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Checks, Not Balances

Joshua C. Macey* & Brian M. Richardson**

Critics of the administrative state who would revive the nondelegation doctrine and embrace the unitary theory of executive power often assume that each branch's powers are capable of precise definition, functionally distinct from the others, and that the formal boundaries between each branch are sacrosanct. This Article situates these critiques in Founding Era and nineteenth century debates about the structure of the Constitution. In the 1780s, the Anti-Federalists objected to the Constitution for failing to enumerate a precise taxonomy of each branch's powers, for failing to specify that each branch's powers were exclusive, and for failing to make government officials sufficiently accountable to the voting public. The drafters responded that the Anti-Federalist approach would neither support effective government nor prevent the branches from acting tyrannically. Rather than develop a scheme of discrete and precisely divided powers, as the Anti-Federalists proposed, the drafters preferred precise rules of inter-branch coordination to ensure that no one branch dominates the others. This debate continued throughout the nineteenth and early twentieth centuries, with influential legal minds such as Daniel Webster and Joseph Story rejecting the Anti-Federalist theory of separation of powers.

We call this a theory of separation of powers based on a principle of anti-domination. On this view, the separation of powers is breached only if one branch deprives another of its procedural capacity to check the others. We further argue that this theory (a) provides a plausible account of the Framers' understanding; (b) has had significant purchase in the development of inter-branch relations since the Founding and thus can serve as a kind of rational reconstruction of historical practice; and (c) is consistent with the relevant constitutional text and the overall constitutional structure.

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Introduction

The concern that the federal bureaucracy is an unaccountable fourth branch of government has given rise to renewed attacks on the constitutionality of the administrative state. Five sitting Justices, anxious about the federal bureaucracy’s place in the United States’ constitutional framework, have expressed interest in (a) reducing agencies’ authority to promulgate rules and (b) limiting Congress’s power to structure the Executive Branch.¹ The Constitution names three branches of government. If agencies exercise legislative, executive, and judicial functions simultaneously, then they appear to be an illegitimate fourth branch.²

1. See *Gundy v. United States*, 139 S. Ct. 2116, 2148 (2019) (Gorsuch, J., dissenting) (expressing, along with Chief Justice Roberts and Justice Thomas, a “hope[] that the Court may yet recognize that . . . [Congress] may never hand off to [the Executive]” extensive rulemaking power); *id.* at 2131 (Alito, J., concurring in the judgment) (expressing support for reconsideration of the Court’s approach to nondelegation when a majority of the Court is ready to do so); *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., respecting the denial of certiorari) (agreeing that Justice Gorsuch’s “thoughtful *Gundy* opinion raised important points that may warrant further consideration in future cases”); see also PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* 29 (2014) (arguing that administrative law is an “end run around acts of Congress and the judgments of the courts”); Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine’s Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1298 (2003) (arguing that the nondelegation doctrine still has force despite scholarship disputing its validity); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1233 (1994) (positing that legislative delegations to agencies frequently contravene Articles I, II, and III of the Constitution).

2. Others have argued that the Constitution’s text does not foreclose the administrative state. See, e.g., Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 32–38 (1994) (arguing that the Opinions Clause suggests that the President does not

One solution is to eliminate the supposed fourth branch altogether by prohibiting agencies from exercising “legislative” and “judicial” powers. For example, the Supreme Court’s push to reinvigorate the nondelegation doctrine, which would prevent Congress from giving substantial rulemaking authority to agencies, would ensure that Congress—and only Congress—exercises the legislative power. And the Court’s embrace of the unitary theory of executive power, which contends that the vesting of executive power conveys an illimitable discretion to dismiss any official (the “removal” power by the modern debate; the “dismissal” or “displacement” power in earlier eras), is an attempt to ensure that the Executive is not deprived of the power to supervise officers who execute the law. Both the nondelegation doctrine and the unitary executive theory are attempts to reconcile the administrative state with the Constitution’s tripartite allocation of government powers.

Reviving the nondelegation doctrine and embracing the plenary view of the President’s removal power would effect a sea change in modern governance. Congress has long sought to increase the competence and independence of agency officials by limiting the President’s appointment and removal powers, and it has given agencies broad rulemaking authority to implement federal policy. Congress has also sought to cultivate expertise and independence in policy areas that are of urgent national concern, such as the regulation of energy in an era of climate change or of public health during a global pandemic.³ According to Justice Kagan, the reforms advocated by a current majority of the Supreme Court could “commit[] the Nation to a static version of governance, incapable of responding to new conditions and challenges.”⁴

Scholars who have sought to identify a doctrinal foundation for the federal bureaucracy have done so by (a) claiming that the Necessary and Proper Clause or another piece of constitutional text gives Congress the

enjoy unfettered power over administrative officials); Blake Emerson, *The Departmental Structure of Executive Power: Subordinate Checks from Madison to Mueller*, 38 YALE J. ON REGUL. 90, 93 (2021) (“[T]he constitutional structure of the department provides a foundation for the administrative state that is separate from the President’s executive power.”).

3. See Brief for Petitioners at 15, *West Virginia v. EPA*, 142 S. Ct. 2587 (2022) (No. 20-1530) (contending that there is a “separation of powers-based” default rule against delegating “major lawmaking authority” (quoting *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc))); *NFIB v. Dep’t of Lab.*, 142 S. Ct. 661, 668 (2022) (Gorsuch, J., concurring) (discussing OSHA’s argument that it had congressional authorization to promulgate rules in response to emergencies like the COVID-19 pandemic).

4. *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2226 (2020) (Kagan, J., concurring in the judgment and dissenting in part).

power to establish agencies that are independent from the Executive Branch,⁵ (b) arguing that the need for administrative expertise has made agencies an essential feature of modern democracies,⁶ and (c) identifying Founding Era laws that granted agencies broad rulemaking authority or limited the President's discretion to remove officials.⁷

These arguments accept the premise that the federal bureaucracy fits uneasily within the separation of powers and counter that Congress, either because of historical practice or the Necessary and Proper Clause, has the power to change that balance while preserving each branch's "functions."⁸ But such responses provide scant assurance to scholars and jurists who believe that the Constitution pursues its theory of separated powers by establishing rigid boundaries between the three branches. On this account, any institution that exercises a power that the Constitution assigns to another branch is incompatible with the tripartite distribution of executive, legislative, and judicial powers, and it is the province of the Judiciary to keep each power within its bounds. Courts must therefore strike down any branch's incursion into another's domain "in service of the constitutional rule that [branches] may not divest [themselves] of . . . power."⁹

It may be true that the complexities of modern life require a robust administrative state, but if the Constitution does not contemplate a fourth branch of government, then critics of modern administration have an answer:

5. See Lessig & Sunstein, *supra* note 2, at 45 (summarizing nineteenth-century theorists' view that the Necessary and Proper Clause gave Congress the "broad authority to structure the administration of government institutions as it saw fit").

6. See, e.g., JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 46 (1938) ("The administrative process is . . . our generation's answer to the inadequacy of the judicial and the legislative processes."); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 582 (1984) (recognizing the expertise-emphasizing, politics-rejecting nature of administrative agencies).

7. E.g., Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 281–82 (2021); Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288, 1313 (2020); Jed Handelsman Shugerman, *Vesting*, 74 STAN. L. REV. (forthcoming 2022) (manuscript at 55), <https://ssrn.com/abstract=3793213> [<https://perma.cc/E7NM-S5NE>]; Daniel D. Birk, *Interrogating the Historical Basis for a Unitary Executive*, 73 STAN. L. REV. 175, 232 (2021); Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 19 U. PA. J. CONST. L. 323, 325 (2016); Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1, 5 (2021).

8. See John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1951 (2011) (quoting Strauss, *supra* note 6, at 597) (explaining that functionalists believe that the Necessary and Proper Clause empowers Congress to determine how the government will exercise its powers).

9. See *Gundy v. United States*, 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting) (explaining that the major questions doctrine limits Congress's ability to transfer legislative power to executive agencies).

amend the Constitution. And while the Necessary and Proper Clause may empower Congress to pass “all Laws which shall be necessary and proper for carrying into Execution” other federal powers,¹⁰ that does not support the conclusion that Congress can invoke that authority to ignore the Constitution’s tripartite system of government. Finally, evidence of Founding Era delegations may not conclusively prove that these delegations were constitutional since, as Ilan Wurman has pointed out, the importance of these delegations is in the eye of the beholder: it is possible to understand these delegations as permitting the Executive to fill in only minor details while otherwise respecting the formal difference between legislation and executive action.¹¹

Thus, the most influential defenses of the administrative state concede that the words *legislative* and *executive* possess clear and exclusive meanings that make it possible to distinguish between legislation and law execution¹²—for example, that Congress’s power to enact legislation includes an implied definition of the legislative power that constrains the type of laws Congress can pass, and that the executive power contains an implied supervisory power that extends presidential authority beyond those powers enumerated in Article II. Once one accepts that assumption, the only question is whether a particular power is exclusive, or whether it might be shared—or delegated—to executive or judicial agents. Scholars who have made efforts to marshal evidence for and against the proposition that early Congresses delegated wide policy-making discretion to executive officials broadly agree that Article I’s Vesting Clause contains an implied definition of the legislative power but quibble about how much discretion was seen as too much in the early republic.

This Article responds directly to the concern that agencies occupy a liminal place between the three branches by reconstructing a theory of separation of powers based on a Founding Era debate between Federalists who supported the Constitution and their Anti-Federalist critics.¹³ Modern

10. U.S. CONST. art. I, § 8.

11. Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490, 1502 (2021); see also Ann Woolhandler, *Public Rights and Taxation: A Brief Response to Professor Parrillo* 3 (U. Va. Pub. L. and Legal Theory Rsch. Paper Series, Paper No. 2022-09, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4003530 [<https://perma.cc/T6V3-VGCM>] (arguing that Professor Parrillo’s evidence is consistent with the nondelegation doctrine because taxation falls into a “special category” of “public rights”).

12. The nondelegation and unitary executive debates are based on the view that the terms *legislative* and *executive* convey implied and exclusive meanings. That is the assumption we critique in this paper. We take no position on which substantive provisions of Articles I and II, such as the Commander in Chief and the Take Care Clauses, convey implied powers. Nor do we take a position on whether (or when) those powers are exclusive.

13. For a survey of Anti-Federalists’ views, a discussion of their motivations, and their role in the Constitution’s contingent settlements, see generally MICHAEL KLARMAN, *THE FRAMERS’ COUP*

critiques of the administrative state are based on an elaborate and contestable exegesis of the terms *legislative* and *executive* that requires courts to arbitrate between substantive definitions of those branches' powers. As we show, important constitutional partisans in the Founding generation debated and rejected precisely that approach to the separation of powers. Anti-Federalists *objected* to the proposed Constitution because “[l]egislative, executive, and judicial powers were commingled in . . . ways contrary to [the separation of powers].”¹⁴ For them, “the complexity of an arrangement of shared powers made government less comprehensible to ordinary citizens and therefore less accountable.”¹⁵ To the Anti-Federalists, the Constitution violated the separation of powers because it would make it impossible for the voting public to identify and hold accountable the government actor that was responsible for government policies.

The Constitution's defenders replied with skepticism that rigid boundaries between legislative and executive power could check each branch's ambition. They further argued that it was difficult, if not impossible, to develop pure or inherent definitions of legislative and executive powers and that, in any event, doing so would neither support effective government nor check tyrannical rule.

But that does not mean that the supporters of the Constitution lacked a theory of their own. For them, to the extent that the Constitution should

(2016). See generally SAUL CORNELL, *THE OTHER FOUNDERS* (1999) (discussing in Part I the diversity of Anti-Federalist thought on constitutionalism).

14. JEFFREY K. TULIS & NICOLE MELLOW, *LEGACIES OF LOSING IN AMERICAN POLITICS* 55 (2018); see also Bernard Manin, *Checks, Balances, and Boundaries: The Separation of Powers in the Constitutional Debate of 1787*, in *THE INVENTION OF THE MODERN REPUBLIC* 27, 40 (Biancamaria Fontana ed., 1994) (explaining that the Anti-Federalists adhered to the principle “one branch, one function”).

15. TULIS & MELLOW, *supra* note 14, at 55. Like Manin, Mellow, and Tulis, we reconstruct the Anti-Federalist objection to the Constitution's separation of powers. But, in tracing the Anti-Federalist–Federalist fight over the theory of separated powers, we do not conclude that one vanquished the other as a matter of modern constitutional interpretation. As we note below, Anti-Federalists and Federalists alike occupied important offices in the early republic, and they jostled over which of their views should be the default theory of separated powers in cases of ambiguity. Because we are interested in the modern judicial critique of the administrative state, our aim is to explain how a plausible, context-sensitive reading of the Founding materials forecloses the modern Court's idea that the terms *legislative* and *executive* entailed the nondelegation and unitary executive theories as a matter of Founding consensus. We take no position, however, on the “default-rule” question that survived the Federalist–Anti-Federalist fight over separation of powers: that is, should we strive to realize Anti-Federalist ideals where the Constitution's separation of powers is silent? Compare *id.* at 55, 59 (tracing the Anti-Federalist critique in accord with Bernard Manin's account, and concluding that the appropriation of Anti-Federalist thought in later eras created an anti-constitutional tradition), with Bryan Garsten, *Constitutionalizing Conservatism*, 48 *POL. THEORY* 796, 801 (2018) (positing that notwithstanding Mellow and Tulis's account of the Anti-Federalists' loss, the “logic” of the Constitution might have been understood, from the beginning, to facilitate just the kind of controversies between centralizers and decentralizers that the[ir] book traces throughout American political development” (emphasis omitted)).

pursue the separation of powers as an end in itself, it should rely on procedural checks rather than an exhaustive classification of each type of governmental power. The goal was to distribute government *agency*—not government *powers*—across the three branches to prevent a single branch from consolidating decision-making authority.

We call this a theory of separation of powers based on a principle of anti-domination.¹⁶ Today, the Constitution’s principle of separated powers is often described by reference to the Madisonian maxim of “[a]mbition . . . counteract[ing] ambition.”¹⁷ While modern scholars interpret that maxim as a statement about political science where the branches will check each other out of a sense of inter-branch rivalry,¹⁸ we understand the *capacity* of the branches to mutually check one another—whether or not it is exercised in a given case—to be the entire theoretical and formal basis of the Constitution’s separation of powers.

Under this theory, the legislative power vested by the Constitution is not “the power to adopt generally applicable rules of conduct governing future actions by private persons.”¹⁹ That view of the legislative power appears nowhere in the Constitution’s text and instead reflects a mix of modern and post-hoc glosses on the meaning of the word *legislative*. Besides the Constitution’s various subject-matter limitations and precisely defined grants of authority, the legislative power is simply the power to (a) carry out those specific powers enumerated in Article I and (b) “make all [l]aws,” including those laws that regulate the execution of “other” powers “vested” in

16. A note about methodology: We are not originalists, though we make historically inflected arguments about the Constitution’s meaning. Nor do we claim that our theory is required by the Founding vision. We simply argue that our theory makes sense of the textual and historical puzzles presented by the nondelegation and unitary executive debates. However, because we conclude that the balance of historical evidence forecloses one prominent view of the Constitution’s idea of the separation of powers, we make a kind of originalist argument when we show that modern critiques of the administrative state are incorrect, on their own terms, about the separation of powers. It is likely, in light of the available evidence, that the Founders did not reach consensus on one conceptually coherent theory of the separation of powers and that they expressed many rivalrous views of the purpose of the separation of powers. The Constitution is a compromise, but, as we show, its separation-of-powers principles are incompatible with the theory that underlies modern critiques of the administrative state.

17. THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

18. See Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 439 (2012) (“[T]his Madisonian theory is not an accurate description of modern separation of powers.”); Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI L. REV. 865, 884 (2007) (“Whether or not this [Madisonian] picture was ever realistic, it is no longer so today.”); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2313 (2006) (“Few aspects of the founding generation’s political theory are now more clearly anachronistic than their vision of legislative-executive separation of powers.”).

19. *Contra Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting) (providing that this is how the Framers defined the legislative power).

“[d]epartment[s] or [o]fficer[s]” of the government.²⁰ The cardinal limitation on the legislative power that follows from the Constitution’s separation-of-powers principles is that all such laws must be made through bicameralism and presentment. The secondary limitation is that no law can alienate or divest the powers the Constitution vests in another branch. The Constitution’s separation of powers is thus a highly formal idea, but its substantive content is modest: the separation of powers is breached only where a branch’s actions would allow it to tyrannize or to dominate another.²¹

Apart from these procedural requirements, of course, a legislative act must also be consistent with substantive limitations created by other parts of the Constitution. These include federalism-oriented structural constraints, a panoply of rights limitations, and crucially, provisions of the Constitution that allocate bespoke powers without implicating the principle of anti-domination. The last category, in particular, includes textual provisions that assign particular powers to branches—like the commander-in-chief power or the power to call recess—but that do not elaborate formal procedures that distribute a shared governmental agency. Such provisions identify the ministerial agent that will bind the government to a particular action, but they do not implicate the Constitution’s separation-of-powers principles. Indeed, such provisions may convey additional powers, but if they do, those powers come from specific textual grants of authority and not from implied constraints upon the terms *legislative* and *executive*.

Recognizing that the Constitution’s commitment to anti-domination is the defining feature of the separation of powers would resolve many, though not all, of the critiques that have been levied at the administrative state. First,

20. U.S. CONST. art. I, § 8, cl. 18. Our account insists on a semantic distinction between separation-of-powers values and other constitutional values. At some level of abstraction, one could imagine a theory of separated powers that covers the entire field of structural constitutional law, or one could imagine a separation of powers that bleeds horizontally into other structural limitations like federalism or due-process values. *See, e.g.*, Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1516–17 (1991) (“[W]hen government action is challenged on separation-of-powers grounds, the Court should consider the potential effect of the arrangement on individual due-process interests.”). Because we view the rejection of an antifederal view of separation-of-powers theory to give modest but identifiable content to the Constitution’s separation-of-powers theory, we treat this area as a distinctive province of structural constitutional law but insist on its modest formal content. This contrasts with modern scholars who reject the nondelegation doctrine and the unitary executive theory on the ground that the separation of powers has little justiciable content. *See* Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. (forthcoming 2022) (manuscript at 2115–16), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3959042 [<https://perma.cc/2H2Q-BA6T>] (arguing that the “handiwork” of Congress and the President “simply does not implicate a judicially enforceable separation-of-powers principle” when they exercise constitutionally granted powers).

21. Put another way, the Constitution fashions branches that are “‘omnicompetent’ as regards subject-matter but ‘unipowered’ as regards tools at their disposal.” Todd D. Rakoff, *The Shape of the Law in the American Administrative State*, 11 TEL AVIV U. STUD. L. 9, 22 (1992).

the nondelegation doctrine assumes that agency rulemaking is an exercise of the legislative power. But that assumption is incorrect under the anti-domination theory of separation of powers. When agencies promulgate rules, they must be authorized by legislation to exercise the Executive's law-execution power.²² The justiciable separation-of-powers problem arises only if there is no such authorization: then, an agency arrogates to itself the power to make law. Second, the theory of the unitary executive embraced in recent cases like *Seila Law LLC v. CFPB*²³ and *Collins v. Yellen*²⁴ assumes that limitations on the President's authority to remove officials interferes with an unenumerated executive supervisory power that conveys an inherent power to remove any official at the President's pleasure. But duly enacted limitations on the President's removal power—like any regulation of the composition, tenure, and removal of officers of the civil service—can also be understood as legislative acts that Presidents may resist using the procedure of presentment but must ultimately respect to exercise their authority to enforce the law.

Like formal critics of the administrative state, we agree that the President sits at the head of the Executive Branch and that all agencies fall within that branch. And like these unitarian critics, we agree that it would exceed the legislative power to give an agency outside the Executive Branch the power to execute the law. But in our view, the duty to supervise, like the power to legislate, is defined by specific provisions of the Constitution. To Congress is given the power to create executive offices and to enact laws that regulate the “carrying into Execution the . . . Powers . . . vested . . . in any Department or Officer” so created.²⁵ To the President is given the

22. Similar views about the executive power have been advanced in debates about executive authority. Some scholars have argued that *all* executive power is created through congressional delegations. *See, e.g.*, Julian Davis Mortenson, *The Executive Power Clause*, 168 U. PA. L. REV. 1269, 1273 (2020) (“The signal characteristic of executive power, however, was that it was substantively an empty vessel. The only thing the clause authorized the President to do was to carry out legal instructions created pursuant to some other authority.”); Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1173 (2019) (arguing that the Founders understood the phrase *executive power* to refer to the narrow power to carry out projects defined by the legislature). Others think that the Executive enjoys significant power independent of legislation but that the content of much of the executive power is still determined through particular legislative enactments. *See, e.g.*, Memorandum from John C. Yoo, Deputy Assistant Att’y Gen., Office of Legal Counsel, on Military Interrogation of Alien Unlawful Combatants Held Outside the United States to William J. Haynes II, Gen. Counsel, Dep’t of Def., 5 (Mar. 14, 2003), <https://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memo-combatantsoutsideunitedstates.pdf> [<https://perma.cc/5THX-TRSX>] (“[A]ny power traditionally understood as pertaining to the executive . . . unless expressly assigned to Congress, is vested in the President.”).

23. 140 S. Ct. 2183 (2020).

24. 141 S. Ct. 1761 (2021).

25. U.S. CONST. art. I § 8.

Appointments Clause, the Commander in Chief Clause, the Presentment Requirement, and the Take Care Clause.²⁶ Removal protections are one of the ways a legislature can regulate the composition of the civil service. Like tenure protections for civil service agents, those regulations constrain—at some level of generality—the President’s powers of appointment and law execution.

Most importantly, our theory is responsive to first-order critiques about the constitutionality of the administrative state. But whereas our account insists on a procedural formalism that serves only the goal of anti-domination, more typical separation-of-powers formalism indulges the idea that the three branches wield three powers of materially different natures. Gary Lawson, for example, has argued that “[t]he Constitution clearly—and one must even say obviously—contemplates some such lines among the legislative, executive, and judicial powers.”²⁷ We agree with this principle, but that does not imply that the branches cannot exercise the same *functions*. Precise lines delineate the three branches’ relative authority, but only insofar as there are distinctive procedural devices that prevent domination by any one branch. We note that a branch may impermissibly exercise a power that belongs to another branch, but unless the system of checks is implicated, the breach is an ordinary offense against the Constitution’s enumeration of powers rather than a violation of a separation-of-powers principle.

