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THE CONCURRENCE OF POWERS: ON THE PROPER OPERATION OF THE STRUCTURAL CONSTITUTION

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INTRODUCTION

The 15th Annual Hayek Lecture at New York University School of Law by the Honorable Judge Raymond Kethledge was another signal of a new generation in the federal judiciary. In his lecture "Hayek and the Rule of Law: Implications for Unenumerated Rights and the Administrative State," Judge Kethledge builds from Hayek's observations on the purpose and prerequisites of the "Rule of Law"

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to examine the role of courts and the political branches with respect to two related areas: the unenumerated rights thought to be enshrined in the 9th Amendment to the U.S. Constitution, and the problems that have arisen with the advent of the Administrative State.

Judge Kethledge joins an increasing number of judges and legal scholars who are willing to take a fresh look at the Supreme Court's jurisprudence of the structural Constitution. In recent decades, the suspicion that the Court has gotten many, if not most, of the key decisions wrong in this area has become harder to dismiss out of hand as the executive branch continues its steady absorption of control over the governmental functions of the other federal branches as well as the states. This article takes Judge Kethledge's discussion of Hayek, the Rule of Law and the Administrative State as its point of departure for a fresh look at the Constitution's dissolving separation of powers.

In the summer of 2019, a topic of renewed theoretical interest suddenly acquired high stakes in the real world with a surprising dissent in a Supreme Court case that few expected to make history: *Gundy v. United States*.[1] The dissent, and just as interestingly, the configuration of votes, signaled that a majority of the Court may be willing to take on one of the most difficult and challenging issues in the jurisprudence of the structural Constitution: the nondelegation doctrine, which in theory limits the ability of Congress to delegate legislative rulemaking authority to the executive branch.

The *Gundy* dissent reiterates the familiar postulate from Montesquieu via James Madison, that concentrating all legislative, executive, and judicial power in the same hands is "the very definition of tyranny," and therefore Congress may not delegate its

[1] 139 S. Ct. 2116 (2019).

vested constitutional function to another branch. Writing for the dissent, Justice Neil Gorsuch sets forth various tests that courts have used to distinguish delegations that come close to being impermissible from those that go over the line. But the *Gundy* dissent fails to articulate—much as all the Supreme Court's nondelegation decisions before it have failed to articulate—a single unifying nondelegation principle broad enough to tie together the various strands of nondelegation jurisprudence while at the same time precise enough to be operationalized as a rule of a constitutional law. In short, the *Gundy* dissent asks the basic question ("What is the test?") but does not answer it.

In this article, I argue that the best answer to that question, and perhaps the only one, may be found in Judge Kethledge's Hayek Lecture—namely his simple observation, following Hayek, that the separation of powers protects liberty through "the requirement that any particular act of coercion have the concurrence of three branches." Those familiar with the scholarly debates on separation of powers and nondelegation will likely recognize that Kethledge is really saying two separate things here: First, that the three basic functions of government should be confined to separate branches; and second, that those three branches must concur for any coercive exercise of government power to be valid.

There is a great deal to unpack with Judge Kethledge's observation, and to begin we must first rewind our clock back to early 17th century England. As many scholars have pointed out, the American Constitution represents the synthesis of two distinct and somewhat incompatible ideas, the classical notion of "mixed government," which was put through trial-by-fire in 17th century England, and the notion of "separation of powers," which

subsequently emerged from that trial-by-fire.[2] The idea of "mixed government" was an early attempt to forge representative governance out of the social arrangement of feudalism, and was at the most basic level a principle of political *organization*: a just government would include the crown, aristocracy, and commoners. Crucially for the Framers' purposes, however, "mixed government" also implied a principle of intra-governmental *operation*, of how the various power centers of the state should act and interact—namely, through concurrence.

In America, the idea of "mixed government" evolved in the course of the 18th century into a more modern form, the *organizational* principle of "separation of powers." Like "mixed government" its purpose was to prevent tyranny and to provide democratic representation. And like "mixed government" it also implied the *operational* principle of concurrence.

And because its star was waxing by the time of the Philadelphia Convention, the Framers had a great deal to say about it. Curiously, however, they had rather less to say about how these separated powers were supposed to *operate* together through what they called "checks and balances."

The Framers provided for a lawmaking scheme that would require one kind of inter-branch concurrence, through bicameralism, presentment, and judicial review. Beyond that, James Madison argued in Federalist No. 51 that each branch would check the others merely by defending its own prerogatives.[3] As subsequent history was to show, however, it was not always easy for those who held legislative and judicial offices to decide what was in the best interest

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[2] See., e.g., Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution*, pp. 245–49 (Vintage 1996) and authorities cited therein.

[3] Federalist 51 (Madison) in *The Federalist Papers* (New American Library 2003) (Clinton Rossiter, ed.).

of the institutions they served, and—worse still—their personal interests often diverged from their institution's. In fact, neither "separation of powers" nor "checks and balances" rested on textual premises sufficiently firm to prevent the rise of the Administrative State and the steady disintegration of the original constitutional structure.

This article argues that the separation of powers carries not just a well-known *structural* principle, but also a less well-understood *operational* one: The requirement of concurrence among the three branches for any exercise of coercive government power. Inter-branch concurrence is vital for giving effect to the purposes for which the government was organized into three branches, namely to prevent arbitrary government and ensure the greatest possible representation in every exercise of government power. To state the proposition another way, preventing arbitrary power and ensuring the widest possible representation requires preserving each function of government within its respective branch as much as possible. To be sure, the exercise of executive power entails functions that are sometimes legislative or adjudicatory, but these incidents should be held to an implied limitation, namely that each such incident must be necessary and proper to the exercise of the vested executive power. Legislative and adjudicatory functions beyond those that are necessary and proper to the exercise of executive power increase the risk of arbitrary government and diminish representation—unless they are subject to ratification by the proper branch. Without the principle of concurrence, the separation of powers becomes unmoored from its purposes, and thereby becomes almost infinitely malleable. Hence the principle of concurrence should guide the federal judiciary in its re-examination of virtually all aspects of its "separation of powers" jurisprudence, from nondelegation and legislative vetoes, to the purpose and scope of judicial review, to the problem of independent agencies and the "unitary executive."

This article proceeds in three steps. In Part I, I examine the *Gundy* dissent and show that while it opens the door to a major shift the

Court's nondelegation jurisprudence, it fails to articulate a single comprehensive nondelegation doctrine. I then reprise Judge Kethledge's Hayek Lecture and suggest how his insistence on a "concurrence of powers" helps us answer the questions left unanswered by the *Gundy* dissent. In Part II, I trace the roots of the Constitution's separation of powers, and the related idea of mixed government, back to 17th century England. I approach this review through both formalist and functionalist lenses, and show how ineffective the various iterations of the nondelegation doctrine and "separation of powers" have been in protecting the intended operation of the Constitution. In Part III, I try to show how a renewed commitment to the "the concurrence of powers" can help a new generation of federal judges work through the major—and thus far poorly answered—questions of the proper *operation* of the Constitution's separation of powers.

I. A NEW GENERATION TAKES A NEW LOOK AT THE CONSTITUTION

With close to 200 new judges nominated and confirmed to the federal bench since the start of the Trump administration, we are witnessing the dawn of a new generation in the federal judiciary. That generation will almost certainly leave an epochal stamp on our constitutional jurisprudence. If so, it is safe to assume that many areas where doctrine had long seem settled will be reexamined in the years ahead, particularly in those areas of constitutional jurisprudence which still bear the scars of New Deal justices and their activist successors, areas where conservative legal thinkers have learned to live with the results but never conceded the argument.

One area that is certain to be reexamined is the general domain of the structural Constitution, including separation of powers and federalism. Within that domain, the rise of the Administrative State and the consolidation of legislative, and to a lesser extent judicial, power in the hands of the President have been particularly worrisome to conservative legal thinkers, the likes of which have now

joined the federal bench in historic numbers. This makes the interplay of administrative law and nondelegation principles a particularly promising area for a fresh look.

Hence the dissent of Justice Neil Gorsuch in *Gundy v. United States* was potentially historic—perhaps not as a milestone in itself, but as a first step in a new direction for the Court. The *Gundy* dissent first observed that the Constitution requires bicameralism and presentment for a bill to become law, as the Framers recognized that "an excess of lawmaking" was itself a threat to democracy. Hence, Gorsuch writes that Congress cannot "divest itself of legislative responsibilities" by delegating those responsibilities to the executive branch, followed by an explicit framing of the Gordian knot itself: "What's the test?" for determining when there has been an impermissible delegation of power? Gorsuch's answer is a small catalogue of the various tests that courts have come up with over time to tackle the problem of nondelegation. What is missing in this patchwork of answers, or as it were, first brainstorming session towards an answer, is a simple, durable, *single* test for nondelegation.

A. THE *GUNDY* DISSENT

When Chief Justice John Roberts (by many accounts the new swing vote on the Court in the aftermath of Justice Anthony Kennedy's retirement) joined a dissent that, for the first time in living memory, would have struck down a law of Congress as a violation of the nondelegation doctrine, it raised eyebrows across the American legal landscape. The dissent in *Gundy v. United States* was curious for several reasons. First of all, it is now clear that for the first time in generations a majority of the Court may be willing to strike down a law of Congress as a violation of the nondelegation doctrine.

Second, it is also equally clear that the Supreme Court doesn't really *have* a nondelegation doctrine.[4]

In addition to the Chief Justice, Gorsuch's *Gundy* dissent was joined by Justice Clarence Thomas, with Justice Samuel Alito concurring in the majority decision but signaling his philosophical agreement with the dissent. Most importantly, Justice Alito made plain that he was willing to revisit the Constitutional issue at question: "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."[5] Whether or not a majority of the Court was "willing" to reconsider the Court's approach, no majority was available: Justice Kavanaugh joined the Court too late to take part in its consideration of *Gundy*, so a four-four decision would merely have upheld the Second Circuit Court of Appeal's decision upholding the law in question. Seeing no point in that, Alito joined the progressives to make a clear 5-3 majority. That left everyone to guess where Kavanaugh might stand, and he didn't take long to show his hand. In a rare statement appended to a denial of certiorari in a similar case, Kavanaugh signaled that he looked forward to reprising the arguments of the dissent, particularly those centered on the "major questions" doctrine.[6] Hence, the nondelegation analysis laid out in the *Gundy* dissent now almost certainly enjoys the support of a

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[4] See Cass R. Runstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 322 (2000) ([T]he conventional [nondelegation] doctrine has had one good year, and 211 bad ones (and counting).").

