The Courts and Coequality

Aiding a False Originalism

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Paper prepared for the Western Political Science Association’s 2013 Annual Meeting

Los Angeles, CA, March 2013

Abstract: Though the "coequality" of legislative, executive, and judicial branches was not part of the American founders' institutional design, it has become a popular shorthand to describe institutional power in the US. Through an examination of Supreme Court opinions which discuss and assert the coequality of institutions, this paper examines the Court's role in backing and promoting the idea of coequality. The record shows that most judicial assertions of coequality are of a quite recent vintage, with a growth spurt contemporaneous with the presidents who first asserted this same institutional power relationship. Institutional coequality has moved from something not contemplated, to an assertion of equal constitutional standing, to a kind of blithe truism used in many opinions. Emphasizing coequality has moved the Court away from a "separation of functions" model of government, toward a “separation of powers” model of institutional relations. The court has a special reason to assert coequality: it is a safe means of asserting its power, couched in a shell of interbranch deference. This phraseology also gives rhetorical ammunition to others who tout institutional coequality as a desirable norm.

The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of the other and neither may control, direct or restrain the action of the other.

-Justice George Sutherland, *Frothingham v. Mellon* (1923)

The principle of separation of powers focuses on the distribution of powers among three coequal Branches.

-Justice Sandra Day O’Connor, *Touby v. United States* (1991)

While the above quotes are not mutually exclusive or diametrically opposed to each other, they do suggest an important difference in emphasis. Justice Sutherland expresses a traditional view of interbranch relations. The Constitution gave specific powers to each institution of government, and it is the duty of each of these institutions to stay within its proper bounds and to resist the temptation to act in spheres designated to the other branches. The traditional shorthand term for this view is often the “separation of powers.” Yet the use of that phrase can be misleading, as it might be when stated in the quote of Justice O’Connor. O’Connor uses the term “separation of powers” and “distribution of powers” in the same sentence that she asserts the existence of coequal branches. Thus it seems O’Connor is suggesting that the three branches of government have an equal quantity of power allotted to them by the Constitution. This is a very different assertion than that forwarded by Sutherland, which does not assess the quantity of power associated with each major function of government, and thus each branch.

Because of this potential confusion, I will refer to the Sutherland approach as a “separation of functions” approach to institutions. It has been articulated frequently in court decisions, and perhaps the most famous example is Justice Hugo Black’s opinion for the court in *Youngstown Sheet & Tube v. Sawyer* (1952). The alternative view implied in the O’Connor quote can be described using the “separation of powers” label because it is a statement about the distribution of power itself. In this paper my goal is to discern whether the US Supreme Court has transitioned from a more traditional and constitutionally intended separation of functions approach to jurisprudence to a newer separation of powers approach.

This research is prompted by two observations which serve as the background for this paper. First, the founders did not set up the Constitution with the separation of powers model in mind. The founders did not intend for the presidency or the federal judiciary to be equal in power to the legislative branch. Instead, these two institutions were to act in the roles prescribed to them by the Constitution. The president was to execute the law, periodically recommend to Congress beneficial laws, and veto ill-advised enactments. The judiciary was to adjudicate federal matters and disputes within the states which implicated the federal Constitution. The founders set in place a separation of functions model, slightly more complicated than the one simply described in Justice Sutherland’s quote, because there are powers shared between the executive and legislative branches. Second, in recent times presidents have actively endorsed the separation of powers model, stressing institutional coequality. Their primary motive in doing so seems to be a justification of their own exercise of power, and in so doing they have helped add this conception to the American civics lexicon.

After setting the stage by briefly discussing how the founders and presidents have discussed coequality, I systematically analyze the Supreme Court opinions in which the terms “coequal” and “coequality” have been employed. A numerical analysis indicates that using the word coequal to describe interbranch relations has risen significantly in the last four decades. A qualitative analysis of these cases shows that while the court has not moved to touting a pure separation of powers view, there has been substantial movement from the separation of functions approach. Since language from Supreme Court decisions is often quoted, the court itself has likely been a player in turning the American public’s view of their polity toward a separation of powers perspective.

The distribution of power across branches is a key element of the American polity. Supreme Court cases which involve interbranch power are particularly important and include some of the most consequential and controversial cases of recent decades, like *Baker v. Carr* (1962, asserting federal power in gerrymandering cases), *New York Times v. US* (1971, the Pentagon Papers case), *US v. Nixon* (1974, ruling on the president’s obligation to produce evidence in a criminal probe), and the landmark campaign finance cases *Buckley v. Valeo* (1976) and *Citizens United v. FEC* (2010). While lawyers and students of the law discuss cases and the reasoning of opinions in depth, rarely do anything but phrases from opinions work their way to the public’s consciousness. In rather cavalierly employing the terms “coequal” and “coequality” to describe interbranch relations, and in doing so repeatedly, the US Supreme Court has contributed to a major misunderstanding of American institutions. This conception is at odds with the founders’ separation of functions view, but more importantly, it contributes to a problematic view that the institutions of the national government are locked in a kind of Newtonian battle, with each institution able to check the action of any other with an “equal and opposite” reaction.

**Coequality: Rejections and Rebirth**

None of the American Founders intended to construct a coequal set of governing institutions, at least not in the way that the concept is typically bandied about today, as a balance of power between legislative, executive, and judicial branches. How could they, when James Madison, that most active architect of the new regime wrote that “in republican government the legislative authority, necessarily, predominates” (Federalist #51, Cooke 1961: 350)? Bicameralism was not only a device used to balance the power prospects of the large and small states. It was a means to prevent the aggrandizement of power by the legislature. Madison concludes that “the remedy for this inconveniency is, to divide the legislature into different branches” and “the weakness of the executive, on the other hand, [requires] that it should be fortified” (ibid.).

Most who gathered in Philadelphia to write the Constitution worried more about legislative than executive usurpation.[[1]](#footnote-0) Though Alexander Hamilton was the most executive-centric of them all, he shared with many an understanding of history that emphasized legislative aggrandizement. In Federalist #71, an essay written to be convincing to those unlikely to share his enthusiasm for executive power, he noted that the English House of Commons had “raised themselves to the rank and consequence of a coequal branch of the Legislature” (Cooke 1961: 485). This was part of a package of arguments offered by Hamilton to show that the proposed federal executive should not be feared. The views of those like Madison and Hamilton carried the day in Philadelphia, and this is why the president, much to the consternation of separation of powers purists, was dealt in to the legislative process, tasked with recommending to Congress “measures as he shall judge necessary and expedient” (Article II, Section 3), and given possession of a qualified veto.

Hamilton also singled out the judiciary in *The Federalist*, noting that its power paled in comparison with the lawmaking branches. Alongside his famed comment about the judiciary being “least dangerous” because it lacked the power of purse and sword, he wrote in Federalist #78 that “the judiciary is beyond comparison the weakest of the three departments of power” (Cooke 1961: 523). In general, during the ratification debate Federalists emphasized that institutions of government did different things, which produced a differential of power between them.

The trick of constitution-making to those in Philadelphia, was producing a stable arrangement out of an institutional array that, left to its own devices, would be unstable and degenerate into tyranny. Tinkering, adjusting the system away from a pure segregation of legislative, executive, and judicial power, was needed to induce stasis. In Federalist #51 Madison emphasized the need of each branch having the tools to protect its own ability to wield its constitutional prerogatives.[[2]](#footnote-1) He did not suggest that this final outcome produced institutions that were “coequal” in power, even though he used that very word in other settings, to describe how states were treated in certain ways in the Constitution (Federalist #39). Hamilton, meanwhile, used the term coequal to describe joint federal and state control over taxation, but not to describe the institutions of the federal government.