We thus reach the same conclusions as many defenders of the administrative state, but we do so on the basis of neglected historical evidence and a different theory of separation of powers.²⁸ Legal scholars have come to the aid of the administrative state by arguing that large areas of legislative and executive powers are nonexclusive, that the departments should be given wide latitude to define their own powers, and that particular acts of legislation are constitutive of the Executive’s law-execution power.²⁹

26. *Id.* art. II, §§ 2–3; *id.* art. I, § 7.

27. Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 340 (2002).

28. Our theory of legislation is similar to those proposed by other constitutional law scholars. See *infra* subpart II(C). Where we differ is *why* we think that view is correct and on the theory of separation of powers that supports it.

29. See, e.g., Strauss, *supra* note 6, at 578 (“[T]he rigid separation-of-powers compartmentalization of governmental functions should be abandoned in favor of analysis in terms of separation of functions and checks and balances.”); PETER M. SHANE, MADISON’S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 164 (2009) (“The ideal of expertise argues strongly for diffusing policy making authority to specialized agencies with the capacity and incentive to master their own policy domains.”); JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 83 (1997) (explaining that agencies were given interpretive deference because of their perceived expertise); Jerry L. Mashaw, *Of Angels, Pins, and For-Cause Removal: A Requiem for the Passive Virtues*, U. CHI. L. REV. ONLINE, Aug. 2020, at *13, *16 (“FTC commissioners are not judges and they are not legislators. Their task is to implement a federal statute. This is an executive function and those officers are

We agree that there is a justiciable idea of separated powers but argue that it merely pursues the end of anti-domination between the branches. Given the historicist justification of current critiques of administrative agencies, it is of particular importance that many Federalist defenders of the Constitution accepted our idea of separated powers in lieu of a rival theory that insisted on a clear taxonomy of the legislative, executive, and judicial powers. These rejected proposals, which we group under the heading of “Anti-Federalist” critiques of the Constitution’s separation of powers, have much in common with current critiques of the administrative state, since they place the goals of accountability and simplicity at the core of their theory of separated powers.

It is important to clarify two limitations of our claim at the outset: First, we do not claim that ours is the only plausible theory of separation of powers; or that it is constitutionally required; or that it is normatively or textually or historically superior to all alternative accounts. We do not think that any single theory of separation of powers could ever conclusively rebuff others.³⁰ Those who favor one approach to the separation of powers tend to rely on methods of constitutional interpretation that continue to be fiercely debated, and so their conclusions follow from their interpretive premises. We are instead reconstructing a theory that has had a long historical pedigree, which is consistent with the Constitution’s text and structure, and which we think is normatively preferable to existing accounts.

Second, our theory does not suggest that the entire content of the legislative and executive powers consists of procedural devices that prevent any one branch from dominating the others. It is plausible that specific allocations of power, such as the Commander in Chief and Take Care Clauses, convey powerful grants of authority. We take no position on those questions. Nor do we have a position about whether those implied powers, if they exist, are exclusive. We make the more modest point that the Constitution’s use of the terms *legislative* and *executive* need not impliedly

executive officers.”); Mortenson & Bagley, *supra* note 7, at 290 (“[E]ighteenth-century British legal and political theorists thought legislative power simply meant the authority to issue authoritative instructions—and they agreed that it could be delegated by whoever happened to hold it.”); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1723 (2002) (“A statutory grant of authority to the executive isn’t a *transfer* of legislative power, but an *exercise* of legislative power.”); Adrian Vermeule, *No*, 93 TEXAS L. REV. 1547, 1560 (2015) (reviewing PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014)) (“[S]o long as an agency acts within the boundaries of the statutory authorization . . . the agency is necessarily exercising executive rather than legislative power . . .”).

30. See, e.g., Aziz Z. Huq & John D. Michaels, *The Cycles of Separation of Powers*, 26 YALE L.J. 347, 437 (2016) (discussing a theory of separation of powers and recognizing that “[r]easonable people . . . can disagree”).

convey exclusive grants of authority that permit judgments about today's pressing puzzles.

This Article proceeds in four parts. Part I describes constitutional challenges currently being levied at the administrative state. Part II explains how orthodox defenses of the administrative state accept the premise that it is an extraconstitutional invention. Part III reconstructs a theory of separation of powers based on the Founding Era debate between the Constitution's drafters and its Anti-Federalist critics. It also traces post-ratification history to show that, for much of American history, politicians, judges, and scholars rehashed this debate, with critics of the administrative state making Anti-Federalist arguments about implied powers and others pointing out that the Founding generation rejected that theory. Part IV applies our theory to modern debates about the administrative state.

I. Critiques of the Administrative State

Attacks on the legality of the administrative state stem from concerns that agencies form a fourth branch of government not contemplated in the Constitution's separation of three kinds of power between three branches. This Part describes the nondelegation doctrine and the theory of a unitary executive—two constitutional challenges to agency authority that, if accepted, would transform the federal bureaucracy.

A. *The Nondelegation Doctrine*

The nondelegation doctrine is based on the first sentence of Article I, which says that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”³¹ Adherents of the nondelegation doctrine argue that this clause prohibits Congress from giving away its legislative power to agencies.³²

The word “all” provides the nondelegation doctrine's textual hook. The Constitution does not grant Congress *some* of the legislative powers enumerated in Article I. It grants Congress *all* of those powers. When Congress gives away, or delegates, legislative authority, whether to the President or administrative agencies, it would seem to flout the constitutional directive that the power inheres only in the people's elected representatives.

The relevant nondelegation question, then, is how to define the legislative power. According to many adherents of the nondelegation

31. U.S. CONST. art. I, § 1.

32. See Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2104 (2004) (“[T]he nondelegation doctrine has become firmly implanted in the Vesting Clause of Article I.”).

doctrine, the legislative power is “the power to adopt generally applicable rules of conduct governing future actions by private persons.”³³ If any governmental agency adopts such rules, it is taken to exercise the legislative power. More broadly, the idea is that the substantive content of legislative and executive powers can be defined in the abstract and in the absence of a particular grant of legislation. If one accepts this conception of the legislative power, the critical separation-of-powers inquiry is thus transformed into the question whether a particular agency action fits this category of “legislative” action. Within this separation-of-powers framework, one can imagine a menu of government actions in which legislative and executive prerogatives are kept distinct. And one can also imagine related rules of interpretation that would construe Congress’s delegations of discretion—particularly to decide “major questions”³⁴—so narrowly that they would vanish, all at the expense of administrative discretion.

Since the Court first invoked the nondelegation doctrine to invalidate a federal statute in 1935,³⁵ the Court has never explicitly rejected the nondelegation doctrine. Still, for most of the past century, scholars assumed that the Supreme Court had construed the nondelegation doctrine out of existence.³⁶ That is because, since 1936, the Supreme Court has upheld every congressional delegation, including those that direct agencies to promote the “public interest, convenience, or necessity,”³⁷ to issue price controls that “will be generally fair and equitable and will effectuate the purposes of [an] Act,”³⁸ and to set air quality standards that “protect the public health.”³⁹ For most of the past century, the Court has insisted that the constitutionality of any particular delegation of legislative authority depends on whether Congress provides an “intelligible principle” to direct agency decision-

33. *Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting).

34. *See NFIB v. Dep’t of Lab.*, 142 S. Ct. 661, 668–69 (2022) (Gorsuch, J., concurring) (per curiam) (stating that the major questions and nondelegation doctrines are both “designed to protect the separation of powers and ensure that any new laws governing the lives of Americans are subject to the robust democratic processes the Constitution demands”); *West Virginia v. EPA*, 142 S. Ct. 2587, 2616 (2022) (holding, in a major questions case about the EPA’s authority to cap carbon emissions, that “[a] decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body”).

35. *Panama Refin. Co. v. Ryan*, 293 U.S. 388, 430 (1935); *see also A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541–42 (1935) (invalidating a federal statute because of its delegation of authority to the Executive); *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (same).

36. *See infra* subpart II(C).

37. *NBC v. United States*, 319 U.S. 190, 194, 225–26 (1943).

38. *Yakus v. United States*, 321 U.S. 414, 420 (1944).

39. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 475–76 (2001).

making.⁴⁰ Judicial decisions upholding such broad grants of administrative discretion led Judge Douglas Ginsburg to claim that “for 60 years the nondelegation doctrine has existed only as part of the Constitution-in-exile.”⁴¹ The nondelegation doctrine, Judge Ginsburg lamented, had been “ancient[ly] exile[d],” but was “kept alive by a few scholars who labor on in the hope of a restoration, a second coming of the Constitution of liberty.”⁴²

Now, however, the Court seems poised to breathe new life into the nondelegation doctrine while scholars joust at the margins about questions of degree. In 2019, in *Gundy v. United States*,⁴³ Justice Gorsuch wrote in dissent that the intelligible principle test “has been abused to permit delegations of legislative power that on any other conceivable account should be held unconstitutional.”⁴⁴ Chief Justice Roberts and Justice Thomas joined the dissent.⁴⁵ Justice Alito indicated that he would be willing to reconceptualize the nondelegation doctrine in the manner Justice Gorsuch proposed, as did Justice Kavanaugh after he joined the Court.⁴⁶

A nondelegation doctrine with teeth would limit agencies’ ability to make federal policy. In a solo concurrence authored five years before *Gundy*, Justice Thomas argued that, under the Constitution’s separation of powers principles, agencies could only make “factual determination[s]”; they could not exercise what he called “policy discretion” without violating the separation of the Executive from the legislative power.⁴⁷ Thomas would also have carved out a second exception for matters that “involved the external relations of the United States.”⁴⁸ As Nicholas Parrillo has explained, “Justice

40. See *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) (stating the “intelligible principle” standard).

41. Douglas H. Ginsburg, *Delegation Running Riot*, 18 REGUL., Winter 1995, at 83, 84 (reviewing DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993)); see also Cary Coglianese, *Dimensions of Delegation*, 167 U. PA. L. REV. 1849, 1851 (2019) (“[T]he nondelegation doctrine remains alive, and is more manageable and coherent too, even if it has almost never been invoked to strike down legislation authorizing lawmaking by executive officers.”).

42. Ginsburg, *supra* note 41, at 84.

43. 139 S. Ct. 2116 (2019).

44. *Id.* at 2140 (Gorsuch, J., dissenting).

45. *Id.* at 2131.

46. See *id.* at 2131 (Alito, J., concurring) (“If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort.”); *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., respecting the denial of certiorari) (agreeing that Justice Gorsuch’s “scholarly analysis of the Constitution’s nondelegation doctrine in his *Gundy* dissent may warrant further consideration”).

47. See *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 78–80 (2015) (Thomas, J., concurring in the judgment) (explaining that delegations of policy discretion “pose a constitutional problem because they effectively permit the President to define some or all of the content of that rule of conduct”).

48. *Id.* at 80 & n.5.

Thomas's theory . . . would seem . . . to invalidate most of today's domestic regulatory state."⁴⁹

Justice Gorsuch proposed a similar approach in *Gundy*, arguing that agency rulemaking that governs "private conduct" is permissible only if it (a) involves "details," (b) is an exercise of "fact-finding," or (c) implicates "authority the Constitution separately vests in another branch."⁵⁰ Under this view, the policy-making function is reserved to the Legislature and cannot be exercised by any other branch—even if the Legislature so authorizes.

Defenders of the nondelegation doctrine often focus on the problem of agency "accountability." The nondelegation doctrine helps ensure that "legislating be done only by elected representatives in a public process."⁵¹ According to Justice Gorsuch, "the Constitution sought to ensure that the lines of accountability would be clear: The sovereign people would know . . . whom to hold accountable for the laws they would have to follow."⁵² The concern is that Congress's choices to delegate discretion to executive agencies would "disguise responsibility" for governmental actions.⁵³

Scholars who support the nondelegation doctrine have urged the Court to require that congressional delegations be much more specific,⁵⁴ to prohibit rulemaking on "important subjects," and to uphold only those delegations that involve filling in minor "details."⁵⁵ If the Court accepts these proposals, the legality of agency policies would likely turn on how strictly the Court polices the distinction between fact-finding and policy making.

49. Parrillo, *supra* note 7, at 1295. *But see* Daniel E. Walters, *Decoding Nondelegation After Gundy: What the Experience in State Courts Tells Us About What to Expect When We're Expecting*, 71 EMORY L.J. 417, 421 (2022) ("[T]he changes . . . envisioned by a possible majority of the Court . . . will not fundamentally change anything about how courts approach the problem of delegation."); Jonathan H. Adler & Christopher J. Walker, *Nondelegation for the Delegates*, REGUL., Spring 2020, at 14, 15 ("[R]econsideration of the nondelegation doctrine may not mean much.").

50. 139 S. Ct. at 2136–37 (Gorsuch, J., dissenting).

51. *Id.* at 2134.

52. *Id.*

53. *Id.* at 2135 (ellipsis omitted) (quoting Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1478 (2015)); *NFIB v. Dep't of Lab.*, 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring) (per curiam) ("The nondelegation doctrine ensures democratic accountability by preventing Congress from intentionally delegating its legislative powers to unelected officials.").

54. *See* Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J.L. & PUB. POL'Y 147, 186 (2017) (distinguishing between impermissible delegations of broad authority and permissible delegations of authority to create rules that apply "to a more circumscribed group and setting").

55. Wurman, *supra* note 11, at 1502 (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825)); *see* Ilan Wurman, *The Specification Power*, 168 U. PA. L. REV. 689, 709–12 (2020) (explaining early examples of detail-filling by the Executive).

B. *The Unitary Theory of Executive Power*

The unitary executive theory holds that a single person, the President, sits atop the Executive Branch, and that the President's authority to remove officials in the Executive Branch is plenary. Like the nondelegation doctrine, this view is based on the Constitution's text as well as an intuition about accountability in government. Article II begins, "[t]he executive Power shall be vested in a President of the United States."⁵⁶ It further provides that the President shall "take [c]are" that the laws are "faithfully executed."⁵⁷

Those concerned about agency independence often argue that independence prevents officials from being held accountable to the electorate. This is true both of modern and New Deal proponents of the unitary theory of executive power.⁵⁸ Defenders of the theory of the unitary executive assert that, to protect Presidents' supervisory responsibilities, they must possess unfettered authority to terminate agency officials. On this view, congressionally imposed limitations on the President's removal power are a threat to the separation of powers because they immunize agency officials from presidential oversight. That, in turn, prevents the President from ensuring the faithful execution of the law.

In the past few years, the Supreme Court has embraced the unitary theory of executive removal in a variety of contexts. In *Seila Law*, the Court held that a statutory requirement that the director of an agency could only be removed "for cause" violated the separation of powers.⁵⁹ As Chief Justice Roberts wrote, "[u]nder our Constitution, the 'executive Power'—all of it—is 'vested in a President,' who must 'take Care that the Laws be faithfully executed.'"⁶⁰ *Seila Law* was quickly followed by *Collins*, in which the Supreme Court invalidated a provision requiring "cause" for the removal of the Director of the Federal Housing Finance Agency.⁶¹ Read together, *Seila Law* and *Collins* suggest a theory of separated powers that requires courts to ensure that the President retains an unfettered removal power.⁶²

56. U.S. CONST. art. II, § 1.

57. *Id.*, § 3.

58. Cf. Christopher S. Yoo, Steven G. Calabresi & Laurence D. Nee, *The Unitary Executive During the Third Half-Century, 1889–1945*, 80 NOTRE DAME L. REV. 1, 96–97 (2004) (describing a 1937 presidentially appointed committee's report that suggested a closer integration of independent agencies into the Executive Branch because of their lack of responsiveness to the President).

59. 140 S. Ct. 2183, 2192, 2194 (2020).

60. *Id.* at 2191 (quoting U.S. CONST. art. II, §§ 1, 3). Jed Shugerman has pointed out that the Chief Justice's decision to insert the word "all" when interpreting Article II's Vesting Clause is a common move. See Shugerman, *supra* note 7 (manuscript at 3) (noting that "[m]any scholars" add words when interpreting the Vesting Clause).

61. 141 S. Ct. 1761, 1783 (2021).

62. See *id.* at 1784 (emphasizing the President's "vital" at-will removal power).

These cases build on the unitarian turn that began ten years earlier, when the Supreme Court held that the for-cause removal provisions of the Public Company Accounting Oversight Board were an excessive limitation on the President's removal power.⁶³ And President Biden's Office of Legal Counsel recently justified the President's decision to fire the independent Commissioner of the Social Security Administration on unitarist grounds, citing *Collins*, *Seila Law*, and the Vesting Clause as evidence that the President has authority to remove the Commissioner at will.⁶⁴

The logic that undergirds the unitary executive theory has implications beyond the President's removal power. In considering the constitutionality of administrative patent judges, the Court recently held that the Director of the Patent and Trademark Office (PTO) must have authority to review decisions issued by administrative patent judges (APJs). Chief Justice Roberts, again writing for the majority, explained that giving the PTO Director "discretion to review decisions rendered by APJs" was necessary to ensure that "the President remains responsible for the exercise of executive power."⁶⁵ Similarly, in the wake of a high-profile decision about the *appointment* of SEC administrative law judges (ALJs), the Office of the Solicitor General issued a memo interpreting the case to strengthen the President's *removal* power such that "the President" could possess "a constitutionally adequate degree of control over ALJs."⁶⁶

Here, too, the stakes are high. Congress gives agencies a degree of independence to protect them from political control. On many accounts, agency independence and expertise are thought to produce better decision-making.⁶⁷ And on any account, Congress's choice of removal protection expresses a policy judgment about the administration of the laws it creates. Congress protects agency heads from removal to ensure that agencies make decisions based on expertise, not the President's political agenda. That is why, in response to *Seila Law*, Justice Kagan wrote that the majority opinion

63. See *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 484 (2010) (holding that a two-level for-cause protection from removal violates the Vesting and Take Care Clauses).

64. See *Constitutionality of the Comm'r of Soc. Sec.'s Tenure Prot.*, 45 Op. O.L.C., slip op. at 1, 5 (July 8, 2021), <https://www.justice.gov/olc/file/1410736/download> [<https://perma.cc/49QU-DBVM>] (using these authorities to argue that the for-cause removal protection for the Commissioner is unconstitutional).

65. *United States v. Arthrex, Inc.*, 141 S. Ct 1970, 1988 (2021).

66. Memorandum from the Solic. Gen., U.S. Dep't of Just., to Agency Gen. Counsels, on Guidance on Administrative Law Judges After *Lucia v. SEC* (S. Ct.) 9 (July 2018).

67. See, e.g., Gillian E. Metzger, Foreword, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 71–72 (2017) ("The administrative state—with its bureaucracy, expert and professional personnel, and internal institutional complexity—performs critical constitutional functions and is the key to an accountable, constrained, and effective executive branch.").

“commits the Nation to a static version of governance, incapable of responding to new conditions and challenges.”⁶⁸

II. Responses to Administrative Skeptics

Academics who have rejected the nondelegation doctrine and the unitary executive theory generally make arguments based on doctrine, history, or exigency. These responses, though powerful, do not directly rebut the charge that the administrative state sits outside of the three departments enumerated in the first three articles of the U.S. Constitution.

A. *Doctrine*

According to many defenders of the administrative state, the Constitution’s Necessary and Proper Clause provides the doctrinal foundation for a robust federal bureaucracy within the broader constraints of the tripartite separation of powers. This clause gives Congress the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”⁶⁹

Many academics have read the Necessary and Proper Clause broadly to empower Congress to pass any laws that support the exercise of its substantive powers. Cass Sunstein and Lawrence Lessig, for example, have argued that it is “the power to define the means to carry into effect any power of the federal government.”⁷⁰ John Manning has taken a similar position, observing that “[t]he text of the Necessary and Proper Clause cuts decisively in favor of one of these conflicting visions. The clause delegates to Congress broad and explicit (though not limitless) discretion to compose the government and prescribe the means of constitutional power.”⁷¹ Blake Emerson has suggested that the term “Department,” which “appears in the Opinion Clause and Appointments Clause of Article II as well as in the Necessary and Proper Clause of Article I,” provides textual support for the administrative state.⁷²

68. *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2226 (2020) (Kagan, J., concurring in the judgment and dissenting in part).

69. U.S. CONST. art. I, § 8, cl. 18.

70. Lessig & Sunstein, *supra* note 2, at 68.

71. John F. Manning, Foreword, *The Means of Constitutional Power*, 128 HARV. L. REV. 1, 6 (2014).

72. Emerson, *supra* note 2, at 93–94. Our theory is complementary to Emerson’s. Whereas Emerson identifies reasons to think Congress possesses authority to structure executive departments, we explain why those departments can exercise rulemaking authority and enjoy removal protections.

Members of the Court, too, have invoked the Necessary and Proper Clause to defend modern administration. Such views are often traced to *McCulloch v. Maryland*,⁷³ where Chief Justice Marshall wrote, “[l]et the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”⁷⁴ The Necessary and Proper Clause is thought, therefore, to reflect the “vision” that “the separation of powers is, by design, neither rigid nor complete.”⁷⁵ On this view, the sweeping clause puts many questions of agency design and supervision “in the legislature’s hands.”⁷⁶

Once one accepts this position, then both the nondelegation doctrine and the unitary theory of executive power lose their force. When Congress creates independent agencies and gives them substantial policy-making discretion, it is simply establishing a mechanism for carrying out federal law. But this category of argument assumes that textual enumeration of three separate branches lacks constitutional significance, or that Congress can, through legislation, reconstitute the constitutional allocation of executive, legislative, and judicial powers. At least five sitting members of the Supreme Court have signaled that they are likely to be unpersuaded by such justifications. They have responded that the “foundational doctrines are instead evident from the Constitution’s vesting of certain powers in certain bodies.”⁷⁷

The Necessary and Proper Clause is not the only argument scholars have marshaled to defend federal agencies. Others have found textual support for legislative delegations and limitations on the President’s removal power. In the unitary executive debates, for example, commentators have pointed out that, while Article II vests the executive power in the President, it does not—in contrast to Article I’s vesting of the legislative power—vest “all” of the executive power in the Executive Branch because it requires the Executive to share. On this basis, they have questioned whether the unitary theory of executive power gives the President plenary power over administrative officers.⁷⁸

Similarly, scholars have collected clauses of the Constitution that would appear anomalous if the Constitution is read to deny Congress the power to

73. 17 U.S. (4 Wheat.) 316 (1819).

