting in this manner.

[164] *Id.*

[165] See Ex parte Ward, 173 U.S. 452, 452–54 (1899).

[166] *Id.* (emphasis added).

[167] *Id.*; see also Ryder, 515 U.S. at 181–83 (reaffirming *Ward*); Roell v. Withrow, 538 U.S. 580, 598–99 (2003) (Thomas, J., dissenting) (citing *Ex parte Ward* for the proposition that "defect[ive]" or "improper[]" recess appointments are precisely the kinds of "technicalities" to which the de facto officer doctrine applies).

Second, Congress overall has at its disposal innumerable formal devices for influencing executive action—and specifically for discouraging excessive use of the recess-appointments power.[168] Congress, for example, might utilize targeted appropriations riders to defund those agencies heavily staffed with recess appointees. Congress could also impose burdensome reporting and certification requirements on such agencies, requiring them to submit costly, time-intensive reports detailing their budgetary and operational activities. By increasing the transaction costs for agencies run by recess-appointed officers, Congress could eliminate most of the perceived advantages of recess appointments.

Third, the Senate itself also has informal methods of discouraging recess appointments.[169] The Senate could, for instance, issue official resolutions denouncing certain recess appointments or otherwise undermine the public legitimacy of such officials through negative publicity campaigns. The Senate could also make life difficult for such officials and their agencies through repeated committee hearings or intrusive information requests. And while each of these formal options occurs *ex post*—that is, after the recess appointments are made—they nevertheless may generate enough *ex ante* disincentives that presidents would avoid excessive reliance on the recess-appointments power.

Fourth, the Senate also presumably has authority to *end* those recess appointments with which it disagrees. After all, the commissions granted to recess appointees "expire at the End of [the Senate's] next Session."[170] Following a recess in which the president unilaterally appointed a disfavored nominee, therefore, the Senate could immediately divest that official of authority by adjourning *sine die*—thereby ending its session. In this way, the Senate possesses both the front-end power to trigger the Recess Appointments Clause, as well as the back-end power to terminate the authority of recess appointees. Although the Court in *Noel Canning* did not broach this issue specifically, the logic of the majority opinion suggests that the Senate's "wide latitude to determine whether and when to have a

[168] See generally Jack M. Beermann, Congressional Administration, 43 San Diego L. Rev. 61, 69–138 (2006).

[169] See *id.* at 70, 121–22; see also Jacob E. Gersen & Eric A. Posner, Soft Law: Lessons from Congressional Practice, 61 Stan. L. Rev. 573, 577–78 (2009).

[170] U.S. Const. art. II, § 2, cl. 3.

session" would include the authority to determine when its "next Session" has "End[ed]."[171] And so long as the Senate kept its break in business sufficiently brief, its adjournment would not require the consent of the House and would not permit the president to make new recess appointments.

*3. Noel Canning*'s Potential Impact on Presidential Authority

As the previous discussion makes clear, Congress in general and the Senate in particular enjoy a substantial degree of power over the practices of the executive branch. Although the president has statutory avenues for filling important offices that fall vacant at inopportune times, I explore below a few constitutionally based workarounds that the president might employ to balance the scales of power. Ultimately, however, I conclude that none is independently adequate as a constitutional or political matter to thwart senatorial intransigence.

*First*, the president could seek to defeat political resistance over executive appointments by reconvening the Senate during its recess in order to goad a recalcitrant majority into confirming potential nominees. Under Article II, Section 3, the Constitution authorizes the president "on extraordinary Occasions" to convene both houses of Congress—"or *either* of them"—in what have been termed "special sessions."[172] Exercising this authority, a future president could reallocate the burden of inertia by forcing the Senate to consider and approve appointments.

The drawbacks of this approach, however, are three-fold. First, the president's actions would be highly public and thus potentially subject to derisive political criticism. Second, if the Senate is meeting in periodic pro forma sessions—and therefore is in session as it was in January 2012—it is not clear the president has authority to convene a "special session." After all, if the Senate is in session, it is arguably already "convene[d]," and thus the president's convention authority may be inapposite. Third, and more important, even if called back into special session, the Senate nevertheless retains an absolute right to reject the president's nominees. A special session, therefore,

[171] NLRB v. Noel Canning, 134 S. Ct. 2550, 2574–75 (2014).

[172] U.S. Const. art. II, § 3, cl. 2 (emphasis added).

would entail substantial political risks with no countervailing guarantee of a practical benefit.

*Next*, under imaginable conditions, the president could manufacture the preconditions of the recess-appointments power by adjourning both chambers of Congress for a sufficient period of time. Article II, Section 3, of the Constitution empowers the president to adjourn Congress "to such Time as he shall think proper" when the chambers themselves cannot agree "with Respect to the Time of Adjournment."[173] If the president's party controlled the House, but the Senate was controlled by an oppositional party that refused to confirm the president's nominees, the House could, at the president's behest, seek an unexpected or inconvenient adjournment in order to create a disagreement between the chambers. And, once the chambers disagreed as to the date of adjournment, the president could exercise his or her authority to adjourn both houses unilaterally. At that point, any preexisting vacancies could be filled under the Court's construction of the Recess Appointments Clause in *Noel Canning*.