Coequality and coequal were words frequently used and well known to the founding generation. And there was, in fact, a version of coequal institutionalism that was preferred by some of the leading figures of the American political scene. Those who admired the historical stability of English institutions and thought them worthy of emulation because of this, believed that what made these institutions work was their trilateral coequality. The House of Commons, the House of Lords, and the British monarch each needed to approve of legislation for it to go into effect.[[3]](#footnote-2) This was not a claim of equal power. However, it was an understanding that substantial changes in the government required the simultaneous approval of all three governing estates; each had an equal ability to prevent change in the laws of the realm.

Among those who favored this version of institutional coequality were Hamilton, John Adams, George Mason, and Elbridge Gerry. The latter two became Antifederalists, in large part because they believed that common citizens were inadequately represented in the House of Representatives, which they thought of as the American equivalent of the House of Commons. Hamilton and Adams supported the Constitution, but both frequently lamented the relative weakness of the executive. Adams, for instance, complained to Roger Sherman that “the house and the senate are equal, but the third branch, the essential, is not equal” (Carey 2000: 449). Because the institution lacked an unqualified veto, that is one that could not be overridden, “the legislative power will increase, [and] the executive power will diminish” (450). This view may not have been prescient, but that is not the point. Rather, it is that these “founding coequalists” did not have sufficient strength to get their way in Philadelphia and ended up disappointed in the new government to varying degrees, precisely because the institutions of government were *not* coequal.

So how did the concept of coequal institutions come into vogue? Who was responsible for introducing three coequal branches as a shorthand for describing American governing institutions? Part of the answer lies in prior research on how presidents have addressed coequality. My coauthor Paul T. Beach and I demonstrated that presidents up to Richard Nixon had not claimed to be at the head of a branch of government coequal in power to the legislature or judiciary. Nixon and his successor, Gerald Ford, popularized this view as a means of staving off Congressional investigation and then electoral defeat during and immediately after the Watergate scandal. From Richard Nixon forward, coequality of power has become a fairly common claim of presidents (Siemers and Beach).[[4]](#footnote-3)

The first president who used the word coequality in relation to the presidency predated Richard Nixon by well over a century. In using the term, Andrew Jackson was not suggesting that the quantity of power he possessed as president rivaled that of the Congress. Rather, he was insisting that the presidency and Congress’s constitutional standing or legitimacy was equal. The Senate censured Jackson in 1834 for ordering his Treasury Secretary to distribute funds in the Bank of the United States to state banks. Jackson protested that in the absence of specific constitutional authorization, the Senate could not invent a punishment, a reprimand, or a device to stop the president from acting in what he argued was his own constitutional sphere (a controversial claim, to be sure). The Congress did have a constitutionally sanctioned mechanism for stopping the President: the impeachment process. This power, expressly given, implied that the Congress could not use other means to invade the executive sphere. Jackson reasoned that as the head of a branch with legitimate constitutional authority acting in his own sphere (again, a controversial claim), his own actions should stand. The term coequality was actually first used by a president to police the separation of functions understanding of the Constitution. It took 135 years more before any president regularly asserted coequality and turned it into an assertion about the relative power of institutions. President Nixon’s increasingly desperate attempts to stave off Congressional investigation relied heavily on a “Newtonian” presumption about institutions: the force of Congress should be able to be rebuffed by the equal and opposite force of the president.[[5]](#footnote-4) Despite Nixon’s failed attempt to quash a subpoena in the Watergate investigation, he seemed to succeed in creating a “separation of powers” narrative about American institutions that has come to rival or even eclipsed the “separation of functions” view.

Explaining this embrace of coequality as a separation of powers perspective by recent presidents seems fairly straightforward. In an environment where the president is expected to maximize his power, recent presidents have had an incentive to assert their coequality vis a vis Congress. Practice shows that they have, at the very least, gotten away with this rhetorical innovation and they seem to have convinced many Americans in the process. Rational choice models of judicial action might also posit a power-maximizing approach for the justices. Justices may be thought to have an incentive to borrow the idea of coequality for themselves. But if the Court really is the “least dangerous branch” because it is “the weakest of the three departments of power,” the Court may also have less ability than the president to credibly assert its own coequality. Examining how the Court has approached coeqality is, therefore, partly an exercise in discerning the perceived limits of judicial power. Additionally, the very nature of its job, gives the Court a role in policing constitutional boundaries, and that means coequality has inevitably become an issue before the court. Describing how the Court has approached coequality is what I turn to now.

**Method and Varieties of Explanation**

To examine the issue of institutional coequality as it has been elucidated by the US Supreme Court, I performed a key word search for the terms “coequal” and “coequality” in the Lexis/Nexis “US Legal” database, restricting cases to ones adjudicated in the US Supreme Court. Performing this search produced 121 “hits”—cases in which the official transcript contained one or both of the two key words.[[6]](#footnote-5)

Reading through these 119 cases reveals many items other than national institutions which have been asserted to be coequal by justices (or which are disputed as being coequal). These include twelve cases in which states were called coequal to each other, beginning with *Howard v. Ingersoll* in 1852 and stretching to *PPL Montana v. Montana* in 2012. There is a robust line of cases which have declared that states have a coequal obligation to enforce the federal Constitution and constitutional law—an “equal responsibility” doctrine first asserted in *Townsend v. Sain* (1963); states have occasionally been called coequal sovereigns with the federal government, each with their own final jurisdiction in which they are fully empowered to act. However, there has also been significant resistance to this view. As common legal terms “coequal” and “coequality” have been used in other instances as well.[[7]](#footnote-6) Just like Alexander Hamilton and James Madison, Supreme Court justices have long had the concept of coequality in their legal vocabulary.

In the 119 total cases found in this search, clear patterns emerge. The number of cases rise drastically around 1970. Nearly three-quarters of all instances of cases using this language appear after 1970, with 88 cases from 1970 or after and just 31 before. With the much longer time span in the earlier era, the frequency with which coequality has been used by the court has skyrocketed (from an average of once every six years in the earlier era to more than two times per year in the later era). Sheer numbers are of less interest than patterns in the type of case involved. For the purposes of this analysis I have distinguished four kinds of “coequal” case, described by what is considered equal: states; nation and state in the federal relationship; executive, legislative, and judicial branches; and miscellaneous examples, a catch-all of all other instances in which one thing is called coequal to another (or in which the word is used to dispute the equal relationship). Table 1 shows the number of cases by type, with 1970 used as a cutting point:

**Table 1: Number of Supreme Court Cases with “Coequality” Language by Type**

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| --- | --- | --- |
|  | Before 1970 | 1970 and After |
| State-State | 3 | 9 |
| Federalist | 3 | 19 |
| Interbranch | 8 | 57 |
| Miscellaneous | 17 | 6 |
| Total | 31 | 91 |

\*Three cases, *Rostker v. Goldberg* (1981), *Seminole Tribe v. Florida* (1996) and *Williams v. Taylor* (2000) are counted twice, as there are two different senses in which coequality is used in the written opinions.

The use of coequal and coequality as a descriptor has gone up significantly in recent decades. Yet it has not done so uniformly. While there is a rise in states being called coequal to other states, this is not anywhere near as great as the increase in cases which deal with interbranch relations and those which discuss the federal relationship. The percentage of cases involving state-to-state coequality has remained at 10% of the total number of cases. Examples of federalism grew much more. Modern assertions that states are sovereign entities and due significant deference by the federal government were spearheaded by Chief Justice Rehnquist and Justices Sandra Day O’Connor and Anthony Kennedy.[[8]](#footnote-7) These claims were disputed, most vigorously by Justices Harry Blackmun, John Paul Stevens, and David Souter.[[9]](#footnote-8) The irony is that a robust debate about the true nature of the federal relationship has been rekindled using terms that were never used to describe it in the first place, at least not in Supreme Court decisions.