74. *Id.* at 421.

75. *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2226–27 (2020) (Kagan, J., concurring in the judgment and dissenting in part).

76. *Id.* at 2227.

77. *Id.* at 2205 (majority opinion).

78. See Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1791 (1996) (identifying a lack of evidence that “anyone” in the ratification debates understood the differences between “the three Vesting Clauses” to suggest a grant of specific executive powers).

create independent federal agencies. Article II empowers the President, for example, to “require the Opinion, in writing, of the principal Officer in each of the executive Departments.”⁷⁹ Unless the clause is a mere “redundancy,” Professors Lessig and Sunstein have argued, the most likely interpretation is that the Constitution conferred no inherent executive power to the President to demand opinions until it was given in terms.⁸⁰ The inclusion of the Opinion Clause, they contend, disproves the unitarian idea that the Vesting Clause gave all such executive powers to the President while denying all such powers to the other branches.⁸¹ For Lessig and Sunstein, the inclusion of the Opinion Clause allows Presidents to demand information from independent agencies that Congress might create within their branch.⁸² And finally, they note that the word *executive* modifies the word *departments* in the Clause, which they argue suggests that the Constitution contemplates that Congress might create “*nonexecutive departments*.”⁸³ Justice Kagan recently adopted Professors Lessig and Sunstein’s argument, arguing that the Opinion Clause “becomes at least redundant—though really, inexplicable—under” a strong unitary view that the Vesting Clause entails an executive removal power.⁸⁴

B. History

Much recent administrative law scholarship argues that the Founding generation was comfortable with expansive delegations and with congressionally imposed limits on presidential removal. Perhaps because of the Supreme Court’s originalist turn, these arguments generally seek to determine whether modern understandings of the nondelegation doctrine and the unitary executive theory accord with the Founding generation’s conception of legislative and executive authority. Much recent scholarship argues that they do not.

For example, two influential articles have extensively surveyed Founding Era delegations. One, authored by Julian Davis Mortenson and Nicholas Bagley, claims that “the Constitution at the Founding contained no discernable, legalized prohibition on delegations of legislative power, at least so long as the exercise of that power remained subject to congressional

79. U.S. CONST. art. II, § 2, cl. 1.

80. Lessig & Sunstein, *supra* note 2, at 33–34.

81. *See id.* at 38 (arguing that the Opinion Clause makes clear the “oddity” in the idea that the Vesting Clause alone grants the Executive authority to “direct executive officers”).

82. *See id.* at 34 (“[W]ithout this clause, [presidents] would not necessarily have had the power to direct the departments to report to [them].”).

83. *Id.* at 36 (emphasis added).

84. *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2227 n.3 (2020) (Kagan, J., concurring in the judgment and dissenting in part).

oversight and control.”⁸⁵ Another, by Nicholas Parrillo, describes eighteenth- and nineteenth-century federal tax boards and argues that the rulemaking authority they wielded provides “important evidence that the American political nation in the Founding era viewed administrative rulemaking as constitutional, even in the realm of domestic private rights.”⁸⁶ Both these views regard Founding Era practices as evidence that the Constitution can accommodate delegations of legislative power. Jerry Mashaw’s account of the growth of a “pragmatic” administrative state in the early republic proves the same.⁸⁷

Recent scholarship defending the removal power also points to historical evidence that the Founders accepted congressionally imposed limitations on presidential removal. Jed Shugerman, for example, claims that at the time of the Founding the word “vest” did not refer to complete and indefeasible or irrevocable powers and argues that “modern assumptions about ‘vesting’ as indefeasible are likely semantic drift and ahistoric projections.”⁸⁸ Daniel Birk shows that officers of the Crown were not subject to at-will removal. He argues that “the unitarians’ claims about the original meaning of the executive power are largely unfounded.”⁸⁹

C. *Exigency*

Finally, throughout American history, the administrative state has been defended on prudential grounds. On this view, the complexities of modern life required that expert technocrats make policy decisions about how to run the federal bureaucracy. Justice Kagan accepted the practical necessity of agency delegations in her *Gundy* plurality decision. She wrote that Congress is “dependent” on the “need to give discretion” to administrative officials, and that the Court’s reluctance to question the “necessities of government”

85. Mortenson & Bagley, *supra* note 7, at 280.

86. Parrillo, *supra* note 7, at 1313.

87. JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION* 12–13 (2012). *See also* NICHOLAS R. PARRILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940* 360 (2013) (citing federal programs and agencies as examples of how American government “departs from centralization”); THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* 44–46 (1992) (discussing the growth of administrative agencies in America in the late-nineteenth and early-twentieth centuries); STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920* 285 (1982) (“Modern American state building successfully negotiated a break with an outmoded organization of state power.”); Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 *YALE L.J.* 1538, 1549 (2018) (“[H]istory reveals an administrative state that was established, at least in part, to protect individual rights and to maintain equal liberty . . .”).

88. Shugerman, *supra* note 7 (manuscript at 5).

89. Birk, *supra* note 7, at 175; *see also* Shane, *supra* note 7, at 325 (identifying that “early administrative practice was often at odds” with the unitary executive theory).

reflects both “wisdom” and “humility.”⁹⁰ She has attributed this flexibility to the Framers’ design, since they would have known that “new times would often require new measures, and exigencies often demand innovation.”⁹¹ To underscore the stakes, she explained that the Court’s new tack would mean that “most of Government is unconstitutional.”⁹²

The view that structural separation-of-powers law must adapt to the administrative state has a long history. In 1938, just two years after the Supreme Court’s nondelegation decisions, James Landis defended the administrative state not by arguing that it fit comfortably within a single branch of government but rather by asserting that powerful agencies were needed to meet the policy challenges of his era.⁹³ And today, defenders of the administrative state who take this position have acknowledged that its creation amounts to a “radical toppling of the Framers’ tripartite system” and is “nothing short of constitutional apostasy.”⁹⁴

Prudential defenses of the modern bureaucracy appear to ignore the structural concerns that motivate the skeptics’ formal objection to the source of administrative power. “The Constitution,” these skeptics remind us, “does not vest the Federal Government with an undifferentiated ‘governmental power,’” but instead “sets out three branches and vests a different form of power in each—legislative, executive, and judicial.”⁹⁵

Similarly, the legislative work of early Congresses and administrations offers convincing evidence of Founding Era practices but does not conclusively establish that such delegations are compatible with the formalists’ tripartite system of government. Critics of the administrative state could respond that these Founding Era practices were unconstitutional, or they could question the significance of the evidence. That is why Ilan Wurman argues that the Founding Era delegations analyzed by Mortenson, Bagley, and Parrillo do not rebut the nondelegation doctrine, but rather show that Congress could delegate authority to “fill up the details” so long as it

90. *Gundy v. United States*, 139 S. Ct. 2116, 2130 (2019) (plurality opinion) (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)).

91. *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2241 (2020) (Kagan, J., concurring in the judgment and dissenting in part).

92. *Gundy*, 139 S. Ct. at 2130.

93. See LANDIS, *supra* note 6, at 46 (“The administrative process is . . . our generation’s answer to the inadequacy of the judicial and the legislative processes.”).

94. Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 570 (2015).

95. *Seila Law*, 140 S. Ct. at 2212 (Thomas, J., dissenting) (quoting *Dep’t of Transp. v. Ass’n. of Am. R.Rs.*, 575 U.S. 43, 67 (2015) (Thomas, J., concurring in the judgment)).

spoke with sufficient specificity.⁹⁶ Justice Kagan and Justice Gorsuch rehashed this debate in *Gundy*. There, Justice Gorsuch interpreted a nineteenth-century case about legislative delegations to the Judiciary to support his view that Congress can permit other departments to fill in the gaps of statutes,⁹⁷ while Justice Kagan understood the same case to bolster her view that Congress can delegate substantial rulemaking authority to agencies.⁹⁸

Confirmation bias plagues efforts to locate evidence of political theory in past practices. By proceeding inductively, and taking samples at various points, it is possible to turn up evidence of the *effects* of one's chosen political theory. Other samplers of the historical record, armed with a different theory or a different assessment of the magnitude or effects of a given theory, can reject your evidence out of hand. Unless one's opponent's evidence is erroneous or misleading, the inductive approach does not give us a way to choose among these warring interpretations of common facts.

Finally, arguments based on the Necessary and Proper Clause, or other pieces of constitutional text, prove too much for those who believe that “[w]hen the Government is called upon to perform a function that requires an exercise of legislative, executive, or judicial power, only the vested recipient of that power can perform it.”⁹⁹ Even if the Necessary and Proper Clause is an expansive grant of congressional authority, it cannot render the rest of the Constitution's forms meaningless. If the Constitution creates only three branches of government, then the Necessary and Proper Clause cannot sweep away those limitations.

Many defenders of the administrative state thus accept that administrative agencies fit uneasily within the Constitution's tripartite system of government, and they respond that this uneasy relationship with the three departments listed in the Constitution is acceptable—whether for doctrinal, historical, or practical reasons. Peter Strauss, for example, has contended that the “theory of separation-of-powers breaks down when attempting to locate administrative and regulatory agencies within one of the three branches” and argued that most formalist reasoning about the separation of powers applies only at the “apex” of the Constitution's

96. See Wurman, *supra* note 11, at 1502 (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825)) (arguing that the historical evidence suggests a limited category of permissible congressional delegations).

97. See *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting) (citing *Wayman*, 23 U.S. (10 Wheat.) at 31, 43) (discussing Congress's permissible delegation of a gap-filling authority).

98. See *id.* at 2123 (plurality opinion) (citing *Wayman*, 23 U.S. (10 Wheat.) at 42–43) (beginning a defense of congressional delegations with a citation to *Wayman*).

99. *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 68 (2015) (Thomas, J., concurring).

structure.¹⁰⁰ For the rest of government, “the rigid separation-of-powers compartmentalization of governmental functions should be abandoned in favor of analysis in terms of separation of functions and checks and balances.”¹⁰¹ For Strauss, it would be preferable to “accept the idea of potent actors in government joining judicial, legislative and executive functions.”¹⁰²

Even scholars who accept a theory of the separation of powers more akin to the one we develop in the next Part often concede that administrative agencies exercise functions that are ordinarily assigned to another of the three branches. For example, Bagley and Mortenson recognize that executive power is generally constituted by legislative acts but contend that the Founders would have understood agencies to exercise both legislative and executive functions:

The Founders would have said that agencies absolutely wield legislative power to the extent they declare binding rules that Congress could have enacted as legislation. At the same time, the Founders would have said—indeed, they did say—that such rulemaking also constitutes an exercise of the executive power to the extent it is authorized by statute. It isn’t one or the other; it’s both.¹⁰³

Similarly, while Thomas Merrill has argued that “there are only three branches of government, and . . . an attempt by Congress to create a ‘Fourth Branch’ of the federal government would be unconstitutional,”¹⁰⁴ he has also claimed that agencies that exercise rulemaking authority are engaged in the legitimate exercise of “legislative power.”¹⁰⁵ Legislative power, on this view, is “the power to adopt any measure having the force and effect of a statute.”¹⁰⁶

Defenders of the administrative state thus often accept that the legislative power can be defined as something more than the constitutionally determined procedure of making bills into law. Like administrative skeptics, defenders of the federal bureaucracy often assume that a substantive definition of legislative power can be found in the Constitution and that the Constitution assigns that power to only one of the three branches. For both sides then, legislative power refers to something like “the power to make ‘law’ in the . . . sense of generally applicable rules of private conduct.”¹⁰⁷ The

100. Strauss, *supra* note 6, at 578–79.

101. *Id.* at 578.

102. *Id.*

103. Mortenson & Bagley, *supra* note 7, at 331–32.

104. Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 228 (1991).

105. See Merrill, *supra* note 32, at 2101 (arguing that “Congress has the power to vest executive and judicial officers with authority . . . to promulgate legislative regulations”).

106. *Id.*

107. *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 76 (2015) (Thomas, J., concurring).

two sides thus differ on whether the “functions” they have assigned to each branch may be shared without violating a common idea of the separation of powers. But once one accepts that the legislative power should be defined with an *ex ante* view of what kinds of legislative acts are permissible (whether broad or narrow), then an executive agency whose rules mimic that standard will breach the tripartite system of government. The battle then resolves into the question of whether governmental “functions” are separable from “powers,” and whether the former category should escape the Court’s scrutiny.¹⁰⁸ Proponents of the administrative state are thus in the unenviable position of arguing how much apostasy the Constitution should tolerate before Justices that seek restoration of an original public meaning.

III. A Checks-Based Theory of the Separation of Powers

To fit the administrative state within a formal conception of the separation of powers, it is necessary to locate agencies within a single branch of the federal government. This Part offers a theory of the separation of powers that does so. The problem with the nondelegation doctrine and the unitary theory of executive power is not simply that contrary practices occurred at the Founding, or that the Constitution’s text contains clauses that appear to contemplate administrative agencies, or that the complexities of modern government require a robust administrative state. The problem with these theories is that they are based on an elaborate and contestable exegesis of the terms *executive* and *legislative* that turns out to be, at best, historically and textually contestable. At worst, these theories obscure the contested reality of pitched battles over the separation of powers at the Founding. Indeed, as political scientists Nicole Mellow and Jeffrey Tulis have argued, they may have lost sight of which theory of the separation of powers was victorious.¹⁰⁹

A brief methodological note: This Part offers a textual and historical critique of the theory of separation of powers that underlies modern attacks on the administrative state, and it also develops a theory of separation of powers that is consistent with the Constitution’s original public meaning. But that is not to say that ours was the only, or even the dominant, theory of separation of powers at the Founding or at a given moment in American constitutional history. As we show, attributing a single theory to the Framers

108. See Strauss, *supra* note 6, at 577 (distinguishing between “separation of powers” and “[s]eparation of functions”).

109. See TULIS & MELLOW, *supra* note 14, at 61 (“Progressives often express an Anti-Federal posture on separation of powers, especially when the presidency is held by an opposing party. Conservatives are split on this point with some . . . embracing a Hamiltonian understanding of executive power and others . . . expressing the Anti-Federal perspective.”).

is a gross oversimplification of the heterogenous and at times inconsistent theories they developed.

We do, however, argue that a theory of separation of powers based on anti-domination is consistent with the views the Framers espoused and that it offers a more plausible interpretation of the Constitution's system of distributing powers than the alternatives scholars and jurists have proposed. Thus, while our critique of the nondelegation doctrine and the unitary executive theory has a strong historicist flavor, our own theory is informed by text, structure, post-ratification practice, and the conviction that it is not the only plausible theory of separated powers.

A. *A Theory of Checks, Not Balances*

Modern constitutional scholars often describe the Madisonian maxim of “[a]mbition . . . counteract[ing] ambition” as a naïve, empirical prediction:¹¹⁰ Madison was stating, as a matter of political science, that the branches would restrain each other out of a sense of mutual rivalry.¹¹¹ We disagree. In our view, each branch's *capacity* to check the others is the primary theoretical basis for the Constitution's separation of powers. With narrow exceptions in which the Constitution expressly defines a duty and assigns that duty to a single branch—think Congress's power of the purse¹¹² or the Executive's powers as commander in chief¹¹³—the Constitution's separation of powers is preserved so long as each branch respects the *process* by which it is supposed to act. To borrow from one of Madison's defenses of the Constitution, its “best lesson” is that “security against power lies in the division of it into parts mutually controuling each other.”¹¹⁴ The practicable way of accomplishing this lies solely in providing “defensive armour for each.”¹¹⁵

The text of the Constitution says much more about the process for enacting laws than it says about the substantive definition of legislation.¹¹⁶

110. See Levinson & Pildes, *supra* note 18, at 2313 (quoting THE FEDERALIST NO. 51 (James Madison), *supra* note 17, at 322) (explaining that competition between political parties quickly overwhelmed the Madisonian conception of competition between branches).

111. See THE FEDERALIST NO. 51 (James Madison), *supra* note 17, at 321–22 (advocating for providing each branch with “the necessary constitutional means and personal motives to resist encroachments of the others”).

112. See U.S. CONST. art. I, § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . .”).

113. See *id.* art. II, § 2, cl. 1 (“The President shall be Commander in Chief . . .”).

114. James Madison, *Government of the United States*, NAT'L GAZETTE (Phila.), Feb. 6, 1792, reprinted in 14 THE PAPERS OF JAMES MADISON 217, 218 (Robert A. Rutland, Thomas A. Mason, Robert J. Brugger, Jeanne K. Sisson & Fredrika J. Teute eds., 1983).

115. *Id.*

116. We largely omit the judicial power here because the Constitution is more precise in its description of the judicial power. See *infra* subpart IV(C).

To enact a bill into law, it must be voted on in both the House of Representatives and the Senate, and presented to the President.¹¹⁷ If the President does not sign the bill into law, then Congress can override the presidential veto if two-thirds of the members of each house vote in support of the bill.¹¹⁸ This is the Constitution's bicameralism and presentment requirement. In our view, it also enacts the only justiciable separation-of-powers limit on Congress's power to pass legislation.

When a law is duly made, the President is bound to take care that it be faithfully executed. The dispositive question, at this next stage of the separation-of-powers inquiry, is the question of authorization. Was the Executive's command authorized by the terms of Congress's legislation? From the separation-of-powers perspective, the Executive impermissibly exercises legislative power when it seeks to enforce, *ultra vires*, a putative law that has not undergone bicameralism and presentment.¹¹⁹

While the Constitution speaks clearly about the mechanism through which Congress can pass laws, it does not explain how the lawmaking power differs from the law-execution power.¹²⁰ Nowhere does the Constitution say that the legislative power is the power to adopt prospective rules of general applicability. Nor does it prohibit the Executive from issuing such rules. In fact, the Constitution does not seem to define the legislative power at all.

This omission is significant. As discussed in the next subpart,¹²¹ it was the *opponents* of the federal Constitution who advocated for a separation of powers based on a simple and exclusive recitation of each branch's substantive responsibilities. They argued that the Constitution should be rejected because it failed to elaborate simple definitions that keep each power

117. U.S. CONST. art. I, § 7, cl. 2.

118. *Id.*; see also Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253, 1256 (1988) (describing "procedural" rules for all three branches, and noting bicameralism and presentment rules apply to Congress's actions); Merrill, *supra* note 104, at 228, 237–39 (proposing a "minimal" theory of the separation of powers that places procedural limitations at its core and proposing a series of "attribution" rules to ensure that every governmental action can be attributed to one branch).

119. Cf. Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2186–87 (2019) (arguing that the Constitution's "faithful execution command" limits Presidents' ability to refuse to enforce duly enacted federal law).

120. It does contain limitations on congressional authority. For example, the Constitution limits the federal government's powers in many other ways—like the other familiar structural and rights-based constraints that serve as other guardrails—but these other constraints do not sound in the Constitution's theory of separated powers. Bills that have "become law," may nonetheless be unconstitutional because, for example, they offend federalism principles or the Constitution's rights provisions. Legislation may be unconstitutional for separation-of-powers reasons because it interferes with those provisions of the Constitution that establish each branch's independence, such as tenure or compensation. See, e.g., U.S. CONST. art. II, § 1, cls. 1, 7 (providing that the President shall have a four-year term and shall receive compensation not to be diminished during that term).

121. See *infra* subpart III(B).

separate from the others and thus betrayed the true meaning of Enlightenment separation-of-powers theory.¹²² But even without that history, it is worth noting that the nondelegation doctrine and the unitary theory of executive power assume that the terms *legislative* and *executive* convey exclusive meanings beyond the powers enumerated in the Constitution's text.¹²³

The assumption that certain powers are both exclusive and defined by implication is at odds with the Constitution's text, which defines many congressional powers and specifies that a subset of those powers are exclusive. For example, Article I, Section 2 gives the House of Representatives "the sole Power of Impeachment,"¹²⁴ and Article I, Section 3 gives the Senate "the sole Power to try all Impeachments."¹²⁵ Article II goes on to specify the criminal offenses that provide the basis for removal ("Treason, Bribery, or other high Crimes and Misdemeanors"¹²⁶), and Article I provides the penalty that applies to officials who have been impeached ("Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States"¹²⁷).

Article I's Appropriations Clause, too, stipulates that "[n]o money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."¹²⁸ Unlike the Constitution's general grant of a lawmaking power to Congress, the Appropriations Clause grants a particular government function to Congress exclusively: disbursements from the Treasury must go through bicameralism and presentment.¹²⁹ In order to make the assignment of the appropriation function to Congress both clear and exclusive, the Appropriations Clause constrains *any* governmental actor that intends to draw money from the Treasury. The Clause then provides that no matter the governmental actor, the appropriation must be "made by Law"—that is, each

122. See A COLUMBIAN PATRIOT, OBSERVATIONS ON THE NEW CONSTITUTION, AND ON THE FEDERAL AND STATE CONVENTIONS (1788), reprinted in 4 THE COMPLETE ANTI-FEDERALIST 270, 276 (Herbert J. Storing ed., 1981) ("The Executive and the Legislative are so dangerously blended as to give just cause of alarm, and every thing relative thereto, is couched in such ambiguous terms—in such vague and indefinite expression, as is a sufficient ground . . . for the reprobation of a system . . .").

123. See Alexander & Prakash, *supra* note 1, at 1297–99 (arguing for a nondelegation doctrine primarily on the basis of Locke's political theory).

124. U.S. CONST. art. I, § 2, cl. 5.

125. *Id.* § 3, cl. 6.

126. *Id.* § 4.

127. *Id.* § 3, cl. 7.

128. *Id.* § 9, cl. 7.

129. Similarly, the Constitution says that Congress shall "exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may . . . become the Seat of the Government of the United States." *Id.* § 8, cl. 17.

authorization must be made by Congress.¹³⁰ The implication is that other government actors, either federal or state, can exercise some federal powers in the absence of a congressional act. Congressional authorization is not necessary, for example, for states to regulate intellectual property,¹³¹ suggesting that Congress's power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"¹³² is not an exclusive one. But Congress's control over appropriations is exclusive; the Constitution requires congressional authorization in the form of law.