[5] 139 S. Ct. at 2131.

[6] *Paul v. United States*, 140 S. Ct. 342, 342 (2019) ("In [*Industrial Union Dept., AFL–CIO v. American Petroleum Institute*, 448 U. S. 607, 685–686 (1980)] Justice Rehnquist opined that major national policy decisions must be made by Congress and the President in the legislative process, not delegated by Congress to the Executive Branch.").

majority of the Court—at least as an initial point of departure for further doctrinal development.

Gundy concerned a provision of the Sex Offender Registration and Notification Act (SORNA) that authorizes the Attorney General to "specify the applicability" of SORNA's registration requirements to individuals convicted of a sex offense before SORNA's enactment, and "to prescribe rules for [their] registration."[7] As both the majority and dissent agreed, the provision allowed the Attorney General to require all pre-Act offenders to register, some but not all, or none at all. Furthermore, for those the Attorney General does require to register, a further decision can be made on which of SORNA's requirements to apply. After serving a five-year term for a sex offense, Herman Gundy was released from prison. Apparently unaware that some of SORNA's requirements applied to him by action of the Attorney General, Herman Gundy was rearrested and now faced an additional 10-year prison term.

Justice Elena Kagan, writing for a progressive majority, predictably held that the law "easily passes Constitutional muster." No surprise there—under the Court's decisions since the 1930s, it is virtually impossible to conceive of a delegation of rulemaking authority that would not just as easily pass Constitutional muster.

The Gorsuch dissent, however, embraced a more formalist view. First, the Associate Justice noted that the Framers sought to protect against arbitrary government and protect minority rights against the tyranny of the majority, while also assuring stability and accountability by ensuring lawmaking was difficult. "[T]he framers insisted that any proposed law must win the approval of two Houses of Congress—elected at different times, by different constituencies,

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[7] 24 U.S.C. § 2913(d).

and for different terms in office—and either secure the President's approval or obtain enough support to override his veto."[8] Hence, Congress cannot "divest itself of legislative responsibilities" by delegating those responsibilities to the executive branch. But for all the handwringing, the question still remains: "What's the test?"

Alas, Gorsuch leaves us with only pieces of an answer. At the outset he acknowledges that absolute formalism in separation of powers is not realistic. He quotes James Madison's observation that "no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces—the legislative, executive, and judiciary."[9] Gorsuch then discusses the main categories of delegation cases that do not raise constitutional concerns.

He begins with early cases. "First," Gorsuch observed, "we know that as long as Congress makes the policy decisions when regulating private conduct, it may authorize another branch to 'fill up the details.'" Gorsuch quotes the majority opinion in *Wayman v. Southard*, in which Marshall distinguished between those "important subjects, which must be entirely regulated by the legislature itself," and those of less interest, in which a general provision may be made, and power given to those are to act . . . to fill up the details."[10] This allows the executive to fill the content of a rule with more precise detail, a function Chief Justice Marshall thought appropriate for subjects of lesser interest where a general provision on the part of Congress would do. Though Gorsuch takes up the doctrine of "major questions" in a subsequent part of his dissent, one is left wondering

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[8] 139 S. Ct. at 2134.
[9] Federalist 37 (Madison), in *The Federalist Papers* 220, 224 (cited in note 3).
[10] 139 S. Ct. at 2136 (2019) (Gorsuch dissenting) quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825) (Marshall).

whether "major questions" aren't really the same as the "important subjects" of *Wayman*.

Second, recalling *Cargo of the Brig Aurora v. United States*,[11] Gorsuch explained, "once Congress prescribes the rule governing private conduct, it may make the application of that rule depend on executive fact-finding." Unlike the first principle, this second dispensation makes the precise application of the rule in a given case dependent on the facts as the executive finds them, clearly a larger delegation of authority.

Third, Gorsuch writes that Congress may delegate discretion over matters that are already within the scope of executive power, and can regulate the exercise of that discretion. He related this third category to both *Brig Aurora* and *Wayman*:

> Though the case was decided on different grounds, the foreign-affairs-related statute in *Cargo of the Brig Aurora* may be an example of this kind of permissible lawmaking, given that many foreign affairs powers are constitutionally vested in the president under Article II. *Wayman* itself might be explained by the same principle as applied to the judiciary: Even in the absence of any statute, courts have the power under Article III "to regulate their practice."

These cases are discussed in more detail in the next section.

Gorsuch then turned to several modern cases also discussed in more detail in the next section: *J.W. Hampton Jr. & Co. v. United States*,[12] *A. L. A. Schechter Poultry Corp. v. United States*,[13] and *Panama*

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[11] 11 U.S. (7 Cranch) 382 (1813).
[12] 276 U.S. 394 (1928).
[13] 259 U.S. 495 (1935).

Refining Co. v. Ryan.[14] Citing them as if all were still good law[15] he located in them another basic test of nondelegation:

> To determine whether a statute provides an intelligible principle, we must ask: Does the statute assign to the executive only the responsibility to make factual findings? Does it set forth the facts that the executive must consider and the criteria against which to measure them? And most importantly, did Congress, and not the Executive Branch, make the policy judgments? Only then can we fairly say that a statute contains the kind of intelligible principle the Constitution demands.

In addition to these rationales, the dissent also cited the "major questions" doctrine, the "void for vagueness" rule, and even the prohibition of unicameral vetoes as other versions of the nondelegation doctrine. Regardless, Gorsuch reasoned, the delegation in question was not a case of filling up details or fact-finding, nor was it one of overlapping authorities with Congress solely making the policy judgments. The delegation was open-ended and left all the policy judgment to the Attorney General.

Given Justice Kavanaugh's pronouncement in *Paul*, the Court may be getting ready to focus on "major questions" as a strengthened bar to delegations. The stage for a "major questions" doctrine was set long ago in *Wayman*, but there are reasons to doubt its promise. Certainly, such a rationale could be used to strike down some particularly open-ended delegation affecting important private rights, and many would doubtless celebrate the outcome. But there is no obvious basis for distinguishing between "major" and "minor"

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[14] 293 U.S. 388 (1935).
[15] See note 4.

questions. The difference will always be a matter of degree, an exercise of locating the importance of a particular question along a continuous spectrum. Clearly, the importance of a given question is ultimately in the eye of the beholder. In short, such an approach has all the hallmarks of indeterminate balancing tests and artificial categories that judges have all too often used to rule whichever way feels best to them as a matter of largely unaided intuition.

The search for a single unifying and operational principle of nondelegation continues.

B. KETHLEDGE ON HAYEK AND THE ADMINISTRATIVE STATE

Judge Raymond Kethledge started NYU's 15th Hayek Lecture by recalling that, according to Friedrich Hayek, a properly functioning Rule of Law requires four principles: the law must be known in advance; it must be certain, not vague; it must apply equally to all who are similarly situated; and the function of making laws and applying them must be performed by separate bodies.

But how are those principles to be guaranteed? In *The Road to Serfdom*, Kethledge reminds us, "Hayek wrote that "the essential point" of the Rule of Law—its *sine qua non*—is that "the discretion left to the executive organs wielding coercive power should be reduced as much as possible[.]"[16] In *The Constitution of Liberty*, Hayek elaborated that "the rule of law requires that the executive in its coercive action be bound by rules which prescribe not only when and where it may use coercion but also in what manner it may do so."[17]

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[16] Raymond M. Kethledge, *Hayek and the Rule of Law: Implications for Unenumerated Rights and the Administrative State*, 13 N.Y.U. J. L. & Liberty 193, 210 (2020).
[17] F.A. Hayek, *The Constitution of Liberty* 319 (Routledge 2011) (Ronald Hamowy ed.) (originally published 1960).

And crucially, "[t]he only way in which this can be ensured is to make all its actions of this kind subject to judicial review."[18]

Kethledge then focused on the cardinal principle that has eluded so much commentary on separation of powers:

> The overarching concern, of course, was that executive discretion to say what the law is and to make the law violates the separation of powers, his fourth principle in the Rule of Law. But the reason why the separation of powers protects liberty, Hayek wrote, "is not always understood." The reason is not merely that, "through mutual jealousy," each branch will prevent the others from invading its authority and thereby confine the others to their own. Quite the contrary: modern administrative law shows that both the legislative and judicial branches are often quite willing to cede their power to the executive. *The more important protection, instead, is the requirement that any particular act of coercion have the concurrence of three branches.* The legislature must prescribe a rule of conduct that authorizes the coercion; the executive must choose to enforce that rule; and the judiciary must conclude that the executive's act of coercion falls within the rule's limits.[19]

To appreciate the potential impact of this observation, let's go back Gorsuch's point of departure in *Gundy*. Gorsuch tells us that to protect liberty and democratic values, the Framers required bicameralism and presentment in order for a law to be enacted. Hence, Congress should not constitutionally delegate its legislative powers generally to the executive branch.

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[18] Id.

[19] Kethledge, 13 N.Y.U. J. L. & Liberty at 212 (emphasis added) (cited in note 16).

But bicameralism and presentment are only an example of inter-branch concurrence, and it is not the primary reason why we know there must be a nondelegation doctrine. The requirement of bicameralism and presentment only points to a more basic separation of powers principle. Having divided the Constitution's power among three branches of government, the Constitution mandates that each branch *actually exercise* its quantum of power by concurring in the exercise of the whole power. The requirement of bicameralism and presentment applies the principle of concurrence to a law of Congress, which can affect private rights by operation of law. But there are other kinds of government coercion – for example the actions of the executive branch.

Each delegation of rulemaking authority diminishes the constitutionally vested legislative power by pushing it further away from the only branch that can legitimately exercise it. As delegations accumulate, an increasing quantum of legislative authority is being captured by the executive branch. These legislative delegations go far beyond necessary and proper incidents of executive authority. Rulemaking and enforcement are increasingly done by the executive branch, both raising the risk of arbitrary government that the Framers foresaw and diminishing the degree of representation present in those government actions.