The number of coequal references to interbranch relations dwarfs the total from federalism. More than 60% of all references in recent decades have been about interbranch relations, compared with just over 25% in the earlier era. What was a relatively rare occurrence before 1970 is now one which is referenced in nearly every term of the Court, and often more than once. A comprehensive listing of these cases, with the justice (or justices) using the term in question and the context of the case is included as Appendix I. Unlike the references regarding federalism, there is, seemingly, no controversy whatsoever about referring to the branches of the federal government as coequal. Not a single reference among the 65 cases at issue disputed the truth of interbranch coequality. From *Field v. Clark* in 1892, to *Zivotofsky v. Clinton* in 2012, every reference to “coequal branches” holds up coequality between branches of government as an ideal.

Since the first instance of coequality being applied to interbranch relations was in 1892, the Court’s first century came and went without such an opinion (as per curiam, majority, dissent, or concurrence). While the analysis which follows does not include any textual analysis of cases before *Field v. Clark*, the absence of cases produced by the key word search before 1892 is telling in and of itself. If the Constitution as it was originally written, had posited the coequality of government institutions, surely someone would have noted it in a Supreme Court decision prior to 1892. What follows is the story of how coequality was introduced into constitutional law as a descriptor of interbranch relations, and a delineation of its traditional usage and purpose.

**The Origins and Early Development of Coequality Jurisprudence**

Two cases dominate interbranch coequality jurisprudence in the pre-1970 era: *Field v. Clark* (1892) and *Frothingham v. Mellon* (1923). Their influence has extended into the latter era as well and both are not infrequently cited. In the former case, importer Marshall Field challenged the constitutionality of the McKinley Tariff Act. The strongest argument against constitutionality was that the Act delegated taxation power to the president, a power vested in the lawmaking function by Article I, section 8. The McKinley Act allowed the president to determine which imports would be taxed at a higher rate in retaliation for specific country-of-origin protections. John Marshall Harlan, writing for the Court, dismissed the claim. The president was executing the will of Congress in responding to protectionist practices, not creating a new tax on his own.

But Field’s lawyers found an additional problem with the Act, which became a centerpiece of the case’s enduring fame: it had not been properly passed into law, according to them. One section of the bill—Section 30, which offered a rebate on tobacco taxes—had been printed in both the Senate and the House journals but had somehow not been engrossed into the final bill. Field’s lawyers argued that there had been no vote to eliminate this provision, at least one was not shown in the journals of either chamber. So the law itself did not correspond to what had passed both houses of Congress. The constitutional violation asserted was against Article I, Section 5, clause 3, which requires each chamber to keep a journal containing the yeas and nays on matters where a minimal number of representatives request a formal vote. To them, the mistake meant that the law was improperly passed. It could not be trusted as law and was therefore null and void.

Harlan did not agree. The McKinley Act, without its former Section 30, had been certified as law by the Speaker of the House, the President of the Senate, and the President of the United States. Field felt that it would be too intrusive for the judiciary to pry into the legislative process in such a case. A certified act “carries, on its face, a solemn assurance by the legislative and executive departments of the government, charged, respectively, with the duty of enacting and executing the laws, that it was passed by Congress.” The Court could still judge the bill’s constitutionality, but it should not inquire into how it was passed. Harlan borrowed language from a recently decided case from Mississippi, *Ex Parte Wren* (1886), which held that “‘the respect due to coequal and independent departments requires the judicial department to act upon that assurance, and to accept, as having passed Congress, all bills authenticated’” in this manner. Thus a “judicial deference doctrine” was articulated in *Field* out of what was a typical practice of the Court: the Court judged the constitutionality of content in the law as it was written and applied, but not the legislative process by which it passed. Harlan need not have used the term “coequal” to describe this doctrine of deference, but he did.

In two subsequent cases Harlan applied his own deference doctrine, quoting the words from *Field*. In *Harwood v. Wentworth* (1896) he reasoned that an Arizona territorial bill which was to go into effect on a particular date was not nullified by its being implemented months later. Such nitpicking would violate the “‘respect due to coequal and independent departments.’”[[10]](#footnote-9) In *Twin City Bank v. Nebeker* (1897) a taxation clause that had originated in the Senate was similarly held not to invalidate a law, as it had been certified valid by the Speaker, the President of the Senate, and the President of the United States. To Harlan, it seems, any properly passed federal law was due deference by the Court unless its content was unconstitutional. However, in *Wilkes County v. Coler* (1901), Harlan himself introduced a limit or caveat on this judicial deference doctrine. A North Carolina law had not been read three times before passage, a necessary procedure in that state (and many others). Could the law be considered unconstitutional because of this oversight? Harlan’s answer was neither yes nor no. It was up to the state courts to determine the issue, as it was the state constitution which potentially had been violated.

What is left unclear in Harlan’s reasoning is whether the judicial deference doctrine was constitutionally derived. There is no specific constitutional provision Harlan cites as requiring this deference. Rather his position seems rooted in a more general view—the same one offered by President Jackson in 1834—for one branch to operate outside of its normal sphere, delving into the actual business of another, there would need to be specific constitutional authorization. Why else would Harlan rely on the self-same claim of Jackson: the equal constitutional legitimacy of the branches? Even with the Harlan doctrine, the Court might still be thought to have the discretion to determine if the legislative process used by Congress was legitimate. One can easily imagine instances where the legislative process used to pass a bill is so egregiously unconstitutional that the Supreme Court would consider invalidation. But the norm outlined in *Field* is deference—deference to a branch deserving respect when it acts in its own constitutionally defined space.

Like *Field v. Clark*, the decision in *Frothingham v. Mellon* (1923) is about nonjusticiability. The Federal Maternity Act of 1921 promised states additional funds to protect the health and well being of pregnant mothers and infant children. Acceptance of the money was voluntary but came with certain obligations for the states, which were written into the law. A taxpayer and the state of Massachusetts sued the federal government for relief (the companion case is *Massachusetts v. Mellon*). Justice George Sutherland concluded that the state did not have standing, as acceptance of the funds was voluntary; Massachusetts could not make a valid Xth Amendment claim against the federal government. The individual respondent, who claimed standing as a taxpayer, was also not eligible to sue, as her interest in the case—her harm—was too remote. The bill had not damaged any of her constitutional rights and it had not cost her more than a few pennies; she therefore had no valid grounds on which to sue.

The second to last paragraph in Sutherland’s decision is the initial quote on the lead page of this paper. It lays out a highly orthodox view of the separation of functions: the legislature makes the laws, the executive executes them, and the judiciary interprets and applies them “in cases properly brought before the courts.” That sentiment is followed by a final flourish which is worth quoting at length:

Looking…to the substance of their complaint, it is merely that officials of the executive department of the government are executing and will execute an act of Congress asserted to be unconstitutional; and this we are asked to prevent. To do so would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and coequal department, an authority which we plainly do not possess.

The court, absent a compelling showing of unconstitutionality where individuals are substantially harmed, cannot force the executive not to execute a law.

With these two paragraphs written into the same decision and in such close proximity, it is clear that Sutherland felt there was no tension between a separation of functions view of interbranch relations and their coequality. This is the case because he is merely asserting an equal ability by each branch to operate within its own designated sphere, free from unauthorized interference from the others. The branches are equal in the legitimacy the Constitution grants their own authorized acts. When the legislature is legislating, or the executive is executing, or the judiciary is adjudicating—each is equally right-acting.[[11]](#footnote-10) This is very much the sentiment of President Jackson in his separation of functions manifesto.