Similarly, the clause that immediately succeeds the Appropriations Clause, which prohibits titles of nobility, addresses itself to *every* branch of government ("No Title of Nobility shall be granted by the United States"), but then grants Congress an exclusive capacity to authorize governmental agents to receive such titles from abroad ("no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State").¹³³ When Article I enumerates many of Congress's other substantive powers, by contrast, it does not stipulate that the functions or regulatory domains are exclusive.¹³⁴ Article III also specifies that "The judicial Power shall extend to *all* Cases . . . arising under this Constitution."¹³⁵

The point is that when the Constitution makes a grant of substantive regulatory authority exclusive and unshareable, it says so.¹³⁶ We should therefore expect constraints on Congress's powers to delegate or insulate agency heads to appear in the text. They do not.

This is especially notable because Congress's lawmaking authority is highly prescriptive about the mechanism by which bills become law:

130. *See* Hart v. United States, 118 U.S. 62, 67 (1886) (holding that a pardon could not restore a person's claim for payment from the government because "[i]t was entirely within the competency of Congress to declare that the claims mentioned in the joint resolution should not be paid till the further order of Congress").

131. *See, e.g.*, OHIO REV. CODE ANN. § 1329.54 (West 2022) (providing definitions for state regulation of trademarks and service marks).

132. U.S. CONST. art. I, § 8, cl. 8.

133. *Id.* § 9, cl. 8.

134. *See, e.g., id.* § 8, cl. 1 ("Congress shall have Power To lay and collect Taxes . . .").

135. *Id.* art. III, § 1, cl. 1 (emphasis added).

136. Scholars have made a similar point about the fact that Article III says the word *all* before *cases* but not *controversies*. The idea is that Article III judges must hear *all* cases of a certain sort, but that controversies involving citizens in multiple states can be heard in state court. *See, e.g.*, Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 240 (1985) (differentiating between disputes over which federal jurisdiction is mandatory versus permissible on the basis of Article III's use of the word *all*).

“[e]very” bill must be presented to the President.¹³⁷ Yet nowhere does the Constitution contain an explicit separation-of-powers limitation on the scope, content, or type of law Congress can pass. Indeed, in conferring regulatory authority over the District of Columbia, Article I, Section 8 empowers Congress “[t]o exercise exclusive Legislation in all Cases whatsoever, over such District.”¹³⁸ But apart from expressly noting this power’s exclusivity, the text says nothing more about the requisite level of specificity that such legislation must include. Indeed, the District today operates a measure of self-government pursuant to Congress’s choice to “grant[]” and “vest[]” its council with a number of sweeping “legislative powers.”¹³⁹ So the question becomes whether it is appropriate to graft onto the process of enacting bills into law a substantive definition of legislative power (or, for that matter, the executive power) and assume that the implied grant of authority is exclusive.

As we explain in the next subpart, many Founding Era state constitutions did contain separation-of-powers-based limitations on legislative and executive powers. As we also explain, a number of contemporaneous opponents of the Constitution demanded such a distributing clause based on a particular reading of Enlightenment political theory that required, in their view, a principle of simple accountability in the distribution of governmental functions. The fact that the Constitution did not adopt this approach implies that the Constitution did not assign Congress exclusive authority to pass prospective rules of general application. A simpler interpretation is that limitations on legislative authority are contained primarily in the explicit constraints enumerated in Article I and the Bill of Rights, and that the separation-of-powers limitation on legislative authority is exclusively enacted by the shared distribution of lawmaking power in the Presentment Clause.

Moreover, the Constitution routinely authorizes members from multiple branches to participate in important functions. Congress may be a (or the) legislative branch, but it adopts the judicial prerogative when it hears cases of impeachment and removal.¹⁴⁰ Presidents may sit at the head of the Executive Branch, but they participate in the legislative process when they veto bills.¹⁴¹ In these situations, the Constitution is highly prescriptive about who should wield certain powers.

So what political theory underlies a Constitution that comingles power between separate branches while stipulating that the agents that inhabit those

137. U.S. CONST. art. I, § 7, cl. 2.

138. *Id.* § 8, cl. 17.

139. *See* District of Columbia Home Rule Act, Pub. L. No. 93-198, § 404(a), 87 Stat. 774 (1973). We are grateful to Peter Strauss for this point.

140. *See* U.S. CONST. art. I, § 3, cls. 7–8 (providing for impeachment in the Senate).

141. *See id.*, § 7, cl. 2 (providing the President’s power to veto bills).

branches follow highly prescriptive procedures for exercising their authority? Can it be called a theory of “separated” powers at all? The rest of this Article offers an alternative theory in which the Constitution’s separation of powers is based solely on the goal of preventing any one branch from destroying the decision-making capacity of the other branches. As we show, this theory is more consistent with the Federalist vision of the Constitution that appeared during eighteenth-century ratification debates.

B. Separation of Powers in the Early Republic

The previous subpart showed that there are reasons to doubt that the Constitution includes a precise definition of the words *executive* and *legislative* that conveys exclusive powers to those branches. The remainder of this Part analyzes Founding Era separation-of-powers debates to argue that the Founding generation made a deliberate choice *not* to enumerate a clear separation of powers based on a taxonomical account of each branch’s substantive responsibilities. Our view is based on a public debate that occurred during the ratification period about whether the Constitution should stipulate that the boundaries between each power are sacrosanct. The drafters overcame a strident critique that the Constitution would blend powers. To Anti-Federalists, this blending was a vice because it undermined government accountability. To the drafters, however, inter-branch checks that “blended” powers were necessary to prevent legislative and executive overreach.

One way to understand how the Constitution resolves this issue is to observe the warring Federalist and Anti-Federalist receptions of the same maxim: that is, Montesquieu’s aphorism that “[w]hen the legislative and executive powers are united in the same person or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.”¹⁴² As it does in today’s Supreme Court,¹⁴³ the maxim then inspired radically different views of the purpose and function of separating powers in a mixed government.

Before the Constitution was ratified, Anti-Federalists engaged in a concerted campaign to reject the Constitution precisely because it failed to define and separate the content of each department’s powers. To them, the reliance on each branch’s self-interest to constrain the others was insufficient

142. BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 151–52 (Thomas Nugent trans., Hafner Press 1949) (1748).

143. *See Decker v. Nw. Env’t Def. Ctr.*, 568 U.S. 597, 619 (2013) (Scalia, J., concurring in part and dissenting in part) (“[A] fundamental principle of separation of powers [is] that the power to write a law and the power to interpret it cannot rest in the same hands.”); *Buckley v. Valeo*, 424 U.S. 1, 120 (1976) (per curiam) (“[T]he intent of the Framers [was] that the powers of the three great branches of the National Government be largely separate from one another.”).

without a concrete definition of each branch's powers. This point is understood by intellectual historians but does not appear to have been the focus of administrative law scholarship.¹⁴⁴ For example, as Bernard Manin has explained, "[t]he Anti-Federalists unremittingly advocated precision and certainty in constitutional matters. They complained over and over again that the constitution was 'incomprehensible and indefinite', 'vague and inexplicit.'"¹⁴⁵ These Anti-Federalists advocated a system with no overlap among the three branches' functions. They referred to this goal as the ideal of "simple" government.¹⁴⁶

Anti-Federalists had substantial source material from which to develop their critique of the Constitution's separation of powers. In addition to referencing prominent political theorists such as Locke, Montesquieu, and Blackstone—the same sources that proponents of the nondelegation doctrine rely on today¹⁴⁷—they pointed to state constitutions as a model for their preferred approach. Anti-Federalists who thought Montesquieu's separation-of-powers maxim required "separate jurisdiction[s]"¹⁴⁸ looked to the state constitutions as a model—second only to the "holy scriptures"¹⁴⁹—because they embodied the idea that "[t]he executive shall never exercise the legislative and judicial powers."¹⁵⁰ For example, many praised the Massachusetts Constitution, which provided that "the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them."¹⁵¹ The federal Constitution should be rejected, Anti-Federalists argued, because "[t]he LEGISLATIVE and EXECUTIVE are not

144. See, e.g., Manin, *supra* note 14, at 42 (explaining that the Anti-Federalists viewed the "provisions which granted more than one function to one department" as "a source of ambiguity, confusion and potential conflict"); TULIS & MELLOW, *supra* note 14, at 31–32 (describing the separation of powers as a major "area of contention" between the Federalists and the Anti-Federalists during the ratification debates).

145. Manin, *supra* note 14, at 41.

146. *Id.* at 32.

147. See, e.g., SCHOENBROD, *supra* note 41, at 155–56 (citing John Locke's injunction against delegation of the legislative power and contending that "[d]ebate at the Constitutional Convention proceeded on the premise that Congress could not delegate its legislative powers to the executive").

148. William Penn, *To the Citizens of the United States*, INDEP. GAZETTEER (Phila.), Jan. 3, 1788, reprinted in 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 122, at 171, 173.

149. William Penn, *To the Citizens of the United States*, INDEP. GAZETTEER (Phila.), Jan. 2, 1788, reprinted in 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 122, at 168, 170.

150. Penn, *supra* note 148.

151. MASS. CONST. pt. 1, art. XXX.

kept separate as every one of the American [state] constitutions declares they ought to be; but they are mixed in a manner entirely novel and unknown.”¹⁵²

Their principal concern was that the Constitution’s system of checks was incompatible with Montesquieu’s maxim because it commingled functions between departments. For example, the presentment requirement struck some Anti-Federalists as “a political error of the greatest magnitude” precisely because it blended powers.¹⁵³ To them, Montesquieu’s principle of “DIVISION OF POWER” required that “the different jurisdictions are inviolably kept distinct and separate.”¹⁵⁴ On this antifederal reading of Montesquieu,¹⁵⁵ constitutions must respect the “natural division of the powers of government” so that the “legislative and executive branches . . . should never be suffered to have the least share of each other’s jurisdiction.”¹⁵⁶ If two branches are given any “share of each others authority,” then “they will in fact be one body; their interest as well as their powers will be the same, and they will combine together against the people.”¹⁵⁷ Accordingly, the veto violated Montesquieu’s great maxim because it allowed the Executive “*any kind* of control over the proceedings of the legislature.”¹⁵⁸ As Bernard Manin has explained, the Anti-Federalists’ commitment to an exclusive theory of separated powers was so profound that it led them to, at once, oppose the President’s veto and the Senate’s role in appointments, while also embracing bicameralism within the legislative branch. The former power-sharing arrangements impermissibly commingle powers between the branches, but the latter does not: despite the cost to “simplicity,”¹⁵⁹ Anti-Federalists had no objection to sharing legislative power between two houses, because each house shared only one type of power; their objection instead concerned blending legislative functions with those that are executive or judicial.¹⁶⁰

To such critics, a troubling feature of the Constitution’s blending of powers was that, in failing to define each branch’s powers precisely and exclusively, the Constitution prevented the sovereign people from holding

152. William Findlay, To the Citizens of Philadelphia ¶ 11 (Nov. 1787), <https://www.loc.gov/resource/rbpe.1470030c/?st=text> [<https://perma.cc/87FV-W4EJ>].

153. Penn, *supra* note 148.

154. *Id.* at 172.

155. We say antifederal reading because Montesquieu himself endorsed procedural checks to forestall “encroachments of the legislative body.” MONTESQUIEU, *supra* note 142, at 157.

156. Penn, *supra* note 148, at 172. *But see* Manin, *supra* note 14, at 38 (noting that some Anti-Federalists did not oppose the veto and counted it as a permissible exception from the general requirement that powers be kept separate).

157. Penn, *supra* note 148.

158. *Id.* (emphasis added).

159. *See infra* note 201.

160. Manin, *supra* note 14, at 40.

their agents to account. To use their vernacular, it allowed the government to evade “*responsibility*.”¹⁶¹ These Anti-Federalist critics urged a “complete separation of the great distinctions of power,”¹⁶² and insisted that the government be structured so that “whenever the people feel a grievance they cannot mistake the authors.”¹⁶³ Where the Constitution does not precisely define boundaries between each branch’s powers, they reasoned, the public would have difficulty discerning which branch of government had taken an action.¹⁶⁴ That, in turn, would obscure which of the public’s representatives should be voted out of office.

The Constitution’s most vocal Anti-Federalist opponents thus demanded a “simple” distribution of powers so that the government would be maximally “responsib[le]” to its constituents.¹⁶⁵ Otherwise,

If you complicate the plan by various orders, the people will be perplexed and divided in their sentiments about the source of abuses or misconduct, some will impute it to the senate, others to the house of representatives, and so on, that the interposition of the people may be rendered imperfect or perhaps wholly abortive.¹⁶⁶

In sum, opponents of the U.S. Constitution worried that, without a simple formalism to allocate powers cleanly among the branches, the Constitution would “bid defiance to all *responsibility*, (the only test of good government) as it can never be discovered where the fault lies.”¹⁶⁷ These arguments should sound familiar, since proponents of the nondelegation doctrine and the unitary theory of executive power make precisely these claims about attribution and accountability today.¹⁶⁸

161. *See id.* at 32 (emphasis added) (“The opponents of the constitution . . . regarded responsibility to the people as the cornerstone of republican government.”).

162. Centinel, *To the People of Pennsylvania*, FREEMAN’S J. (Phila.), Oct. 24, 1787, reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 122, at 143, 151.

163. Centinel, *To the Freemen of Pennsylvania*, INDEP. GAZETTEER (Phila.), Oct. 5, 1787, reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 122, at 136, 139.

164. *See id.* at 139 (arguing that, without a “simple” government structure, the people will be unable to tell whom to attribute a governmental action to).

165. *See id.* (“The highest responsibility is to be attained, in a simple structure of government . . .”).

166. *Id.*; *see also* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 122, at 209 n.29 (noting that “Anti-Federalists generally insisted on the necessity of a separation of powers” and collecting sources).

167. A [Maryland] Farmer, *Essays by A Farmer II*, MD. GAZETTE (Balt.), Feb. 29, 1788, reprinted in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 122, at 16, 23.

168. *See, e.g., Gundy v. United States*, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting) (arguing that the nondelegation doctrine is justified because “the Constitution sought to ensure that the lines of accountability would be clear: The sovereign people would know, without ambiguity, whom to hold accountable for the laws they would have to follow”).

Yet the Founding generation rejected the Anti-Federalists' arguments,¹⁶⁹ and they did so because they felt that the legislative power was incapable of precise definition. They also rejected the Anti-Federalists' claims because they worried that a precise taxonomy of each branch's powers would fail to prevent Congress or the President from acting despotically. The first issue was definitional. Many influential theorists disclaimed that a precise taxonomy of each branch's powers was even possible. James Madison, for example, explained that "no skill in the science of government has yet been able to discriminate and define . . . its three great provinces—the legislative, executive, and judiciary."¹⁷⁰ Madison said that Anti-Federalists who pushed for strict separation between executive and legislative powers supported an edifice of "parchment barriers"¹⁷¹ to keep each power at bay. These parchment barriers were "the security which appears to have been principally relied on by the compilers of most of the [state] constitutions. But experience assures us that the efficacy of the provision has been greatly overrated."¹⁷² Other influential drafters such as Thomas Jefferson agreed.¹⁷³

More importantly, the drafters who *did* think that executive and legislative powers were capable of precise definitions, or that certain powers were inherently executive or legislative in nature, recognized that the Constitution was charting a different course. To be sure, some Founding Era statements suggest that many of the Constitution's drafters believed that certain powers were thought to be inherently legislative, others inherently executive, and others inherently judicial. In fact, Madison, who, as we have just explained, at one point denied that it was possible to define precisely the legislative power,¹⁷⁴ said during the Constitutional Convention that "certain

169. TULIS & MELLOW, *supra* note 14, at 35; Paul Finkelman, *Turning Losers into Winners: What Can We Learn, If Anything, from the Antifederalists?*, 79 TEXAS L. REV. 849, 870 (2001) (reviewing SAUL CORNELL, *THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA* (1999)). Rehabilitation of Anti-Federalists as a source of constitutional meaning appears in some recent judicial scholarship. *See generally, e.g.*, Andrew S. Oldham, *The Anti-Federalists: Past as Prologue*, 12 N.Y.U. J.L. & LIBERTY 451 (2019) (arguing that Anti-Federalist perspectives are an important source of constitutional meaning).

170. THE FEDERALIST NO. 37 (James Madison), *supra* note 17, at 228; *see also* Manin, *supra* note 14, at 50–51 (expanding on Madison's "belief in the ultimate indeterminacy affecting the definition of public functions").

171. THE FEDERALIST NO. 48 (James Madison), *supra* note 17, at 308, 313.

172. *Id.* at 308–09.

173. *See id.* at 310 (drawing on Thomas Jefferson's writings on his experience as Governor of Virginia).

174. *See supra* note 170 and accompanying text.

powers were in their nature Executive, and must be given to that departmt.”¹⁷⁵ Wilson made the same point.¹⁷⁶

But statements such as these do not indicate that the Constitution conveys implied definitions of each branch’s powers, or that those powers are exclusive. Precisely the opposite. During the Constitutional Convention, the drafters discussed various government powers not as though some were inherently legislative or executive, but rather as though it was open to debate which branch (or branches) should exercise which powers and how they should do so. For example, when Madison and Wilson said that some powers were “strictly” executive,¹⁷⁷ they were assuming a definition of the executive power—the scope of which is uncertain—and urging other members of the convention to assign those powers to the Executive Branch. They were cautioning that other powers—even those that may seem to possess executive characteristics—should not be assigned to that branch.

The implication is that participants in the Constitutional Convention who thought that some powers were inherently executive and others inherently legislative did not assume that all executive powers would be assigned to the Executive and all legislative powers would be assigned to the Legislature. Legislative powers could be assigned to the Executive and executive powers to the Legislature, and drafters who wanted to assign one power to a particular branch had to advocate for that position.

Consider, for example, James Wilson’s arguments about the meaning of the executive power. Wilson is often thought to have had a fairly elaborate view of each branch’s powers.¹⁷⁸ But during the Constitutional Convention, Wilson himself claimed that only two powers—the power to execute the laws that Congress passed and certain appointment powers—were “strictly Executive.”¹⁷⁹ For Wilson, “other” powers, such as those involving the military and foreign affairs, could not be neatly divided.¹⁸⁰ But even Wilson recognized that it was contestable whether those powers should be assigned to the Executive Branch. He was arguing persuasively: the goal was to convince other participants of the Convention to assign specific powers to a particular branch. That suggests that Wilson (a) had a thin conception of the executive power, (b) recognized that many powers did not lend themselves to easy categorization, and (c) acknowledged that even those powers that he

175. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 67 (Max Farrand ed., 1911).

176. *See* 2 *id.* at 300–01 (reporting Wilson’s preference that the Executive Branch be given powers sufficient to resist encroachment from the Legislature).

177. *See* 1 *id.* at 66 (identifying the powers Wilson understood to be “strictly” executive).

178. *See id.* at 66 (advancing a view of executive and legislative powers).

179. *Id.*

180. *See id.* at 65–66 (reporting that Wilson understood powers of “war & peace” to be legislative, despite them having been assigned to the “British Monarch”).

felt naturally belonged to one branch or another would not necessarily be assigned to that branch.

Ultimately, the Constitution extensively mixed and matched powers with branches. These do not seem to be politicians faithfully applying the teachings of Montesquieu and Locke, but rather skeptical pragmatists intent on inventing a new form of government.¹⁸¹ Even if a power was properly categorized as legislative or executive, the drafters did not take for granted that legislative powers would be assigned to the Legislative Branch nor that executive powers would be assigned to the Executive Branch.

The Founding generation had reason to resist strict boundaries between the branches. They felt that a system of precisely defined and exclusive boundaries would result in Legislative and Executive overreach. James Wilson, for example, argued that parliamentary supremacy in Great Britain led to the “destruction of the King” and was itself “pure and unmixed tyranny.”¹⁸² Madison wrote that the “great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.”¹⁸³

Nor did the drafters think that neat divisions based on metaphysical, philosophical categories would provide an effective check on government overreach. John Adams, for example, wrote in defense of the new Constitution that while “[a] philosopher may be perfect master of Descartes and Leibnitz . . . when called upon to produce a plan of legislation, he may astonish the world with a signal absurdity.”¹⁸⁴ Adams criticized John Locke, in particular, since Locke had actually tried his hand at separating powers in the American colonies in 1663:

Mr. Locke . . . was employed to trace out a plan . . . for Carolina; and he gave the whole authority, executive and legislative, to the eight proprietors Who did this legislator think would live under his

181. In fact, there is reason to think that the Founders were fairly skeptical of Enlightenment political theorists. For further discussion of this skepticism, see generally Christopher Havasy, Joshua Macey & Brian Richardson, *Against Political Theory in Constitutional Interpretation*, 76 VAND. L. REV. (forthcoming 2023).

182. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 301 (Max Farrand ed., 1911). Robert Morris made the same point. *Id.* at 31.

183. THE FEDERALIST NO. 51 (James Madison), *supra* note 17, at 321–22.

184. 1 JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 365 (1787). *But see* Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 735 (1988) (arguing that the administrative state discards the founders’ commitment to the “Lockean axiom that the grant of legislative power is only to make laws, not to make other legislators”); Alexander & Prakash, *supra* note 1, at 1298 (arguing, as an “original matter,” that the Founders would have had “Locke’s nondelegation principle” in mind).

government? He should have first created a new species of beings to govern, before he instituted such a government.¹⁸⁵

The drafters' concerns that strict separation would lead to despotism were based on colonial experience with state constitutions that had provided for a strict separation between the state legislatures and governors. Jefferson pointed out that the Virginia Assembly had managed to use its legislative power to "decide[] rights which should have been left to judiciary controversy: and the direction of the executive, during the whole time of their session, is becoming habitual and familiar."¹⁸⁶ For Jefferson, too, precisely defined, exclusive powers failed to check government overreach because concentrating lawmaking authority in a single branch ended up helping state legislatures dominate the executive and judicial branches. Given the critiques that proponents of the Constitution levied at Enlightenment political theorists and state constitutions that embraced a strict separation between legislative, executive, and judicial powers, one should be exceedingly cautious before engrafting a theory of precisely separated powers onto the Constitution's compromises.

