

## Separation of Powers and Centripetal Forces: Implications for the Institutional Design and Constitutionality of Our National-Security State

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*Today's national-security state is increasingly highly concentrated, centralized, and consolidated across at least three dimensions: the public-private divide, the federal-state divide, and the political-civil servant divide within government agencies. Each of these dimensions of concentration, centralization, and consolidation has been individually examined. Yet notwithstanding careful study, there has been little appreciation of the potentially reinforcing effects of consolidation occurring along any two, let alone all three, of the relevant dimensions. That is to say, scholars and policymakers have generally zeroed in on only one dimension of consolidation at a time—and they have assessed the pros and cons of public-private, federal-state, or intra-agency consolidation against what they treat as an otherwise static backdrop.*

*This Essay insists that we need to think more capaciously and systemically—to take stock of all of the moving parts and gauge how they work together. We need to do so for purposes of smarter, more careful institutional design that accounts for the multiple dimensions on which federal executive power has become concentrated and consolidated. What's more, we need to do so for reasons pertaining to constitutional separation of powers. The public-private, federal-state, and intra-agency lines of separation are each constitutionally salient. Even if the weakening or collapsing of any one of those lines of separation does not by itself rise to the level of a constitutional transgression, the weakening or collapsing of multiple lines of separation within a given substantive policy domain may well threaten our constitutional order. In short, this Essay proffers a multidimensional, aggregate-effects theory of constitutional structure. The sum total of individually minor incursions (on private, state, and bureaucratic autonomy) might constitute a major one as the president and her agency heads accumulate power along multiple dimensions, picking up bits and pieces from dragooned corporations, from co-opted states and municipalities, and from a defanged federal workforce effectively serving at the pleasure of the Administration.*

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## INTRODUCTION

Today's national-security state is increasingly highly concentrated, centralized, and consolidated. It is so across at least three dimensions.

First, *power across spheres* is commingled and consolidated, with the government contracting with, partnering with, deputizing, and otherwise directing private firms and individuals to advance military, intelligence, and homeland security objectives.<sup>1</sup> Second, *power across jurisdictions* is consolidated, with one authority (usually the feds) dragooning, directing, and encouraging other authorities (usually state and local agencies) to support counterterrorism and emergency-management initiatives.<sup>2</sup> And third, *power within any one government agency* is consolidated, with agency leaders asserting greater control over a good number of their department's rank-and-file employees (who previously had been legally insulated from political pressure exerted by those agency leaders).<sup>3</sup>

Each of these lines of concentration, centralization, and consolidation has been individually examined.<sup>4</sup> And there is no shortage of corresponding analysis of how centralization or consolidation along any one of these dimensions has (or is likely to)

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<sup>1</sup> See generally Paul R. Verkuil, *Outsourcing Sovereignty: Why Privatization of Government Functions Threatens Democracy and What We Can Do about It* (Cambridge 2007) (addressing national-security privatization); Jon D. Michaels, *Deputizing Homeland Security*, 88 Tex L Rev 1435 (2010) (detailing homeland security public-private partnerships); Jon D. Michaels, *All the President's Spies: Private-Public Intelligence Partnerships in the War on Terror*, 96 Cal L Rev 901 (2008) (examining intelligence public-private partnerships); Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 BC L Rev 989 (2005) (describing military contracting); Steven L. Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, 16 Stan L & Pol Rev 549 (2005) (same).

<sup>2</sup> See, for example, Michael Bahar, *The Presidential Intervention Principle: The Domestic Use of the Military and the Power of the Several States*, 5 Harv Natl Sec J 537, 633–35 (2014) (describing the coordination of federal and state resources for domestic emergency-management operations); Matthew C. Waxman, *National Security Federalism in the Age of Terror*, 64 Stan L Rev 289, 301–11 (2012) (detailing federal-state-local intelligence partnerships); Danielle Keats Citron and Frank Pasquale, *Network Accountability for the Domestic Intelligence Apparatus*, 62 Hastings L J 1441, 1448–55 (2011) (same); Samuel J. Rascoff, *The Law of Homegrown (Counter)terrorism*, 88 Tex L Rev 1715, 1717–24 (2010) (describing federal-local cooperation in counterterrorism efforts).

<sup>3</sup> See generally Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 Colum L Rev 515 (2015); Jon D. Michaels, *Privatization's Progeny*, 101 Georgetown L J 1023 (2013).

<sup>4</sup> See notes 1–3 and accompanying text.

advance or complicate national-security operations.<sup>5</sup> Yet notwithstanding careful study, there has been little appreciation of the potentially *reinforcing* effects of consolidation occurring along any two, let alone all three, of the dimensions mentioned above. That is to say, scholars, policymakers, and journalists have generally zeroed in on only one dimension of consolidation at a time and assessed the pros and cons of public-private, federal-state, or intra-agency consolidation against what they treat as an otherwise static backdrop.

This Essay insists that we need to think more capaciously and systemically—to take stock of all of the moving parts and gauge how they work together. We need to do so for purposes of smarter, more careful institutional design that accounts for the multiple dimensions on which federal executive power has become concentrated, centralized, and consolidated. What's more, we need to do so for reasons pertaining to constitutional separation of powers. The public-private, federal-state, and intra-agency lines of separation are each constitutionally salient. Even if the blurring or collapsing of any single line of separation (public-private, federal-state, or presidential appointee–civil servant) does not by itself rise to the level of a constitutional transgression, the collapsing of multiple lines of separation within a given substantive policy domain may well threaten our constitutional order. In short, this Essay proffers a multidimensional, aggregate-effects theory of constitutional structure. The sum total of individually minor incursions (on private, state, and bureaucratic autonomy) may constitute a major incursion<sup>6</sup> as the president and her agency heads accumulate power along multiple dimensions, picking up bits and pieces from draagooned corporations, co-opted states and municipalities, and a defanged federal workforce effectively serving at the pleasure of the Administration.

#### I. THE SYSTEMIC AND REINFORCING EFFECTS OF MULTIDIMENSIONAL NATIONAL-SECURITY CONSOLIDATION: IMPLICATIONS FOR SMART INSTITUTIONAL DESIGN

The push to concentrate and consolidate governmental power—and national-security power in particular—has been quite

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<sup>5</sup> See Part I.A.

