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## **The False Allure of the Anti-Accumulation Principle**

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## THE FALSE ALLURE OF THE ANTI-ACCUMULATION PRINCIPLE

MICHAEL HERZ\* & KEVIN M. STACK\*\*

### ABSTRACT

*Today the executive branch is generally seen as the most dangerous branch. Many worry that the executive branch now defies or subsumes the separation of powers. In response, several Supreme Court Justices and prominent scholars assert that the very separation-of-powers principles that determine the structure of the federal government as a whole apply with full force within the executive branch. In particular, they argue that constitutional law prohibits the accumulation of more than one type of power—legislative, executive, and judicial—in the same executive official or government entity. We refer to this as the anti-accumulation principle. The consequences of this principle, applied to its full extension, are vast. It would invite a new era of constitutional policing of the internal structure of the executive branch and administrative agencies.*

*This Article argues that separation-of-powers law contains no anti-accumulation principle. Unable to find textual support in the Constitution for this principle, proponents latch on to but misread James Madison's famous statement that the "accumulation of all powers . . . in the same hands . . . may justly be pronounced the very definition of tyranny." Functional considerations—like fairness, avoiding the triumph of faction, and efficiency—also do not justify the anti-accumulation principle or its application internally to the executive branch.*

*The anti-accumulation principle is generally posited by jurists and scholars whose leanings are formalist and conservative. However, a set of liberal scholars commit the same error. More focused on checks and balances than on pure separation of powers, these scholars either defend or seek to reform the current structure of the executive branch. In doing so, they either invoke or assume the existence of an anti-accumulation principle, working from the premise that the principles that justified the allocation of power among the three branches must also apply within the executive branch.*

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*While the executive branch needs greater constraint, separation of powers neither requires greater internal divisions nor provides a robust menu for reform. To the extent valid constitutional concerns underlie the anti-accumulation principle, they rest on due process and should be evaluated as such.*

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## INTRODUCTION

Today the executive branch is generally seen as the most dangerous branch.<sup>1</sup> Scholars from different perspectives share the view that the contemporary executive branch dominates in a way that fundamentally challenges, and perhaps overwhelms and defies, separation of powers. On the legal liberal side, Neal Katyal writes that the executive now “subsumes much of the tripartite structure of government.”<sup>2</sup> Peter Shane observes that the system of checks and balances has been “increasingly battered by . . . the gathering concentration of power in the hands of the federal executive.”<sup>3</sup> Bruce Ackerman and Martin Flaherty label the executive the “most dangerous branch”<sup>4</sup> and argue for reforms to bring it within the constitutional scheme.<sup>5</sup> On the right, Philip Hamburger has become the standard-bearer for laments that “[t]he administrative regime consolidates in one branch of government the powers that the Constitution allocates to different branches.”<sup>6</sup>

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<sup>1</sup> See, e.g., Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 125 (1994) (“[T]he framers’ factual assumptions [that the legislature would be the most dangerous branch] have been displaced. Now, it is the President whose power has expanded and who therefore needs to be checked.”); William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters*, 88 B.U. L. REV. 505, 506 (2008) (“[The] expansion in presidential power has created a constitutional imbalance between the executive and legislative branches, calling into doubt the continued efficacy of the structure of separation of powers set forth by the Framers.”); Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 465-66 (2012) (“[C]ommentators have suggested that the three branches have become unbalanced, with the executive exercising a predominant, and often unchecked, role.”).

<sup>2</sup> Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2316 (2006).

<sup>3</sup> PETER M. SHANE, MADISON’S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 3 (2009); see also Harold H. Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451, 451 (1979) (“The increasing sprawl of the federal agencies has challenged the effectiveness of the checks and balances designed by the Constitution.”).

<sup>4</sup> BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC 15 (2010) (“[O]ver the course of two centuries, the most dangerous branch has turned out to be the presidency . . . .”); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1821 (1996) (“[E]ven the most glancing survey indicates that the executive branch long ago supplanted its legislative counterpart as the most powerful—and therefore most dangerous—in the sense that the Founders meant.”).

<sup>5</sup> See ACKERMAN, *supra* note 4, at 181-88 (advocating that Congress, among other institutions, must directly address executive overreach); Flaherty, *supra* note 4, at 1828-39 (arguing judiciary should more robustly police separation of powers violations and Congress should more closely monitor executive by exercising its veto power and passing statutory items limiting executive removal power).