Sutherland returned to this strong defense of separation of functions with a flourish of coequality in his dissent in *West Coast Hotel v. Parrish et al.* (1937). He was joined by the other three “Horsemen” who consistently opposed to New Deal programs. “The people by their Constitution created three separate, distinct, independent, and coequal departments of government….[and] the powers of these departments are different and are to be exercised independently.” While he concluded that “each [branch] is answerable to its creator for what it does, and not to another agent,” the deference that one branch owes the others “is not controlling.” In the case of the judiciary, the Court should presume that laws are constitutional, but may find, in light of compelling evidence to the contrary, that a law is unconstitutional. Sutherland thought he had this kind of case in *West Coast Hotel*. He argued that Washington state’s minimum wage law should be struck down as a violation of the freedom of contract.

Most of the subsequent cases found in my sample refer either to Sutherland in *Frothingham* or to Harlan in *Field*. Some reference their precedents favorably and are used to dismiss cases for lack of standing; others distinguish the case at hand from one or the other of these two, suggesting that deference is a norm but is not controlling, and therefore the judiciary can pronounce judgment. The two remaining interbranch cases from the pre-1970 period are good examples of this latter phenomenon. In *Baker v. Carr* (1962), Justice William Brennan tipped his cap to Harlan’s *Field* decision, but then concluded that the federal judiciary could rule on gerrymandering: “‘The respect due to coequal and independent departments,’ and the need for finality and certainty about the states of a statute contribute to judicial reluctance to inquire whether as passed, it complied with all requisite formalities. But it is not true that a court will never delve into a legislature’s record.”

*Flast v. Cohen* (1968) revised the taxpayer nonstanding standard of *Frothingham*. The case was taken to challenge the use of federal funds to support parochial schools in the teaching of non-religious subjects. Under the *Flast* rule, a taxpayer would not have standing to challenge this practice. The decision on appeal before the Court had used *Flast* to deny relief. Chief Justice Earl Warren rejected the idea that *Frothingham* had set up a true constitutional standard. The decision had been a pragmatic guideline rather than a formal constitutional stricture. This allowed him, in his own view, to offer a new standard for taxpayer standing without overturning any prior constitutional doctrine. The new standard required a specific violation of a constitutional clause outside of the Article I, section 8 taxation power. In *Flast*, the transfer of federal revenue to a parochial school was voided because it violated both the establishment clause and the free exercise clause. The majority opinions in both *Flast* and *Baker v. Carr* accepted nonstanding and nonjusticiability, respectively, as norms. They were, therefore, not entirely at odds with *Frothingham* and *Field*. However, they made clear that pledges of coequal status did not make coming to conclusions any easier. In fact, coequality had already become a sort of truism—used to indicate what was inevitable anyway—that the Court would normally defer to the determinations of the other branches. Coequality provided no firm guidance about whether the Court could rule on a case or not. A new dynamic was at hand: frequent mention of the concept of interbranch coequality, without it having a defining role in whether a litigant’s claim was to be dismissed or accepted.

**Modern Coequality Jurisprudence**

In the post-1970 era of “coequality jurisprudence,” there have been two major developments in addition to the great increase in cases which contain coequal language. The first is that it has become clear that assertions of coequality rarely provide clear direction about justiciability and standing. Though coequality promises that deference is an interbranch norm, particularly for the judiciary toward the legislative branches, by itself it does not help determine whether the norm should be transgressed. That is for other tests and standards to determine, as well as the facts of a case, and the judges’ outlooks. This means that when coequality is written into a decision it is little more than a blithe truism. At best, it does not change anything. Second, in many instances, coequality is now frequently offered up without much of any connection to what brought it into the Supreme Court’s lexicon in the first place: the separation of functions ideal. Recent assertions of coequality can float untethered, and that produces a misguided sense that it is a statement on the relative powers of the branches rather a statement about each playing their own constitutionally defined role without unauthorized interference from the other branches.

The very first case of the post-1970 era into which coequality was written is a case in point of how little direction this acknowledgment actually provides. The decision in question is *New York Times v. US* (1971), the Pentagon Papers case. The *Times*  had printed a classified report prepared for Defense Secretary Robert S. McNamara, containing embarrassing details about the American involvement in Vietnam. The government sued but the *Times* asserted a First Amendment justification in releasing the report. Six justices agreed that publication should not be restrained or prosecuted, though no one justice’s reasoning commanded a majority. The executive had failed to demonstrate that the printing of the document would harm national security.

Two justices, Thurgood Marshall and John M. Harlan II, used the language of coequality in their *New York Times v. US* opinions. Marshall’s concurrence referenced Hugo Black’s decision in *Youngstown Sheet and Tube v. Sawyer* (1953) which emphasized an orthodox view of the separation of powers. Under normal circumstances it is not the executive’s job to regulate the press; if there would be needed regulation to prevent classified information from being printed, then it should be written into statute law, thus involving Congress. Marshall went on to write that it would be “utterly inconsistent with the concept of separation of powers for this Court to use its power of contempt to prevent behavior that Congress has specifically declined to prohibit. There would be a similar damage to the basic concept of these co-equal branches of Government” if the Court stopped activity through its contempt power “when the Executive Branch has adequate authority granted by Congress to protect ‘national security’…” Thus only if Congress’ non-action actually threatened national security would the Court be obligated to step in to enjoin publication. That standard had not been reached.

Justice Harlan dissented, primarily because he felt that the federal courts were rushing to judgment. The *Times* had the report and was eager to print. The Court had expedited a hearing to either allow publication or prevent it, a procedure Harlan objected to. In a full, unrushed hearing process, Harlan held open the possibility that he would have allowed prior restraint. The Executive had determined that the Vietnam report was not for public consumption. Harlan cited the “sole organ doctrine” articulated in *Youngstown*: the president is the nation’s sole authority in dealing with foreign nations. With this (dubious) doctrine as his grounding, Harlan concluded that “I can see no indication in the [lower court opinions] that the conclusions of the Executive were given even the deference owing to an administrative agency, much less that owing to a co-equal branch of the Government operating within the field of its constitutional prerogative.” Because of the expedited nature of the proceeding, Harlan was uncomfortable in coming to a definitive conclusion on whether the president’s position should prevail. However, that would have been the most likely result, given the tenor and reasoning of his opinion.

So the Pentagon Papers case indicates that coequality can be used in different ways. In *New York Times v. US*, assertions of coequality are used to defer both to Congress (Marshall) and to suggest that the court should defer to the Executive (Harlan), with polar opposite outcomes likely. This does not exhaust the possibilities of how coequality can be used. It can be employed by the judiciary to argue that it needs to take a case; or it can be used to argue that the case should not be taken; it can be used to argue that the Court needs to defer to Congressional pronouncements; it can be used to say that the Court should refer to the president’s interpretation and execution of the law. There are many different moves to be made from within interbranch coequality.

Accordingly, I analyzed the total population of opinions where coequality is mentioned to determine what action the phrase is used in service of. My primary guide in this is the outcome favored by the writer of the opinion with additional attention paid to the specific context of usage for the key word. There are five categories of outcome: 1. defer to the political branches, usually eschewing a decision for lack of standing, mootness etc. 2. claim judicial jurisdiction and take the case because of the judiciary’s coequal status (or state other branches need to respect the coequal judiciary); 3. decide (or make a non-decision) which defers to Congress in particular; 4. decide (or make a non-decision) which defers to the president in particular; 5. Coequality either does not apply here or as a norm it is trumped by the specific considerations of the case.