<sup>6</sup> For a seminal work on aggregate effects in various legal domains, see generally Ariel Porat and Eric A. Posner, *Aggregation and Law*, 122 Yale L J 2 (2012).

strong in recent years, intensifying most notably in the aftermath of 9/11.<sup>7</sup> It is well beyond the scope of this Essay to recount the many discrete instances of such consolidation. Fortunately, the trend is not an unfamiliar one—nor is it one whose existence is subject to much dispute.

Accordingly, I begin my inquiry *in medias res*, as it were, stipulating that much concentration has occurred and that it has occurred along multiple dimensions, including (but not limited to)<sup>8</sup> the ones mentioned in the Introduction. Building on those stipulations, Part I.A summarizes the principal arguments in favor of and against public-private, federal-state, and intra-agency consolidation as a matter of smart institutional design. Part I.B suggests that the debate over consolidation is limited or incomplete, in large part because participants in that debate typically focus on singular, discrete consolidating efforts along only one dimension. Given that the concentration of governmental power is occurring along multiple dimensions, often at the same time, it is my contention that those interested in institutional design need to more fully appreciate the ways in which the multiple lines of concentration can—and seemingly do—interact with one another. Indeed, multidimensional consolidation is likely to amplify the advantages, or multiply the dangers, that are associated with greater concentration of State responsibilities along any one dimension.

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<sup>7</sup> See notes 1–3, 8, and accompanying text. See also Homeland Security Act of 2002, Pub L No 107-296, 116 Stat 2135; Intelligence Reform and Terrorism Prevention Act of 2004, Pub L No 108-458, 118 Stat 3638.

<sup>8</sup> There are, in addition, important forms of centralization or consolidation occurring across national borders and between and among federal agencies. For an example of transnational consolidation, see Austin Long, *Partners or Proxies? U.S. and Host Nation Cooperation in Counterterrorism Operations* (Combating Terrorism Center, Nov 30, 2011), archived at <http://perma.cc/Q9FD-BZL6>. For examples of interagency consolidation, see Daphna Renan, *Pooling Powers*, 115 Colum L Rev 211, 221–34, 243–49 (2015); Jody Freeman and Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 Harv L Rev 1131, 1155–73 (2012); Dara Kay Cohen, Mariano-Florentino Cuéllar, and Barry R. Weingast, *Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates*, 59 Stan L Rev 673, 704–12 (2006). See also William C. Banks, *And the Wall Came Tumbling Down: Secret Surveillance after the Terror*, 57 U Miami L Rev 1147, 1164–67 (2003) (noting the breakdown of the “wall” previously understood to separate law-enforcement from intelligence-surveillance operations).

A. The Practical Virtues and Problems with Consolidation along Any Single Dimension

Generally speaking, proponents of greater consolidation of national-security responsibilities emphasize that State power can be wielded more effectively and with far greater accountability when that power is indeed consolidated. Consolidation across any of the lines of separation or division identified above helps amalgamate otherwise disaggregated and often rivalrous power centers, enabling government officials to more fully marshal, coordinate, and direct resources to address the task at hand. At the same time, consolidation aims to reduce or eliminate various points of drag, resistance, confusion, and competition (stemming from what proponents of consolidation see as petty turf wars).

In what follows, I describe the purported virtues of consolidation along each of the following dimensions: public-private, federal-state, and intra-agency. I then recount some of the main arguments against efforts to concentrate State power.

1. Public-private.

Over the past couple of decades, government reliance on public-private partnerships has skyrocketed. Such partnerships, whether reached contractually or through less formal mechanisms,<sup>9</sup> are ubiquitous across the range of government responsibilities.<sup>10</sup> But they are especially prominent in the realm of national security, where military, intelligence, and homeland security operations are regularly carried out by or with the help of private actors.<sup>11</sup>

Those championing this fusion of public and private power generally seek to expand, extend, and improve the efficacy of government programs. Briefly, private actors can furnish the State with additional manpower. Such force-multiplying effects were certainly on display in Iraq and Afghanistan, where the

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<sup>9</sup> See, for example, Aziz Z. Huq, *The Social Production of National Security*, 98 Cornell L Rev 637, 683–85 (2013) (describing a range of public-private partnerships); Michaels, 88 Tex L Rev at 1156–57 (cited in note 1); Michaels, 96 Cal L Rev at 904 (cited in note 1).

<sup>10</sup> See generally Martha Minow, *Partners, Not Rivals: Privatization and the Public Good* (Beacon 2002) (discussing public-private partnerships in education, criminal justice, legal services, and welfare programs). See also David A. Super, *Privatization, Policy Paralysis, and the Poor*, 96 Cal L Rev 393, 405–07 (2008) (describing the privatization of several signature welfare programs).

<sup>11</sup> See note 1 and accompanying text.

number of private military contractors often matched and at times exceeded the number of active duty American servicemen and women.<sup>12</sup> Private actors can also provide government officials with special access to otherwise unavailable or hard-to-penetrate financial, travel, and social media databases, physical locations, and telecommunications networks.<sup>13</sup> Lastly, these private actors can sometimes carry out tasks that government officials are themselves prohibited by law from undertaking.<sup>14</sup>

Proponents of public-private partnerships contend that without the benefit of such ongoing and dedicated arrangements, the government would be limited in its knowledge and reach. That is, government officials would be forced to make do with less<sup>15</sup> or otherwise try to extend the State's reach through more adversarial means such as military conscription, subpoenas, and court orders. With a steady and ready set of private actors trained<sup>16</sup> (and often paid<sup>17</sup>) to support and expand various government efforts—and a sense of a shared enterprise that ongoing and tight-knit partnerships seemingly engender<sup>18</sup>—the costs of gaining private sector assistance and the likelihood of private resistance are reduced dramatically.

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<sup>12</sup> Moshe Schwartz, *Department of Defense Contractors in Iraq and Afghanistan: Background and Analysis* \*13 (Congressional Research Service, Aug 13, 2009), archived at <http://perma.cc/XH95-QMMF>.

<sup>13</sup> See Michaels, 88 Tex L Rev at 1435–41 (cited in note 1).

<sup>14</sup> See Jon D. Michaels, *Privatization's Pretensions*, 77 U Chi L Rev 717, 734–39 (2010).

<sup>15</sup> See Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 Wash U L Q 1001, 1062–64 (2004) (suggesting that absent the availability of contractors, the US government would be forced to scale back its military engagement, initiate a civilian draft, or rely more heavily on multinational cooperation).