Instead, the drafters read Montesquieu's maxim as a prohibition against the domination of all of the levers of government by one set of hands.¹⁸⁷ John Adams attributed to Montesquieu the idea that "[w]hen the legislative and executive powers are united in the same person . . . there can be no liberty . . . lest the same . . . senate . . . should enact tyrannical laws, to execute them in a tyrannical manner."¹⁸⁸ Adams thus read Montesquieu not to discern the meaning of the terms *legislative* and *executive*, but to emphasize that combining all powers in one set of actors—literally uniting them in the same person—would lead to tyranny. Madison also accepted this more modest reading. In his view, Montesquieu had "rather distinguished himself by enforcing the reasons and the importance of avoiding a confusion of the several powers of government, than by enumerating and defining the powers which belong to each particular class."¹⁸⁹ The real mischief that Montesquieu's maxim addresses is when the executor of the laws is left to judge whether his actions are authorized. In such cases, the magistrate has dominated the legislature. Or, in Madison's reception, the "real meaning" of Montesquieu's maxim does not require the powers to be "separate and

185. ADAMS, *supra* note 184, at 365–66.

186. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 120 (William Peden ed., W.W. Norton & Co. 1954) (1785).

187. On the question of whether Montesquieu intended to invent the theory of functional separation now attributed to him, see Manin, *supra* note 14, at 30 n.10.

188. ADAMS, *supra* note 184, at 153–54 (quoting MONTESQUIEU, *supra* note 142).

189. Helvidius, *Number I*, GAZETTE U.S. (Phila.), Aug. 24, 1793, reprinted in 15 THE PAPERS OF JAMES MADISON, *supra* note 114, at 66, 68.

distinct;”¹⁹⁰ it instead requires the “departments [to] be so far connected and blended as to give to each a constitutional control over the others.”¹⁹¹ Checks; not balances.

The entire enterprise of drafting the Federalist Constitution thus appears to be inconsistent with interpretive approaches that attempt to divine exclusive government powers based on an elaborate exegesis of the terms *legislative* and *executive*. We should accordingly read the Constitution’s practical blending of powers as a choice to favor the anti-domination theory of separated power. The maxim of separated powers was

not meant to affirm, that [the powers] must be kept wholly and entirely separate and distinct, and have no common link of connexion or dependence The true meaning is, that the whole power of one of these departments should not be exercised by the same hands, which possess the whole power of either of the other departments.¹⁹²

To its Anti-Federalist critics, the Constitution’s anti-domination features were bugs because they ensured that the Constitution did not properly vest any of the three powers in a branch of its own, thus destroying simplicity and accountability in government.

It is for this reason that some modern intellectual historians have suggested that references to the “great” maxim of separated powers by the principal defenders of the Constitution may have been “slightly sarcastic.”¹⁹³ Montesquieu could not *actually* mean that each of the three branches’ powers must have exclusive metes and bounds. Indeed, Madison himself acknowledged that the “[the legislative department’s] constitutional powers” are “less susceptible of precise limits.”¹⁹⁴ Instead, the Framers developed a system in which multiple branches would participate in exercising government authority. That is why, in lieu of a high theory that could separate comprehensively one power from the other, the “most difficult task is to provide some *practical security* for each, against the invasion of the others.”¹⁹⁵ To provide this security, the Framers developed a system in which the branches were given powers of self-help.¹⁹⁶ To guard against encroachments by the Legislature, the legislative power should be divided

190. THE FEDERALIST NO. 47 (James Madison), *supra* note 17, at 301, 308.

191. THE FEDERALIST NO. 48 (James Madison), *supra* note 17, at 308.

192. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 8 (1st ed. 1833).

193. See Manin, *supra* note 14, at 27 (remarking that Madison regarded Montesquieu with some sarcasm).

194. THE FEDERALIST NO. 48 (James Madison), *supra* note 17, at 310.

195. *Id.* at 308 (emphasis added).

196. Thus, the “interior” structure of the government would allow each branch, in its “mutual relations,” to “be the means of keeping each other in their proper places.” THE FEDERALIST NO. 51, *supra* note 17, at 320.

into two houses—thus the requirements of bicameralism—and the President should be “armed” with the “natural defense” of a veto of any bill that both houses pass.¹⁹⁷

The Federalists should thus be understood to have revised the theory of separation of powers their generation received from Blackstone and Montesquieu. The drafters accepted that it was necessary to prevent the consolidation of all government power in one set of hands, but they rejected the idea that exclusive control over a particular function was an effective way to do so. Instead, they felt it was necessary to comingle powers because doing so would deprive any one government actor of the ability to exert tyrannical control. Rightly understood, the Federalists understood the primary goal of Enlightenment theorists to be one of nondomination: the worry was that “[t]he *total union* of [legislative and executive powers] . . . would be productive of tyranny.”¹⁹⁸

In the first edition of his *Commentaries on the Constitution*, Joseph Story explained that it would not have been worth the effort to “dwell[]” on the practical necessity of blending powers were it not “made a special objection to the constitution” by the Anti-Federalists.¹⁹⁹ The Anti-Federalists’ objection caused *The Federalist* writers to “bestow[] . . . a most elaborate commentary,” even though “[a]t the present time the objection may not be felt[] as possessing much practical force, since experience has demonstrated the fallacy of the suggestions.”²⁰⁰ Story, indeed, called the Anti-Federalist separation-of-powers objection the work of “ingenious minds, dazzled by theory, and extravagantly attached to the notion of simplicity in government.”²⁰¹ The Federalists’ separation-of-powers principle instead makes each branch “so far connected and blended as to give to each a constitutional control over the others.”²⁰²

Because the Constitution’s separation-of-powers principles pursue a goal of anti-domination—rather than taxonomical precision or functional accommodation²⁰³—nearly every structural constitutional argument that

197. *Id.* at 322–23.

198. 1 WILLIAM BLACKSTONE, COMMENTARIES *149.

199. STORY, *supra* note 192, at 11.

200. *Id.* at 12.

201. *Id.*

202. *Id.* at 12–13 (quoting THE FEDERALIST NO. 48 (James Madison), *supra* note 17, at 308).

203. Cf. Flaherty, *supra* note 78, at 1774–77 (criticizing the “myth” of formalist separation of powers, understood to mean that the Constitution elaborates a “precise and near-absolute division of powers”). On the characterization of separation-of-powers theories as “formal” versus “functional,” see, e.g., M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1129–30 (2000) (critiquing the “functionalist” versus “formalist” divide for muddling the varied goals of balancing versus separating power); Merrill, *supra* note 104, at 225–

helps itself to an extratextual definition of a particular branch's powers will substitute a rejected political theory for the terms of the Constitution's actual compromise.²⁰⁴ These extraconstitutional theories return us to questions Madison derisively called matters of "real nicety"²⁰⁵—questions about the substantive content of the legislative power that the Constitution was designed to avoid.

It is common today for scholars to say that the Constitution adopts a system of checks *and* balances. But the reality is that the Framers selected a system of checks, *not* a system of balances. The Constitution was worth supporting not because it had solved this enduring metaphysical puzzle, but because it avoided these metaphysics entirely.

C. *Post-Ratification Separation-of-Powers Debates*

Much recent support for the idea that the legislative power included a principle of nondelegation comes from two later episodes in Madison's political life. In these two moments, Madison suggested that the boundary between executive and legislative powers was more substantive than procedural. The first is Madison's conditional support for an amendment that would have prohibited any branch besides Congress from exercising legislative power. The second is that, once, when Madison opposed a bill, he argued that it was unconstitutional because it would involve Congress forfeiting its legislative authority.²⁰⁶

But these episodes hardly prove that Madison, not to mention other proponents of the Constitution, accepted that the legislative power—as against the executive power—had an independent meaning that could give rise to a justiciable separation-of-powers claim. During the ratification debates, Madison embraced a vision of the separation of powers based on anti-domination. In *Federalist No. 47*, for example, Madison argued that

Montesquieu . . . did not mean that these [branches] ought to have no partial agency in, or no control over, the acts of each other. His meaning . . . can amount to no more than this, that where the whole power of one [branch] is exercised by the same hands which possess the whole power of another [branch], the fundamental principles of a free constitution are subverted.

26 (noting the Supreme Court's alternating "formal" and "functional" construction of separation of powers).

204. See Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 638 & n.12 (2000) (noting the flowering of "pietistic references to Montesquieu and Madison," especially after the Court's reinvigoration of separation-of-powers doctrine in *INS v. Chadha*, 462 U.S. 919 (1983)).

205. THE FEDERALIST NO. 48 (James Madison), *supra* note 17, at 310.

206. See Wurman, *supra* note 11, at 1504, 1507 (using these two episodes to argue that the Founders understood that Congress could not delegate legislative power).

....

[T]here is not a single instance in which the several [branches] of power have been kept absolutely separate and distinct.²⁰⁷

Madison thus denied that it was desirable to neatly divide the functions of government. He was instead concerned that one branch would be able to control the others. To prevent a single branch from controlling all levers of power, he argued that government should be restrained by involving each branch in the others' affairs. Like Adams, Madison was more concerned with preventing the concentration of power than he was with developing a system of exclusive spheres of authority: "[T]he great security against a gradual concentration of the several powers in the same [branch] consists in giving to those who administer each [branch] the necessary constitutional means and personal motives to resist encroachments of the others."²⁰⁸

This is a vision of constitutional self-help—not of neatly divided powers that can be discerned by the Judiciary. It is one in which “the powers of government” are “divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits without being *effectually* checked and restrained by the others.”²⁰⁹

Perhaps Madison reversed course after the Constitution was ratified. Some have made this argument by pointing out that Madison included among his committee's report on the proposed Bill of Rights a draft amendment that ostensibly aimed to ensure a separation of powers by distributing powers *exclusively* between the branches.²¹⁰ This draft amendment, which was never adopted, was similar to the state constitutions' distributing clauses described in subpart III(B),²¹¹ and recent scholarship has suggested that this “Nondelegation Amendment” evidences the Founders' commitment to both a discrete separation of powers—that is, the exclusivist rendering of

207. THE FEDERALIST NO. 47 (James Madison), *supra* note 17, at 302–04.

208. THE FEDERALIST NO. 51 (James Madison), *supra* note 17, at 321–22.

209. STORY, *supra* note 192, at 6–7 n.2 (emphasis added).

210. See Wurman, *supra* note 11, at 1504 (arguing that Madison's proposal of a separation-of-powers amendment evidences his understanding that the Constitution exclusively divides powers).

211. See *supra* notes 149–152 and accompanying text. The amendment would have read:

The powers delegated by this Constitution are appropriated to the departments to which they are respectively distributed: so that the Legislative Department shall never exercise the powers vested in the Executive or Judicial, nor the Executive exercise the powers vested in the Legislative or Judicial, nor the Judicial exercise the powers vested in the Legislative or Executive Departments.

James Madison, Speech Regarding Proposed Amendments to the Constitution (June 8, 1789), in 5 THE WRITINGS OF JAMES MADISON 370, 379 (Gaillard Hunt ed., 1904).

Montesquieu's maxim—and the Founders' acceptance of the nondelegation doctrine.²¹²

But that interpretation overstates the historical evidence. In explaining the amendments' genesis, Madison distanced himself from the amendments' drafters, explaining (perhaps magnanimously; perhaps sarcastically) that although he had supported the Constitution as drafted, some “respectable” characters had opposed him on theoretical grounds.²¹³ Those grounds included that “the powers of [the Senate] were compounded . . . in a manner that did not correspond with a particular theory.”²¹⁴ Those wedded to theoretical objections, he wrote, had opposed the Constitution with “dogmatic maxims with respect to the construction of the Government; declaring that the Legislative, Executive, and Judicial branches, shall be kept separate and distinct.”²¹⁵ And in presenting the amendments that would become the Bill of Rights to the First Congress—and the “Nondelegation Amendment,” which Congress would reject—Madison explained that some were included as changes that were “eligible [for inclusion] as patronised by a respectable number of our fellow-citizens.”²¹⁶

It is problematic to count proposed amendments—particularly those that failed—as representative of the First Congress's constitutional thought. Here Madison expressly acknowledged that the list of amendments included some that aimed to “make the Constitution better in the opinion of those who [we]re opposed to it.”²¹⁷ Of course, both Federalists and Anti-Federalists held positions in the early Congress. If anything, Madison's willingness to tolerate a nondelegation amendment in spite of his previous opposition to this approach should be understood part of a larger effort to appease people who opposed the Constitution but who nevertheless made up a substantial part of the early Congress.

Crucially, after presenting the proposed Distributing-Clause Amendment, Madison restated the argument he had first developed in *Federalist No. 51* to reject the Anti-Federalists' conception of Montesquieu's maxim. After describing the claim as a “dogmatic maxim,” Madison added: “Perhaps the best way of securing this in practice is, *to provide such checks*

212. See, e.g., Wurman, *supra* note 11, at 1504 (proposing that the debate over the amendment reflected some Founders' view that the Constitution already exclusively separated powers but that the amendment would helpfully make “the principle explicit”).

213. 1 ANNALS OF CONG. 432 (1789) (Joseph Gales ed., 1834) (statement of Rep. Madison).

214. *Id.* at 433.

215. See *id.* at 437 (reporting Madison's explanation that some state bills of rights contained such a provision).

216. *Id.* at 441.

217. *Id.*

as will prevent the encroachment of the one upon the other.”²¹⁸ In other words, while Madison was willing to put forward the Amendment, he simultaneously reiterated his view that a system of checks—not balances—is the superior way of organizing the federal government. Madison’s subtlety should not be mistaken for acquiescence.

Madison’s description of the separation-of-powers dogmatism among the Constitution’s opponents suggests his enduring skepticism of the Anti-Federalists’ pure theory of separated powers. Indeed, the Anti-Federalists’ separation-of-powers absolutism continued into the First Congress, after several of them were elected to federal office. In one of the first debates on the removal power, for example, Richard Henry Lee invoked Montesquieu’s “sacred” maxim to insist that the President be granted removal authority in the statute that created the office of the Secretary of Foreign Affairs.²¹⁹ To motivate his argument, Lee contended that “all judicious writers” agreed that the three powers must “be kept as separate and distinct as possible,” and accordingly “if these powers are blended in or exercised by one body . . . the public liberty is destroyed.”²²⁰ Lee, who himself was an Anti-Federalist, urged Congress to look to the state constitutions that had “sedulously separated these powers of Government.”²²¹ Thus, Lee asked Congress to ensure that in establishing offices, all three branches were kept “distinct; by informing the people where to look.”²²² And generally, Anti-Federalists kept a steady drumbeat of dogmatic Montesquieu-ism alive on the floor of Congress.²²³ But one would expect that Anti-Federalists who advocated for separation-of-powers absolutism before the Constitution was ratified would continue to do so when they participated in government.

To be sure, Madison arguably would take divergent views on the delegation of regulatory authority to the Executive during the political battles of this period. As a member of Congress, he joined a strident opposition to executive discretion during a debate concerning the designation of postal roads, where he obliquely invoked the Constitution to oppose a bill that

218. *Id.* at 437 (emphasis added).

219. *Id.* at 545–46 (statement of Rep. Lee).

220. *Id.* at 545.

221. *Id.*; see Finkelman, *supra* note 169, at 858 (identifying Richard Henry Lee as an “[e]lite antifederalist[]”).

222. ANNALS OF CONG., *supra* note 213, at 546 (statement of Rep. Lee).

223. See, e.g., 3 *id.* at 703–04 (1792) (statement of Rep. Baldwin) (opposing Executive proposals for the Treasury Department and excise schedules, seeking for it to be “explicitly and finally determined how far the Legislative business should be solely transacted by the Legislature,” and endorsing the “propriety of keeping the Legislative, Judicial, and Executive powers distinct from each other”); *id.* at 706 (statement of Rep. Mercer) (“The Constitution had divided the delegated powers of the people among the three branches . . . neither of which could alter or transfer the powers so vested.”).

would provide for post roads “by such route as the President of the United States shall, from time to time, cause to be established.”²²⁴

This post-roads debate is the second episode cited by defenders of the nondelegation doctrine,²²⁵ who often discern constitutional significance from Madison’s floor statement that “there did not appear to be any necessity for alienating the powers of the House; and that if this should take place, it would be a violation of the Constitution.”²²⁶ A Sixth Circuit judge recently described this episode as evidence that it was “clear from the start” that Congress would use overbroad delegations to “shift[] responsibility to a less accountable branch.”²²⁷

Bagley and Mortenson have catalogued reasons why Madison’s invocation of the Constitution is a “thin reed” on which to hang the modern nondelegation doctrine.²²⁸ From our vantage point, it is important to add that in mounting a constitutional challenge to the post roads, Madison did not surrender to the Anti-Federalists’ obsessive concern with attribution and exclusive functionalism in the allocation of governmental powers. That would have been an incredible *volte-face*, replacing thousands of words of prose concerning the Constitution’s novel separation-of-powers theory with one floor statement that a post-roads bill would “alienat[e] the powers of the House.”²²⁹

Madison instead told us what he meant. He argued merely that “[h]owever difficult it may be to determine with precision the exact boundaries of the Legislative and Executive powers,” those powers should not be blended “so as to leave no line of separation whatever.”²³⁰ It is therefore crucial to place Madison’s floor statements—uttered as a voting member of Congress—in their proper context. In advancing a set of reasons on the floor and then voting no on the bill, Madison was demonstrating as a voting legislator what he had contemplated as an author of *The Federalist*: the practical check on overbroad executive power is Congress’s own jealousy

224. *See id.* at 229 (1791) (emphasis omitted) (reporting the language of the bill).

225. *See, e.g.,* Ilan Wurman, *As-Applied Nondelegation*, 96 TEXAS L. REV. 975, 991–92 (2018) (using the post-roads debate as evidence of the Founders’ acceptance of the nondelegation doctrine).

226. *See id.* at 992 (quoting 3 ANNALS OF CONG. 239 (1791) (statement of Rep. Madison)) (invoking this statement to argue that the Founders understood certain delegations to be unconstitutional); Wurman, at 1507 (same); *see also* Mortenson & Bagley, *supra* note 7, at 352 (noting that commentators have cited this as “decisive evidence of a Founding Era nondelegation commitment that was both broadly shared and fundamental,” even though the “opposite was true”).

227. *Tiger Lily LLC v. HUD*, 5 F.4th 666, 674 (6th Cir. 2021) (Thapar, J., concurring).

228. *See* Mortenson & Bagley, *supra* note 7, at 350 (“[T]o call the post-roads debate a thin reed would be an overstatement. It is no reed at all.”).

229. *See supra* note 226 and accompanying text.

230. 3 ANNALS OF CONG. 238 (1791) (statement of Rep. Madison).

of its discretion. If a proposed bill permits the Executive too much discretion, Congress may reject it. Here, the check worked.

In doing the practical work of government, Congress usually resisted the Anti-Federalists' dogmatic view of exclusively separated powers.²³¹ By design, the Constitution blends powers among different federal actors such that multiple agents are involved in making policy. The purpose of these checks is to prevent the agglomeration of power in one branch—in other words, that no one branch dominates the machinery of government. The appointment power, for example, is shared because if it “was vested in the president alone, he might . . . render himself despotic.”²³² A properly checked Legislature and Executive, on this view, exhibits a distributed regulatory agency. Neither can dominate the other, or circle its wagons to external political pressure, because each possesses a procedural check that requires inter-branch coordination.

D. *Post-Ratification History*

The drafters' vision of separation of powers based on the Constitution's procedural checks has persisted throughout American constitutional history. That is not to say it has been the exclusive, or even the dominant, theory of the Constitution's allocation of powers, but rather that, throughout the nineteenth century, judges and policymakers continued to rehash the debate that occurred between the Federalists and Anti-Federalists about the definition of each branch's powers. The theories adopted by each group have thus both made their way into constitutional theory, which suggests both that the meaning of separated powers was undetermined at the Founding and that claims about the determinate character of any branch's inherent powers are unreliable.

1. Separation of Powers in the Nondelegation Cases.—Consider the nondelegation precedents. The cases that have struck down a statute on nondelegation grounds adopt the Anti-Federalist vision of precisely delimited powers. For example, in *Field v. Clark*,²³³ the precursor to the 1930s nondelegation cases, the Supreme Court said, “That Congress cannot delegate legislative power to the President is a principle universally

231. See Mortenson & Bagley, *supra* note 7, at 296 (“[T]he Founders’ account of government itself belies . . . claims that there was anything intrinsically nondelegable about any portion of the legislative power. The people had already delegated it once.”); Parrillo, *supra* note 7, at 1434–35 (explaining that Congress’s 1798 delegation of direct-tax administration was politically unpopular but not understood as constitutionally infirm).

232. Letter from Roger Sherman to John Adams (1789), in 6 THE WORKS OF JOHN ADAMS 440, 440 (Charles Francis Adams ed., 1851).

233. 143 U.S. 649 (1892).

recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.”²³⁴

But in that period, courts also resisted the vision of precisely distinct powers that supports the nondelegation doctrine. For example, in *United States v. Grimaud*,²³⁵ the Court recognized that “it is difficult to define the line which separates legislative power to make laws[] from administrative authority to make regulations.”²³⁶ The Court adopted a similar theory of separation of powers in *Butfield v. Stranahan*,²³⁷ where it found that a law that gave the Secretary of the Treasury authority to determine “what teas may be imported” conferred “the mere executive duty to effectuate the legislative policy declared in the statute.”²³⁸ And, while riding circuit in 1888, a Supreme Court Justice who regularly promoted substantive-due-process limits on federal regulation explained that “the line of demarcation between legislative and administrative functions is not always easily discerned. The one runs into the other. The law books are full of statutes unquestionably valid, in which the legislature has been content to simply establish rules and principles, leaving execution and details to other officers.”²³⁹ Thus, while plenty of state court cases in this period gestured at a nondelegation doctrine,²⁴⁰ there were also a significant number of cases that embraced the Federalist position that the nondelegation doctrine was based on an incorrect understanding of the legislative power.²⁴¹

The idea of a nondelegation *doctrine* remained largely academic until the 1930s. Courts occasionally mused about the distinction between legislative and executive power but ultimately permitted legislatures wide discretion to treat an agency as “a creature in the hands of its [legislative] creator, subject to be moulded and fashioned as the ever varying exigencies of the State may require.”²⁴²

234. *Id.* at 692.

235. 220 U.S. 506 (1911).

236. *Id.* at 517.

237. 192 U.S. 470 (1904).

238. *Id.* at 496.

239. *Chi. & N.W. Ry. Co. v. Dey*, 35 F. 866, 874 (Brewer, Circuit Justice, C.C.S.D. Iowa 1888). For Justice Brewer’s views on substantive due process, see Robert E. Gamer, *Justice Brewer and Substantive Due Process: A Conservative Court Revisited*, 18 VAND. L. REV. 615, 627 (1965).

240. See Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 418 (2017) (“The constitutional law and practice of the nondelegation doctrine was thus largely written in the states.”).