A special and little studied problem arises when the exercise of the delegated power occurs during the pendency of a subsequent Congress or (with respect to constructive delegations of executive branch authority) during the pendency of a subsequent President. Every new Congress and President must contend with the laws and actions of prior Congresses and presidents. But altering the

requirements for lawmaking is not the same as other laws,[20] for it affects the constitutional basis for lawmaking, and changes the contours of vested constitutional powers in ways that those future Congresses and presidents may not be able to change unless they act together. This problem is discussed in Part III.

Each delegation does not merely weaken the protections that the separation of powers was designed to afford to the citizen as a matter of social fact. Each delegation also weakens the very legitimacy that the exercise of coercive government power vitally depends upon.

II. SEPARATION OF POWERS: ORIGINS, EVOLUTION, AND SCHOLARLY DEBATES

The Constitution that emerged from the Philadelphia Convention enshrined both the separation of powers and the related but distinct idea of mixed government. Though the ideas were arguably incompatible in their original forms, the Framers emerged from America's colonial experience with the conviction that a proper Constitution needed both. The idea of "separation of powers" was more fully developed in their minds as an organizational principal, with that of "mixed government" (an important but fading vestige of *representation* in a feudal system) standing now for the vague *operational* principle that the three federal branches would keep each other in check through some sort of competitive equilibrium.

Throughout the 19th century, the separation of powers remained a bedrock principle, even as Presidential power waxed and waned in a magnitude largely commensurate with the rise of judicial review. But the principle was directly challenged at end of the 19th century

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[20] In *The Constitution of Liberty*, Hayek made a similar distinction between laws and the rule of law: "From the fact that the rule of law is a limitation upon all legislation, it follows that it cannot itself be a law in the same sense as the laws passed by the legislator." Hayek, *The Constitution of Liberty* at 310 (cited in note 17).

by a scholar-turned-politician, Woodrow Wilson, who scarcely hid his disdain for America's political order. He argued for a new kind of "mixed government" in which technocratic administrative agencies would perform all the necessary functions of government.

This first articulation of what was to become the modern administrative state opened the way for novel and often troubling combinations of legislative, executive, and judicial functions within administrative agencies, and even within the presidency itself. New opportunities were afforded for unilateral executive actions that challenged the prerogatives of the legislature or judiciary (or both). At times these went uncontested, while at other times they proved fiercely controversial. All too often, however, the 20th century pattern was to be one of Congress and the Supreme Court actively encouraging and facilitating the consolidation of all government functions into the federal executive branch, all in the name of "efficiency," while giving short shrift to any constitutional obstacles. The Supreme Court in particular has navigated the "separation of powers" cases with little real direction or coherence, other than a fairly consistent desire to wash its hands of the issue altogether.

A. ORIGINS

As mentioned previously, the idea of "mixed government" had ancient roots and was the dominant principle of English constitutional thinking in the first part of the 17th century. It was, at the most basic level, a principle of political *representation*. A just government required the crown to share power with the aristocracy in the House of Lords and commoners (or to be more precise, the bourgeoisie) in the House of Commons. The principle of "mixed government" had been exemplified by the Long Parliament in Britain, when executive, legislative, and judicial powers were all located within a single repository, the legislature.

Battered by the tumult of 17th century England and a failed attempt at revival in the 18th century by a society with neither royalty nor aristocracy, "mixed government's" star had largely waned by the

time of the Philadelphia Convention in 1787. For our purposes, however, the key thing to notice about "mixed government" is that, in addition to being a principle of *representation*, it was also a principle of intra-governmental *operation*, in that it required constant negotiation among the major power centers of the state. From this particular facet, the Framers drew the idea that law-making should require the concurrence of the three *functions* of government.

That there ought to be three *branches* of government had a distinct genesis, however. It was not a principle of representation so much as a concept of intra-governmental *organization*. It arose not from the pressure of different social orders, but from Enlightenment political philosophy, fueled by the struggles of 17th century England, and the experience of colonial government in 18th century America.

When the Baron de Montesquieu set out to write *The Spirit of the Laws*, he looked back on both the tumult of 17th century England and classical antiquity, having written a book about the rise and fall of Rome. One of the lessons he drew from that rich history was the importance of keeping the three main functions of government separate:

> When legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically.
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> Nor is there liberty if the power of judging is not separate from legislative power and from executive power. If it were joined to legislative power, the power over the life and liberty of the citizens would be arbitrary, for the judge would be the legislator. If it were joined to executive power, the judge could have the force of an oppressor.
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> All would be lost if the same man or the same body of principal men, either of nobles, or of the people, exercised

> these three powers: that of making the laws, that of executing public resolutions, and that of judging the crimes or the disputes of individuals.[21]

Delegates to the Philadelphia Convention of 1787 had shared the experience of colonial government under British rule and its brief aftermath under the Articles of Confederation. They remembered that royal governors had often acted as legislator, executive, and judge all at the same time, and that they had often abused their authority. They also remembered that under the Articles of Confederation, the delegates discovered the dangers of erring too far in the opposite direction by concentrating both legislative and executive powers in the state legislature. As historian Jack Rakove relates:

> From the memory of the wrongs inflicted by generations of royal governors and the belief that ambitious monarchs and their ministers regularly threatened liberty, the American Constitution writers of 1776 drew two great lessons. The first was to "strip" the state executives of what John Adams called "those badges of domination called prerogatives"; the second was to affirm the principle of separated powers with the fervor that enabled the Virginia Constitution of 1776 to declare "that the legislative, executive, and judiciary departments shall be separate and distinct; so that neither exercise the powers properly belonging to the other; nor

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[21] Charles de Secondat, Baron de Montesquieu, *Spirit of Laws*, Book 11, Ch. 6 (Cambridge 1989) (originally published 1748).

> shall any person exercise the powers of more than one of them at the same time."[22]

Their shared colonial experience, as well as coupled with the guidance of the famed Montesquieu, left the Framers with a related and equally powerful idea, convinced that the three essential functions of government should be kept separate. Complaining about the Articles of Confederation in 1786, John Jay wrote to Thomas Jefferson: "To vest legislative, judicial and executive Powers in one and the same Body of Men, and that too in a Body daily changing its Members, can never be wise." In Federalist No. 47, Madison wrote, "where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free Constitution are subverted."[23]

However, most of their concern centered on the powers of the President, a position whose only analogue was the King, and they feared that this executive would become equally autocratic. Days of debate went on at the Philadelphia Convention without conclusion about precisely how to structure the executive branch,[24] with Madison himself remaining adamant that the separation of powers not be subverted by any one function falling into the same "hands" as another.

Even so, drawing the proper boundaries proved difficult. Delegates to the Convention of 1786, including Madison himself, accepted that a completely clean distinction between executive and

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[22] Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* at 249 (cited in note 2).
[23] Federalist 47 (Madison) in *The Federalist Papers*, 299 (cited in note 3).
[24] Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* at 256–68 (cited in note 2).

legislative authority might not always be possible. After all, the separation of powers could not be absolute, as the branches inherently have to work together, and each power entails necessary and proper incidents of the others. Still, each power had to be able "to counterpoise the other."[25] The key was to divide power among different institutions, while ensuring that those institutions could act together as a coherent whole. Hence Madison's warning was tellingly couched in terms of "the *whole* power of one department," rather than *any* power of one department.[26]

Implied in this admonition was an imperative to build on the British legacy of "mixed government." In the place of a system that would represent the three social orders of feudal England, they sought to devise a government that would broadly represent the "multiplicity of interests" in the new American society, which for James Madison were the essential building blocks of a democratic society. The idea of representing social orders was gone, replaced by elections based on popular suffrage, limited though it was. On the operational side, meanwhile, the Framers apparently drew from out of the legacy of "mixed government" the notion of "checks and balances."

What then was the intended conception of "checks and balances" the Framers sought to instill in the structural Constitution? They seemed to put a good deal of faith in the ability of any two branches to check the powers of the third. In Federalist No. 51, James Madison asks:

> To what expedient shall we finally resort, for maintaining in practice the necessary partition of power among the several

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[25] Montesquieu, *Spirit of Laws* at Book 5, Ch. 14 (cited in note 21).
[26] See Federalist 47 (Madison) in *The Federalist Papers*, 299 (cited in note 3).

> departments, as laid down in the Constitution? The only answer that can be given is, that as all these exterior provisions are found to be inadequate, the defect[27] must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places."[28]

But while separating the three functions of government into separate branches was a necessary precondition to work against the consolidation of tyrannical powers, Madison at least implicitly recognized that it was only part of the solution. The key was the "mutual relations" of the separate branches—but that still leaves unanswered exactly what those mutual relations were supposed to be. How were "checks and balances" intended to operate in practice? For example, was it enough to require bicameralism and presentment for the valid enactment of any law, with judicial oversight the only necessary check on the execution of that law? Or beyond that issue, how exactly would each branch be required to guard its own constitutionally vested authority against encroachment by the others? And relatedly, would each branch have some degree of control over what the other branches did with their constitutionally vested authorities?

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[27] "Defect" in the sense of the mathematical "difference" in subtraction. The term was then commonly used to mean something like "the missing part." See 3 *A New English Dictionary on Historical Principles* 128 (Clarendon 1897) (James A. H. Murray & Henry Bradley, eds.) ("defect" noun, definition 4: "The quantity or amount by which anything falls short; in Math. a part by which a figure or quantity is wanting or deficient.").

[28] Federalist 51 (Madison) in *The Federalist Papers* 317 (cited in note 3).

The Constitution that was ratified in 1789 only partly answered those questions, and they continue to bedevil our constitutional debates to the present day.

B. SEPARATION OF POWERS AND THE PROBLEM OF DELEGATION: A BRIEF HISTORY

With so many novel issues to worry about, President George Washington and his senior advisors were not likely to be long detained over such matters as the location of a post office. Even minor matters such as this, however, proved to raise crucial questions on how the separation of powers were to be upheld in practice.