<sup>16</sup> See Michaels, 88 Tex L Rev at 1444–46 (cited in note 1) (describing the range of government-sponsored training programs for private actors deemed potentially useful in advancing or supporting counterterrorism initiatives).

<sup>17</sup> Some of that compensation is indirect. See Michaels, 96 Cal L Rev at 913 (cited in note 1) (considering the influence that large and lucrative government contracts unrelated to specific counterterrorism operations have on the willingness of telecom firms to support those counterterrorism operations).

<sup>18</sup> See Office of the Inspector General, *A Review of the Federal Bureau of Investigation's Use of Exigent Letters and Other Informal Requests for Telephone Records* \*20–50 (DOJ, Jan 2010), archived at <http://perma.cc/EZ7R-9L4U> (describing the camaraderie between telecom and government officials involved in surveillance partnerships, highlighting the apparent enthusiasm telecom employees expressed as part of “TEAM USA,” and documenting those private employees' efforts to help the government cut legal corners).

## 2. Federal-state.

National-security operations are also becoming increasingly vertically integrated. Generally, it is federal officials who take the lead and direct their state and local counterparts—but the converse happens as well.<sup>19</sup> Consider, among other things, the consolidation of federal, state, and local intelligence gathering and analysis as prescribed by the Intelligence Reform and Terrorism Prevention Act of 2004,<sup>20</sup> the proliferation of joint terrorism task forces,<sup>21</sup> and the development of a national network of fusion centers.<sup>22</sup>

Supporters of such vertical consolidation recognize that federal, state, and local officials all have distinct strengths and weaknesses, and thus that there is considerable value in bringing those officials together. Moreover, were federal, state, and local officials acting more independently of one another, they'd likely be bumping into each other, unwittingly duplicating each other's work, or even jeopardizing each other's missions. The existence of fragile, broken, thin, or simply confused lines of control and communication thus threatens the efficiency and efficacy of any number of efforts. For these reasons, many have hailed federal-state-local coordination and centralization, emphasizing their particular importance in national-security contexts where speed, comprehensiveness, and a clearly defined chain of command are often understood to be essential when it comes to identifying and neutralizing threats.<sup>23</sup>

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<sup>19</sup> See Waxman, 64 *Stan L Rev* at 314–18 (cited in note 2) (describing state and locally led initiatives that involved partnering with the federal government).

<sup>20</sup> Pub L No 108-458, 118 Stat 3638.

<sup>21</sup> See *Protecting America from Terrorist Attack: Our Joint Terrorism Task Forces* (FBI), archived at <http://perma.cc/PA49-6TWR> (stating that 71 of the 104 joint terrorism task forces were created after 9/11); Rascoff, 88 *Tex L Rev* at 1742 (cited in note 2) (emphasizing federal dominance over most joint task forces).

<sup>22</sup> For a comprehensive overview of the fusion center program, see *State and Major Urban Area Fusion Centers* (DHS, July 30, 2015), archived at <http://perma.cc/A8ZH-KPFG>.

<sup>23</sup> See, for example, Waxman, 64 *Stan L Rev* at 292 (cited in note 2) (emphasizing the importance of “harnessing state and local institutions for national security”); John Ashcroft, *Cooperation with State and Local Officials in the Fight against Terrorism* \*1 (Office of the Attorney General, Nov 13, 2001), archived at <http://perma.cc/5WZ8-ZR5A> (stressing that “law enforcement officials at all levels of government—federal, state, and local—must work together, sharing information and resources needed” to deter and punish terrorists); National Commission on Terrorist Attacks upon the United States, *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks upon the United States* 215–41, 390, 401, 416 (Norton 2004) (underscoring the importance of vertical integration of American intelligence capabilities).

### 3. Intra-agency.

A third and related pattern involves the consolidation of national-security power *within* any one government agency. Those clamoring for a more effective, fully mobilized, and fully accountable government worry about the tensions and lines of division that typically exist within most agencies. Specifically, they worry about the rivalry (or simply the disconnect) between top agency officials—appointed by the president and serving at her pleasure—and the politically independent, job-tenured, career civil servants<sup>24</sup> often alleged to be apathetic<sup>25</sup> or hostile to the interests and objectives of the presidentially appointed leadership.<sup>26</sup> A more unitary expression of agency power (achieved by truly subordinating career staff to the agency leaders) would, they insist, streamline agencies and render them more politically responsive and accountable.<sup>27</sup>

Those seeking such intra-agency consolidation have been quite successful. Over the past decade or so, hundreds of thousands of civil servants at the federal, state, and local levels have been reclassified as at-will employees who now serve at the pleasure of the agency leaders,<sup>28</sup> with seemingly further reclassifications to come.<sup>29</sup>

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<sup>24</sup> See Michaels, 115 Colum L Rev at 538–47 (cited in note 3) (describing the rivalrous engagement between agency leaders and rank-and-file civil servants).

<sup>25</sup> See, for example, E.S. Savas, *Privatization: The Key to Better Government* 4–6, 119–230 (Chatham House 1987); Kevin R. Kosar, *Privatization and the Federal Government: An Introduction* \*4–5 (Congressional Research Service, Dec 28, 2006), archived at <http://perma.cc/2UNW-Q2KF>; Elena Kagan, *Presidential Administration*, 114 Harv L Rev 2245, 2263 (2001) (describing bureaucratic “torpor”).

<sup>26</sup> See, for example, Daniel Guttman and Barry Willner, *The Shadow Government: The Government’s Multi-billion-Dollar Giveaway of Its Decision-Making Powers to Private Management Consultants, “Experts,” and Think Tanks* 28, 65, 151 (Pantheon 1976) (characterizing political appointees’ frustration with a civil service viewed as hostile to the president’s agenda); Michaels, 115 Colum L Rev at 572–73 (cited in note 3); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum L Rev 573, 586 (1984) (recognizing that the civil service’s “cooperation must be won to achieve any desired outcome”).

<sup>27</sup> This is presumably especially true in an era in which agency leaders are themselves highly politicized. See, for example, David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 Geo Wash L Rev 1095, 1121–29 (2008); Peter L. Strauss, *Overseer, or “the Decider”? The President in Administrative Law*, 75 Geo Wash L Rev 696, 707–08 (2007).