241. See *State v. Atl. Coast Line R.R. Co.*, 47 So. 969, 971 (Fla. 1908) (explaining that “where a valid statute . . . enacts the general outlines of a governmental scheme, or policy, or purpose, and confers upon officials . . . authority to make . . . rules and regulations, . . . such authority is not an unconstitutional delegation of legislative power” and collecting cases).

242. *Cincinnati, Wilmington & Zanesville, R.R. Co. v. Comm’rs of Clinton Cnty.*, 1 Ohio St. 77, 89 (Ohio 1852). The tendency to invoke separated powers while still affirming Congress’s

As the Court began to toy with the idea of a nondelegation doctrine in the early twentieth century, influential scholars rejected the Anti-Federalist view of separation of powers and denied that it was possible to construct a coherent definition of the legislative power.²⁴³ For example, Edmund Parker wrote in the *Harvard Law Review* that “the making of even general regulations under statutory authority is an executive and not a legislative function.”²⁴⁴ John B. Cheadle made a similar point in a 1918 *Yale Law Journal* article. After describing what he perceived to be the two functions of government, he claimed that “this broad division probably does not correspond with the facts of any government known to history.”²⁴⁵ Cheadle further emphasized that “the reported debates of the Convention show that the members consciously mixed powers and functions which in their nature were legislative, judicial and executive, and as freely defended the mixing on the ground that the greatest security results from a partial participation of

delegations is most pronounced in cases concerning the boundary between the legislative and judicial powers, where the delegation inquiry has the oldest pedigree. *See, e.g.*, *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 46 (1825) (Marshall, C.J.) (“[T]he maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry”); *see also* Whittington & Iuliano, *supra* note 240, at 392 (stating that prior to the New Deal, the Supreme Court was generally deferential to Congress when it decided to delegate to the other branches). On the fundamental question whether the founders’ debates over constitutional meaning can be separated from foundational differences between “public” versus “private” kinds of legislation, *see generally* Farah Peterson, *Expounding the Constitution*, 130 *YALE L.J.* 2 (2020).

243. The nondelegation debate still episodically winds its way through the law review literature and retraces the same steps every generation or so. *Compare, e.g.*, John B. Cheadle, *The Delegation of Legislative Functions*, 27 *YALE L.J.* 892, 896 (1918) (arguing that Congress can delegate legislative functions), with Frederick Green, *Separation of Governmental Powers*, 29 *YALE L.J.* 369, 393 (1920) (arguing that the separation of powers limits Congress’s ability to delegate legislative functions). *See also* William Bondy, *The Separation of Governmental Powers*, 5 *COLUM. STUD. HIST. ECON. & PUB. L.*, 1896, at 4, 78 (“Any power not expressly vested by the constitution in either of the departments or other governmental authority, *irrespective of its nature*, may be assumed by the legislature, or delegated to either of the other departments . . . without violating the distributing clause.”); FRANK J. GOODNOW, *POLITICS AND ADMINISTRATION* 9–10 (1900) (arguing that “political functions group themselves naturally under two heads”: legislative and executive); Thomas Reed Powell, *Separation of Powers: Administrative Exercise of Legislative and Judicial Power*, 27 *POL. SCI. Q.* 215, 237 (1912) (“The assumption that governmental power is divisible into mutually exclusive kinds of action has proved inapplicable to the concrete problems of government. . . . And if we attempt to classify powers according to their nature, by induction, men will have difficulty in agreeing upon the *a priori* basis of classification.”); ERNST FREUND, *ADMINISTRATIVE POWER OVER PERSONS AND PROPERTY* 218 (1928) (“While it is extremely difficult to formulate a generally valid principle of legitimacy of delegation, the observation may be hazarded, that with regard to major matters the appropriate sphere of delegated authority is where there are no controverted issues of policy or of opinion.”).

244. Edmund M. Parker, *Executive Judgments and Executive Legislation*, 20 *HARV. L. REV.* 116, 124 (1906).

245. Cheadle, *supra* note 243, at 898.

each branch of the government in the powers of the other branches.”²⁴⁶ Here, too, theorists remembered that the Founders’ refusal to enumerate rigid boundaries between the powers reflected a deliberate decision to provide for interdepartmental checks.

William Bondy made the same point a generation earlier in a Ph.D. dissertation he wrote before taking the federal bench. He noted that “a most cursory perusal of the debates in the constitutional conventions” revealed that “no separation of powers, based upon the nature of the different governmental powers, was ever intended to be inserted in our organic law.”²⁴⁷ Like Joseph Story, and like Madison in his critique of the Anti-Federalists, Bondy observed that while references to Montesquieu’s maxim abound in the constitutional conventions, it is an error to attribute to these references a notion of functional specialization of powers:

[U]nfamiliar with any supposed possibility of classifying powers according to their intrinsic nature, they vested legislative power, meaning thereby only the power of enacting general laws for the entire government, in the legislature; judicial power, meaning thereby only the power of determining and protecting the rights of persons under the constitution and constitutional laws, in the courts; and executive power, meaning thereby the power of seeing that the laws are faithfully executed, in the executive department.²⁴⁸

Bondy also identified the Federalists’ pragmatic cast of mind, which included a skepticism of metaphysical definitions of legislative and executive power. In distributing powers to the three branches, he explained, Federalists “did not enter into a philosophical discussion as to whether such a power was legislative, executive or judicial in its nature, but deliberated in which one or more of the departments already established by them the given power could with greatest propriety and safety be vested.”²⁴⁹ Again, this is not to say that early proponents of the nondelegation doctrine did not exist, but that during the nondelegation doctrine’s formative period, scholars rejected on both theoretical and historical grounds the vision of separation of powers that undergirds that interpretive approach, and they did so by pointing out that the doctrine did not reflect the Founders’ views.

But then came an energy crisis. After the discovery of a large East Texas oil field, the State of Texas and the Department of the Interior engaged in a cooperative regulatory project to staunch the flow of “hot oil”—that is, oil extracted in excess of state government quotas—into the national market.

246. *Id.* at 894–95.

247. Bondy, *supra* note 243, at 74.

248. *Id.*

249. *Id.* at 75.

Producers of hot oil fought a multi-pronged battle against the quotas, and their nondelegation argument was based primarily on state law. They contended that the Texas Legislature—not Congress—had delegated too much law-making power to a state regulatory commission.

The challenges to the state and federal statutes were separated into two lawsuits: one heard by a three-judge panel²⁵⁰ composed of one court of appeals judge and two district court judges, and another heard by just one of the district court judges. The three-judge panel rejected the hot oil producers' suit:

We were at pains . . . to make it clear that in our opinion the state, through the Legislature, has broad powers in conserving its natural resources of oil and gas, to regulate and control the business of producing and handling them, with the right to broadly delegate to the commission, as statutory agents, the administration of the regulation and control it decides upon.²⁵¹

Were it not for the quirk of then-existing federal jurisdictional statutes, the three-judge panel would have dismissed the hot oil plaintiffs' suit against the federal government too.²⁵² But one member of the panel, Judge Randolph Bryant, dissented from the panel majority. And here is where nondelegation made its appearance: Judge Bryant would have held the state quotas to be an exercise of "an unauthorized" and "prohibited" power, thus striking down the Texas Legislature's efforts to regulate its domestic oil market.²⁵³

Judge Bryant held a greater power to resist his colleagues, however: he retained jurisdiction over the plaintiffs' challenge to the *federal* hot oil quota.²⁵⁴ He declined to dismiss the suit as the three-judge panel suggested he should. He started his opinion by restating the plaintiffs' kitchen-sink litigation strategy. (Plaintiffs had argued that the quotas violated the separation of powers, the Guarantee Clause, the Tenth Amendment, the Ninth Amendment, the Due Process Clause of the Fifth Amendment, the Fourth and Fifth Amendments, and the Eighth Amendment.²⁵⁵) Turning to the federal statute, Judge Bryant accepted his colleagues' "exceedingly doubtful" presumption "[t]hat the [National Recovery Act] does not delegate legislative power and authority to the President."²⁵⁶ Ultimately, though, he

250. 28 U.S.C. § 2281, since repealed, then required federal complaints seeking injunctive relief against state laws to be heard by a three-judge district court. 28 U.S.C. § 2281 (repealed 1976).

251. *Amazon Petroleum Corp. v. R.R. Comm'n of Tex.*, 5 F. Supp. 633, 635 (E.D. Tex. 1934).

252. *Id.* at 634.

253. *Id.* at 639 (Bryant, J., dissenting).

254. *See Amazon Petroleum Corp. v. R.R. Comm'n of Tex.*, 5 F. Supp. 639 (E.D. Tex. 1934) (adjudicating the constitutionality of the federal hot oil quota).

255. *Id.* at 643–44.

256. *Id.* at 644.

struck down the statute under the Commerce Clause, holding that the production of oil in East Texas was a matter for the state, not the federal government.²⁵⁷

The Fifth Circuit reversed, noting that the delegation issue was “not seriously attacked.”²⁵⁸ The Court explained that such delegations are “often done,” and that the President’s delegation of authority to regulate to the Secretary of the Interior simply involved “a legislative agent authorized to appoint a subagent.”²⁵⁹

The Supreme Court granted certiorari in *Panama Refining Co. v. Ryan*.²⁶⁰ Here, too, the Court’s decision to rely on the nondelegation doctrine appears to have come as a surprise even to the parties who made that argument. Almost all of the petitioners’ brief contended that the federal regulatory program violated the Commerce Clause, and it candidly admitted that “[w]e assume that it will again be stated by [the government], as they have often stated before, that this court has never held an act of Congress invalid because of the delegation of legislative power to the President.”²⁶¹ Similarly, the first one-hundred pages of the Government’s brief addressed the Commerce Clause challenge.²⁶² A mere twenty pages addressed the nondelegation challenge, noting again that the Court had never struck down a federal statute on nondelegation grounds.²⁶³ The government’s response did not seem to take the nondelegation argument seriously, and it emphasized that it would have been unrealistic “[t]o have required Congress to legislate for each industry” in the midst of the Great Depression because doing so “would have prevented any legislation at all.”²⁶⁴

Chief Justice Hughes penned the majority opinion in *Panama Refining*, and he sidestepped entirely the Commerce Clause challenge. Though the plaintiffs’ brief exhaustively litigated the Commerce Clause issue, and their reply briefed *only* the Commerce Clause challenge, the Chief Justice instead focused on the nondelegation claim.²⁶⁵ Later that Term, Hughes wrote for the

257. *Id.* at 649–50.

258. *Ryan v. Amazon Petroleum Corp.*, 71 F.2d 1, 6 (1934).

259. *Id.* at 6–7.

260. 293 U.S. 388 (1935).

261. Brief for Appellants at 25–26, *Panama Refining*, 293 U.S. 388 (No. 135).

262. *See generally* Brief for the Respondents, *Panama Refining*, 293 U.S. 388 (No. 135) (using the first, one-hundred-page section to address the Commerce Clause).

263. *See generally id.* (addressing the nondelegation argument in the final twenty pages).

264. *Id.* at 152.

265. *See Panama Refining*, 293 U.S. at 430 (“Thus, in every case in which the question has been raised, the Court has recognized that there are limits of delegation which there is no constitutional authority to transcend. We think that § 9 (c) goes beyond those limits.”); *see generally* Reply Brief for Appellants, *Panama Refining*, 293 U.S. 388 (No. 135) (discussing only the Commerce Clause issue).

majority in *Schechter Poultry Corp. v. United States*,²⁶⁶ which struck down another New Deal program on nondelegation grounds.²⁶⁷

It was thus not until this constitutional showdown that nondelegation was anything more than brief-filling fodder in ordinary Commerce Clause challenges to federal legislation.²⁶⁸ And, remarkably, the doctrine reappeared in a case where both the lower courts and the litigants treated the nondelegation argument as an afterthought.

In light of the terseness of *Panama Refining* and *Schechter Poultry*, and the desuetude of the doctrine in the many decades since, lower courts spent most of the twentieth century sidestepping it. As we have noted, courts have relied on the intelligible principle test to uphold broad congressional delegations, and they have not challenged the theory of separation of powers that inheres in the nondelegation doctrine's logic.²⁶⁹

But this question has taken on renewed importance now that a majority of the Supreme Court seems prepared to revive the nondelegation doctrine. The intelligible principle test does not explain how agencies fit into the tripartite system of government. On the contrary, by assuming that a duly enacted statute could *ever* delegate legislative power, the test accepts the very Anti-Federalist frame that forces a false choice.²⁷⁰ While a small number of administrative law scholars have asserted that there are no independent agencies, courts continue to use the language of independence to describe the administrative state, and even scholars who have argued that all agencies are executive agencies have conceded that legislative and executive powers refer to precise metaphysical categories.²⁷¹ "Legitimation has always been a major, perhaps the major, concern of American administrative law."²⁷² But that

266. 295 U.S. 495 (1935).

267. *Id.* at 551.

268. See generally Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991 (2008) (theorizing constitutional showdowns).

269. That is particularly surprising since, outside the nondelegation context, the Supreme Court has often accepted the Federalist vision of the separation of powers. For example, *INS v. Chadha* suggests that bicameralism and presentment are the core features of the legislative power. See 462 U.S. 919 (1983) ("It emerges clearly that the prescription for legislative action in Art. I, §§ 1, 7, represents the Framers' decision that the legislative power . . . be exercised in accord with a single, finely wrought and exhaustively considered, procedure."). *Chadha* does not perfectly capture our theory of the separation of powers, since it contains a two-step inquiry in which the Court first determines whether a law is legislative in character and then makes sure it went through bicameralism and presentment. *Id.* at 952–54. In other words, *Chadha* accepts both a procedural definition of the legislative power and the metaphysical one. We reject the metaphysical one. But see *Mistretta v. United States*, 488 U.S. 361, 368 n.14 (1989) ("[R]ulemaking power originates in the Legislative Branch and becomes an executive function only when it is delegated by the Legislature to the Executive Branch.").

270. We explain this argument more fully below.

271. See *supra* Part II.

272. Rakoff, *supra* note 21, at 25.

concession suggests that agencies sit awkwardly within the separation of powers: how can an agency be “executive” if it exercises legislative powers? What is needed is a theory of separation of powers that explains why agencies do not exercise legislative and judicial powers. That is the task we turn to in Part IV.

E. Regulating the Executive Patronage

First, though, it is worth tracing the theory of separation of powers that underlies the presidential removal cases. Our goal here is not to rehash existing histories of the executive removal power, but rather to show that in the major removal episodes that have been the focal point of debates about presidential removal, politicians, jurists, and scholars are repeating the same debate the Federalists and Anti-Federalists had at the Founding. Those who locate plenary removal power in Article II’s Vesting Clause discern by implication the Anti-Federalist categories that were rejected at the Founding, and those who argue that Congress can create tenure protections tend to be skeptical that the words *executive* and *legislative* convey implied, exclusive constitutional meanings.

Founding Era debates about presidential removal present a mixed picture about the Founding generation’s views about the scope of the President’s authority. The Constitution is silent on presidential removal. This silence gave rise to considerable debate almost immediately when, in 1789, the First Congress set to work structuring the first federal bureaucracy, which included the creation of three executive departments. Congress proposed to create the Departments of Foreign Affairs, Treasury, and War.²⁷³ Members of the House, whose debates were publicly recorded, split on the question of whether the statute should provide that the secretaries would be “removable by the President.”²⁷⁴ Madison urged Congress to include a statutory removal power. Although his “original impression” was that the removal power was something Congress could delegate to the President,²⁷⁵ he eventually reversed course and argued that the Vesting Clause contained an implied executive removal power.²⁷⁶

273. Lessig & Sunstein, *supra* note 2, at 25.

274. ANNALS OF CONG., *supra* note 213, at 576.

275. Jed Handelsman Shugerman, *Presidential Removal: The Marbury Problem and the Madison Solutions*, 89 FORDHAM L. REV. 2085, 2096 (2021) (quoting Debates in the House of Representatives, THE DAILY ADVERTISER (N.Y.), June 18, 1789, *reprinted in* 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 845, 846 (Charlene Bangs Bickford, Kenneth R. Bowling & Helen E. Veit eds. 1992)).

276. See ANNALS OF CONG., *supra* note 213, at 463 (statement of Rep. Madison) (invoking the Vesting Clause to argue for presidential authority to remove Executive Branch officials).

Madison's statements are significant because the modern Supreme Court has cited them as providing support for the orthodox unitarist view that the Vesting Clause confers an unlimited removal authority to the President.²⁷⁷ The Court, indeed, named the debate the "[D]ecision of 1789" in its seminal removal case many generations later.²⁷⁸

But Madison equivocated to the end. He appealed to the floor to recognize a removal power regardless of the constitutional theory:

If [the power is inherent], the clause in the bill is nothing more than explanatory of the meaning of the Constitution, and therefore not liable to any particular objection on that account. If the Constitution is silent, and it is a power the Legislature have a right to confer, it will appear to the world, if we strike out the clause, as if we doubted the propriety of vesting it in the President of the United States.²⁷⁹

After significant debate, Congress adopted an amended version of the statute, which omitted any reference to removal of the Secretary but provided that the Secretary shall have a clerk "who, whenever the . . . principal officer shall be removed from office by the President of the United States . . . shall . . . have the charge and custody of all records, books and papers appertaining to the said department."²⁸⁰ The significance of this debate, and the probability that its conclusion embodied a consensus view of the First Congress, are questions that have divided the Court, Congresses, and scholars ever since.²⁸¹

While some scholars have read Founding Era documents to support the unitary executive theory,²⁸² others have identified contrary evidence suggesting that the Founding generation would not have understood Article II's Vesting Clause to confer plenary removal power.²⁸³ To find certainty in this debate, one has to account for changes in views of some of its most significant figures (who, like Madison, changed their account of the constitutional source of a removal power). One must also account for the

277. See *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2205 n.10 (2020) (using Madison's statements on the floor of Congress to support an unfettered removal power grounded in the Vesting Clause).

278. *Myers v. United States*, 272 U.S. 52, 148 (1926).

279. ANNALS OF CONG., *supra* note 213, at 464 (statement of Rep. Madison).

280. Act for Establishing an Executive Department, to Be Denominated the Department of Foreign Affairs, ch. 4, § 2, 1 Stat. 28, 29 (1789).

281. See, e.g., *Myers*, 272 U.S. at 286 n.75 (Brandeis, J., dissenting) ("[N]one of the three votes in the House revealed its sense upon the question of whether the Constitution vested an uncontrollable power of removal in the President.").

282. See, e.g., STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE* 33 (2008) (invoking the Founders' written statements); Saikrishna Prakash, *Removal and Tenure in Office*, 92 VA. L. REV. 1779, 1828–29 (2006) (pointing to comments in the Washington Administration that the executive power includes the removal power).

283. E.g., Birk, *supra* note 7, at 232; Shane, *supra* note 7, at 325.

persistent division within the First Congress, which contained a significant minority of Founders who thought Congress could regulate removal to the end. And finally, one must discern the constitutional theory of an “enigmatic faction”²⁸⁴ of Congress whose constitutional views on whether the power was inherent in the Executive Branch or delegable by Congress were never recorded.

For our purposes, the critical issue is that once the Executive began to exercise the removal power with frequency—several decades after the Decision of 1789—and Congress began to consider its power to regulate appointment, tenure, and removal from office, Congress understood its prior debates to be both contested and nonbinding. As we explain in subpart IV(B), in light of the contested nature of the removal power from the start, we think that the best approach is to resort to the checks-based constitutional framework elaborated by the Federalists.

In private correspondence, Madison acknowledged that the Decision of 1789 did not yield a definitive theory of presidential removal:

The last opinion [that the vesting of executive power includes a removal power] has prevailed, but is subject to various modifications, by the power of the Legislature to limit the duration of laws creating offices, or the duration of the appointments for filling them, and by the power over the salaries and appropriations.²⁸⁵

On Madison’s telling, these “modifications” undercut the idea that removal is an exclusive executive power, and he reiterated his concern that “the Legislative power is of such a nature that it scarcely can be restrained either by the Constitution or by itself.”²⁸⁶ His language echoes the equivocation Hamilton expressed in *Federalist No. 77*, which claimed that “[t]he consent of [the Senate] would be necessary to displace as well as to appoint.”²⁸⁷

284. Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1043 (2006).

285. Letter from James Madison to Edmund Pendleton (June 21, 1789), in 12 THE PAPERS OF JAMES MADISON, *supra* note 114, at 251, 252–53.

286. *Id.*

287. THE FEDERALIST NO. 77 (Alexander Hamilton), *supra* note 17, at 459. Some have argued that modern eyes have read Hamilton anachronistically. *See, e.g.*, Seth Barrett Tillman, *The Puzzle of Hamilton’s Federalist No. 77*, 33 HARV. J.L. & PUB. POL’Y 149, 165 (2010) (arguing that Hamilton was discussing displacement rather than removal); Josh Blackman, *Justice Kagan on Hamilton in Federalist No. 77*, VOLOKH CONSPIRACY (July 1, 2020, 2:09 PM), <https://reason.com/volokh/2020/07/01/justice-kagan-on-hamilton-in-federalist-no-77/> [<https://perma.cc/8V7H-F3BX>] (same). But thirty years later, Madison noted that “[i]t was never understood that the parties to that work were answerable, each, for all the sentiments expressed in papers written by the others.” Letter from James Madison to Tench Coxe (Jan. 17, 1821), in 2 THE PAPERS OF JAMES MADISON: RETIREMENT SERIES 221, 221 (David B. Mattern, J.C.A. Stagg, Mary Parke Johnson & Anne Mandeville Colony eds., 2013).

Indeed, when he reflected back on the Decision of 1789 thirty years later, Madison wrote that “[i]t is remarkable that the power of removal from office, though of such material agency, excited so little attention, whilst the Constitution was under discussion.”²⁸⁸ He admitted that the issue “presented its important aspects, for the first time, at the first session of Congress,” and he acknowledged that politicians had aired “different reasonings in support of the different opinions on the subject.”²⁸⁹ In the end, Madison claimed that *prudential* considerations, not constitutional ones, had crowned the winner of the Decision of 1789. If the Executive did not hold an inherent removal power, “[w]hat indeed would become of the efficiency or even practicability of the Executive trust If ever there was a case where the [argument from inconvenience], ought to turn the scale, this was surely one.”²⁹⁰

The most famous advocate for an inherent removal power thus rested, in the end, on a pragmatic case for vesting the removal power in the President. It is a mistake to attribute more certainty to the Decision of 1789 than its own partisans would admit. It is doubly wrong to overlook that the decision was seen, in its own time, to be supported more by prudential reasoning than constitutional fate.