The Constitution empowered Congress to provide for a postal system, but Congress soon discovered that it could not easily do so without delegating certain basic decisions, such as the selection of sites, to the Postmaster, an executive branch official. The First Congress failed to reach a satisfactory solution, but the Second Congress found one: the Postmaster could choose post office locations, but only if the official followed certain guiding principles.[29] This proved to be an early harbinger of so-called "intelligible principles" that the Supreme Court would later require for congressional delegations of rulemaking authority to federal agencies.[30]

As noted by Justice Gorsuch in the *Gundy* dissent, one early separation-of-powers case of particular note arose during the presidency of James Madison. In *The Brig Aurora*,[31] the Supreme Court upheld a law that empowered the President to lift trade

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[29] David P. Currie, *The Constitution in Congress: The Federalist Period 1789–1801*, 147–49 (1997).
[30] *J.W. Hampton, Jr. v. United States*, 276 U.S. 394 (1928).
[31] 11 U.S. (7 Cranch) 382 (1813).

embargoes against either England or France (then locked in the Napoleonic wars) if they stopped attacking the "neutral commerce" of the United States. The law was challenged as an improper delegation of legislative functions to the President. The Supreme Court disagreed, however, and held that Congress could delegate to the President authorities that were triggered only after specified contingencies were met. In *The Brig Aurora*, the President's role in lifting trade embargoes was seen only as a ministerial function. The President was therefore not legislating, but merely executing the law according to contingencies defined by Congress.

Another important nondelegation case, also discussed in the *Gundy* dissent, was *Wayman v. Southard*.[32] At issue was a statute that delegated to the Supreme Court the power to set rules for service of process and execution of judgments in federal court. The majority opinion, authored by Chief Justice John Marshall, seemed to presuppose a blanket nondelegation principle that would prohibit the delegation of powers that are "strictly and exclusively legislative."[33] The Court nonetheless determined that the delegation of such procedural rules did not fall in that category, because it merely delegated authority to promulgate "minor regulations."[34] Marshall also pointed towards a kind of "major questions" principle, though there was arguably some tension between this and his blanket rule of nondelegation:

> The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a

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[32] 23 U.S. (10 Wheat.) 1 (1825).
[33] Id. at 19.
[34] Id. at 20.

> general provision may be made, and power given to those who are to act under such general provisions, to fill up the details.[35]

Much like the dissent in *Gundy*, *Wayman* presents several interrelated rationales, though none of them are thoroughly developed.

There things stood for much of the 19th century, a century which saw two titanic figures in the presidency—Andrew Jackson and Abraham Lincoln. Each tested the outer bounds of separation of powers—Jackson by strengthening the authority and independence of the executive branch, and Lincoln by the expansive use of emergency expedients. But even so, at the end of the day those Presidents left behind a Constitutional structure not much different than what had been bequeathed to them.

The behemoth we know today as the administrative state began modestly enough, with the passage of the Interstate Commerce Act in 1887. The Act was intended to regulate competition and safety among the nation's rapidly expanding railways, and like much of the early administrative state, it was a response to the rapid industrialization in the latter half of the 19th century. The Act created the Interstate Commerce Commission, which was empowered to set rates and regulations, impose penalties for violations and hold quasi-judicial enforcement hearings. Combining legislative, executive, and judicial functions, it was the first modern administrative agency.

The Supreme Court was wary of permitting Congress to delegate so much power, particularly legislative power, but found it hard to draw the line between permissible and impermissible delegations. In *Field v. Clark*,[36] the Supreme Court upheld a law that allowed the President to impose retaliatory tariffs on countries whose tariffs on

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[35] Id. at 19.
[36] 143 U.S. 649 (1892).

U.S. goods were deemed "reciprocally unequal and unreasonable." The Court affirmed that the principle of non-delegation "is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." But it reasoned that the law under challenge was not such a delegation, and was instead merely an instruction to determine objective facts, as in *The Brig Aurora.*

The statute in *Field* allowed the President even broader discretion than the one in *The Brig Aurora*, however. The decision arguably raised the question of how the President could determine "unreasonableness" without in effect making trade policy. But the Court held fast to the formal distinction between legislative and executive functions, insisting that Congress had not given away its legislative powers. Here, the President was merely implementing a previous policy decision, a function that required some room for discretion on his part. Such were the formalist foundations on which the non-delegation doctrine survived through the end of the 19th century.

Then came the modern era. The presidency of Woodrow Wilson was a watershed for the separation of powers, and indeed for the Constitution. In his earlier academic writings, Wilson was an inveterate enemy of American-style separation of powers.[37] He

[37] In Congressional Government, Wilson had written:

> It is, therefore, manifestly a radical defect of our federal system that it parcels out power and confuses responsibility as it does. The main purpose of the Convention of 1787 seems to have been to accomplish this grievous mistake. The "literary theory" of checks and balances is simply a consistent account of what our Constitution-makers tried to do; and those checks and balances have proved mischievous just to the extent to which they have succeeded in establishing themselves as realities. It is quite safe to say that were it possible to call together again the members of that wonderful Convention to view the work of their hands in the light of the century that

originally championed the control of executive functions by Congress. Later as President, he would champion the executive's exercise of legislative powers. However, what did not change was his skepticism of a formal separation of powers and his belief in the exercise of all government functions by administrative agencies whose competence was not democratic, but technocratic.

On the other hand, Wilson did oppose any branch interfering in the operations of the others, which for him was a more serious problem than that of any branch exercising functions formally vested in the others. Hence, late in his presidency, Wilson struck a blow in favor of strict separation of powers. In 1920, he vetoed an appropriations bill that subjected executive branch publications to the prior approval of a congressional committee. In his veto message, Wilson asserted:

> The Congress and the Executive should function within their respective spheres. Otherwise, efficient and responsible management will be impossible and progress impeded by wasteful forces of disorganization and obstruction. The Congress has the power and the right to grant or deny an appropriation, or to enact or refuse to enact a law, but once an appropriation is made or a law is passed the appropriation should be administered or the law executed by the executive branch of the Government.[38]

> has tested it, they would be the first to admit that the only fruit of dividing power had been to make it irresponsible.

Woodrow Wilson, *Congressional Government* 284–285 (Houghton Mifflin 1885).

[38] 17 *Compilation of the Messages and Papers of the Presidents: Prepared under the Direction of the Joint Committee on Printing of the House and Senate, Pursuant to An Act of the Fifty-Second Congress of the United States (with Additions and Encyclopedic Index by Private Enterprise)* 8845 (Bureau of National Literature 1927) (James D. Richardson, ed.).

Wilson's veto on separation of powers grounds may seem inconsistent with his general animus towards formalist separation of powers, but properly understood it was not. His objection to the 1920 bill was not the prospect of Congress exercising functions that were formally executive, but rather the prospect of Congress exercising some degree of *control* over the executive branch itself. It was to prevent institutional interference by one branch in the operations of another branch that he insisted on each branch "functioning" unimpeded within its respective sphere. Whether the executive branch sometimes exercised formally legislative functions, or the Congress sometimes exercised formally executive functions, was of less concern to him, as all such considerations (in his view) should be determined by sober investigation into what arrangement of government powers would produce the most efficient and effective government. He thus embraced a key element of the "concurrence of powers" principle—namely that each branch must operate independently. But he took a dim view of the other side of the coin—the idea that each branch must exercise the whole of its constitutionally vested power independently. Wilson's position highlights an ambiguity in the phrase "separation of powers." Does the phrase refer to a tripartite separation of government *functions*? Or does it refer to a tripartite separation of government *institutions*?

The right answer is "both," but Wilson put much less emphasis on the former than on the latter. Wilson vetoed a number of bills pertaining to expansion and reorganization of the executive branch—bills he appears to have otherwise supported—because the bills would have crimped the President's removal power. This is a crucial detail, often missed, in the gestation of the modern administrative state. His decision to have a senior Post Office official fired, for example, led to the milestone decision of *Myers v. United*

States[39] in which the Supreme Court confirmed Wilson's properly broad view of the President's removal power, albeit years after his death.

Myers remained true to the traditional understanding that certain executive functions of an adjudicative nature which affect the interests of individuals (i.e., how much a person owes under the Internal Revenue Code, to give a modern example) could and should be shielded from Presidential control. This makes common sense from the point of view of simple transparency. Any organization (private or public) conducting an internal audit, for example, would want the auditors to be transparently shielded from undue influence by those being audited by some sort of firewall. Military lawyers are shielded from "command influence" in military proceedings. That is a matter of common sense, but it is not necessarily a matter of Constitutional law. *Myers* affirmed that the President could still influence an executive official's activities by removing the relevant official and replacing them with a more compliant one.

The agencies and commissions created during Wilson's presidency would establish the model for the independent agencies we know today. These included the Federal Reserve Board (1913), the Federal Trade Commission (1914), U.S. Tariff Commission (1916), the U.S. Shipping Board (1916), the Federal Power Commission (1920), and the first proposals for what became the Commodity Futures Trading Commission (at first called the Grain Futures Administration).

Even though Wilson defended the prerogatives of the President while he was in office, this dramatic expansion of the executive branch through the creation of major new commissions and agencies would eventually mark the birth of the headless "fourth branch" of

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[39] 272 U.S. 52 (1926).

government. Ironically, however, it was not Wilson who created the headless "forth branch." True enough, he created a host of agencies that were later to become independent, but they were not independent when he created them. It was Congress and the Supreme Court who conspired a generation later to wrest those agencies from the President's control by curtailing the President's power to remove the agency heads.

When he created the new executive agencies, Wilson had reason to hope that the President's control over every part of the executive branch would endure. In the earlier case of *Shurtleff v. United States*,[40] the Supreme Court had settled that the language in the Customs Administration Act of 1890 purporting to limit the removal of officials to "inefficiency, neglect of duty, or malfeasance" did not limit the President's removal power.

But Wilson was certainly running a significant risk assuming this holding would endure. Reflecting Wilson's belief in "mixed government," the agencies created under his tenure were empowered to exercise what would later be called "quasi-legislative" and "quasi-judicial" functions. For example, as Federal Trade Commission Act sponsor Senator Albert Cummins had declared, "The whole policy of our regulation of commerce is based upon our faith and confidence in the administrative tribunals" of the FTC.[41] But unforeseen by Wilson, it would later be on exactly that basis that the Supreme Court (and Congress) would set such agencies free from the control of the President in *Humphreys' Executor*, a case we will discuss in detail soon.

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[40] 189 U.S. 311 (1903).

[41] Quoted in John Adams Wettergreen, *Bureaucratizing the American Government*, reprinted in *The Imperial Congress* 80 (Gordon S. Jones and John A. Marini, eds., 1988).