<sup>28</sup> See Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 Yale L J 2314, 2333 (2006) (documenting the recent weakening of civil service protections for approximately 170,000 federal employees); Michaels, 101 Georgetown L J at 1047–50 (cited in note 3) (identifying and describing the “marketization of the bureaucracy” in which federal, state, county, and municipal civil servants are being reclassified as at-will employees); Michaels, 115 Colum L Rev at



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So far I have focused only on the purported advantages of concentrating power. There are many who contest the benefits of institutional consolidation in general and along each of these three dimensions in particular. Some critics might even agree with the goals of consolidation but remain dubious that the institutional redesigns or dedicated partnerships of the sort described above will produce the intended results. That is to say, they're skeptical that consolidation engenders the desired efficiencies or achieves the desired degree of institutional and organizational uniformity, homogeneity, and hierarchical accountability.

Others might be willing to concede that consolidation across the public-private, federal-state, and intra-agency divides achieves what it seeks to accomplish but nevertheless insist that those aims are deleterious. This latter group of critics would be one that affirmatively prizes a nonconsolidated space, where power is purposefully and importantly divided to limit government overreaching; where redundancies constitute a different, and better, method of ensuring nothing of consequence falls through the cracks; and where the separation of authority and responsibility between, among, or even within institutions amplifies a diverse set of viewpoints and promotes healthy competition (such that there is incentive to find and root out problems and to challenge questionable strategic, tactical, or legal decisions).<sup>30</sup>

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584 (cited in note 3). See also Paul R. Verkuil, *Deprofessionalizing State Governments: The Rise of Public At-Will Employment*, 75 Pub Admin Rev 188, 188 (2015) (discussing the marketization of the bureaucracy at the state level).

<sup>29</sup> See Office of Personnel Management and Office of the Director of National Intelligence, Designation of National Security Positions in the Competitive Service, and Related Matters, 78 Fed Reg 31847, 31850–51 (2013) (allowing White House officials to reclassify current federal civil servants whose work responsibilities touch on national or homeland security as at-will employees).

It bears mentioning that the Pentagon presents a distinctive case given it has both a political–civil service line of separation as well as a military–civilian divide. Of late, attention has been given to the increasing politicization of the military leadership. See Bruce Ackerman, *The Decline and Fall of the American Republic* 43–64 (Belknap 2010). Whether that politicization trend reflects a military–civilian consolidation similar to the forms of consolidation discussed in this Essay or, instead, a troubling inversion of the traditional and constitutionally resonant model of civilian control is beyond the scope of this Essay.

<sup>30</sup> See, for example, Cohen, Cuéllar, and Weingast, 59 Stan L Rev at 711 (cited in note 8); Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 Cal L Rev 1655, 1676–78 (2006) (questioning the wisdom of interagency consolidation because such consolidation enables groupthink and limits creativity); Ernest A. Young, *Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 Brooklyn L Rev 1277, 1290–91 (2004) (emphasizing the

B. The Reinforcing Effects of Consolidation Occurring along Two or More Dimensions

What I've just presented is a stylized, simplified account of powerful and often far more nuanced claims. In doing so, I was not covering much new ground, nor trying to; nor was I endorsing or challenging those claims on the merits. Instead, I am taking it as a given that consolidation achieves its desired effects and am doing so to tee up what's seemingly missing from debates and conversations about consolidation. Rarely have scholars and policymakers focused their attention on multiple lines of institutional concentration happening in any one substantive policy domain. Rarely too have they considered the aggregate effects of minimizing opportunities for rivalrous pushback and autonomous activity across multiple dimensions. This is so notwithstanding the fact that the military, intelligence, homeland security, and emergency-management domains have each recently become more fully consolidated along all three of the dimensions this Essay highlights.

It isn't altogether obvious why such integrative thinking hasn't more fully informed contemporary inquiries. A couple of reasons do, however, come to mind. First, many practices and initiatives that result in consolidated State power are incremental, subterranean, or piecemeal. As such, perhaps observers zero in on the instant, marginal, or readily observable reconfiguration of State power, focusing on that change to the exclusion of other, less transparent consolidating efforts along other dimensions. Second, different structural dimensions are more or less important to different groups of scholars. Perhaps scholars attend to the particular dimensions that they study—for example, federalism or privatization—while downplaying the other axes of consolidation.

For these reasons among, no doubt, others, there is an apparent need for more sweeping studies that would help show how the multiple dimensions of consolidation seemingly interact with one another as related parts in a system.<sup>31</sup> To be sure, in some contexts the addition of a second or third dimension of consolidation

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virtues of state autonomy vis-à-vis federal control); Michaels, 115 Colum L Rev at 552–70 (cited in note 3) (explaining the problems that result from fusing public and private power); Jon D. Michaels, Book Review, *Running Government Like a Business . . . Then and Now*, 128 Harv L Rev 1152, 1168–70 (2015) (criticizing efforts to weaken intra-agency rivalries).

<sup>31</sup> See Adrian Vermeule, *The System of the Constitution* 3–5 (Oxford 2011).

might have only a marginal impact above and beyond what the initial dimension achieved in terms of, among other things, increased operational efficiencies.

In other contexts, those second or third dimensions of consolidation might double or triple the efficiencies. For instance, considerable federal-state consolidation in addition to extensive public-private cooperation provides federal officials with two extra sets of resources to supplement their preexisting tools and authorities.

And in yet still other contexts, the effect of multiple layers of consolidation might be exponential. Consider the possibility that there already exist surveillance partnerships between the private sector and state governments. If federal surveillance operations are restructured to more fully integrate state *and* private resources, federal officials will be getting more than just the benefits of two new and distinct sets of resources. These federal officials will also be acquiring the productive, synergistic capacity of two distinct sets of resources that already know how to work well together.<sup>32</sup>

Lastly, there might be some effects that are entirely novel—that is, the combined effects of multidimensional consolidation produce results that no one line of consolidation could generate by itself.<sup>33</sup> For example, a new and untested Department of Homeland Security *fortified through public-private, federal-state, and intra-agency consolidation* might be a more formidable counterweight to the venerable and long-potent Department of Justice in ways that—for better or worse—actually limit the aggregate exercise of federal executive power.<sup>34</sup> In such a case, multidimensional consolidation in one domain (that of homeland security) might actually result in a greater disaggregation of power across domains (that is, between federal agencies).

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<sup>32</sup> See Citron and Pasquale, 62 *Hastings L J* at 1449–55 (cited in note 2).