Not all the opinions expressed fit perfectly into one of these five categories, but it is quite evident where most should be placed. Where an opinion might fall into more than one category, I chose the one most prevalent in the opinion. The results of this analysis is set forth in Table 2, with exemplars of each case drawn from prominent cases in which majority opinions contained a reference to coequality:

**Table 2: Number of Coequality Cases by Type with Examples**

Reason for Referencing Coequality # of Cases Example of Case Type

Defer to Political Branches; 15 *Field v. Clark* (1892)

lack of standing, mootness, etc. *Frothingham v. Mellon* (1923)

Claim judicial jurisdiction or need 13 *Flast v. Cohen* (1968)

for deference to judicial branch *Clinton v. Jones* (1997)

Defer to Congress 22 *Nixon v. Administrator of General* *Services* (1977)

*Fullilove v. Klutznick* (1980)

Defer to President 7 *Lujan v. Defenders of Wildlife* (1992)

*Cheney v. US District Court* (2004)

Coequality dismissed as not 12 *Baker v. Carr* (1962)

controlling or trumped by *US v.Nixon* (1974)

other considerations

*Field* and *Frothingham* have already received extensive attention here as early cases in a line of “non-justiciable” decisions. In *Flast*, Chief Justice Earl Warren quoted the latter case but came to a very different conclusion: the Court had the power to rule. Likewise, in *Clinton v. Jones*, Justice Stevens reasoned that coequality and the separation of powers doctrine does not require the stay of all private legal actions against the President of the United States. Just because one litigant is the president, the work of the courts in administering justice does not stop. In these two cases, the authors of majority opinions suggested that because the judiciary was a coequal branch, the judiciary should rule.

In *Nixon v. Administrator of General Services*, the former president sued the federal government for the recovery of papers he generated while president. The Congress had passed the Presidential Records and Materials Preservations Act in the wake of the Watergate scandal, which made presidential records and materials the property of the US government and scheduled them for release 12 years after a presidency ended. Chief Justice Warren Burger vehemently disagreed in a dissent, both William Brennan and Lewis Powell felt that Congress’ determination that the public had an interest and “owned” presidential papers should be respected. The *Fullilove* case is about affirmative action. Burger’s majority opinion stated that “we are bound to approach our task with appropriate deference to Congress, a co-equal branch charged by the Constitution with the power to ‘provide for the…general Welfare of the United States’ and to enforce, by appropriate legislation, the equal protection guarantees of the Fourteenth Amendment.” A clearer example of deference to Congress would be hard to find.

Deference to the president and the executive branch has been less common than deference to Congress. There are, however, several well known cases. *Lujan* concerns whether citizens have standing in bringing suit against the administration for loosening protections on endangered species. Antonin Scalia’s opinion for the majority was that the average citizen did not suffer sufficient harm to bring suit. Though this sounds like a case of the *Frothingham* variety, and Scalia did quote from the decision, the way he put his words together suggest deference to the executive branch (rather than *Frothingham’s* more general deference to the result of the lawmaking process). A ruling adverse to the Administration, “would enable the courts, with the permission of Congress, ‘to assume a position of authority over the governmental acts of another and co-equal department…and become ‘virtually continuing monitors of the wisdom and soundness of Executive action.’” In short, the Executive Branch possessed the ability to interpret and reinterpret the implementation of the Endangered Species Act. In the *Cheney* case, environmental groups had sued to learn of those with whom Vice President Cheney met with to formulate a new energy policy. Justice Kennedy, on behalf of the Court, decided that Cheney’s claim of confidentiality was reasonable. Cheney did not have to rest his claim to privacy on executive privilege, and therefore the courts would not be drawn into the painful task of deciding whether the public’s right to know outweighed the Vice President’s interest in confidentiality.

*Baker v. Carr* was the groundbreaking case in which William Brennan declared that malapportioned legislative districts violated the equal protection clause. A concern in Brennan’s mind was combating the claim of non-justiciability because the Supreme Court had never taken on such a case. One of Brennan’s references to coequality is a quote from *Field v. Clark*. There is respect due to the legislature, he acknowledged, but that did not mean the courts would never delve into a legislative record to determine something like whether there was intent to violate equal protection. In *US v. Nixon* the Court already had a claim of coequality on the table: Richard Nixon’s insistence that any adverse decision would disrespect the coequal status of the presidency. Chief Justice Burger rejected the idea that coequality granted an unqualified privilege and decided that the search for relevant evidence in a criminal probe took precedence over a more general protection offered by executive privilege. In both of these cases coequality was acknowledged, only to be dismissed as not controlling.

These cases indicate that there are prominent examples of many different kind of decision that employ coequality as part of the text of the opinion. Coequality by itself is not dispositive; contextual matters and the disposition of the justices involved are primary determiners in each case. What is also clear from this analysis is that the Court has not been primarily interested in increasing its own power in using coequal language. In this it seems to differ from the presidency. On the contrary, the judiciary has more typically used the claim of coequality to demonstrate that it should not rule, or should defer to the other branches (or both of them at the same time). This is likely not the whole story, however. This tack seems reminiscent of Chief Justice Marshall in *Marbury*: enhance the Court’s standing through the renunciation of power. In ruling that the Court did not have jurisdiction in *Marbury*, Marshall struck down part of the Judiciary Act of 1789, thus beginning the practice of judicial review. In cases of coequality, the court reinforces its own secure position among the federal branches by inference, even while usually deferring to other federal institutions.

**“Apt Quotations from Respected Sources…”**

What remains to be discussed is how close or how untethered from the separation of functions ideal the Court’s “coequality talk” has become. Are references to coequality rooted in the functional boundaries set up in the Constitution, like the decisions in *Field* and *Frothingham* purported to be, do they reflect an alternative “separation of powers” understanding of American constitutionalism, or do these decisions collectively fall somewhere in between?

A discussion of each case from recent decades is beyond the scope of this paper. A small sample may be sufficient to gain the understanding that the sum of these cases is “somewhere in between,” rather than reflective of a pure separation of function or pure separation of powers approach. While there are cases that clearly suggest that “coequality jurisprudence” is proceeding from the separation of functions perspective, there are also opinions written in such a way that it seems equality of power is a primary consideration or where the separation of functions is not readily found.

The diversity of approaches brings to mind the different approaches of Hugo Black and Robert Jackson in *Youngstown Sheet and Tube v. Sawyer* (1952). Black, writing for the Court laid out a very clean separation of functions case: in the absence of a true national security emergency, President Truman could not nationalize production in steel mills. This was a thing to be authorized by law. Jackson, no doubt remembering his work in the Roosevelt Administration, suggested that “the actual art of governing under our Constitution does not, and cannot, conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context.” This opinion went on to emphasize the importance of power dynamics between Congress and the president, practical considerations, and the evolutionary nature of interbranch relations. His was not a defense of the textbook version of separation of functions but a rejection of it as naïve. The alternative was something significantly closer to a separation of powers approach.

In recent decades, some decisions using the language of coequality have hinted at the separation of functions, while others bring the power dynamics of Jackson more quickly to mind. Cases which explicitly link coequality with the separation of functions in an extended discussion (like *Frothingham* did) are rare. Among the separation of functions oriented cases is *US v. Gillock* (1980). In this case a state senator sought relief from the discovery of evidence that he aided those from whom he was taking bribes. The appellant rested his case on the immunity granted to members of Congress during their speeches in the Speech and Debate clause of Article I, section 6. This did not fly with the majority, including Chief Justice Burger, who noted that the protection only extended to those in the federal legislature. In denying relief, Burger noted that the Speech and Debate clause was animated by “the need to avoid intrusion by the Executive or Judiciary into the affairs of a coequal branch.” A full separation of functions argument was not articulated by Burger, but there was no need for it. On offhand comment that the Speech and Debate clause helped preserve the distinction of functions made his point.