Thus, the Decision of 1789 was not a vote to renounce congressional constraints on removals. Indeed, Madison felt compelled to opine on his arguments in favor of removal thirty years later because, in the early 1820s, Congress began experimenting with tenure limitations. Throughout these legislative debates, Congress aired nearly every argument that recurs today in the rancorous debates about whether the executive power is so “unitary” that Congress cannot regulate the removal of officials.

By the 1820s, the federal civil service had grown substantially. The Executive Branch comprised a huge corps of customs officials and land agents, who in turn were responsible for the administration of the public purse.²⁹¹ In May 1820, Congress passed a statute to limit the President’s appointment power over such offices by subjecting all United States Attorneys and customs collectors to presumptive removal after four years.²⁹²

These tenure protections, like the Decision of 1789, led to spirited debate over presidential removal. Two participants in the earliest debates over Congress’s power to regulate appointments in 1789 bemoaned what the civil service had become. The tenure limitation, Jefferson wrote to Madison in 1820, was worse than the “attempt which failed in the beginning of the

288. Letter from James Madison to Tench Coxe, *supra* note 287, at 221.

289. *Id.*

290. *Id.* at 221–22.

291. “The number of persons employed and living on the bounty of the Government in 1825, 55,777; in 1833, 100,079.” S. DOC. NO. 28-399, at 61 (1844).

292. Tenure of Office Act, ch. 102, 3 Stat. 582 (1820).

government, to make all officers irremovable but with the consent of the Senate.”²⁹³ Madison agreed. Congress’s tenure limitation, he said, “overlooks the important distinction between repealing or modifying the office, and displacing the officer. The former is a Legislative, the latter an Executive function.”²⁹⁴ According to Madison, if Congress could limit tenure, “nothing is necessary but to limit appointments . . . to a single year . . . to make the pleasure of the Senate a tenure of office, instead of that of the President alone.”²⁹⁵

Madison and Jefferson agreed that tenure limitations were bad policy: Congress would turn officers into “hungry cormorants for office, render them, as well as those in place, sycophants to their Senators.”²⁹⁶ But, judging by the letters of an aged Madison, he viewed the President’s sense of honor—not the Constitution—to be the appropriate check: “The odium” of a poorly functioning administration, he said, “would be an antidote to the poison of the example, and a security against the permanent danger apprehended from it.”²⁹⁷

Madison may have been right about policy. These tenure limitations quickly led to concerns of government corruption as officials lobbied the President for reappointment.²⁹⁸ Politicians pushed for Congress to assume a role in the firing of government officials—to pass “an act of reclamation of th[e] co-ordinate power[] [to regulate removal], which, in 1789, [Congress] had consented . . . to yield to the President alone.”²⁹⁹

Against those who argued that the power to remove was inherent in the Presidency, those who wanted to limit the President’s authority to fire government officials responded that the Constitution rejects an approach to the separation of powers based on inherent definitions of the terms *legislative*

293. Letter from Thomas Jefferson to James Madison (Nov. 29, 1820), in 7 THE WORKS OF THOMAS JEFFERSON 190, 190 (H.A. Washington ed., 1884).

294. Letter from James Madison to Thomas Jefferson (Dec. 10, 1820), in THE PAPERS OF JAMES MADISON: RETIREMENT SERIES, *supra* note 287, at 176, 176–77. Madison’s equivocation between “removal” and “displacing” in this passage undercuts recent scholarly efforts to downplay *Federalist No. 77*’s reference to a Senate share in the removal power. See, e.g., Blackman, *supra* note 287 (arguing that Hamilton’s reference to displacement in *Federalist No. 77* referred merely to the Senate’s advice-and-consent duty).

295. Letter from James Madison to Thomas Jefferson, *supra* note 294, at 177.

296. Letter from Thomas Jefferson to James Madison, *supra* note 293.

297. *James Madison to Edward Coles, 29 August 1834*, NATIONAL ARCHIVES, <https://founders.archives.gov/documents/Madison/99-02-02-3022> [<https://perma.cc/8JXB-LURZ>]; see also Frederick W. Whitridge, *Rotation in Office*, 4 POL. SCI. Q. 279, 286 (1889) (repeating this language).

298. See Gerald E. Frug, *Does the Constitution Prevent the Discharge of Civil Service Employees?*, 124 U. PA. L. REV. 942, 952 (1976) (explaining that the Tenure of Office Act of 1867 was enacted to “assert a legislative check on executive patronage power”).

299. S. DOC. NO. 28-399, at 5 (1844).

and *executive*, and that it instead adopts a system of interdepartmental checks. They explained that “[a]n exact discrimination of those powers which seem executive in their nature, and their distinct allotment to a separate department, to be wielded without check, seems not to have been within the view of the framers.”³⁰⁰ Another reformer in the Senate argued that “[t]he framers of our Constitution wisely blended . . . the powers of the Executive and Legislative branches, making them in some measure dependent upon each other, and the welfare of our country depend on the just and harmonious action of the whole.”³⁰¹ And, like the Federalists, the reformers resisted their opponents’ invocation of Enlightenment separation-of-powers theory: “[t]hose who contend that there should be in a free Government an exact partition of powers, executive, legislative, and judicial, and that those powers, so secured, should be vested in distinct departments, . . . fall into a very great, though a very natural, error.”³⁰² This was the same error that had defeated the Anti-Federalist vision thirty years earlier:

[I]t is not in the nature of things that there should be equal power of self-preservation in those several functions of government; and if there be not, . . . the functionary that wields the stronger power may, and in the nature of things will, encroach upon the rest, until they are gradually swallowed up and absorbed by the master principle.³⁰³

Statements such as these echo the Federalist concern that allocating all of the legislative power to Congress or all of the executive power to the President would lead to congressional or legislative overreach. That is why, the reformers emphasized, “[t]he framers of our Constitution . . . did wisely to blend those powers, and we ought not to struggle against that principle of the Constitution, and still further to separate them.”³⁰⁴

These civil service reformers did not mince words in their rejection of the Anti-Federalist vision. They explained that “[i]t is not true . . . as a principle of our Government, that several powers, legislative, executive, and judicial should be accurately defined and separated by exact lines of demarcation.”³⁰⁵ Any argument “based on that assumption,” they argued, will “fall[] to the ground.”³⁰⁶ The reformers further argued that the Anti-Federalists’ vision was incompatible with familiar features of the Constitution. Those who opposed statutory constraints on the appointing and removal powers assumed that the scope of executive power could be proved

300. *Id.* at 106.

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.* at 107.

305. *Id.*

306. *Id.*

by reading Enlightenment political theorists. Those progenitors of the modern unitarist view observed that political theorists had typically assigned the “appointing” and “removing” powers to the chief magistrate.³⁰⁷ Civil service reformers responded that those same continental separation-of-powers theorists describe several *types* of legislative power: “[i]t requires the same power to repeal that it does to enact.”³⁰⁸ If removal inheres in the Executive alone, then wouldn’t a repeal power inhere in the Legislature alone? If, like the purported power of removal, the power of repeal is a “*casus omissus*, and necessarily attaches to the Legislative” power,³⁰⁹ then wouldn’t the same theory that gives an inherent removal power to the President give an inherent repeal power to Congress? Can Congress repeal statutes regardless of the President’s veto?

Civil service reformers were pointing out that arguments based on inherent powers would cause the Constitution’s system of checks to unravel. They argued that the possibility of legislative repeal without presentment “is all idle,” since it would defeat the check created by the presentment requirement.³¹⁰ Congress could not evade the President’s veto by invoking its inherent legislative power. So, too, should the removal power be subject to Congress’s check: the power to faithfully execute the removal of an official is the Executive’s alone, but the exercise of that power is regulable by Congress.

And, like today, reformers of the executive patronage in the 1830s pointed to several pieces of textual evidence to support Congress’s check. For example, some noticed that the final clause of Article I, Section 8, speaks of Congress’s power to regulate the carrying into execution of powers “vested by this Constitution . . . in any department or officer thereof.”³¹¹ From this clause, “it was very evident that the power to regulate the exercise of powers granted by the Constitution was vested in Congress itself, and not left to executive discretion.”³¹² That is because “surely the words ‘department, or officer thereof,’ applied as well to the President as to any other officer of the Government.”³¹³

307. See CHARLES FRANCIS ADAMS, AN APPEAL FROM THE NEW TO THE OLD WHIGS 6–7, 19 (1835) (emphasis omitted) (invoking political theorists to argue that the Executive has appointing and removing powers). Progenitors of the modern unitarist view invoked political theorists’ claims that “in the keeping of these [executive and legislative] powers distinct, flowing in distinct channels, so that they may never meet in one . . . consists the safety of the state,” but the political theory of the Constitution had abandoned that conceit. See *also id.* at 6 (emphasis omitted).

308. S. DOC. NO. 28-399, at 107.

309. *Id.* at 107.

310. *Id.*; see *also id.* (“It requires the same power to repeal that it does to enact . . .”).

311. *Id.* at 110.

312. *Id.*

313. *Id.*

Daniel Webster, who supported reform of the patronage system, found textual evidence of Congress's authority to insulate agency officials from presidential control in the Constitution's decision to share the appointment power between the President and the Senate. Executive power, he observed, "is not a thing so well known and so accurately defined as that the written Constitution of a limited Government can be supposed to have conferred it in the lump."³¹⁴ Webster was cautioning against the use of extratextual sources: "[T]he Constitution means no more than that portion which itself creates, and which it qualifies, limits, and circumscribes."³¹⁵ As a result, "the power of nomination and appointment is left fairly where the Constitution has placed it, [but] the whole field of regulation is open to legislative discretion."³¹⁶ Webster thus followed Madison and Jefferson's functionalist distaste for tenure limitations to its natural end: the power to structure tenure and the power to regulate removal are nominally indistinguishable.

The Senate debates on executive patronage recurred every decade in the nineteenth century, reprising the same warring views about how the Constitution separated powers. Congress's early- to mid-nineteenth-century debates over the removal power emphasized, over and over again, that the Decision of 1789 was a legislative judgment that could be revised. For example, reformers of the patronage in the 1830s proclaimed that "the proceedings of the Congress of 1789 amount to no more than the declaration of a legislative opinion, expressed in a manner and under circumstances which do not . . . carry with it the force and authority of an irreversible decision of a great . . . constitutional question."³¹⁷ These reformers recounted the floor debates about the "precedent of 1789" at great length,³¹⁸ pausing to notice that there was little consensus about whether Congress could "imply the power of removal to be in the President."³¹⁹ In the view of a Senate Committee in 1844, "[i]f the first Congress were competent to bestow [a removal power] upon the President, a subsequent Congress was equally competent to withdraw and otherwise invest it."³²⁰ Thus, Congress could grant or restrain the removal power. As a result, Senate committees considered themselves free to ask the question anew: "[A] *legislative* grant

314. *Id.* at 118.

315. *Id.*

316. *Id.* at 125.

317. *Id.* at 5–6.

318. *E.g., id.* at 5.

319. *Id.* at 17 (emphasis omitted).

320. *Id.*

of the power [of removal]” was possible, but Congress remained free to revise this prior “legislative declaration.”³²¹

By mid-century, praise for the First Congress’s deliberation about the appointment power had given way to a consensus view of their naivete. A constitutional history written in 1876 emphasized that, at the Founding, holding federal office was seen as a burden that few would seek. The historian quoted a letter from Hamilton written in 1799 to prove that “[p]ublic office in this country has few attractions,” and that “the ablest men could often be moved” to public service only by “the most urgent appeals of their friends.”³²² By the turn of the century, “Madison’s supposition that [state rather than federal] offices . . . would continue to be more eagerly looked for, turned out to be erroneous.”³²³ Instead, “the growing violence of independent party life” had created a “class of office-hunters.”³²⁴

The pattern in the modern unitary executive debates is thus similar to that in the nondelegation debate, as courts and scholars have toggled between Federalist and Anti-Federalist visions of the separation of powers. By the middle of the nineteenth century, politicians acknowledged that the removal issue had been relitigated on the Senate floor “without producing any impression on the public, because nothing was now said which had not been heard . . . before.”³²⁵

The Supreme Court removal cases have followed a similar pattern, creating what Jerry Mashaw has described as a “jurisprudential train wreck.”³²⁶ The first major removal case, *Myers v. United States*,³²⁷ is difficult to interpret, in part because the statute at issue required the Senate’s “advice and consent” before the President could remove certain postal officials.³²⁸

321. *See id.* at 19 (emphasis added) (expressing the view that the First Congress drafted statutory language with an eye toward avoiding suggesting that the removal power is a legislative grant).

322. 2 H. VON HOLST, *THE CONSTITUTIONAL AND POLITICAL HISTORY OF THE UNITED STATES* 15 & n.2 (John J. Lalor trans., 1879) (quoting JAMES A. HAMILTON, *REMINISCENCES OF JAMES A. HAMILTON* 15 (1869)).

323. *Id.* at 16.

324. *Id.* at 17. *See also id.* at 19 n.14 (“In general, when I open a letter, the silent question I put to myself is, who is this that wants a cadetship or a midshipman’s warrant, or an office, or an errand done at one of the departments?”) (quoting Letter from Mr. Webster to Mr. Dutton (May 9, 1830), in 1 *THE PRIVATE CORRESPONDENCE OF DANIEL WEBSTER* 500, 500 (Fletcher Webster ed., 1857)). Whereas relatively few officials were removed before 1837—averaging around nine per administration—in 1837 alone, Jackson removed hundreds of officials in his first year in office for patronage reasons. *Id.* at 23 n.1, 24.

325. 3 H. VON HOLST, *THE CONSTITUTIONAL AND POLITICAL HISTORY OF THE UNITED STATES* 145 (John J. Lalor & Paul Shorey trans., 1881).

326. Mashaw, *supra* note 29, at *14.

327. 272 U.S. 52 (1926).

328. Act of July 12, 1876, ch. 179, 19 Stat. 78, 80.

Such statutes pose two separation-of-powers problems, since they both regulate the Executive's removal discretion *and* arrogate the power to execute the removal to Congress. Still, the first major case about the scope of the President's removal power can be—and has been—read as adopting an Anti-Federalist theory of the separation of powers.

Chief Justice Taft, writing for the *Myers* majority, embraced an exclusivist theory of nonoverlapping powers, but only with respect to the unusual statute being reviewed. Taft thought the Founding generation uniformly embraced “Montesquieu’s view that the maintenance of independence as between the legislative, the executive and the judicial branches was a security for the people.”³²⁹ In Taft’s view, the Federalists’ reliance on checks did not fundamentally revise Enlightenment separation-of-powers theory, and instead left in place an Anti-Federalist default that “the branches should be kept separate in all cases in which they were not expressly blended.”³³⁰

Then came *Humphrey’s Executor v. United States*,³³¹ which foreshadowed a functionalist turn in the separation of powers. It was in *Humphrey’s Executor* that the Court described agencies as exercising quasi-judicial and quasi-legislative powers, but then sanctioned the commingling of such power. While appearing to accept the premise that the legislative and executive powers are amenable to readily discernible metaphysical definitions, the Court felt that those categories lacked significance as applied to “an administrative body created by Congress to carry into effect legislative policies.”³³² Put differently, classical separation-of-powers principles apply everywhere *but* the administrative state.

Approximately fifty years later, the Supreme Court took a sharp turn towards the Federalist vision of checks-based separation of powers. In two major removal cases decided in the 1980s, the Court rejected the Anti-Federalist vision of *Myers* and *Humphrey’s Executor* and suggested that the validity of congressional removal statutes rested primarily—perhaps entirely—on whether the removal provisions transgressed a constitutional check. The less famous of the two cases, *Bowsher v. Synar*,³³³ rejected a statute that gave Congress the power to remove an officer by joint resolution.³³⁴ The Gramm–Rudman–Hollings Act authorized the Comptroller General to review deficit estimates from the Office of Management and Budget and the Congressional Budget Office and mandate

329. *Myers*, 272 U.S. at 116.

330. *Id.*

331. 295 U.S. 602 (1935).

332. *Id.* at 628.

333. 478 U.S. 714 (1986).

334. *Id.* at 726.

spending reductions.³³⁵ The report then went to the President, who was required to enforce the spending reductions the Comptroller General mandated.³³⁶ Congress could remove the Comptroller General only by impeachment or joint resolution, and only for cause.³³⁷ The President lacked authority to remove him. *Bowsher* found the statute's removal provisions unconstitutional. The Court held that "Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws."³³⁸ Though the opinion is sparsely justified, it is significant that the Constitution gives Congress the power to remove officers through impeachment, and so the statute seems to have provided a route for congressional removal that flouts the procedure enumerated in the Constitution's text.

*Morrison v. Olson*³³⁹ was the other 1980s case that embraced the Federalist vision of government and rejected an allocation based on precisely defined power.³⁴⁰ *Morrison* concerned the constitutionality of the independent counsel provisions of the Ethics in Government Act, which prohibited the President from firing the independent counsel without cause.³⁴¹ The Supreme Court upheld the Act's removal provisions, and in doing so, it engaged squarely with the Anti-Federalist assumptions in prior removal precedents.³⁴² The Court acknowledged that it had previously described administrative officials as possessing "quasi-legislative" and "quasi-judicial" powers, and that the Court's ability to distinguish *Humphrey's Executor* from *Myers* rested on the fact that the agency in *Humphrey's Executor* mingled various federal powers.³⁴³ But the seven-Justice majority rejected this approach, explaining "that the determination of whether the Constitution allows Congress to impose a 'good cause'-type restriction on the President's power to remove an official cannot be made to turn on whether or not that official is classified as 'purely executive.'"³⁴⁴

Morrison applied an anti-domination theory to the separation of powers. The Court explained that the categories used in the previous cases were not particularly useful and, more importantly, assessed whether the for-cause removal provision prevented Presidents from exercising their office. The

335. *Id.* at 718.

336. *Id.*

337. *Id.* at 760 (White, J., dissenting).

338. *Id.* at 726 (majority opinion).

339. 487 U.S. 654 (1988).

340. *See id.* at 690 (rejecting that the Executive has an unfettered removal power simply by nature of being the Executive).

341. *Id.* at 663.

342. *See id.* at 697 (upholding the provisions).

343. *Id.* at 689–91.

344. *Id.* at 689.

Court found that it did not.³⁴⁵ According to the majority, the “‘good cause’ removal provision” did not “impermissibly burden[] the President’s power to control or supervise the independent counsel, as an executive official.”³⁴⁶ The Court emphasized that the provision allowing the Attorney General to terminate the independent counsel for “good cause” ensured that “the Executive, through the Attorney General, retains ample authority to assure that the counsel is competently performing his or her statutory responsibilities in a manner that comports with the provisions of the Act.”³⁴⁷ Under this logic, for-cause removal restrictions are constitutionally permitted because the President can fire agency officials who fail to carry out their statutory duties.³⁴⁸

After *Morrison*, the Court did not squarely face the removal question for another twenty years, though scholars challenged the Court’s findings in the wake of Ken Starr’s investigation of Bill Clinton.³⁴⁹ While many felt that *Morrison* was functionally dead,³⁵⁰ the Court only began to chip away at it in 2010 in *Free Enterprise Fund v. Public Company Accounting Oversight Board*.³⁵¹ On its face, the Court’s holding in *Free Enterprise Fund* was limited, but the case’s logic seems to return to an Anti-Federalist theory of separation of powers. Chief Justice Roberts, writing for the majority, found that a two-layered for-cause removal statute—applicable to an agency whose heads enjoyed for-cause removal protections and who themselves could only be removed by officials who enjoyed for-cause removal protections—was anathema to the separation of powers.³⁵² Citing *Myers*, Roberts wrote that “[s]ince 1789, the Constitution has been understood to empower the President to keep these officers accountable—by removing them from office, if necessary.”³⁵³ Roberts was emphatic: “We hold that such multilevel protection from removal is contrary to Article II’s vesting of the executive

345. *Id.* at 691 (“Considering for the moment the ‘good cause’ removal provision in isolation from the other parts of the Act at issue in this case, we cannot say that the imposition of a ‘good cause’ standard for removal by itself unduly trammels on executive authority.”).

346. *Id.* at 692.

347. *Id.*

348. See U.S. CONST. art. II, § 3 (“[The President] shall take Care that the Laws be faithfully executed . . .”).

349. See generally Akhil Reed Amar, Professor at Yale L. Sch., Testimony Before the Senate Committee on the Judiciary (Sept. 26, 2017) (“Outside the Court, Justice Scalia’s *Morrison* dissent has carried the day in legal and expert-opinion circles left, right, and center.”).

350. See generally Nick Bravin, Note, *Is Morrison v. Olson Still Good Law? The Court’s New Appointments Clause Jurisprudence*, 98 COLUM. L. REV. 1103 (1998) (suggesting that two developments in the ten years following *Morrison* undermine the Court’s holding).

351. 561 U.S. 477 (2010).

352. See *id.* at 484 (holding that a statute protecting an officer with “more than one level of good-cause protection” contravenes the Vesting Clause).

353. *Id.* at 483.

power in the President. The President cannot ‘take Care that the Laws be faithfully executed’ if he cannot oversee the faithfulness of the officers who execute them.”³⁵⁴ *Free Enterprise Fund* thus equated faithfulness to the President, to faithful execution of the law. The President’s wishes, whether motivated by politics, personal animus, or public-spirited desire to enforce the laws, are all captured in the faithful execution language of the Take Care Clause.

As we have noted, the Court fully embraced the Anti-Federalist approach in *Seila Law*.³⁵⁵ Though the Court again refrained from overturning precedents that upheld restrictions on the President’s removal power, the logic of the decision seems plainly unitarian, and it is difficult to see how for-cause removal protections will survive much longer.

But the dissent in *Seila Law* does not appear to provide an alternative vision of the separation of powers. For Justice Kagan, the President enjoys greater removal powers over officers like the Secretary of State and the Secretary of Defense because they “mainly help[] the President carry out his own constitutional duties in foreign relations and war.”³⁵⁶ But this reprises *Humphrey’s Executor*: some functions are more “executive-like,” and removal protections turn on proximity to the President. This ad hoc approach hardly seems consistent with the separation of powers, since it raises all the same issues that led scholars to caricature *Humphrey’s Executor* for stating that agencies are quasi-judicial and quasi-legislative entities. Once the dissenters agreed with the majority’s Anti-Federalist premise that the branches possess perceptible inherent and exclusive powers, they had few theoretical resources to resist the majority’s contrary policy judgment.