But the Federal Trade Commission (FTC) was not under formal congressional control any more than it was under the President's power. It is true that "Congress can yank commissioners' chains without having to accept the responsibility for the actions of those commissioners," [42] for example through its investigation and oversight powers. But interference by one branch in the operations of another is not the same as that branch exercising control of its constitutionally vested authority. The Court seemed to be saying that if an agency serves only executive functions, the President must control it, but if it serves any legislative or judicial functions in addition to executive ones, then nobody can control it—a conclusion that simply cannot be correct. The counter-intuitive holding of *Humphrey's Executor* marks the true beginnings of the headless "fourth branch."

But before we get to *Humphrey's Executor*, in *J.W. Hampton, Jr. & Co. v. United States* [43] the Supreme Court upheld a statute which delegated to the president the authority to impose tariffs on another country at such levels as might be necessary to "equalize" the costs of production in both countries. Upholding the delegation, the Court wrote, "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."

Taken literally, this articulation of the nondelegation principle opened the door to "delegations of legislative power," so long as there was an "intelligible principle" that an executive officer must follow. If the *J.W. Hampton* Court had no intention of eliminating the barrier between legislative and non-legislative delegations, it was at

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[42] Nolan E. Clark, *The Headless Fourth Branch*, reprinted in *The Imperial Congress* 268, 282 (cited in note 42).
[43] 276 U.S. 394 (1928).

least careless in its formulation, with fateful results. Perhaps it saw the determination of what level of tariff would "equalize" costs of production as nonlegislative, but in practice there was no reliable measure. Far from an "intelligible principle," the search for an "equalizing" tariff was one example of the quaint economic nonsense that characterized so much economic regulation in the first 70 years of the 20th century.

In 1935, *Myers* was significantly curtailed by *Humphrey's Executor v. United States*,[44] in which a Supreme Court majority, by then openly hostile to President Franklin D. Roosevelt's initiatives, held that the President could not remove the head of the FTC. The Court distinguished *Myers* on the basis that the Post Office position at issue in that case was a purely executive function, whereas the FTC had been endowed with quasi-legislative functions, and was therefore not purely executive. (The Court ignored the fact that Congress is given plenary power to establish post offices in the Constitution).

Writing for the majority, Justice Sutherland asserted that Myers was still valid, and stood for the rule that a purely executive officer "is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid he is."[45] But Sutherland insisted that the President's power to remove officials exercising quasi-legislative or quasi-judicial functions could not be viewed the same way. The Court then held -- for the first time -- that Congress could severely limit the President's ability to remove executive branch officials exercising quasi-legislative or quasi-judicial functions.

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[44] 295 U.S. 602 (1935).
[45] Id. at 627.

The opinion in *Humphrey's Executor* was carefully couched to avoid giving the appearance of reversing *Myers*, but in fact *Humphrey's Executor* did reverse the most important element of *Myers*. As noted earlier, the Court in *Myers* had affirmed Congress's ability to shield executive officials from the direct day-to-day control of the President, but *Myers* left sacrosanct the President's removal power as an ultimate lever on the President's control of executive agency functions. In *Humphrey's Executor*, on the other hand, the Court seemed to lose sight of the distinction between direct Presidential control of executive officials and the power to remove them.

Once the Court used the distinction between purely executive officers and those that exercised quasi-legislative or quasi-judicial functions to curtail the President's power to remove the latter, the President's relationship to Congress was dramatically transformed. The presidency would never again exercise the degree of control that Wilson had over every part of the executive branch. In short, Wilson did indeed give birth to the administrative state. But it was the Supreme Court and Congress which cut the umbilical cord and set free what we know today as "independent agencies."

But as alluded to above, the modern executive branch, born in the commissions of Woodrow Wilson, matured into the form we know today during the presidency of Franklin D. Roosevelt. Though Roosevelt opposed the notion of independent commissions,[46] his New Deal programs greatly expanded both the power of the federal government generally, and the power of the executive branch relative to the other branches specifically. One common element of

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[46] See President's Commission on Administrative Management, *Report of the Committee with Studies of Administrative Management in the Federal Government* 32, 40 (Washington 1937), archived at https://perma.cc/S6NT-GC6D.

the myriad of New Deal programs was their delegation of significant authority to the President and executive agencies. Pursuant to those delegations, FDR issued more than 3,700 executive orders, more than twice as many as Woodrow Wilson and many times more than any other President before or since.[47]

The New Deal's broad delegations soon lead to a pair of decisions which, while going against Roosevelt, nonetheless appeared to entrench the malleable "intelligible principles" standard of *J.W. Hampton*. In *Panama Refining Co. v. Ryan*[48] the Court struck down Section 9(c) of NIRA, which allowed the President to prohibit interstate commerce of petroleum in excess of quotas set by the states, on the grounds the provision did not establish when the President was required to act. It amounted to a delegation of discretionary power to prohibit competition against the state-based petroleum quotas. The delegation of such discretionary power failed to provide "an intelligible principle" to which the President was required to conform.

Later that year the Court went further still and thoroughly gutted NIRA, striking down all of Title I, in *Schechter Poultry Corp. v. United States*.[49] This case dealt with Section 3 of NIRA, which allowed trade associations to adopt "fair competition" codes (i.e., cartel arrangements) that would then become legally binding upon presidential approval. The Court found several problems in the law. First, "fair competition" was nowhere defined, so the provision was "void for vagueness." As a result, it failed to establish an intelligible principle, which was a second ground for striking down the provision. Finally, the Court ruled that the law failed to establish

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[47] See Gerhard Peters & John T Woolley, *Executive Orders* (American Presidency Project), archived at https://perma.cc/CV5L-ZEFZ.
[48] 293 U.S. 388 (1935).
[49] 295 U.S. 495 (1935).

"fair procedures" for implementation. The latter point was important, for it brought a procedural element into the non-delegation analysis. On this head, it was in part to specify procedures for the exercise of delegated functions that Congress later enacted the Administrative Procedure Act in 1946.

Panama Refining and *Schechter Poultry* still tied the "intelligible principle" standard to a supposedly blanket prohibition on delegating "essential legislative functions," but together still confirmed the Court's abandonment of the 19th century distinction between legislative and non-legislative delegations. Legislative power could be delegated after all, provided that Congress "perform[s] its function in laying down policies and establishing standards."[50]

But were the "intelligible principles" the same as "primary standards"? If so, then Congress could satisfy the new nondelegation standard without adopting any substantive law beyond the delegation itself. The Supreme Court soon adopted just that position, in the case of *Yakus v. United States*.[51] *Yakus* concerned a broad delegation of authority to regulate commodity prices, with the intelligible principle that the prices be "fair and equitable." A more open-ended delegation was difficult to imagine. The Court did not ponder what difference there might be between "fair and equitable" and "wise and expedient", the standard the Court in *Field* had marked as the definition of nondelegable legislative power. Yet the Court upheld the delegation, because the legislation's intelligible principle was "sufficiently definite and precise to enable Congress, the courts and the public to ascertain" whether the agency had conformed to Congress's standards.[52]

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[50] Id. at 530.
[51] 321 U.S. 414 (1944).
[52] Id. at 426.

The distinction between legislative and non-legislative functions had vanished in 1928. Now the distinction between "primary" and "subsidiary" rulemaking vanished as well. What was left of the supposed "nondelegation" doctrine?

Apparently, courts were now to be guided by a sort of inter-branch surveillance principle. But if the important thing was whether "Congress, the courts, and the public" could ascertain whether the agency was exercising its delegated authorities properly, that begged the question of exactly what recourse any of them might have if the agency was not doing so. There was no way for Congress to block the agency action unless the delegation reserved a legislative veto. Courts could still exercise judicial review, but how much was judicial review worth if even "fair and equitable" (and possibly "wise and expedient") satisfied the intelligible principle standard? And what could the public do, other than vote in the next election, where a thousand other considerations across an endless tapestry of constituencies would determine the outcome?

In any case, the Supreme Court would in due course neuter what little power Congress or the courts had to check an agency's exercise of rulemaking authority, in *Immigration and Naturalization Service v. Chadha*,[53] and *Chevron USA v. Natural Resources Defense Council, Inc.*,[54] respectively. In *Chadha*, the Court ruled that a congressional veto barring suspensions of deportation proceedings by the Department of Justice was in the nature of legislation, and thus was subject to the bicameralism and presentment requirements of the Constitution. Why that particular legislative veto was not either deemed an *adjudication* and therefore barred on pure due process grounds, or a usurpation of judicial functions and therefore barred on pure

[53] 462 U.S. 919 (1983).
[54] 467 U.S. 837 (1984).

separation-of-powers grounds, remains a mystery. But even more perplexing was why the Court, which by all accounts had virtually abandoned formalism in its approach to what powers Congress could delegate to the executive branch, now indulged in a fit of hyper-formalism to decide the question of whether Congress could do anything about what agencies did with their delegated authorities. This was especially perplexing considering that the Court's nondelegation doctrine, to the extent it still had any at all, now supposedly made congressional surveillance of agency action an indispensable part of the Constitution's protection against tyranny.

Nor did the jurisprudential mystery end there. The legislative veto is alive and well, at least at the committee and subcommittee level. According to a 2005 study by the Congressional Research Service, some 400 reservations of congressional committee and subcommittee veto authority had been introduced into law in the years *after* Chadha.[55] The "iron triangles" formed by the pressure of special interest groups and self-interested lawmakers proliferated heedless of the Courts' nondelegation pronouncements, and indeed of any separation of powers principles at all.[56]

Hence, *Chadha* did not, as it claimed, shore up the Constitution's separation of powers. On the contrary, its main effect, besides eliminating the possibility of congressional concurrence in what the executive branch does with delegated authorities, was to eliminate an important mechanism through which Congress could defend its constitutionally vested power from usurpation by a coordinate branch. *Chadha* is discussed in more detail in Part III.

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[55] Louis Fisher, *Legislative Vetoes After Chadha*, Congressional Research Service (May 2, 2005), archived at https://perma.cc/AF45-93WL.

[56] **S**ee Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. Rev. 1463 (2015).