In *Mistretta v. US* (1989) Harry Blackmun tied a very old idea with the language of coequality. Sentencing guidelines for federal crimes were challenged for allowing federal judges too much discretion. The question before the Court was whether such discretion was a violation of the separation of powers. Blackmun acknowledged that James Madison stressed that each branch needed the means of its own protection. And “in applying the principle of the separated powers in our jurisprudence, we have sought to give life to Madison’s view of the appropriate relationship among the three coequal Branches.” This, however, did not mean that “the three Branches must be entirely separate and distinct.” Madison had never used the word coequal to refer to the defense that each institution possessed, but Blackmun did it for him two centuries after the fact. They were designed to work in cooperation with each other under many circumstances and sentencing discretion was such an example. Thus Blackmun provided a separation of functions gloss to a case in which he concluded that the decision was not to be made through a strict separation of functions approach.

John Paul Stevens’ majority opinion in *Williams v. Taylor* (2000) offers another example of a case that is closer to a separation of functions approach. The question at hand was whether a convicted murderer’s right to effective counsel was violated. A state court had concluded that this was not the case. Stevens responded with an endorsement of the federal courts’ ability to definitively say whether the defendant’s right had been violated. It is the duty of federal judges to “‘say what the law is’ [quoting Marshall in *Marbury*].” “At the core of this power is the federal courts’ independent responsibility—independent from its coequal branches in the federal Government, and independent from the separate authority of the several States—to interpret federal law.” For many others this case hinged on whether the national government should defer to state interpretations and practices, Stevens emphasized that proper attention to the separation of functions shows that the Court has jurisdiction to decide the case.

Coequality riffs are typically short these days, not couched in elaborate contextual explanation. There are nods to the separation of functions instead of full defenses of it. Yet there are other opinions which use the words “coequal” or “coequality” seem even less connected to the separation of functions. These opinions tend to talk of power dynamics within the branches, bringing to mind the approach of Robert Jackson from *Youngstown Sheet and Tube*. I will discuss three examples here: Warren Burger’s concurrence in *Nixon v. Fitzgerald* (1982), Anthony Kennedy’s majority opinion in *Cheney v. US District Court* (2004) and John Paul Stevens’ dissent in *Citizens United v. FEC* (2010). None of these is a refutation of a separation of functions approach to interbranch relations per se and yet with references to coequality marshaled in the service of fluid power dynamics, it seems as if they are closer to the separation of powers viewpoint.

In *Nixon v. Fitzgerald*, an Administration appointee had sued in civil court for wrongful termination. In Justice Burger’s concurrence there are two references to coequality, one of which offers a separation of functions ideal and the other which leans closer to the separation of powers. The first describes the “essential purpose of the separation of powers” as allowing for the “independent functioning of each coequal branch of government within its sphere of responsibility, free from control, interference, or intimidation by other branches.” This means that decisions which intrude upon the president’s areas of decision-making should be rare, dictated only by constitutional necessity. This sets up the decision that Burger favors: presidential immunity for official acts undertaken, including terminating government employees. Burger reasoned that other federal officials, like judges and lawmakers, already possessed immunity from liability in civil court, so it was only fair for the president to have this as well.

But the reasoning for civil immunity for presidential actions was not to be found directly in the constitution or in prior case law. Burger chose to argue for civil immunity based on “coequality.” He writes, that “the constitutional concept of the separation of independent coequal powers dictates that a President be immune from civil damages for actions based on acts within the scope of Executive authority while in office.” This may be a functional conclusion, but it is also one that suggests a new standard for interbranch relations: one of coequal powers. If judges and legislators possessed civil immunity for their official acts, so should the president—not because this result was dictated by the Constitution, but because if one branch was so endowed, then the others should be too.

*Cheney v. US District Court* is the aforementioned case in which the Bush Administration aimed to keep confidential meetings of Vice President Cheney’s energy policy task force. The federal judge who initially heard the case suggested that the Vice President would have to make public the contributions of private citizens, to determine if they were substantial. The DC Court of Appeals agreed with the judge. Justice Kennedy, writing for the Court, disagreed. Citing the sensitivity of the judiciary sitting in judgment of the executive, Kennedy reasoned that such confrontations should generally be avoided. In warning against this occurrence, Kennedy stated that

once executive privilege is asserted, coequal branches of the Government are put on a collision course. The Judiciary is forced into the difficult task of balancing the need for information in a judicial proceeding and the Executive’s Article II prerogatives. This inquiry places courts in the awkward position of evaluating the Executive’s claims of confidentiality and autonomy, and pushes to the fore difficult questions of the separation of powers and checks and balances.

The position is awkward, it seems, because of the potential of a constitutional confrontation. The President has “Article II prerogatives,” but they may be trumped by other considerations, as occurred in the Nixon case. The separation of functions is insufficient to answer to the question at hand. Unofficial power dynamics are at work and this is an arena in which, as Kennedy readily acknowledges, the Court does not typically do well.

A final example of coequality edging away from a separation of functions ideal is Justice Stevens’ dissent in *Citizens United v. FEC* (2010). The Court’s recent history with campaign finance law has been checkered, at first seeming to uphold certain provisions of the Bipartisan Campaign Reform Act (BCRA), and then declaring them unconstitutional in *Citizens United*. Stevens’ exasperated dissent notes that the BCRA was written specifically to conform to prior rulings of the Court itself. These very attempts to satisfy the Court were rebuffed as unconstitutional. Stevens describes the court’s majority as “pulling out the rug [from] beneath Congress after affirming the constitutionality of [section] 203 six years ago,” and noted that this “shows great disrespect for a coequal branch.” He does not employ further explain this assessment nor does he offer a separation of functions argument. Rather this is a loose, generalized expression of the respect due from one branch to another. The Congress should know what to expect from the Court, Stevens suggests, in matters of constitutional interpretation.

In the words of Robert Jackson’s Youngstown concurrence, “a century and a half of partisan debate and scholarly speculation yields no net result, but only supplies more or less apt quotations from respected sources on each side of any question.” While the decisions of the Court in the above cases are hardly negligible, to think the Court has offered plenty of fodder that may serve to release the concept of “coequality” from its traditional mooring to a separation of functions approach. A word that could quite easily be avoided by the Court as indeterminate and potentially misleading, is now used regularly, and any justice who wishes can make an argument that branches are coequal can do so as the purpose suits them. This is true not just for the functional outcome of the case, but it also pertains to exactly what is coequal. As often as not that is left sufficiently vague that a misleading separation of powers view is reinforced.

**Conclusion**

Members of the Supreme Court, according to their own understanding of their work, are to be the most scrupulous guardians of the American polity’s constitutional heritage. Therefore it is of interest when new concepts, never before applied to the structure of government laid out in the Constitution, are introduced. Such is the case with the use of the concept of interbranch coequality. This idea was originally marshaled in favor of a traditionally accepted separation of functions view of the American government. In recent decades, with the idea firmly established, the concept itself seems to have drifted away from its original usage. It is frequently thrown into an opinion without any purpose other than to repeat a truism. Particularly puzzling is that the concept does not seem to be a valuable aid in making decisions. While no one yet has disputed the use of coequality to describe the three branches of the US government, use of this concept is flabby. References to interbranch coequality fail to give opinions greater force.