<sup>6</sup> PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 6 (2014).

The modern predominance of executive power is one of the most significant embarrassments to James Madison's vision of the Constitution.<sup>7</sup> Interconnected with the rise of executive power—part cause, part effect, part exacerbator—is a second great embarrassment to the Madisonian vision: the rise of political parties. Madison assumed that the branches of government would have their own inherent and internal ambitions, with “[a]mbition . . . made to counteract ambition.”<sup>8</sup> In a path-breaking article, Daryl Levinson and Richard Pildes show that this supposed adversarial tension between the legislature and the executive has been “displaced by competition between [the] two major parties.”<sup>9</sup> Whereas Madison envisioned the political branches checking one another, in practice, the character—even the very existence—of their competition is largely a function of whether they are controlled by the same or different parties.<sup>10</sup> In periods of divided government, the Madisonian regime is in evidence, but one might say it functions too well, as the “check” becomes a near complete barrier, leaving the president the choice between paralysis and overreaching. And in periods of unified government, the check largely disappears.

We do not contest this account. Our concern, rather, is with a common response to executive domination that is wholly misplaced. In the face of executive dominance and inconsistent congressional checking, scholars often articulate the view, not that the executive is too powerful in some absolute sense, but rather that the contemporary executive branch “toppl[es] . . . the framers’ tripartite system.”<sup>11</sup> In response, some jurists and scholars propose reorganizing and/or eliminating functions of the executive branch to bring its operations into line. They contend that the separation-of-powers principles that determine the structure of the federal government as a whole apply with full force to the distribution and combination of powers *within* the executive branch.<sup>12</sup> On this account, separation-of-powers law prohibits the accumulation of more than one

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<sup>7</sup> Madison argued that the “the weakness of the executive” required that it be “fortified,” THE FEDERALIST NO. 51, at 322-23 (James Madison) (Clinton Rossiter ed., 1961), against a legislature that is “everywhere extending the sphere of its activity and drawing all power into its impetuous vortex,” THE FEDERALIST NO. 48, *supra*, at 309 (James Madison). See THE FEDERALIST NO. 47, *supra*, at 301 (James Madison).

<sup>8</sup> THE FEDERALIST NO. 51, *supra* note 7, at 322 (James Madison).

<sup>9</sup> Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2313 (2006).

<sup>10</sup> *Id.* at 2329-30.

<sup>11</sup> JON D. MICHAELS, CONSTITUTIONAL COUP: PRIVATIZATION’S THREAT TO THE AMERICAN REPUBLIC 54 (2017) [hereinafter MICHAELS, CONSTITUTIONAL COUP].

<sup>12</sup> As Gillian Metzger notes, internal separation-of-powers principles could also be applied to the legislature and the judiciary. Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 428 & n.21 (2009) [hereinafter Metzger, *Interdependent*]. However, the focus of the internal separation of powers literature is the executive branch, and, like Metzger, we use “internal separation of powers” to refer to separation within the executive branch.

type of power—legislative, executive, and judicial—in the same official or government entity. We refer to this as the *anti-accumulation principle*.

The anti-accumulation principle has intuitive appeal. Within our constitutional tradition, the prohibition on the accumulation of more than one type of governmental power in any single official or entity would appear to be fundamental. In one widely quoted passage in *The Federalist No. 47*, James Madison appears to say as much: “The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.”<sup>13</sup>

Over the past decade, the anti-accumulation principle has been endorsed by Supreme Court Justices, other prominent jurists, and scholars. Justice Gorsuch, echoing Justice Scalia,<sup>14</sup> and with the support of Justices Thomas, Alito, and Kavanaugh,<sup>15</sup> has invoked this principle as a basis for challenging administrative law doctrines requiring judicial deference to agencies.<sup>16</sup> Chief Justice Roberts, too, has expressed general support for the anti-accumulation principle.<sup>17</sup> These Justices have built, sometimes explicitly, on scholars who have elaborated the idea that the Constitution contains an independent separation-of-powers prohibition on the accumulation of different types of powers in the same hands.<sup>18</sup>

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<sup>13</sup> See, e.g., THE FEDERALIST NO. 47, *supra* note 7, at 301 (James Madison).

<sup>14</sup> *Decker v. Nw. Env’t Def. Ctr.*, 568 U.S. 597, 619 (2013) (Scalia, J., dissenting) (criticizing *Auer* deference on the ground that implying that “[an] agency can resolve ambiguities in its own regulations . . . would violate a fundamental principle of separation of powers—that the power to write a law and the power to interpret it cannot rest in the same hands” (citing *Auer v. Robbins*, 519 U.S. 452 (1997))).