With respect to judicial powers of review, in the landmark case of *Chevron*, the Supreme Court held that agency interpretations of ambiguous provisions of their own enabling statutes were owed deference so long as there was a rational basis for the interpretation. The Court's decision was premised on the idea that judicial deference in this context would enhance democratic political control and reduce the scope for judicial supremacy. *Chevron* is also discussed in more detail in Part III. Suffice to note here that even beyond *Yakus*, *Chevron* was fatal to separation of powers, as while it was never very clear what Congress could do about unwanted agency action, the principle of judicial review was at least a robust potential check on agencies. *Chevron* now eliminated that last line of defense in the cases where it was arguably most needed, namely those where nobody could be quite sure just what Congress had intended in the first place.

C. THE SEPARATION OF POWERS SCHOLARSHIP: FORMALISM VS. FUNCTIONALISM

Modern scholarship on separation of powers and the nature of executive authority reflects the longstanding debate between originalists and proponents of the "living Constitution" over the Constitution's limits on government power. Those in the originalist, or "formalist," camp argue for a separation of powers based on strict adherence to formal categories—legislative, executive, and judicial.[57] The most uncompromising of these voices, Philip Hamburger, insist

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[57] See Steven G. Calabresi and Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 Yale L. J. 541 (1994) (defending formalism on originalist grounds). See also Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 Colum. L. Rev. 452, 478–88 (1989) (arguing that functional limits on delegated power satisfy separation of powers, but *Chevron v. NRDC*, while correctly decided, was far too sweeping).

upon the ironclad principle of *Delegatus Non Potest Delegare* ("the delegate cannot delegate"). In this view, all delegations of *rulemaking* authority by a legislature that is democratically elected and empowered to *make rules* are basically unlawful. [58] More accommodating formalists, such a professors Calabresi and Prakash, still take the position that each of the three Constitutional powers is vested in one branch, and there it ought to remain.

Those in the "functionalist" camp tend to argue that, in practice, these categories blend together at the margins, and that as long as the three functions of government are carried out with some checks and balances, it shouldn't raise too many concerns when those functions get mixed within a single branch.[59] The most extreme of these voices would have us believe that elections are sufficient to keep the executive's exercise of legislative and judicial functions in check.[60]

The "functionalists" have struggled to answer the questions that have eluded complete answers since the time of the Founding. Are checks and balances satisfied by mere inter-branch surveillance, as *J.W. Hampton* might have us believe? Should the several branches be relied upon to guard their vested constitutional authorities assiduously? Do checks and balances require each branch to be able to exercise some measure of control over the others? And today what are we to make of independent agencies?

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[58] Philip Hamburger, *Is Administrative law Unlawful?* 386 (Chicago 2014).

[59] Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions: A Foolish Inconsistency?*, 72 Cornell L. Rev. 488 (1987) (exploring the debate on separation of powers between "formalists" and "functionalists"); Gerhard Casper, *An Essay on Separation of Powers: Some Early Versions and Practices*, 30 Wm. & Mary L. Rev. 211 (1989) (originalist critique of formalism); and Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. Chi. L. Rev. 123 (1994) (defense of functionalism even if formalism is correct).

[60] Eric A. Posner & Adrian Vermeule, *The Executive Unbound* (Oxford 2010).

In one noted article on the subject, Professor Peter Strauss noted that all agencies exercise the three kinds of government power at different times.[61] "Virtually every part of the government Congress has created – the Department of Agriculture as well as the Securities and Exchange Commission – exercises all three of the government functions the Constitution so carefully allocates among Congress, President, and Court."[62] Strauss argues that the key is to maintain the proper connection between the government's various institutions and the three branches:

> This object can be achieved conformably to the words of the Constitution […] by observing that the concept of a "branch," as such, is not required by the text. When the Constitution confers power, it confers power on the three generalist political heads of authority, not on branches as such. The constitutional text addresses the powers only of the elected members of Congress, of the President as an individual, and of the Supreme Court and such inferior federal courts as Congress might choose to establish. Its silence about the shape of the inevitable, actual government was a product both of drafting compromises and of the explicit purpose to leave Congress free to make whatever arrangements it deemed "necessary and proper" for the detailed pursuit of government purposes. One can easily and properly infer some relationships that the three named governmental actors must observe as among themselves and, consequently, with whatever subordinate parts of

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[61] Peter Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions: A Foolish Inconsistency?*, 72 Cornell L. Rev. 488 (1987).
[62] Id. at 492.

> government Congress chooses to create, without having to believe that those parts must be located "here" or "there" in the government structure, or that the governmental functions they may perform are restricted by the accident of that location.[63]

Thus Strauss gives the *reductio ad absurdum* of the principle behind *Humphrey's Executor*: All agencies perform executive, legislative, and judicial functions because that is the reality of government today, and therefore there is no reason to suppose the elected president should control any of them. Boiled down to its essence, this position is really just a belief that the Necessary and Proper Clause should be allowed to swallow up the whole structure of the Constitution. But the Necessary and Proper Clause cannot be read as an unlimited grant of power; it must be read as simply affirming what is clearly implied in the other powers enumerated in Article I, section 8 of the Constitution. The Clause's reference to "all other Powers vested by this Constitution" merely allows Congress to use its lawmaking power to facilitate "carrying into execution" the powers vested in Articles II and III, in addition to those enumerated in Article I, section 8. But incidental powers are implicit with respect to every power vested by the Constitution. For example, the Internal Revenue Service must in many situations "adjudicate" your tax liability. But the adjudication is subject to review by the judicial branch, hence that incidental initial adjudication cannot be used as a peg on which to hang the proposition that each branch can legitimately exercise the power of a co-equal branch. This is especially true because if the word "proper" means anything, it must mean that the powers used in the exercise of the Necessary and

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[63] Id. at 493.

Proper Clause cannot weaken or violate other important constitutional commitments—such as the separation of powers, or its principle of concurrence.[64]

For these and other reasons, some jurists who reject the idea that a strict formalist approach is justified on originalist grounds nonetheless insist that a formalist approach is justified on functionalist grounds. Professors Lawrence Lessig and Cass Sunstein, for example, make much of the fact that Congress saw different agencies differently, and that the Constitution's text therefore does not require the president to control all agencies equally.[65] For example, they argue that, Congress established the Departments of Foreign Affairs and War with few prescriptive details about organization, function, or leadership. The Department of Treasury, however, was established with detailed prescriptions on organization, the duties of the Treasurer, and the shielding of the Comptroller from Presidential direction.

These distinctions are asked to do too much work. As Elena Kagan has persuasively argued, delegations of specific authority to executive branch officials should be construed as delegations to the President, regardless any institutional firewalls Congress may have erected to keep certain processes independent of others.[66] Professors Lessig and Sunstein offer no examples of the early Congresses purporting to shield any department heads from the removal authority of the President. Their example of the Second Bank of the United States is unavailing, as that was arguably not a department at

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[64] See Richard A Epstein, *The Classical Liberal Constitution* 211–26 (Harvard 2014).
[65] Lawrence Lessig and Cass R. Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1 (1994) (need for strong formalism on functionalist grounds).
[66] Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245 (2000) (arguing for increased Presidential control of executive branch agencies on functionalist grounds).

all, but rather a commercial entity that happened to have been chartered and owned by the government.

Lessig and Sunstein sum up their view this way:

> In this view, then, the framers' vision about the executive comes to this: The Vesting Clause of Article II designates the President as the holder of the executive power - not a council, not a triumvirate, but a single person. The balance of Article II defines what that executive power is. More specifically, it defines what executive powers the President can exercise as a matter of Constitutional prerogative; other powers Congress can grant if it thinks proper. With respect to those exercising the President's Constitutionally enumerated powers, including the President himself, Congress has considerable authority to impose obligations of law; with respect to people exercising the President's Constitutionally specified authority, the President must have hierarchical control; but beyond these enumerated aspects of the executive power is an un-defined range of powers that we would now describe as administrative power, marking a domain within which one has a duty to act according not to one's own judgment, but according to the standards or objectives of a law. With respect to these latter powers, Congress has wide discretion to vest them in officers operating under or beyond the plenary power of the President.[67]

This view rests on the premise that there is a function (which Lessig and Sunstein call "administrative power") that is not part of the executive power vested by Article II in the President, for its

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[67] Lessig and Sunstein, 94 Colum. L. Rev. at 54–55 (cited in note 65).

exercise is not subject to presidential discretion because it is subject to the "standards and objectives of a law." This distinction is imaginary, however. Every law to be executed by the president may contain standards and objectives specifying the manner of its execution, as Lessig and Sunstein themselves recognize. Hence, every executive function is both discretionary and subject to the rule of law. The "administrative power" that Lessig and Sunstein imagine is merely some combination of legislative, executive, and judicial functions that Congress has invested in some agency—but in every case, an executive function is involved, otherwise Congress wouldn't be able to put it in an agency. Congress cannot create a species of government power that is not contained with the powers granted by the Constitution. Nor can it impair the powers vested in the other branches.[68] As the Supreme Court has said, valid exercises of the Necessary and Proper Clause are limited to "exercises of authority derivative of, and in service to, a granted power."[69] In short Lessig and Sunstein's supposed discovery of a new species of power does not help them escape the Constitution's separation of powers any more than it helps them escape the Vesting Clauses.

So we wind up back where we started, facing the most basic problem of nondelegation, namely the inability to control what the recipient of a delegated power might do with it. Lessig and Sunstein implicitly recognize this difficulty by coming to rest on what they deem a functionalist justification for the unitary executive:

> The crucial development in this regard is the downfall of the nondelegation doctrine and the rise of unforeseen

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[68] *United States v. Klein*, 80 U.S. 128 (1871) (holding that Congress cannot condition the president's pardon power or the Supreme Court's appellate jurisdiction in cases where Congress has not withheld jurisdiction over the inferior court).

[69] *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 521 (2012).

> administrative agencies exercising wide-ranging discretionary power over the domestic sphere. In view of this development, it would not be faithful to the original design to permit officers in the executive branch, making discretionary judgments about important domestic issues, to be immunized from Presidential control. We have therefore sketched an argument on behalf of a strongly unitary executive, in which the President has a high degree of supervisory and removal authority over most officials entrusted with discretion in the implementation of federal law. [70]

Again, the key is whether the Constitutional design has a mechanism for guaranteeing that the government's discretion in coercing citizens is subject to the concurrence of the three branches. At the most basic level, an agency official exercising such discretion must, by definition, be subject to the concurrence of the official's own branch—the executive—in addition to the others.