The growth in coequality jurisprudence is suspiciously coincident with the beginning of aggressive presidential use of the concept. Presidents who wish to extend executive power have the opportunity to appoint presidentialist judges to the Court. As a “teacher in chief,” the president’s rhetoric seems to have found its way to the Court, reinforcing the increased power of the presidency. Not coincidentally, at least by implication, interbranch coequality shores up the inherent weakness of the “least powerful” branch, even though the Court defers to other coequal branches more often than not when using this phraseology.

Many of the opinions which incorporate the idea of coequality are still rooted in a separation of functions ideal. Others are much more closely associated with a more dynamic power relationship, not defined in the Constitution itself. Coequality is an odd word to use in such a case, because it suggests a static relationship, not an alterable one influenced as much by public opinion and differences in leadership and circumstances through time. Indeed, of more concern than the use of this term to warp power in a direction not intended, is the possibility that it reinforces a Newtonian conception of institutions: nothing was intended to happen unless all could agree. Any action could produce an equal and opposite reaction that could end any attempt to move the polity from the status quo. This is not a healthy presumption and it is one that the individuals who wrote the Constitution to create a better functioning government would find curious indeed.

**Appendix 1: Cases where Branches of the Federal Government are Referred to as Coequal**

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| Case | Justice | Law/  Action | Opinion Type | Outcome |
| Field v. Clark (1892) | Harlan | F | M | deference to lawmaking branches; assume enrolled act is valid |
| Harwood v. Wentworth  (1896) | Harlan | F | M | deference to lawmaking branches; law valid despite late implementation; quotes Field |
| Twin City Bank v. Nebeker (1897) | Harlan | F | M | deference to lawmaking branches; assume enrolled act is valid; quotes Field |
| Wilkes County v. Coler  (1901) | Harlan | S | M | Field rule does not apply to states; up to state court to determine |
| Frothingham v. Mellon  (1923) | Sutherland | F | M | deference to lawmaking branches in cases where there is lack of injury |
| West Coast Hotel Co. v. Parrish et al (1937) | Sutherland | S | D | court should strike down minimum wage law |
| Baker v. Carr (1962) | Brennan | S | M | Field deference has limits; Court can decide if electoral districts are valid |
| Flast v. Cohen (1968) | Warren | F | M | Frothingham standard dismissed in favor of one that gives taxpayer standing; non-deferential |
| New York Times v. US  (1971) | Marshall  Harlan | F | C  D | defer to Congress’ decision not to make laws barring publications  more deference due presidential determination of national security |
| Gravel v. US (1972) | White | F | M | executive branch should defer to legislative to allow free discussion |

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| US v. Brewster (1972) | Burger | F | M | allow federal prosecution of official to move forward |
| Frontiero v. Richardson  (1973) | Brennan | F | M | Congress’ view that sex based classifications are wrong is valued |
| Doe et al v. McMillan  (1973) | White | F | M | Speech and debate clause grants members of Congress immunity; quotes Brewster |
| Memorial Hospital v.  Maricopa County (1974) | Marshall | S | M | quotes Frontiero that Congressional pronouncements have value |
| US v. Richardson (1974) | Powell | F | C | Simple reference to Frothingham rule (Powell dislikes Flast test) |
| Schlesinger v. Reservists  (1974) | Douglas | F | D | quotes Frothingham but only to dismiss it as controlling |
| US v. Nixon (1974) | Burger | F | M | dismisses executive privilege claim in this instance |
| Buckley v. Valeo (1976) | Per curiam | F | M | Quote amici, dismissing their claim about Congress and appointments |
| US v. Donavan (1977) | Burger | F | C | deference to Congress, as it is not violating the 4th Amendment |
| Nixon v. Administrator of  General Services (1977) | Brennan  Powell  Burger | F | M  C  D | Quotes Jackson concurrence in Youngstown; branches share powers  Dismissive of claim that statute should fall b/c presidency is coequal  three references to coequal; Congress and courts not treating pres. as |

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| Davis v. Passman (1979) | Burger | F | D | courts can’t force a member of coequal branch to employ someone |
| US v. Helstoski (1979) | Burger | F | M | speech/debate clause designed to preserve coequality |
| Goldwater v. Carter (1979) | Rehnquist | F | C | deciding the issue is moot is better than using political questions b/c it disrupts coequality less |
| US v. Gillock (1980) | Burger | S | M | Speech/debate clause does not protect state leg. officials |
| Owen v. City of  Independence (1980) | Brennan | S | M | wrongful termination suit can proceed; deference to Congress’ judgment that city has no immunity |
| Fullilove v. Klutznick (1980) | Burger | F | M | deference to Congress’ determination that minorities require remedy to promote the general welfare |
| US v. Will (1980) | Burger | F | M | Congress may cancel pay raises scheduled to take effect |
| Rostker v. Goldberg (1981) | Rehnquist  (Marshall) | F | M  (D) | deference to Congressional determination on national defense  (quotes Sen. Warner, on coequality of genders in law) |
| Valley Forge Christian College v. Americans United for Separation of Church and State (1982) | Rehnquist  Brennan | F | M  D | Judicial pronouncements alter relation between coequal branches (2)  Frothingham was sound; Flast standard applies in this case |
| Nixon v. Fitzgerald (1982) | Burger | F | C | President has immunity from civil liability for terminations (2) |

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| Heckler v. Edwards (1984) | Marshall | F | M | When courts strike down law, it affects sep. of power of coequal branch |
| Walters v. National Association of Radiation Survivors (1985) | Rehnquist | F | M | Insufficient deference given to act of Congress by a lower court |
| Cleburne, TX v. Cleburne Living Center (1985) | Marshall | L | D | quotes Frontiero: Congress reflects evolving standard of equal protection |
| Davis v. Bandemer (1986) | White | S | M | Quotes Baker v. Carr, gerrymander cases are justiciable (2) |
| Commodity Futures v. Schor (1986) | Brennan | S/F | D | A body other than a federal court cannot make judicial pronouncements |
| US v. Providence Journal (1987) | Stevens | F | D | Allowing special prosecutor to bring suit does not violate sep. of powers |
| Mistretta v. US (1989) | Blackmun | F | M | Judicial discretion in sentencing does not violate Constitution; suggests Madison favored coequality |
| Richmond v. Croson (1989) | O’Connor | L | M | Discusses Burger opinion in Fullilove; that view is not controlling here |
| Public Citizen v. US Dept. of Justice | Kennedy | F | C | a non-ruling is desirable here as it gives greater respect to Congress |
| US Dept. of Labor v. Triplett (1990) | Scalia  Marshall | F | M  C | quotes Walters, Congress is entitled to high deference-statute regulating pay of attorneys is constitutional  mere concerns are not enough to overturn a coequal branch’s law |

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| US v Munoz-Flores (1990) | Scalia  Marshall | F | C  M | procedural question not enough to overturn enrolled act; quotes Field  disputes Scalia determination that Field applies to this case |
| Westside Community Schools v. Mergens (1990) | O’Connor | L | M | quotes Walters, Congressional determination on student reactions deserves deference |
| Metro Broadcasting v. FCC (1990) | Brennan | F | M | Quotes Fullilove-deference to Congress in cases of benign racial discrimination generally warranted |
| Touby v. US (1991) | O’Connor | F | M | Separation of powers cases occur across 3 coequal branches, not within; cites Mistretta |
| Chambers v. Nasco (1991) | Scalia | F | D | Court oversteps its bounds in levying attorneys fees for breach of contract |
| Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise (1991) | White | F | D | Congress not usurping the power of a coequal branch to appoint more like Mistretta than Buckley |
| Gregory and Nugent v. Ashcroft (1991) | White | F/S | D | Limiting scope of federal age discrimination intrudes on coequal branch Congress |
| Freytag v. Commissioner of Internal Revenue (1991) | Scalia | F | C | Scalia chides the court for violating judicial coequality by calling tax courts courts of law |
| Lujan v. Defenders of Wildlife (1992) | Scalia | F | M | quotes Mellon; petitioners do not have standing; lack of harm; defer |
| Plaut v. Spendthrift Farm (1995) | Stevens | F | D | Securities and Exchange Act allows alternative to judicial rulings; not a usurpation |