<sup>15</sup> See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2437 (2019) (identifying Justices who joined Justice Gorsuch’s opinion).

<sup>16</sup> See *id.* at 2437-39 (Gorsuch, J., concurring, joined by Thomas, J., and in relevant part by Alito & Kavanaugh, JJ.) (“*Auer* thus means that, far from being ‘kept distinct,’ the powers of making, enforcing, and interpreting laws are united in the same hands—and in the process a cornerstone of the rule of law is compromised.”); see also *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1155 (10th Cir. 2016) (Gorsuch, J., concurring) (“Under [*Chevron*’s] terms, an administrative agency may set and revise policy (legislative), override adverse judicial determinations (judicial), and exercise enforcement discretion (executive). . . . It’s an arrangement . . . that seems pretty hard to square with the Constitution of the founders’ design . . .” (citing *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984))).

<sup>17</sup> *City of Arlington v. FCC*, 569 U.S. 290, 312-13 (2013) (Roberts, C.J., dissenting) (“[A]s a practical matter [administrative agencies] exercise legislative power, by promulgating regulations with the force of law; executive power, by policing compliance with those regulations; and judicial power, by adjudicating enforcement actions and imposing sanctions on those found to have violated their rules. The accumulation of these powers in the same hands is not an occasional or isolated exception to the constitutional plan; it is a central feature of modern American government.”).

<sup>18</sup> See, e.g., John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 654 (1996) [hereinafter Manning, *Constitutional Structure*] (invoking “the constitutional premise that lawmaking and law-

The implications of applying the anti-accumulation principle to the executive branch as a matter of separation-of-powers law are vast. At a minimum, doing so would introduce a new wave of constitutional policing of agencies' internal organization and powers. The principle is present—sometimes front and center, sometimes lurking in the background—in contemporary debates over the agencies' combination of functions,<sup>19</sup> removal protections for independent agencies,<sup>20</sup> the appointment of Administrative Law Judges (“ALJs”),<sup>21</sup> and the Attorney General's “Refer and Review” authority in immigration.<sup>22</sup> Even more consequentially, it could require a dramatic sheering of the powers vested in many administrative agencies. For many proponents of this principle, that is exactly the point.<sup>23</sup>

This Article argues that the anti-accumulation principle, as applied internal to the executive branch or as a basis for challenging doctrines governing judicial review of agency action, misunderstands separation-of-powers law. No anti-accumulation principle prohibits the combination of powers exercised by the executive branch.<sup>24</sup> The Constitution provides modest constraints on the internal

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exposition must be distinct” to critique *Auer*); *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 69 (2011) (Scalia, J., concurring) (citing *id.*); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1248 (1994) (“In Madison’s famous words, ‘[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.’ The destruction of this principle of separation of powers is perhaps the crowning jewel of the modern administrative revolution.” (footnote omitted) (quoting THE FEDERALIST No. 47, *supra* note 7, at 301 (James Madison))).

<sup>19</sup> See Lawson, *supra* note 18, at 1248-49 (examining how combination of executive, legislative, and judicial functions in agency violates separation of powers).

<sup>20</sup> See *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2203-04 (2020) (striking down removal protections for Director of CFPB while noting, with evident concern, that Director “may unilaterally . . . issue final regulations, oversee adjudications, set enforcement priorities, [and] initiate prosecutions”).

<sup>21</sup> See *infra* text accompanying notes 176-84.

<sup>22</sup> See *infra* text accompanying notes 185-98.

<sup>23</sup> See, e.g., HAMBURGER, *supra* note 6, at 7 (contending that administrative power and law is unlawful).