The scholarly debates among formalists and functionalists have failed thus far to uncover a compelling basic principle of separation of powers because their approach has been too narrow. They have focused almost exclusively on the political economy of separated powers as an institutional arrangement, asking how various arrangements and operating rules would prevent tyranny and protect democracy. But separation of powers is not merely a structural safeguard meant to protect the essential spirit of democracy. It is part of the essence of democracy itself, indispensable to it not merely as a descriptive matter but as a normative and

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[70] Lessig and Sunstein, 94 Colum. L. Rev. at 119 (cited in note 65).

philosophical matter, as James Madison would readily have understood.

III. RESTORING THE CONCURRENCE OF POWERS

The Supreme Court's separation of powers jurisprudence has been marked by inconsistence and sometimes incoherence. The principle of concurrence can help put many of those trains back on the tracks.

The distinction between ministerial "fill in the facts" functions and rulemaking is important, but it can only be one part of the solution. Whether the question is major or minor, the key element of concurrence is not whether Congress has previously spoken on the policy and articulated intelligible principles, but whether Congress has exercised its power of concurrence or is able to do so. The same is true for the power of judicial review, particularly with respect to questions of law.

To be sure, not all government actions are coercive in the sense of intruding on individual rights. Foreign policy and the use of military force rarely affect the individual rights of citizens, though such decisions may risk the lives of U.S. servicemembers and carry many other grave consequences besides. How agencies are internally organized, or choose to allocate their resources, likewise do not raise dangers of arbitrary infringements of individual liberties. The same is true of the pardon power and prosecutorial discretion, as those powers can only operate in a way that enhances or safeguards individual rights. Likewise, congressional resolutions that do no

affect private rights do not require presentment to the president for his signature.[71]

The crucial separation of powers problems are those in which private rights are vulnerable to arbitrary government coercion. This section examines some of the major issues.

A. IMPLICATIONS ON THE OPERATIONAL PRINCIPLE OF CONCURRENCE

Suppose that someone's legal rights have been altered by government action. The threshold question is this: Did Congress enact the law, did the President see that the law was faithfully executed, and has the judiciary had a chance to review the action? The requirement of concurrence sheds an important light on what this operation is supposed to look like.

The most essential principle of nondelegation is perhaps this: No branch can delegate its responsibility to concur in the government's exercise of coercive power. It is by means of exercising its constitutionally vested power that each branch expresses its concurrence.

One scholar has examined this precise question. In a challenging 2000 article for the *Virginia Law Review*, Professor M. Elizabeth Magill describes the concurrence principle, which she classifies as a version the "coordination thesis":

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[71] A special case if the override of a presidential veto by supermajorities in both Houses of Congress. This important exception to the principle of concurrence may be justified by reference to the principle's purposes: the prevention of arbitrary government and the preservation of democratic representation. In light of those purposes, the requirement of supermajority fills the representational gap created by the president's veto, and though the law may affect private rights by operation of law, it still can only be enforced by the president.

> The thesis suggests that one department will, through the use of its assigned function, second-guess other departments on a constant basis. Arbitrary action is prevented, on this view, because there are three entities that have to agree, independently of one another, before an individual can be injured.
>
> But the claim that each department does and should look independently at every question that comes before it is wrong. This reading of the coordination thesis transforms routine exercises of the executive and judicial functions into feats of second-guessing, or checking, the previously exercised function. But the occasions for interdepartmental checking are not that all-encompassing; they are, rather, sharply limited to powers such as the exercise of the presidential veto, judicial review, the Senate's confirmation powers, and Congress's impeachment powers.[72]

Prof. Magill dismisses the concurrence principle too readily. It may be that courts do not and cannot independently verify the legality of every exercise of federal power that occurs. But that is not the function of judicial review under any theory of constitutional law. It is rather the *availability* of judicial review when a coercive action is challenged that is the linchpin of its concurrence. The principle of judicial concurrence presupposes that injured

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[72] M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 Va. L. Rev. 1127, 1186–87 (2000).

individuals are able to challenge the exercise of government power in court, not that they will do so in every conceivable case.[73]

B. THE VITAL IMPORTANCE OF TAXPAYER AND CITIZEN STANDING

Unfortunately, for reasons only distantly related to the separation of powers, it is all too often the case that injured individuals are not able to challenge the exercise of government power in court. That is because the Supreme Court has gotten the key decisions on standing wrong as well, leading to a fantastical state of affairs in which people have standing to challenge government actions that injure them in a particular way, but nobody has standing to challenge government actions that injure a large class of people in the same way.

As Professor Richard A. Epstein recounts,[74] the problems began with the Supreme Court's decisions in *Massachusetts v. Mellon* and *Frothingham v. Mellon*[75] and Justice Sutherland's mistaken extension of the traditional standing rules for suits in law to "all Cases, in law and Equity" to which the Constitution's judicial power extends in Art. III, Section 2. As Epstein explains, the standing rules for cases in law were significantly more restrictive than those that the English courts had developed for cases in equity. To establish standing for suits in law a plaintiff must show particularized injury that was

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[73] Lower federal courts are created by Congress, and are routinely referred to as "Article I courts." That does not, however, make them part of the Article I power, as those courts are not controlled by Congress, and the power they exercise is vested in them by Article III, Section 1.

[74] See, e.g., Epstein, *The Classical Liberal Constitution* 101–32 (cited in note 64); Richard A. Epstein, *Standing in Law & Equity: A Defense of Citizen and Taxpayer Suits*, 6 Green Bag 2d 17 (2002).

[75] 262 U.S. 447 (1923) (consolidated cases).

caused by the defendant and is redressable by courts.[76] But courts of equity long had the power to grant relief in many situations where law courts could not, such as a suit by a corporate stockholder to enjoin an interested transaction by management. As Epstein explains:

> The plaintiff could bring an action on behalf of a class of individuals only if they were similarly situated with him. The success of these amalgamations depended on the plaintiff's interest being indistinguishable from those whom he sought to represent. Particularized injury at equity was a disqualification, not a requirement for these class-like suits.[77]

The same rationale that allowed a stockholder to sue in equity on behalf of all those similarly situated obtains with equal force in the case of suits by taxpayers and citizens to enjoin unconstitutional acts of the government. Moreover, the Constitution's extension of the judicial power to "all Cases, in law and Equity" was properly viewed as extending to both kinds of suits.

Part of the rationale for denying standing to taxpayers and citizens was the noxious idea that generalized grievances raise political questions better addressed by the political branches. The principle of concurrence shows just how mistaken this rationale is. The effect of the current rule, by which "generalized grievances [are] more appropriately addressed in the representative branches"[78] and are therefore not justiciable, is to deprive the people of the concurrence of the judicial branch in the very situations where that

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[76] *Allen v. Wright*, 468 U.S. 737, 751 (1984).
[77] Epstein, 6 Green Bag 2d at 18 (cited in note 74).
[78] 468 U.S. at 751.

concurrence is most vital for the survival of the Constitution, namely those in which one or both of the representative branches is materially infringing on the basic constitutional rights of everyone. Thus, under the current standing rules, if the federal government seizes one person's property without due compensation, that person can sue in federal court, but if the federal government seizes everybody's property, nobody can sue.[79]

The ability of individuals to enjoin unconstitutional acts by the government on the basis of taxpayer and citizen standing is thus vital to the proper operation of the structural Constitution.

C. THE NEED FOR CONGRESSIONAL CONTROL OF AGENCY RULEMAKING

The admittedly limited utility of a formal nondelegation principle is no excuse for letting Congress delegate most legislative power to the executive branch without any ability to superintend its exercise of that power. The Court should abandon, or at least hem in, the reasoning of *Chadha* and let Congress retain ultimate control over the rulemaking powers it delegates to the President. The system of de facto legislative vetoes at the committee level (a system with serious problems of accountability, among others) should be replaced with formally reserved vetoes in future legislation. Congress would do well to float a "trial balloon" in the form of legislation designed to avoid the narrow ruling in *Chadha* with

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[79] This standing rule does not apply to all citizens suits. Environmental advocacy groups are able to enjoin federal permits for infrastructure projects merely by claiming that the enjoy the view that the federal agency is about to alter, despite the fact that their injury is at the end of the day arguably no more particular than that of any taxpayer or citizen injured by a general government action. See, e.g., *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 183 (2000).

respect to adjudications, and give the federal courts an opportunity to revive the legislative veto.

The principle of concurrence dictates that it would be eminently proper for Congress to delegate rulemaking authority to an agency while reserving the ability to pass on what that agency ultimately does with the power through at least a bicameral resolution. Presentment would presumably not be a problem since the agency that is producing the rule is, or should be, under the control of the president, who could be expected to sign the congressional resolution of "approval." Should Congress decide not to give its approval to an agency's exercise of such a delegation, then Congress has refused to concur in the ultimate result. It makes little sense for the courts to show virtually no concern with formal separation of powers when Congress makes the initial delegation, and then indulge in a fit of hyper-formalism when Congress decides to reserve ultimate approval authority. The problem with the unicameral veto in *Chadha* is that Congress was usurping a core judicial function, not that Congress was reserving to itself the authority to approve a rulemaking.

There are a host of serious problems with the current state of affairs. Any delegation of rulemaking authority entails the serious problem that all of the safeguards that the Framers devised to make sure Congress does not abuse its lawmaking powers are turned upside down, for once rulemaking authority is delegated, only a congressional supermajority large enough to override a presidential veto can stop the agency's exercise of that power. If the agency does something totally at odds with what Congress intended, the courts are the last line of defense to the imposition of a totally arbitrary rule that no Congress ever assented to. If on top of that the court decides that it must defer to agency interpretations of law (see below), what you have is a rule that utterly fails to satisfy the minimum Constitutional requirements for a law.

But there is yet another problem in the current arrangement, one that has received far less attention than it deserves. A duly enacted

law remains the law of the land even through changes in administration and changes in Congress, unless and until the law is changed. But consider the situation where Congress delegates rulemaking authority to an agency, and years pass and elections turn all the political branches over, and then *only at that moment* does the agency exercises the delegated rulemaking authority. And suppose further the agency's delegation is totally contrary to the wishes of a majority of the current Congress.