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| Adarand v. Pena (1995) | O’Connor  Stevens | F | M  D | imposing strict scrutiny in racial determinations does not cut into deference due a coequal branch  quotes Fullilove; Congressional enactments deserve greater deference |
| Seminole Tribe v. Florida | Stevens  (Souter) | S/F | D  (D) | proclamation of sovereign immunity by state is a shocking affront to coequal branch (Congress)  (Sovereignty resides in the people, not in “coequal sovereignties”) |
| Clinton v. Jones (1997) | Stevens | S | M | there are safeguards against encroachments on coequality |
| Raines v. Byrd (2000) | Souter | F | C | suggests deciding on general separation of power grounds, quotes Valley Forge |
| Williams v. Taylor (2000) | Stevens  (O’Connor) | F | M  (C) | the judiciary’s coequal power is to interpret federal law (2)  coequality doesn’t mean full deference to states, contra Thomas (2) |
| Miller v. French (2000)  w/ US v. French | O’Connor | S/F | M | if Congress were to annul a final judgment of coequal federal judiciary it would be unconst., but that’s not the case here |
| Vieth et al. v. Jubelirer (2004) | Stevens | S | D | Stevens objects to Scalia opinion that gerrymandering cases are non-justiciable political questions; quotes Baker v. Carr |
| Tennessee v. Lane (2004) | Scalia | F | D | Scalia says the “congruence and proportionality” test will bring the court into constant conflict w/ coequal branch |
| Cheney v. US District Court (2004) | Kennedy | F | M | Court must normally defer to coequal president’s confidentiality; need not be an exec. privilege claim (3) |
| Sanchez-Llamas v. Oregon (2006) w/ Bustillo v. Johnson | Roberts | F | M | courts get to say what the law is and what treaties mean independent of the other coequal branches |

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| Hein v. Freedom from Religion Foundation (2007) | Alito | F | M | Quotes Frothingham to dismiss a claim of taxpayer standing against Office of Faith Based Initiatives |
| Boumedienne v. Bush (2008) w/ Odah v. Bush | Scalia | F | D | Court has no business invalidating law of coequals not on non-sovereign territory and invent habeas right there |
| NW Austin Utility District v. Holder (2009) | Roberts | L/S | M | quotes from Rostker as deference flourish before dismissing claim |
| Citizens United v. FEC (2010) | Stevens | F | D | accuses Court of moving standards on Congress in campaign finance law; disrespect for coequal branch |
| Zivotofsky v. Clinton (2012) | Sotomayor | F | C | cites good faith presumption outlined in Field v. Clark |

1. There was, of course, a robust counter-narrative, offering the view that executives tended to aggrandize power. Drawing inspiration from the English Whigs like Cato (John Trenchard and Thomas Gordon), this strand emphasized that power tended to consolidate in the executive. Most who believed in this view became Antifederalists. [↑](#footnote-ref-0)
2. Cooke, ed., pp. 347-353. [↑](#footnote-ref-1)
3. This was, perhaps, not even true at the time that the founders were writing, as the monarch’s veto had essentially gone into disuse. Queen Anne had been the last British monarch to veto legislation in 1708. Certainly from the perspective of hindsight, no one could argue that the British institutions relative power vis-à-vis each other has been stable and coequal over the last 235 years. Nor had English history prior to the 1780s been static. Nevertheless, there were many who admired the relatively stability of the English government and believed that some sort of institutional coequality was the key factor which induced stability. [↑](#footnote-ref-2)
4. Using the database of presidential documents in the American Presidency Project, Beach and I found 31 instances of the use of coequality in presidential speeches or statements from Nixon forward. Every president but Jimmy Carter used this term to describe the relationship between the branches of government. The one possible earlier exception is Dwight Eisenhower’s statement in a news conference of July 29, 1959, but Eisenhower’s reference to coequal institutions is too brief and cryptic for him to have made an intelligible case for institutions coequal in power. [↑](#footnote-ref-3)
5. Siemers and Beach, “Presidential Coequality: The Evolution of a Concept,” *Congress & the Presidency*, September 2012, pp. 316-339. [↑](#footnote-ref-4)
6. Two cases which counted as “hits” are eliminated from the analysis; both are very early court decisions, *McCulloch v. Maryland* (1819) and *Santissima Trinidaad and the St. An De* (1822), because Lexis/Nexis did not distinguish between the lawyers’ arguments (which made a coequality claim) and the opinion of the Court. [↑](#footnote-ref-5)
7. Some of the additional uses of coequal and coequality in Supreme Court decisions include the assertion that every provision in a constitution are considered to have equal status and weight (*Springfield v. Quirk*, 1859); codefendants in a criminal case are considered coequal before the law (*Wheat v. US*, 1988); the right to extract subterranean resources is a coequal right of property holders (e.g. *Ohio Oil Co. v. Indiana*, 1900); labor and management’s prerogatives in negotiations have been called coequal as well (e.g. *National Labor Relations Board v. Fansteel Metallurgical*, 1939). [↑](#footnote-ref-6)
8. An example is Justice Kennedy’s dissent in *Alaska Dept. of Environmental Conservation v. EPA* (2004). There Kennedy noted that federal environmental intrusion would “relegat[e] states to the role of mere provinces or political corporations, instead of coequal sovereigns entitled to the same dignity and respect.” But Chief Justice Rehnquist never used the terms “coequal” or “coequality” to refer to state and federal sovereignty in a decision. O’Connor, focused mainly on a corollary to the doctrine in *Townshend v. Sain* (1963) that state courts were obligated to enforce federal law. In *Miller v. Fenton* (1985), O’Connor posited that federal courts owe deference to “coequal” state courts. [↑](#footnote-ref-7)
9. e.g. Blackmun, in *Federal Regulatory Commission v. Mississippi* (1982), noted that it might have been appropriate to consider states and the federal government as coequal sovereignties before the Civil War, but that “this rigid and isolated statement from *Kentucky v. Dennison* (1861) – which suggest that the States and the Federal Government in all circumstances must be viewed as coequal sovereigns—is not representative of the law today.” In *Seminole Tribe v. Florida* (1996) Souter objected by quoting McMaster and Stone, who were, in turn, quoting James Wilson: “none of these arguments about ‘joint jurisdictions’ and ‘coequal sovereignties’ convincingly refuted the Antifederalist doctrine of a supreme and indivisible sovereignty, [so] the Federalists could only succeed by emphasizing that the supreme power ‘resides in the PEOPLE, as the fountain of government.’” [↑](#footnote-ref-8)
10. In standard English notation I have run out of ways to designate what is happening here. Harlan is quoting himself in *Field* quoting *Ex Parte Wren*. [↑](#footnote-ref-9)
11. As alluded to above, the shared powers doled out in the Constitution open this formulation to question, as does the federal judiciary’s presumption of constitutional supremacy, nowhere mentioned in the Constitution. [↑](#footnote-ref-10)