<sup>24</sup> In *Touby v. United States*, a unanimous Supreme Court, with Justice O’Connor writing, flatly rejected application of separation of powers internal to the branches: “The principle of separation of powers focuses on the distribution of powers among the three coequal Branches, see *Mistretta*, . . . ; it does not speak to the manner in which authority is parceled out within a single Branch.” 500 U.S. 160, 167-68 (1991) (citing *Mistretta v. United States*, 488 U.S. 361, 382 (1989)). We aim to develop, in light of resurgent arguments for application of separation of powers internal to the executive branch, a full argument for the Court’s position in *Touby*. John Manning argues more generally that “the Constitution adopts no freestanding principle of separation of powers.” John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1944 (2011) [hereinafter Manning, *Ordinary Interpretation*]. Manning defends this position based on an examination of a broad array of historical sources and practices. *Id.* at 1978-85. We focus more narrowly on the invocation of one specific



structure of the branches; for instance, Congress must have two houses<sup>25</sup> and the President must appoint principal officers of the United States.<sup>26</sup> In other respects, it anticipates or authorizes particular structures; for instance, that the executive branch include principal and inferior officers,<sup>27</sup> or that the judiciary include (optional) inferior courts in addition to the (mandatory) Supreme Court.<sup>28</sup> But other than these modest constraints, internal structures are left to Congress (primarily through the Necessary and Proper Clause<sup>29</sup> and, with regard to itself, the Rules of Proceedings Clause)<sup>30</sup> and the branches themselves. While the three-branch structure of the federal government as a whole of course reflects a general anti-accumulation idea, it is a large and unjustified step to conclude that such an anti-accumulation principle applies internally to the executive branch.<sup>31</sup>

The text most often invoked to justify such a step is found not in the Constitution (because no such text is to be found there) but in Madison's statement in *The Federalist No. 47* that "[t]he accumulation of all powers . . . may justly be pronounced the very definition of tyranny."<sup>32</sup> This is a profound misreading, one that overlooks Madison's insistence that this maxim "has been totally misconceived and misapplied" and so illustrates the very error Madison cautions against.<sup>33</sup> In *The Federalist No. 47*, Madison is at pains to show that blending of powers is *consistent* with separation of powers, not the opposite.<sup>34</sup>

Nor is such a principle justified on functionalist grounds.<sup>35</sup> Federal agencies operate within a complicated and powerful web of checks and constraints, not least from the three constitutional branches themselves.

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freestanding separation-of-powers principle, the anti-accumulation principle, and its application internally to the executive branch.

<sup>25</sup> U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

<sup>26</sup> *Id.* art. II, § 2, cl. 2 ("[The President] shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States . . .").

<sup>27</sup> *Id.* (vesting nomination of principal "Officers" in President, and granting power to Congress to vest nomination of "inferior Officers . . . in the President alone, in the Courts of Law, or in the Heads of Departments").

<sup>28</sup> *Id.* art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); *see also id.* art. I, § 8, cl. 9 (empowering Congress to create lower courts).

<sup>29</sup> U.S. CONST. art I, § 3, cl. 18.

<sup>30</sup> *Id.* § 5, cl 2.

<sup>31</sup> *See* Manning, *Ordinary Interpretation*, *supra* note 24, at 1950-58, 1996 (arguing against invoking principles of higher level of generality in separation of powers).

<sup>32</sup> THE FEDERALIST NO. 47, *supra* note 7, at 301 (James Madison).

<sup>33</sup> *Id.*

<sup>34</sup> *See id.* at 302-03 (stressing that separation of powers is subverted by exercise of "whole power" of one branch by another).

<sup>35</sup> *See infra* Section II.C (discussing functional arguments).

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Beyond rejecting the application of the anti-accumulation principle internally to the executive branch, this Article aims to clarify proper constitutional terms of argument over the growth of the executive in two ways. First, we note that the concerns animating invocation of this principle frequently are issues of due process, such as notice of the law and the right to a fair hearing. Indeed, in some cases, the anti-accumulation arguments simply collapse into due process claims under a separation-of-powers label. Intertwining separation-of-powers claims with due process concerns does not strengthen the separation-of-powers arguments. But it does suggest that the proper constitutional foothold to address the concerns animating these objections is due process, and they should be evaluated as due process questions.

Second, the underlying point that a freestanding separation-of-powers principle does not apply internally to the executive branch has implications for a variety of scholars who embrace separation of powers as a vocabulary for understanding and advocating for reform of the executive branch. Jon Michaels, for example, contends that “a separation of powers *within the administrative arena* is in many respects even more important than is a separation of powers within the traditional constitutional area.”<sup>36</sup> Under the heading of internal separation of powers, Neal Katyal advocates for strengthening civil service protections as a source of friction and resistance to the abuse of power.<sup>37</sup> The separation-of-powers vocabulary of these and other scholars creates the impression—even if disclaimed by the writers themselves—that a general principle of separation-of-powers law regulates the internal structure of the executive branch. Talk of separation of powers, even at the highest level of abstraction, implicitly provides a menu for thinking about internal executive branch constraint that is unhelpful and often misleading. Not only is such internal separation of powers wrong doctrinally but it also should not be a primary vocabulary or tool kit for constraints on the executive branch.