<sup>33</sup> Vermeule, *The System of the Constitution* at 4–5 (cited in note 31).

<sup>34</sup> There is a rich literature on multiagency administrative collaboration and competition. See generally, for example, Jason Marisam, *Duplicative Delegations*, 63 *Admin L Rev* 181 (2011); Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 *S Ct Rev* 201; O'Connell, 94 *Cal L Rev* 1655 (cited in note 30). For discussions of interagency rivalries in national-security contexts, see generally Jon D. Michaels, *The (Willingly) Fettered Executive: Presidential Spinoffs in National Security Domains and Beyond*, 97 *Va L Rev* 801 (2011).

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Given the number of federal agencies, state and local officials, and private parties involved in the development and administration of our national-security responsibilities, it is beyond the scope of this project to actually evaluate the reinforcing (or counterbalancing) effects of multidimensional consolidation on the ground. Thus, this Part of the Essay has necessarily operated at a level of abstraction, highlighting the risks of succumbing to the fallacy of systems vis-à-vis national-security consolidation, suggesting a framework for thinking holistically about organizational and structural reform initiatives, and inviting more finely calibrated assessments of existing and proposed forms of consolidated State power.

## II. THE SYSTEMIC AND REINFORCING EFFECTS OF MULTIDIMENSIONAL NATIONAL-SECURITY CONSOLIDATION: IMPLICATIONS FOR CONSTITUTIONAL THEORY

The streamlining and consolidating taking place have resonance beyond pure questions of institutional design and practice. After all, these aren't just any old lines being collapsed or blurred. Rather, consolidation is occurring along some of the most constitutionally salient fault lines. The separating and checking of federal power is a cornerstone of our constitutional scheme, as famously evidenced by its tripartite horizontal division among a legislative, executive, and judicial branch and by its vertical structure that safeguards state prerogatives. Notwithstanding the central emphasis on tripartitism and federalism, the constitutional commitment to separation runs deeper still.<sup>35</sup> Consider, for example, the Constitution's implicit delineation and protection of a distinct and autonomous private sphere.<sup>36</sup> Consider too the importance of intra-agency or administrative separation of powers (which, as I've argued elsewhere,

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<sup>35</sup> See Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 NYU L Rev \*1, 7–15 (forthcoming 2016), archived at <http://perma.cc/TT75-LS8G>; Young, 69 Brooklyn L Rev at 1289 (cited in note 30) (characterizing buy-in from multiple, diverse actors as a “pervasive institutional strategy in the Constitution” that includes, but extends beyond, the constitutional separation of powers).

<sup>36</sup> Many of the protections guaranteed in the Bill of Rights limit the reach of the State and thus preserve private autonomy. See, for example, US Const Amends I–IV, IX–X.

merits constitutional solicitude once federal power is regularly routed through administrative agencies).<sup>37</sup>

This Part examines the potentially reinforcing effects of multidimensional institutional and organizational consolidation through a constitutional lens. My claim here is the following: even assuming that it is far from clear that any singular, unidimensional consolidating initiative or practice discussed in this Essay is by itself constitutionally verboten (that is, no hard public-private, federal-state, or intra-agency boundary has been transgressed), the total effect of consolidation across multiple dimensions might represent, *in the aggregate*, too much of an aggrandizement of federal executive power.<sup>38</sup> As will be discussed in Part II.B, an aggregate-effects approach to constitutional analysis can help us determine whether multidimensional consolidation has, in effect, gone too far.

#### A. The Constitutional Resonance of Separating and Checking Federal Power

In this Section, I highlight the constitutional significance of the various lines of division central to this inquiry: the public-private, federal-state, and intra-agency divides. Again, because this is a symposium essay, I paint in broad and quick strokes.

##### 1. Public-private.

First, the public-private divide is arguably the most historically significant and universally recognized of all the divisions—marking the State as different from the private sphere even in unitary liberal governing systems that, unlike ours, do not feature horizontal separation of powers or a federalist structure.<sup>39</sup> This public-private line of separation protects private autonomy; limits the power and reach of the State; promotes a healthy division of labor and responsibility; and ensures that when coercive force is exercised, it is exercised by democratically accountable and legitimate officials.<sup>40</sup>

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<sup>37</sup> See Michaels, 115 Colum L Rev at 529–31 (cited in note 3).

<sup>38</sup> See Porat and Posner, 122 Yale L J at 55–57 (cited in note 6) (describing the legal salience of aggregating strategies).

<sup>39</sup> See, for example, Paul Starr, *Freedom's Power: The True Force of Liberalism* 53–58 (Basic Books 2007).

<sup>40</sup> See Michaels, Book Review, 128 Harv L Rev at 1163–70 (cited in note 30) (emphasizing the State's "specialness" in terms of its structural commitments to democratic deliberation and reason giving); *Department of Transportation v Association of American*

The public-private divide in the United States is, of course, hardly impenetrable.<sup>41</sup> But that divide cannot<sup>42</sup> and ought not be altogether trampled over. Whereas an independent private sector can serve as a vigorous check on State power, a deputized or co-opted private sector is anything but such a bulwark. Instead, such commingled government and private power very much enables the State (specifically, quite often, the federal executive) to reach more broadly and deeply—and correspondingly limits private capacity to resist arbitrary or abusive exercises of State power.<sup>43</sup>

## 2. Federal-state.

Second, the maintenance of a federal-state divide has long been recognized as a constitutional imperative.<sup>44</sup> It remains so even after the fundamental reallocation of state and federal power during Reconstruction and once again during the New Deal.<sup>45</sup> The reservation of constitutional powers to the states—as reflected in, among other things, the Court’s recognition of traditional state police powers<sup>46</sup> and its anticommandeering doctrine<sup>47</sup>—attests to an abiding concern for state autonomy. Thus the vertical consolidation of federal, state, and local resources threatens to chip away at not only state prerogatives and democratic preferences but also individual liberty (given the

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*Railroads*, 135 S Ct 1225, 1234–37 (2015) (Alito concurring) (stressing the importance of public exercises of State power).

<sup>41</sup> See William J. Novak, *Public-Private Governance: A Historical Introduction*, in Jody Freeman and Martha Minow, eds, *Government by Contract: Outsourcing and American Democracy* 23, 27–32 (Harvard 2009) (emphasizing the long history of “public-private cooperation” in the United States).