Every new Congress and President must contend with the laws and actions of prior Congresses and presidents. But, as previously mentioned, a law that alters the requirements for lawmaking is not the same as other laws,[80] for it affects the constitutional basis for lawmaking, and changes the contours of vested constitutional powers in ways that those future Congresses and presidents may not be able to change. For example, assume that the 150th Congress passes a law delegating all lawmaking power to the President, who is to be guided by the "intelligible principle" that the laws must be "wise and just and produce the greatest good for the greatest number." Then it adjourns sine die, and the next Congress is sworn in. That new Congress is now in a position where a veto-proof supermajority is required to block any new law. This is how a delegation of rule-making authority by one Congress deprives future Congresses of the ability to pass laws on the basis of simple majority rule. The president is thus empowered to enact entirely new and previously unimagined laws without any input from Congress other than an "intelligible principle," a qualification that a permissive Supreme Court has made almost infinitely elastic. Each such delegation further increases the risk of arbitrary government and deprives citizens of effective representation in Congress. Hence a strong argument can be made

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[80] See note 20.

for limiting any delegation to the pendency of the Congress that made it.

The principle of concurrence dictates that courts should limit the scope of *Chadha* and open the door to legislative vetoes. It also dictates that courts should look very carefully at the profound difference between an exercise of delegated rulemaking authority during the pendency of the Congress that delegated that authority, and an exercise of such authority during the pendency of a subsequent Congress. The case for a legislative veto is particularly strong where the delegation is made by one Congress and exercised during the pendency of another.

D. REVIVING THE UNITARY EXECUTIVE

Nowhere is the need for a concurrence of powers more starkly illustrated than in the case of independent agencies. As we have seen, independent agencies were made independent by the Supreme Court's unfortunate decision in *Humphrey's Executor*. As noted above, in that case, the Court seemed to be saying that if an agency serves only executive functions, the President must control it, but if it serves any legislative or judicial functions in addition to executive ones, then nobody can control it.

In light of the concurrence principle, that conclusion must be wrong, almost under virtually any theory of a properly functioning separation of powers. The practical consequence of the Court's decision in that case is that if Congress creates an agency that comprehends all three forms of governmental power, the agency must be allowed to exercise that power free of any day-to-day control by any of the constitutional branches.

Perhaps one can say that Congress lent its concurrence by creating the agency and setting its standards, and that the judiciary concurred merely in the availability of judicial review. How did the executive branch lend its concurrence? By signing the law that created the agency? If that constitutes concurrence, then it must be by some act of delegation. But whom has it delegated its concurrence

to exactly? Not to Congress. Not to the courts. The most one can say is that the President has, by signing the original law, lent concurrence through an open-ended delegation of executive authority to an entity that is under the democratic control of nobody.

When an independent agency exercises coercive power against an individual, that act of coercion is occurring without the crucial concurrence of the executive branch. Congress has presumably articulated the standards for the exercise of independent agency power, and judicial review is available in case of any justiciable challenge. But the concurrence of an elected executive, the President, has been magically cut out of the equation.

The Court should reverse *Humphrey's Executor* and give the President back the ability to remove agency heads and thereby control executive agencies. If there is a problem in their exercise of quasi-judicial or quasi-legislative functions, that problem should be dealt with by means other than permanently limiting core executive functions.

E. TAKING JUDICIAL DEFERENCE BACK TO THE DRAWING BOARD

Likewise, the principle of concurrence argues for revisiting the Court's deference doctrines. Judicial review is nowhere needed more than when an agency is exercising the core judicial responsibility of legal interpretation. The Court should revisit *Chevron* and eschew "reasonable basis" deference to agency interpretations of statute in favor of de novo review, as required by both the Administrative Procedure Act and the structural Constitution. On the other side of the coin, the Court should leave to Caesar the factual determinations that are Caesar's, and revisit *Motor Vehicle Manufacturers Association*

v. State Farm Mutual Automobile Insurance Co.[81] in favor of deference to agency expertise and competence in factual questions, which are core executive functions.

Chevron's fateful embrace of deference to agency interpretations of delegated rulemaking authority was premised on several interrelated assumptions. First, if Congress has left ambiguities and gaps in a statute, it was because Congress intended the agency to finish the job of fashioning the rule. Second, if a court rejects an agency's interpretation of the statute and imposes its own, it would be usurping a function that Congress intended to entrust to the agency. Third, rulemaking (including agency interpretation of statutory ambiguities) involved policy choices that are best left to the political branches.

These ideas fall one by one when set against the requirement of tripartite concurrence. The first, that Congress should be assumed to have intended any ambiguities in a statute to be resolved by the agency, is squarely contradicted by Section 706 of the Administrative Procedure Act, which specifically instructs federal courts to "decide all relevant questions of law, [and] interpret constitutional and statutory provisions [….]."[82] How courts have gotten around that clear instruction and passed the duty onto agencies is a saga all its own. For our purposes it suffices to note that the APA allocation of responsibilities is faithful to a proper operation of constitutional design. It allocates to the courts the ultimate responsibility for passing on whatever Congress and the executive branch have agreed to, to make sure that it does indeed comport with the law and the Constitution. That allocation preserves the judiciary's concurrence in the exercise of government power.

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[81] 463 U.S. 29 (1983).
[82] 5 U.S.C. § 706.

Chevron's concern with "judicial usurpation" of a function that Congress intended to delegate to the agency likewise falls in the light of the requirement for concurrence. In *Chevron,* the Court said:

> The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.[83]

This is the famous "two-step" analysis of *Chevron*. "Step one" asks whether the statutory provision is vague. If it is not, then the agency interpretation is due no deference. If it is, then "step two" asks whether the agency's interpretation of the statute is at all reasonable given the statutory provision. The latter situation gets a far higher degree of court deference, even though the principle of concurrence cuts in exactly the opposite direction.

Assume two agency pronouncements, one falling within *Chevron* step one, the other within *Chevron* step two. Once a court has had an opportunity to pass on the first agency pronouncement, all three branches have arguably concurred in the result. Congress has made

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[83] 467 U.S. at 843–44.

an express delegation, and the reviewing court will hold the agency to the statute and its "intelligible principle" (or whatever nondelegation standard is used) without deference to the agency. There is still the basic problem that inheres in delegation, but let's assume for this purpose that the initial delegations satisfy the courts' nondelegation standard because Congress has "set the policy."

Now consider the second agency pronouncement. Once a court has had an opportunity to pass on it, only one branch has concurred in the result: the executive branch. In that situation, Congress has failed in the first instance to create a clear rule; therefore, by failing to exercise its vested legislative responsibility properly, it has failed to concur meaningfully in the result. Meanwhile, on the back end the court has abdicated its obligation to interpret the statute; therefore, by failing to exercise its vested judicial responsibility properly, it has also failed to concur meaningfully in the result.

If a statutory provision is too vague for a court to determine whether the agency's legal interpretation is correct, then as a basic matter the provision's vagueness should be a limiting factor on how far the agency can go with it. In other words, those agency interpretations that reach step two of the *Chevron* analysis are already treading on the thin ice of "arbitrary and capricious" under the APA. It's a difficult situation to be sure, but the correct result cannot be to let both Congress and the courts shirk their constitutionally vested responsibilities and let the agency do whatever it wants. The better result is in the opposite direction, namely to insist that the agency's interpretation go no further than what a court would uphold on *de novo* review of the legal issue. Where a statutory provision admits of several different interpretations and there is no way of telling which Congress intended, the only clearly justifiable result is the one that entails the most minimal exercise of government power, because that it is the only result that we can know with some certainty that Congress concurred in.

This becomes clearer when looking at the third of *Chevron*'s rationales, namely its admonition that policy choices should be left

to the political branches because the alternative is for courts to make "policy choices." To see how incoherent that is, imagine a court ruling as a general proposition that where Congress has made no law on an important subject, the executive branch should make the law itself, otherwise the courts will have to. Where Congress has not exercised its legislative responsibilities properly, there is no law, and no other branch can step in to fill the void. The alternative is not to let the agency make up law, but rather to recognize that no law has been properly enacted.

That is *Chevron* "step two" *reductio ad absurdum*, at least as a baseline setting. Then one can point out that the vague provision is part of an overall statutory scheme that depends for its implementation on *some* meaning being to it, therefore Congress clearly intended that the provision mean *something*. With respect to the statutory provision at issue in *Chevron*, for example, it was fairly clear that "source" meant either a particular point-source within the plant, or the whole plant itself. The agency first picked the former, then decided that was unduly burdensome and picked the latter. Under the principle of concurrence, one of these interpretations was legally wrong: the more burdensome interpretation is the one that risks containing a quantum of coercion that Congress did not concur in. If Congress has left a key term in a complex statutory scheme undefined, then the principle of concurrence creates a presumption in favor of the least coercive result, because that is the only exercise of coercive government power that can be said with some confidence to rest on the concurrence of all three branches. On *that* basis, one might be able to say that *Chevron* was correctly decided as a matter of outcome, even if the reasoning was constitutionally infirm. The counter-example is the Obama EPA's "Clean Power Plan," which interpreted "best system of emissions reduction" under Section 111(d) of the Clean Air Act to include the entire economy of a particular state, rather than just a facility or technology, as the phrase had always been assumed to mean. Leaving aside the glaring statutory deficiency of that interpretation and assuming that the

statute provided no indication whatsoever about the meaning of "best system of emissions reduction," the Clean Power Plan's interpretation was clearly wrong because, of all the possible interpretations, it was by far the most coercive.

On the other side of the coin, of course, is *State Farm*, and its problematic withholding of deference to agencies' factual determinations, precisely the function that separation of powers would dictate deserve the most deference. Here, all of the Supreme Court's concerns about judicial usurpation of another branch's powers, which were the misguided basis for its decision in *Chevron*, are validated. Ministerial fact-finding on the basis of agency expertise is a core executive branch function. The courts' inquiry should be only into whether the agency has properly exercised a ministerial function entrusted to it by law. In this situation, the agency should enjoy as much deference as the court would give to Congress in lawmaking. It is just as inappropriate for a court to ask whether the agency took a "hard look" as it is for the court to ask whether Congress has done so in passing a law.

CONCLUSION

The Trump era has ushered in a new generation on the federal bench, many of whom are imbued with the conviction that the Constitution's crucial separation of powers is eroding, and that in many cases the courts themselves are to blame. These young jurists' reexamination of doctrines and precedents long considered settled give renewed hope for a recovery of the structural Constitution.