The Article is organized as follows. Part I documents the longer tradition of invoking an anti-accumulation principle, grounded in *The Federalist No. 47*, to challenge the internal structure of the executive branch, and notes its prominent contemporary advocates. Part II makes the case that there is no anti-accumulation principle of separation of powers that applies internal to the executive branch. What invocations of an anti-accumulation principle need is precisely what Madison and the constitutional design deny: a principle that the separation of powers present between the three branches of government must be replicated within any branch. Part II also argues that functional considerations—like fairness, avoiding faction, and efficiency—do not justify the anti-accumulation principle. Part III turns to the ways in which the anti-accumulation principle is invoked to challenge judicial doctrines and particular institutional arrangements in the executive branch. It shows not only that the separation-of-powers elements of these challenges lack merit but also that frequently they are

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<sup>36</sup> MICHAELS, CONSTITUTIONAL COUP, *supra* note 11, at 19.

<sup>37</sup> Katyal, *supra* note 2, at 2331-35.

animated by due process concerns. While sometimes constitutional clauses can combine to strengthen constitutional arguments, due process does not save the anti-accumulation principle or its applications. Rather, due process concerns, especially those concerning the separation of prosecutorial and adjudicative roles, should be addressed as such. Part IV shows more generally the ways in which the separation-of-powers vocabulary, while useful in some respects, also has costs and limits the menu for executive branch reform.

#### I. THE ANTI-ACCUMULATION PRINCIPLE

The anti-accumulation principle has two basic elements. First, it asserts that principles of separation of powers applicable to the structure of the federal government as a whole also apply within the executive branch. The anti-accumulation principle thus would operate as a principle of internal separation of powers, in the sense that it applies internally to the executive branch. Second, as to the content of this internal separation-of-powers principle, the anti-accumulation principle asserts a constitutional prohibition on the accumulation or consolidation of more than one type of power—legislative, executive, judicial—in any single official or government entity. The anti-accumulation principle first developed in challenges to the combination of functions in administrative agencies and has more recently been invoked to attack judicial doctrines.

Gary Lawson's 1994 formulation of the anti-accumulation principle and its application to the executive branch have gained a considerable following and provide a helpful point of entry.<sup>38</sup> Lawson begins, as do so many iterations of this point, by quoting James Madison's famous statement in *The Federalist No. 47*: "[T]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."<sup>39</sup> Administrative agencies, Lawson then observes, "routinely combine all three governmental functions in the same body, and even in the same people within that body."<sup>40</sup> Lawson vividly depicts this combination with reference to the Federal Trade Commission:

The Commission promulgates substantive rules of conduct. The Commission then considers whether to authorize investigations into whether the Commission's rules have been violated. If the Commission authorizes an investigation, the investigation is conducted by the Commission, which reports its findings to the Commission. If the Commission thinks that the Commission's findings warrant an enforcement action, the Commission issues a complaint. The

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<sup>38</sup> Lawson, *supra* note 18, at 1248-49 (section entitled "The Death of Separation of Powers").

<sup>39</sup> *Id.* at 1248 (quoting THE FEDERALIST NO. 47, *supra* note 7, at 301 (James Madison)).

<sup>40</sup> *Id.*

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Commission's complaint that a Commission rule has been violated is then prosecuted by the Commission and adjudicated by the Commission. This Commission adjudication can either take place before the full Commission or before a semi-autonomous Commission administrative law judge. If the Commission chooses to adjudicate before an administrative law judge rather than before the Commission and the decision is adverse to the Commission, the Commission can appeal to the Commission.<sup>41</sup>

For Lawson, this combination of functions amounts to the "destruction"<sup>42</sup> of the principle of separation of powers and is the "most jarring way in which the administrative state departs from the Constitution,"<sup>43</sup> which for him is saying a lot.