This second strategy, however, has at least two potential infirmities. First, it is worth questioning whether such maneuvering would comport with the institutional dignity and character of the presidency. Simply because the Constitution ostensibly contemplates such action does not mean it lives up to the highest and best aspirations for the executive branch as a constitutional functionary. Second, aside from the institutional implications, the president's adjournment power presumably depends on the Senate's understanding of its dispute with the House. If the Senate, for example, characterized the chambers' dispute as pertaining to some other matter—such as the substance of proposed legislation rather than the timing of adjournment—the president's power to adjourn the Senate may not arise. The Senate, in other words, could thwart this maneuver through some sort of official resolution proclaiming its institutional understanding of the chambers' disagreement. Thus, because there is no guarantee that the two chambers will agree about the subject of their disagreement, and because it is not clear whether the president would have authority independently to determine the subject of that

[173] U.S. Const. art. II, § 3, cl. 3.

disagreement, this second option may also fail to circumvent Senate intransigence.

*Finally*, as Tom Goldstein has suggested, a member of the Senate who is sympathetic to the president's agenda might be able to "wipe away the fiction" of a pro forma session simply "by making a quorum call."[174] Under its rules, the Senate operates on the presumption of a quorum unless, among other things, a senator makes a "quorum call," and thereby initiates a roll call of the Senate to determine how many of its members are present.[175] If made during a pro forma session, a quorum call would likely reveal the absence of a quorum, in which case the Senate's own rules would forbid it from taking further legislative action.[176] Therefore, by rendering the Senate unable to act, a quorum call would render the Senate unable to provide its advice and consent. And without "the ability to provide its 'advice and consent,'" the Senate would be "without the *capacity* to act" in the relevant sense and would therefore not be "in session" according to the Court's decision in *Noel Canning*.[177] Assuming that the absence of a "session" means that the Senate is in recess, the president might then have authority to make unilateral executive appointments.

Although this "pierce-the-veil" strategy appears quite promising, it too has limitations. First, as a practical matter, it seems unlikely that any senator would be willing to make such a quorum call and thereby risk alienating his or her colleagues. Second, because the Senate would be unable to act only until a quorum was reestablished,[178] there would be only a narrow window of time in which to make any subsequent recess appointments—and even then such appointments may be short-lived. Given the speed of modern travel, the Senate could reconvene a quorum within a matter of hours, and thereby end any manufactured recess. Moreover, even

[174] Tom Goldstein, Can a President (with a Little Help from One Senator of His Party) Circumvent Most of the Court's Limitation on the Recess Appointments Power?, SCOTUSblog (Jun. 27, 2014), http://www.scotusblog.com/2014/06/can-a-president-with-a-little-help-from-one-senator-of-his-party-circumvent-most-of-the-courts-limitation-on-the-recess-appointments-power.

[175] See Floyd M. Riddick, Riddick's Senate Procedure 1038–39 (Alan S. Frumin ed., 1992).

[176] *Id*.

[177] See NLRB v. Noel Canning, 134 S. Ct. 2550, 2575 (2014) (emphasis in original).

[178] See Riddick, *supra* note 175, at 1038–39.

if recess appointments had been made during that brief intervening period, the Senate might—as already discussed—be able to terminate such appointments by immediately adjourning *sine die* and thus "End[ing]" its "next Session."[179]

In the end, therefore, presidents may have to rely upon what Professor Keith Whittington has referred to as the executive's "intrinsic advantages over the Senate" in the appointments process.[180] As Whittington notes, despite the Senate's apparent superiority, presidents actually enjoy an important advantage regarding executive appointments because, unlike "a collective body such as the Senate," "the unitary and hierarchical executive" can choose a course of action without "bear[ing] the organizational costs of mobilizing" and "sustaining" "a majority of their colleagues."[181] In the wake of the Court's decision in *Noel Canning*, it could very well be that such inherent institutional advantages are the president's strongest—and *only*—weapons against Senate intransigence.

## VI. Conclusion

*NLRB v. Noel Canning* counts as a rare and remarkable case. At its core, the case clarified the Constitution's structure—specifically, its tripartite division of federal powers. At its core, the case clarified certain aspects of the Constitution's tripartite division of federal power—specifically, the general metes and bounds of the president's authority to make unilateral executive appointments under the Recess Appointments Clause. Going beyond the propriety of one presidential action, *Noel Canning* highlighted important jurisprudential debates and brought to the fore the intricate institutional relationships among the federal branches—illustrating the ways in which the Constitution advantages and disadvantages each in the performance of its essential functions. Indeed, while the Court's judgment is final as to the propriety of the president's 2012 recess appointments, the overarching themes implicated here will surely arise again as the Court continues to articulate the proper division of authority among the federal political branches.

[179] Noel Canning, 134 S. Ct. at 2574–75.

[180] See Keith E. Whittington, Presidents, Senates, and Failed Supreme Court Nominations, 2006 Sup. Ct. Rev. 401, 406 (2007).

[181] *Id.* at 407.