<sup>42</sup> See *Association of American Railroads*, 135 S Ct at 1237 (Alito concurring) (asserting that delegations to private parties are unconstitutional).

<sup>43</sup> See generally Michaels, 77 U Chi L Rev 717 (cited in note 14); Michaels, 115 Colum L Rev 515 (cited in note 3).

<sup>44</sup> See, for example, Federalist 51 (Madison), in *The Federalist* 347, 351 (Wesleyan 1961) (Jacob E. Cooke, ed) (emphasizing the “double security aris[ing]” from vertical federalism and horizontal separation of powers). See also generally Federalist 28 (Hamilton), in *The Federalist* 176 (cited in note 44) (explaining that national defense powers and responsibilities are divided between the federal government and the states).

<sup>45</sup> See generally Bruce Ackerman, 1 *We the People: Foundations* (Belknap 1991) (describing the constitutional reallocation of powers during Reconstruction and the New Deal).

<sup>46</sup> See *Bond v United States*, 134 S Ct 2077, 2086 (2014) (“In our federal system . . . [t]he States have broad authority to enact legislation for the public good—what we have often called a ‘police power.’ The Federal Government, by contrast, has no such authority and ‘can exercise only the powers granted to it.’”) (citations omitted).

<sup>47</sup> See, for example, *Printz v United States*, 521 US 898, 914–15, 933 (1997).

potency of an effectively unified team of federal, state, and local officials).<sup>48</sup>

### 3. Intra-agency.

Third, and admittedly least salient, are the lines of division within agencies. To be sure, intra-agency divisions aren't provided for in the text of the Constitution. Nor are they historically resonant.<sup>49</sup> What's more, some would no doubt insist that such divisions are, if anything, constitutionally suspect.<sup>50</sup> Nevertheless, the rise and legitimization of modern administrative agencies (themselves not textually rooted<sup>51</sup>) have made these intra-agency divisions constitutionally significant.

Elsewhere I contend that administrative agencies, which combine previously separated legislative, executive, and judicial power all under one roof, initially posed a fundamental threat to the tripartite constitutional regime.<sup>52</sup> This threat was neutralized, I argue, in large part by the eventual engendering of an administrative separation of powers—with the presidentially appointed agency heads, the politically insulated career civil servants, and the diverse members of civil society (legally authorized to participate meaningfully in administrative matters)

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<sup>48</sup> See, for example, *New York v United States*, 505 US 144, 181 (1992) (“[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power.”); Young, 69 Brooklyn L Rev at 1290 (cited in note 30) (emphasizing the vertical separation among government units as protecting liberty because little “can get done without the cooperation of multiple actors at multiple levels”); Ann Althouse, *The Vigor of Anti-commandeering Doctrine in Times of Terror*, 69 Brooklyn L Rev 1231, 1235 (2004) (contending that the constitutional safeguard against state commandeering preserves liberty particularly in times when national-security powers are apt to be consolidated and concentrated); Waxman, 64 Stan L Rev at 297 (cited in note 2) (“Federalism in the sphere of national defense offered another safeguard against security-driven tyranny.”).

<sup>49</sup> See Ronald N. Johnson and Gary D. Libecap, *The Federal Civil Service System and the Problem of Bureaucracy: The Economics and Politics of Institutional Change* 48, 51–52 (Chicago 1994) (recognizing that job tenure was not a central component of the first wave of civil service initiatives); David E. Lewis and Jennifer L. Selin, *Sourcebook of United States Executive Agencies* \*69 (Administrative Conference of the United States, Dec 2012), archived at <http://perma.cc/2HX2-ZN2N> (documenting that by the mid-twentieth century, job-tenured civil servants constituted over 90 percent of the federal civilian workforce).

<sup>50</sup> Although unitary executive theorists focus primarily on presidential control over agency leaders, they nevertheless also recognize the incompatibility of, among other things, civil service tenure with truly unitary control. See, for example, Steven G. Calabresi and Christopher S. Yoo, *The Unitary Executive: Presidential Power from Washington to Bush* 220–21, 230, 242–43 (Yale 2008).

<sup>51</sup> See Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv L Rev 1231, 1233–49 (1994).

<sup>52</sup> Michaels, 115 Colum L Rev at 520–21 (cited in note 3).

serving in many respects as apt stand-ins for the three great and rivalrous constitutional branches. It was this separation within agencies—and this sharing and dividing of power among three diverse administrative rivals—that carried forward and renewed the constitutional commitment to separating and checking State power as that power drifted into the administrative arena.<sup>53</sup>

One critical intra-agency line of division exists between the politically appointed agency heads and the politically insulated civil servants who have the legal authority and often institutional and professional incentive to resist overreaching by the political leaders.<sup>54</sup> To the extent that line of separation is blurred or circumvented (by the reclassification of tenured civil servants as at-will employees), efficiencies can likely be achieved. But those efficiencies are achieved at a cost: intra-agency consolidation means that there are far fewer obstacles standing in the way of hyperpoliticized, immoderate, arbitrary, or unchecked exercises of executive power—of the sort that once again place administrative power outside of the tripartite constitutional regime that spawned and seemingly valorized it.<sup>55</sup>

#### B. The Aggregate Constitutional Burdens of Consolidation Occurring along Two or More Dimensions

Each of these lines of separation contributes to a State that, consistent with our constitutional project, is limited, rivalrous, and heterogeneous. The State cannot act too broadly or reach too deeply, at least not without significant, voluntary buy-in from a diverse set of actors representing distinct institutions, jurisdictions, and constituencies.

It isn't immediately apparent that any of this Essay's discrete examples of national-security consolidation rises to the

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<sup>53</sup> See *id.* at 551–52.

<sup>54</sup> See Gillian E. Metzger, *The Interdependent Relationship between Internal and External Separation of Powers*, 59 *Emory L J* 423, 445 (2009) (“[Civil servants] are committed to enforcing the governing statutory regime that sets out the parameters of their authority and regulatory responsibilities.”); David E. Lewis, *The Politics of Presidential Appointments: Political Control and Bureaucratic Performance* 30 (Princeton 2008) (“[Civil servants] often feel bound by legal, moral, or professional norms to certain courses of action and these courses of action may be at variance with the president’s agenda.”); Harold H. Bruff, *Balance of Forces: Separation of Powers Law in the Administrative State* 380–85, 408 (Carolina 2006) (considering civil servants’ respect for legal constraints as bolstering “the rule of law”).