And now the writing appears to be on the wall. A legal memo from the Biden Administration’s Office of Legal Counsel embraced a strong vision of the unitary theory of executive power to defend the administration’s decision to fire the Trump-appointed Social Security Administrator,³⁵⁷ and the Court recently granted certiorari in a case asking the Court to overturn *Humphrey’s Executor*.³⁵⁸

354. *Id.* at 484.

355. *See supra* notes 59–62 and accompanying text.

356. *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2231 (2020) (Kagan, J., concurring in part and dissenting in part).

357. *See supra* note 64 and accompanying text.

358. *See* Petition for Writ of Certiorari at 32 n.4, *Axon Enter. v. FTC*, 142 S. Ct. 895 (2022) (No. 21-86) (arguing, in the section corresponding to the question denied by the Court, that “should the Court be inclined to revisit *Humphrey’s Executor*, this case presents an appropriate opportunity to do so”).

IV. Modern Administration

While the Constitution does not appear to contemplate a justiciable separation of powers based on metaphysical definitions of the terms *legislative* and *executive*, it does embrace a formal distribution of authority in which each branch must act according to the procedures enumerated in the Constitution. This Part explores the implications of a theory of separation of powers based on anti-domination in modern administrative law debates. Under this approach, it is impossible for Congress to delegate legislative power because the act of passing legislation creates a law that should be faithfully executed. Similarly, limitations on the President's removal power do not interfere with presidential power unless they interfere with the President's obligations under the Take Care Clause.

A. *Nondelegation*

Under our theory of the separation of powers, the nondelegation doctrine embraces a contradiction in terms. We agree with nondelegation proponents that the separation between legislative and the executive powers is "rigid [and] complete."³⁵⁹ However, because we understand the legislative power to be merely the power to make any bill into law through bicameralism and presentment, we think it is almost always a contradiction in terms to say that Congress has delegated legislative power. Once Congress enacts a bill into law, the entity that implements the law is simply acting pursuant to that legislative directive. That is an executive function, not because the Executive exercises the proper degree of policy judgment or aligns with some metaphysical understanding of the concept of executive power, but rather because the Constitution makes the Executive Branch responsible for taking care that the laws Congress has passed are faithfully executed. When an agency authors and then enforces a regulation based on statutory authorization, it is merely enforcing Congress's law.³⁶⁰

Expressed today as a commitment to accountability, modern theorists and judges have discerned an additional inherent—but ultimately extraconstitutional—limitation on the legislative power. That limitation is that the Legislature cannot pass statutes that further delegate legislative power to other branches. A law that gives the Executive Branch wide policy-

359. Cf. *Seila Law*, 140 S. Ct. at 2226 (Kagan, J., concurring in part and dissenting in part) (criticizing the majority for treating the "simple" supposition that the separation of powers is "rigid [and] complete" "as an ending too").

360. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–37 (1952) (Jackson, J., concurring) ("When the President acts pursuant to an . . . authorization of Congress, his authority . . . includes all that he possesses in his own right plus all that Congress can delegate. . . . If his act is held unconstitutional . . . it usually means that the Federal Government as an undivided whole lacks power.").

making discretion over major questions would amount to such an impermissible delegation of legislative power—or so the argument goes.

The nondelegation doctrine represents the resurgence of the view, debated at the Founding, of those “ingenious minds, dazzled by theory,” who are “extravagantly attached to the notion of simplicity in government.”³⁶¹ As we have explained, the Constitution accomplishes the separation of powers by giving each branch a “natural defence” against the encroachments of the others.³⁶² In so doing, it abandoned an alternative vision of separation-of-powers rules that would attribute each governmental act to one and only one crisply defined power. The Constitution’s defense mechanisms will vary with the branch of government, and with the body of Congress. But there are no additional principles of limitation in the Constitution that give effect to the separation of powers. We mean that last point categorically: *only* the Constitution’s procedural checks give life to the Constitution’s separation-of-powers principles. (Many other features of the Constitution give structural form to other goals, but those features do not attend to the separation of powers.)

As we have argued, allowing branches to share powers by giving each the capacity to check the others denies the claim that the Constitution’s separation-of-powers theory abhors the mixing of the three “great” and “independent” powers. In fact, the drafters abandoned the Anti-Federalists’ separationist ideal *in order to accomplish* the separation of powers. Among other things, the Constitution creates an executive Senate (in appointments and treaty-making); a judicial Senate (in impeachment); and it creates a legislative Executive (in presentment).

To be sure, the Constitution’s separation of powers frustrates the Anti-Federalists’ goal of accountability. A system that embraces checks but not balances inflects efforts to trace the origins of governmental actions through a hall of mirrors: Does the statute look this way because the Executive secretly threatened a veto? Or, indeed, does the statute represent the will of the Senate, or the will of the House, or the will of the President?³⁶³ All these issues sound in the Anti-Federalists’ objection that government must be *simple* and accountable, and thus that the Constitution’s separation-of-powers system should ensure that no branch “should [l]ever be suffered to have the least share of each others jurisdiction.”³⁶⁴ But those who urged separation based on immanent definitions of each kind of sovereign power

361. STORY, *supra* note 192, at 12.

362. *Id.* at 344.

363. These rhetorical questions, and many others, were part of the case against the Constitution. See KLARMAN, *supra* note 13, at 369–71 (explaining Anti-Federalists’ concerns with the Constitution’s “blending” of powers).

364. Penn, *supra* note 148, at 172.

faced considerable skepticism during the first 150 years of the American republic. Thus, under at least one influential theory of the separation of powers, these accountability concerns are irrelevant to the constitutional question of whether Congress has delegated legislative power.

That said, a statute that permits the Executive to exercise extraordinarily wide policy-making discretion in executing the laws may well offend the separation of powers if it contravenes the principle of anti-domination. Consider an exotic, hypothetical statute whose text provides that it will enter into force without presentment. Or, less exotically, consider a statute whose text misstates the language on which both houses of Congress voted.³⁶⁵ Were executives to enforce either of these statutes, they would breach the Constitution's separation-of-powers principles.

A statute's mere conferral of discretion to the Executive, however, would not offend the anti-domination separation of powers, even if that delegation lacked an intelligible principle to guide the execution of the laws. If neither the House nor the Senate exercised its reciprocal check on the other house; if the Executive did not exercise its qualified veto; or if the two houses overrode the qualified veto, then the limitations that the Constitution's separation of powers places on legislative power are ordinarily satisfied. And to the extent that this hypothetical statute is perceived as problematic, it can be amended or revoked through ordinary legislation. Congress does not give up its power to check the Executive simply by granting an agency substantial discretion to make policy.

Indeed, were executives to welcome a statute's broad delegation of discretion to their office, the fact that they did not wield the veto only means that the checking power is in repose—awaiting “an occasion worthy of bringing it forth.”³⁶⁶ The relevant question, from the perspective of anti-domination, is whether the branch retains the capacity to prevent the other from acting: “Indeed, one of the greatest benefits of such a power is, that its influence is felt, not so much in its actual exercise, as in its silent and secret energy as a preventive. It checks the intention to usurp, before it has ripened into an act.”³⁶⁷ A branch's use or nonuse of a check, whether an enumerated veto or the various modes of negotiation brought into being by the Constitution's power-sharing arrangements, amounts to the constitutionally appointed mode of enacting the separation of powers. The checks thus

365. This is the lesser noticed question of *Field v. Clark*, 143 U.S. 649, 672–73 (1892).

366. See *STORY*, *supra* note 192, at 346 n.4.

367. *Id.* at 350.

structure and generally entail a system of distributed agency in which neither the Legislature nor the Executive dominates the other.³⁶⁸

There are at least two additional reasons the Constitution's separation-of-powers system has nothing to say about abnegations of policy-making discretion by the Legislature. The first is that a bill that abnegates legislative discretion also happens to affirm the Legislature's lawmaking power. In the case of abnegation, the Legislature is not dominated because it always retains the power to rescind the law pursuant to which the Executive acts. The Executive remains always dependent on the Legislature's authorization. The second reason is that the constitutional evils of usurpation and tyranny are unintelligible as applied to such statutes: if we take the Executive to be the beneficiary of such statutes' policy-making discretion, and if we take the Legislature to be the donor of that discretion, it makes no sense to understand the Legislature's donation as a usurpation.

Although we can surmise reasons why it might be in the Legislature's *self*-interest to confer broad discretion to the Executive—to pass the buck, as members of the Supreme Court have phrased it³⁶⁹—these abnegations of policy-making discretion do not dominate the Executive and so they do not breach the separation of powers. They may be bad policy. But they are not bad constitutional law. We might also surmise reasons that an Executive might *extort* the Legislature to abnegate too much policy-making discretion. But if an overridden veto or a tyrant's threat is the starting point of a nondelegation hypothetical, the Federalists' presumption that each branch will be jealous of its power is so falsified that it is unclear what ends the separation-of-powers doctrine can serve.

B. *The Unitary Theory of Executive Power*

What, then, is the executive power, and where do agencies fit within the Constitution's tripartite framework? Conceiving of the separation of powers as a system of checks indicates that the executive function consists principally of the President's authority to act pursuant to a legislative enactment—to “take Care that the laws be faithfully executed”³⁷⁰—as well as additional reservoirs of inherent authority enumerated in Article II. To be sure, the Executive may possess authority to act absent congressional

368. See Josh Chafetz, *Congress's Constitution*, 160 U. PA. L. REV. 715, 769 (2012) (“[I]nstitutional settlements are negotiated in the shadow of each actor's powers, or, more precisely, in the shadow of each actor's perceptions of both its own powers and those of the other actors.”).

369. See *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2212 (2020) (Thomas, J., concurring in part and dissenting in part) (“While these officers assist the President in carrying out his constitutionally assigned duties, “[t]he buck stops with the President.”) (quoting *Free Enter. Fund v. PCAOB*, 561 U.S. 447, 463 (2010)).

370. U.S. CONST. art. II, § 3.

authorization in situations when there is an independent constitutional grant of authority, and perhaps when the “delphic”³⁷¹ Take Care Clause authorizes the President to act beyond Congress’s law.³⁷² But so long as an entity acts pursuant to a legislative directive, it is executing Congress’s legislative will.

Removal restrictions, like tenure restrictions and all duly enacted laws, went through bicameralism and presentment and are therefore legislative acts. Because the Constitution vests executive power in the President, and because the Take Care Clause makes the President responsible for implementing duly enacted laws,³⁷³ agencies that facilitate the implementation of a duly enacted law are helping the President take care that the laws are faithfully executed. That is why agencies, like all executive officials, help to execute duly enacted laws when they perform any function pursuant to statutory authority.

For example, when establishing a program to regulate hazardous air pollutants, Congress might tell the EPA to establish a threshold level of pollution that can be emitted into the atmosphere. It might also impose regulatory standards to guide agency determinations that a pollutant is harmful to public health. And it might limit the President’s ability to remove the administrator of the EPA. Traditional unitarists bear the burden of explaining why the third part of that law—the limitation on the President’s removal power—is different from the other two. Presumably, they would argue that the removal restriction interferes with the Vesting Clause.³⁷⁴ But like the nondelegation doctrine, that suggests an immanent and ultimately functional definition of the meaning of the law-execution function. As we have shown, that is precisely the approach to the separation of powers that the Federalists’ checks-based system rejects.

A questionable premise of the orthodox unitary theory of executive power is thus that they understand the Vesting Clause to convey a metaphysical definition of executive power that is neither contained in nor described by the Constitution’s text, and they deduce from that definition that Presidents can terminate agency officials as part of their supervisory powers. But if, as we have argued, the separation-of-powers limits on the Executive’s *law-execution* power are defined by (a) legislative enactments and (b) the

371. Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1867 (2016).

372. *See id.* at 1837 (explaining that the Executive’s prosecutorial discretion, sourced in the Take Care Clause, “may give the President room to reshape the . . . laws enacted by Congress”).

373. *See* U.S. CONST. art. II, § 3 (providing that the President must “take Care that the Laws be faithfully executed”).

374. *See id.* § 1, cl. 1 (“The executive Power shall be vested in a President . . .”).

procedures by which the Executive checks the other branches,³⁷⁵ then tenure protections for executive officials, like tenure limitations, are themselves legislative acts that the President must respect in order to take care that the laws are faithfully executed.

It is therefore difficult to understand why it is appropriate to read a plenary grant of removal power into Article II. The President's constitutional supervisory powers are better understood as referring to the procedures that the Constitution expressly allocates to the President to supervise agency officials, supplemented by statutory powers structured by Congress's legislation. These are not the entirety of the executive power, as Presidents may enjoy nonsupervisory powers when, for example, they exercise their power as "Commander in Chief of the Army and Navy of the United States,"³⁷⁶ or when they pardon officials.³⁷⁷ The presidency may enjoy a number of implied powers, but if it does, those powers should be deduced from textual provisions in Article II that allocate powers to the President. The point, though, is that the Constitution is highly specific about the mechanics by which each branch should check the others.

And while the Constitution's text says nothing about removal, it does give the President power to check the other branches and supervise administrative officials, including by participating in administrative and judicial appointments, and vetoing or threatening to veto legislation.³⁷⁸ These are extraordinary powers, especially since both regulatory design choices and appropriations decisions enable the President's veto. Congress is frequently required to make concessions to satisfy the President that an agency will operate in a manner that is consistent with the President's policy goals. While this debate has taken on great import as the administrative state has expanded, orthodox unitarists and those who believe that Congress can limit the President's removal power are actually rehashing a fervent—and ultimately inconclusive—debate that occurred shortly after the Constitution was ratified.³⁷⁹

Note, too, that ours is a unitary theory of executive power. We agree with orthodox unitarists that there are only three branches of government, that the Vesting Clause puts the President at the head of the Executive

375. Cf. Goldsmith & Manning, *supra* note 371, at 1851–53 (describing theories of a "completion power": the power to take measures necessary to effectuate statutory commands).

376. U.S. CONST. art. II, § 2, cl. 1.

377. *Id.*

378. *See id.* art. II, § 2, cl. 2 ("[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court and all other Officers of the United States . . ."); *id.* art. I, § 7 ("Every Bill . . . shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it . . .").

379. *See* Prakash, *supra* note 284, at 1031–33 (recounting the chronology of the "spirited" Decision of 1789).

Branch, and that heads of the Executive Branch possess power to supervise their subordinates. We depart from them, however, in our understanding of the legislative and executive vesting clauses and the relevance of whether those branches' functions mix. Because we do not think that the term *legislative* requires that bills that are passed through bicameralism and presentment be general and prospective, there is no difference between a law that instructs the President to do something and a law that explains how to do it.

The more difficult question is whether the Take Care Clause is relevant to removal. Jerry Mashaw and David Berke have argued that the Take Care Clause defines the President's removal power.³⁸⁰ On this view, the President possesses inherent authority to remove officials when doing so is necessary to take care that the laws are faithfully executed. That interpretation would constitutionalize what is currently the prevalent and bargained-for statutory basis of presidential removal: that Presidents may remove officers for "malfeasance, inefficiency, and neglect of duty."³⁸¹ By contrast, disagreements about matters other than competence have little, if any, bearing on whether the Executive Branch is enforcing duly enacted laws.

The Take Care Clause creates a plausible reading that current statutory removal protections are constitutionally required, and that the President possesses authority to remove agency officials when they are not performing their duties. That does not mean, however, that the President can ignore duly enacted laws that stipulate that officials can only be fired for "inefficiency, neglect of duty, or malfeasance."³⁸² To recognize a removal power in the case of neglect of duty is simply to recognize that Congress cannot pass laws that prevent the President from taking care that the laws are faithfully executed; that is, to dominate the other branch.

Note that this understanding of the President's removal power is consistent with the theory of the separation of powers as a principle of anti-domination. While Congress's legislative power has no inherent substantive limitations, the empty content of the legislative power does not authorize Congress to evade constitutional checks. To that end, Congress can limit both Presidents' authority to remove executive officials and the tenure of their appointees because these are legislative acts; but that does not mean that Congress can interfere with the President's affirmative duty to take care that

380. See Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 *YALE J. ON REGUL.* 549, 552 (2018) (arguing that the "general contours" of executive power, including the removal power, are founded on the Take Care Clause).

381. See, e.g., 15 U.S.C. § 41 (setting removal restrictions for FTC Commissioners).

382. *Contra* Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2206 (2020) (regarding this view as "not persua[sive]").

the laws are faithfully executed. From the vantage point of separated powers, the legislative power has no independent content beyond bicameralism and presentment, but from the vantage point of the freestanding duty to faithfully execute the law, the legislative power cannot disable those supervisory obligations that are expressly imposed by the Constitution.

C. *Agency Adjudication*

Under the theory of separation of powers we have developed, agency adjudication may raise more difficult constitutional questions than rulemaking and removal. Agencies are often tasked with adjudicating suits or petitions that involve administrative entitlements. Sometimes that entails passing judgment on private disputes among individuals.³⁸³ Article III, unlike its immediate antecedents, is specific in defining the scope and content of federal judicial power. Not only does it “vest[]” judicial power in federal courts, but it also specifies that this judicial power “shall extend” to a variety of specific cases, including those in which the United States is a party, those that involve disputes among different states, and those that arise under federal law.³⁸⁴ Scholars have extensively debated the limits of agency adjudicative power and Congress’s authority to strip federal courts of jurisdiction over certain cases. Such scholars assume—rightly, in our view—that there is a category of cases over which federal courts must exercise jurisdiction.³⁸⁵

We take no position on the particulars of the jurisdiction-stripping debates or about when Congress can create non-Article III courts³⁸⁶ except to say that our argument that the Constitution does not accept metaphysical definitions of the legislative and executive functions applies with less force to Article III. Here, in contrast to executive–legislative powers debates, the notion that the Judicial Branch must have a “separate jurisdiction”³⁸⁷ is expressed in the vesting of the judicial power and the tailoring of the terms of its jurisdiction to decide various cases or controversies. While Articles I and II do not provide concrete descriptions of legislative and executive “jurisdictions,” Article III does explain what federal *courts* should do and parcels to them an exclusive share of the government’s regulatory agency. If

383. See *CFTC v. Schor*, 478 U.S. 833, 847 (1986) (asking whether “the CFTC’s assumption of jurisdiction over common law counterclaims violates Article III of the Constitution”); *Stern v. Marshall*, 564 U.S. 462, 494 (2011) (explaining that Congress can sometimes delegate adjudicatory authority over private disputes to expert agencies especially suited to that task).

384. U.S. CONST. art. III, § 1–2.

385. See, e.g., Amar, *supra* note 136, at 272 (“All cases arising under *federal* law . . . must be capable of final resolution by a *federal* judge.”).

386. See generally William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511 (2020) (proposing a framework for discerning when non-Article III adjudication is permissible).

387. Penn, *supra* note 148.

Congress were to declare that a legislative or executive body possesses exclusive authority to decide a subset of “Cases . . . arising under [the] Constitution,” it might flout the constitutional directive that federal courts should decide such cases.³⁸⁸

Note, though, that the specific grant of adjudicative power to Article III is consistent with a theory of separation of powers based on anti-domination. Apart from the typical “armour”³⁸⁹ the Legislature and Executive wield against each other, Article III judges enjoy special protections, including lifetime tenure and salary protections, that are supposed to preserve their independence from the other branches.³⁹⁰ If Congress could declare that the Executive or House of Representatives could decide private controversies, it would thereby be able to make the Legislative and Executive Branches sit in judgment over their own actions; the offending branch would, in that situation, finally be reaching the separation-of-powers outer bound by uniting all powers in one set of hands. Thus, in the case of the Judiciary, it seems consistent with a theory of separation of powers based on anti-domination to define the judicial role to ensure that the Judiciary is able to check the other branches.

A theory of separation of powers based on a principle of anti-domination does not mean that there are no hard separation-of-powers cases. It is one thing to assert that the Take Care Clause gives the President authority to remove incompetent agency officials. It is quite another to imagine that the Constitution parcels out regulatory authority over all appointments and removal matters even though its drafters thought the matter “excited so little attention, whilst the Constitution was under discussion.”³⁹¹

Given the indeterminacy of the Founding Era debates, it is not clear that one can discern a single, decisive historical answer to these questions. But this indeterminacy makes the Anti-Federalist critique all the more significant, since there seems to have been widespread consensus—both among the drafters of the Constitution and their Anti-Federalist critics—that the Constitution did not adopt the theory of separation of powers that underlies modern attacks on the constitutionality of the administrative state. The Federalists’ rival separation-of-powers principle—an anti-czar or anti-domination doctrine—would prevent the Legislature from dominating the President and vice versa.

388. U.S. CONST. art. III, § 2, cl. 1.

389. *See supra* note 115.

390. *See* U.S. CONST. art. III, § 1 (“The Judges . . . shall hold their Offices during good Behavior, and shall . . . receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”).

391. *See supra* note 288.

Conclusion

A challenge for defenders of the administrative state is that they have struggled to articulate a theory of separation of powers that reconciles the administrative state with the tripartite system of government suggested by the first three Articles of the Constitution. They have instead responded to attacks on the federal bureaucracy primarily by arguing that administrative skeptics (a) misunderstand a historical record that permits a fourth branch, (b) misread the text of the Constitution, or (c) are unsympathetic to the practical and exigent needs of modern society.

This Article has reconstructed a theory of the separation of powers based on a Founding Era debate between Federalists, who supported the Constitution, and their Anti-Federalist critics. The theory of separation of powers underlying the nondelegation doctrine and the unitary theory of executive power assumes that metaphysical definitions of the broad powers divided between the three branches are needed to maintain federal accountability. This is not a new argument. It dates back to the Founding, when Anti-Federalists marshaled the same arguments to criticize the Constitution's crucial system of checks.

But as we have shown, the modern reconstruction of an Anti-Federalist separation of powers is in tension with the Constitution's text and structure, and it was rigorously debated at the Founding and throughout the nineteenth century. The Federalists' separation-of-powers theory offers a plausible alternative to the formalism that dominates modern administrative law debates: it is a principle of anti-domination established in the procedural devices the Constitution creates for passing, executing, and reviewing federal laws.