<sup>55</sup> See Michaels, 115 *Colum L Rev* at 565–74 (cited in note 3).



level of a constitutional violation. But that should not be the end of the constitutional inquiry. We still need to think systematically about the multidimensional nature of consolidation—and the seemingly reinforcing effects of consolidation across two or more dividing lines.

Specifically, each of the (for argument's sake) relatively modest federal executive incursions into the private, state, or bureaucratic arenas might not amount to much of a burden on those co-opted, subsumed, or subordinated institutions or jurisdictions—nor on those individuals and groups whom separation is supposed to protect.<sup>56</sup> Furthermore, it might well be the case that no singular act of consolidation along one dimension represents too dangerous of an accretion of federal executive power.

But widening the lens and taking in the totality of consolidating practices along multiple dimensions reveal how those individually modest incursions seem to reinforce one another. Simply stated, the combined effects of several minor incursions might constitute a major one. It is death by a thousand cuts as the president and her deputies accumulate power from the private sector, from states and localities, and from the previously tenured and independent federal bureaucracy. Thus what might once have been thought of as discrete instances of tinkering with constitutional structure only at the margins now looks like a manifold, even systematic (albeit perhaps unwitting and even haphazard) attack on the very principles and physical embodiments of separated, checked, and limited constitutional power.

To help us puzzle through the aggregate constitutional effects of multiple minor incursions on structural safeguards, we can draw on analogous doctrinal inquiries. In cases involving constitutional rights and structure, courts have at times considered aggregate effects, finding the sum total of various measures to be unconstitutional notwithstanding the fact that any one of those measures would, in isolation, register as constitutionally unproblematic. That is to say, in any number of circumstances, courts deem one practice, by itself, to raise no constitutional concerns unless and until that measure is paired with another

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<sup>56</sup> Structure is often valued for the way it protects liberty interests. See, for example, *New York*, 505 US at 181 (recognizing that federalism protects individual liberty); *Bond v United States*, 131 S Ct 2355, 2364 (2011) (“Federalism also protects the liberty of all persons within a State.”).

(which by itself would likewise raise no concerns).<sup>57</sup> Piecing together these disparate doctrinal inquiries and connecting them to this Essay's instant challenge give us the tools and vocabulary to confront the reconfigured architecture of our multidimensionally consolidated national-security state.

### 1. Rights cases.

Perhaps most notably, some courts in Fourth Amendment cases have started to resist the practice of looking at particular acts of government surveillance in isolation to “assess[ ] whether [a] discrete step at [a] discrete time constitutes a search.”<sup>58</sup> Instead those courts are considering the totality of surveillance activity—that is, whether the sum total of government monitoring amounts to a “collective ‘mosaic’ of surveillance” that “can count as a collective Fourth Amendment search even though the individual steps taken in isolation do not.”<sup>59</sup>

What I'm calling an aggregate-effects analysis surfaces in election-law contexts as well. There courts have invalidated combinations of restrictions or requirements, while recognizing that any one of those restrictions or requirements would, by itself, be considered constitutionally unproblematic.<sup>60</sup> For example, the

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<sup>57</sup> See Porat and Posner, 122 Yale L J at 50–53 (cited in note 6) (describing other public law contexts where such aggregation might be useful).

<sup>58</sup> Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 Mich L Rev 311, 314 (2012).

<sup>59</sup> *Id.* at 313. See, for example, *United States v Maynard*, 615 F3d 544, 560 (DC Cir 2010) (recognizing that extensive and persistent surveillance can be unreasonable even if any particular instance of such surveillance raises no Fourth Amendment concerns). A plurality of the Supreme Court seemed to endorse this mosaic theory in *United States v Jones*, 132 S Ct 945 (2012). See Kerr, 111 Mich L Rev at 313 (cited in note 58) (“The concurring opinions in *Jones* raise the intriguing possibility that a five-justice majority of the Supreme Court is ready to endorse a new mosaic theory of Fourth Amendment protection.”); Matthew B. Kugler and Lior Jacob Strahilevitz, *Surveillance Duration Doesn't Affect Privacy Expectations: An Empirical Test of the Mosaic Theory*, 2016 S Ct Rev \*8 (forthcoming), archived at <http://perma.cc/4RQD-3QE2> (noting that in *Jones*, Justice Samuel Alito's “focus on surveillance duration makes the combination of two discrete acts that are independently not searches—say, surveillance for one week and surveillance for the next week—a Fourth Amendment search”).

Such a mosaic theory has been used, too, by the government in nonconstitutional cases. Notable among them are the government's efforts to resist Freedom of Information Act requests in which documents, “some or even all of which are harmless in their own right,” can be combined in ways that “convert[ ] the harmless information into something useful” to those intent on learning national-security secrets. David E. Pozen, Note, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 Yale L J 628, 633 (2005).

<sup>60</sup> See, for example, *Lee v Keith*, 463 F3d 763, 765 (7th Cir 2006) (“In combination, . . . the early filing deadline, the 10% signature requirement, and the additional statutory

Eighth Circuit has held that laws requiring political parties to “both conduct and pay for primary elections as a condition of access to the general election ballot” were “unconstitutional in combination,” notwithstanding the fact that either requirement, on its own, would have been permissible.<sup>61</sup>

Both the emerging Fourth Amendment case law and the election-law doctrines reveal a willingness on the part of the courts to think holistically and systematically about regulatory regimes, identifying troubling patterns that emerge only by examining the interplay of two or more dynamic practices, encroachments, or impositions.

## 2. Structure cases.

This notion of an aggregate-effects constitutional violation seems to apply in matters of structure, too—and that’s especially important given this Essay’s focus. Consider *Free Enterprise Fund v Public Company Accounting Oversight Board*.<sup>62</sup> There the Court addressed whether the members of the Public Company Accounting Oversight Board (PCAOB)—an office within the Securities and Exchange Commission (SEC)—could be independent of the SEC commissioners, given that the SEC commissioners are themselves independent of the president of the United States. *Free Enterprise Fund* reasoned that one layer of insulation from the president would be constitutionally acceptable. But “[t]he added layer . . . makes a difference.”<sup>63</sup> That is, the sum total of two layers of insulation rendered the SEC/PCAOB structural design unconstitutional (as it went too far in cabining presidential power).<sup>64</sup> Tellingly, when this case was before the DC Circuit, Judge Brett Kavanaugh likewise focused on the aggregate effects of the two distinct layers of insulation. He remarked that

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restriction that disqualifies anyone who signs an independent candidate’s nominating petition from voting in the primary [ ] operate to unconstitutionally burden the freedom of political association guaranteed by the First and Fourteenth Amendments.”)

<sup>61</sup> *Republican Party of Arkansas v Faulkner County, Arkansas*, 49 F3d 1289, 1291 (8th Cir 1995). See also Douglas NeJaime and Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 Yale L J 2516, 2588 & n 290 (2015) (emphasizing courts’ heightened concerns with a combination of measures that collectively undermine individuals’ “constitutionally protected reproductive rights”).

<sup>62</sup> 561 US 477 (2010).

<sup>63</sup> *Id.* at 495.

<sup>64</sup> See *id.* (addressing the aggregate effects of multiple layers of political insulation). See also Aziz Z. Huq, *Removal as a Political Question*, 65 Stan L Rev 1, 18 (2013) (offering a broader reading of the *Free Enterprise Fund* opinion consistent with the possibility that the Court might still strike down a single layer of insulation if that layer had “bite”).

the scheme being challenged was not “*Humphrey’s Executor re-dux*”<sup>65</sup>—meaning that it was not just another case in which some plaintiff was challenging the existence of a single layer of insulation between agency officials and the president (as was the case in *Humphrey’s Executor v United States*<sup>66</sup>). Rather, Judge Kavanaugh viewed the SEC/PCAOB scheme as “*Humphrey’s Executor squared*”<sup>67</sup> because the scheme being challenged involved two reinforcing layers of insulation from the president.<sup>68</sup>

The Court has also looked to aggregate or collective effects when assessing encroachments on judicial powers. In *Commodity Futures Trading Commission v Schor*,<sup>69</sup> the Court held that relatively minor incursions on Article III powers along limited lines would be constitutionally permissible.<sup>70</sup> In so holding, the Court contrasted the decidedly modest adjudicatory responsibilities given to the Commodity Futures Trading Commission with the sweepingly broad adjudicatory responsibilities given to non-Article III bankruptcy judges pursuant to the Bankruptcy Reform Act of 1978<sup>71</sup>—which the Court invalidated in *Northern Pipeline Construction Co v Marathon Pipe Line Co*.<sup>72</sup> In distinguishing essentially minor from major constitutional incursions on Article III judges’ authority, *Schor* emphasized that the bankruptcy judges were given “all ordinary powers of district courts” and were authorized to “preside over jury trials or issue writs of habeas corpus.”<sup>73</sup> In all, *Schor* indicated that the Court would look at the sum total of encroachments on Article III judges’ powers and decide in at least some instances that the

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<sup>65</sup> *Free Enterprise Fund v Public Company Accounting Oversight Board*, 537 F3d 667, 686 (DC Cir 2008).

<sup>66</sup> 295 US 602 (1935).

<sup>67</sup> *Free Enterprise Fund*, 537 F3d at 686.

<sup>68</sup> *Id* at 699 (describing the SEC/PCAOB scheme as one in which there is one independent agency “that is appointed by and removable only for cause by another independent agency”). Note a version of this aggregate-effects test appears to have been used even where the Court has considered the constitutionality of only one layer of insulation from the president. In *Morrison v Olson*, 487 US 654 (1988), the Court listed the ways in which the independent counsel was effectively insulated from presidential control and found that the sum of those discrete forms of insulation did not “impede the President’s ability to perform his constitutional duty.” *Id* at 691.

<sup>69</sup> 478 US 833 (1986).

<sup>70</sup> *Id* at 851–53 (explaining that the Commodity Futures Trading Commission’s “adjudicatory powers depart from the traditional agency model in just one respect” and that those powers reach into only one particularized area of the law and thus “do[] not impermissibly intrude on the province of the judiciary”).

<sup>71</sup> Pub L No 95-598, 92 Stat 2549.

<sup>72</sup> 458 US 50 (1982). See also *id* at 87; *Schor*, 478 US at 852–54.

<sup>73</sup> *Schor*, 478 US at 853.

aggregate effects of those discrete incursions amount to a constitutional violation.<sup>74</sup>

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Of course, in *Free Enterprise Fund*, the Court (and Judge Kavanaugh below) feared too great a dissipation of executive power (based on the aggregate effects of minor incursions on presidential prerogatives). And in *Northern Pipeline* and *Schor*, the Court worried about too great a dissipation of judicial power (based on the aggregate effects of multiple encroachments on Article III judges' prerogatives). This Essay, by contrast, focuses on the converse concern: potentially too great a concentration of federal executive power (based on the aggregate effects of multiple minor incursions on separated and divided power along three constitutionally resonant dimensions).

That said, regardless whether sovereign power is excessively concentrated or problematically dispersed, the aggregate-effects analytical approach ought to apply with equal force. Indeed, this aggregate-effects approach seemingly paves the way for future synthetic projects that first carefully study particular institutional and policy domains and then assess how much consolidation is happening and whether the sum total of consolidating forces along multiple axes in that one substantive domain represents an impermissible affront to constitutional governance.<sup>75</sup>

#### CONCLUSION

This Essay puts forward two challenges: one sounding in institutional design and the other in constitutional law. It is my hope that future work in the areas of national security and separation of powers will remain sensitive to the multidimensional

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<sup>74</sup> See *Wellness International Network, Ltd v Sharif*, 135 S Ct 1932, 1944–49 (2015) (applying a seemingly similar aggregate-effects analysis and determining that, as in *Schor*, the sum total of alleged incursions on the Article III judiciary did not amount to a constitutional violation).

<sup>75</sup> Whether such challenges can be successfully litigated in the courts is, of course, a separate question. It might be difficult for plaintiffs to show injury in national-security cases, let alone injuries attributable to multidimensional consolidation per se. For this reason, aggregate-effects claims might be better directed to officials in the executive and legislative branches with the hope that the political branches take such harms seriously. See Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv L Rev 1212, 1220 (1978) (recognizing that constitutional norms should not necessarily be “coterminous with the scope of judicial enforcement” and that other institutions besides courts can address “underenforced constitutional norms”).

nature of institutional and organizational redesigns, both for purposes of making smarter, more careful architectural design choices and for purposes of safeguarding our constitutional system and its underlying structural commitments.