Notice that this objection is distinct from the claim that it is unconstitutional for agencies to exercise the legislative and judicial powers they typically possess. Lawson also makes that argument.<sup>44</sup> But he treats the combination of functions internal to agencies as a distinct violation of a freestanding separation-of-powers principle. Of course, problems with unconstitutional delegation and combination of functions are related. Combination arises only where more than one type of constitutional power is exercised. As a result, for an executive officer or agency to exercise combined powers requires that it have been granted legislative and/or judicial powers. Once that (unconstitutional, in Lawson's view) grant of legislative or judicial powers has taken place, the objection is that the combination of those powers creates a distinct and further violation of the constitutional principle of separation of powers.<sup>45</sup>

Lawson's formulation of this objection is part of a long-standing strain of thought. The canonical text is *The Federalist No. 47*, with its irresistible line about "the very definition of tyranny."<sup>46</sup> Looming behind Madison is Montesquieu, particularly a passage quoted in part in *The Federalist No. 47*:

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty . . . .

Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the *life and liberty of the subject would be exposed to arbitrary control*; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers,

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 1249.

<sup>44</sup> *See id.* at 1237-48 (unconstitutional delegation of legislative power and unconstitutional grant of judicial power).

<sup>45</sup> *Id.* at 1249 (combination of functions separately violates separation of powers).

<sup>46</sup> THE FEDERALIST NO. 47, *supra* note 7, at 301 (James Madison).

that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.<sup>47</sup>

Throughout the twentieth century, and even before,<sup>48</sup> critics have invoked Madison in *The Federalist No. 47* or Montesquieu to make the case that the internal allocation of authority within the executive branch violated separation of powers. Writing in the late 1930s, for example, Robert Cushman considered the already lengthy pedigree of this objection.<sup>49</sup> He observed that “[e]very independent commission which has exercised any substantial regulatory power has been sharply attacked on this same ground.”<sup>50</sup> Indeed, the late 1930s was a period of particular contention regarding the combination of functions.<sup>51</sup> As the

<sup>47</sup> 11 CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 151-52 (Thomas Nugent trans., Hafner Pub. Co. 1949) (1748) (emphasis added); see Rebecca L. Brown, *Separation of Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1534-35 (1991).

<sup>48</sup> Congressional debate over the establishment of the Interstate Commerce Commission included quite modern-sounding objections on these grounds. For example, Representative Oates stated:

I believe that it is absolutely unconstitutional and void, because to my mind it is a blending of the legislative, the judicial, and perhaps, the executive powers of the Government in the same law. . . . In other words, the power of suspending the law is to be vested in the commissioners who are charged with construing the scope of the provisions of this bill, and the powers with which it invests them as well as with the execution of it. All these powers are concentrated in the same body of officers.

18 Cong. Rec. 824, 848 (1887) (statement of Rep. William Oates).

<sup>49</sup> Robert E. Cushman, *Constitutional Status of the Independent Regulatory Commissions*, 24 CORNELL L.Q. 13, 15-21 (1938).

<sup>50</sup> *Id.* at 19.

<sup>51</sup> For example, a published JSD dissertation by Ward Lattin developed the point at book length (concluding, interestingly, that the solution was to separate functions *within* agencies). WARD E. LATTIN, *FEDERAL ADMINISTRATIVE REGULATORY AGENCIES AND THE DOCTRINE OF THE SEPARATION OF POWERS* (1938). This passage is typical:

Extensive exercise of the three distinct powers are placed in the same hands, with the result that instead of the greatest practical separation we have a most impracticable union of powers. It is this precise thing that the framers of the Constitution quite unanimously agreed was the very definition of tyranny.

And if it was tyranny than [sic] it is tyranny now!

*Id.* at 27; see also J. ROLAND PENNOCK, *ADMINISTRATION AND THE RULE OF LAW* 33 (1941) (finding it “clear that the combination of the various powers into one agency without the proper safeguards may be very dangerous indeed”); ROSCOE POUND, *ADMINISTRATIVE LAW: ITS GROWTH, PROCEDURE, AND SIGNIFICANCE* 54-55 (1942) (“The polity proposed by some, in which there is to be a fourth department, the administrative, in which full legislative, administrative, and judicial power is to be concentrated, is a reversion to the seventeenth and eighteenth-century type of absolute government, on the model of the old regime in France, and to the type of government in colonial America which led to the Revolution.”); O.R. McGuire, *Federal Administrative Action and Judicial Review*, 22 A.B.A. J. 492, 492-93 (1936); O.R. McGuire, *Administrative Lawmaking*, 185 ANNALS AM. ACAD. POL. & SOC. SCI. 73, 83 (1936) (objecting to the combination of functions within administrative agencies and noting concern over resulting arbitrary decisions).

federal bureaucracy ballooned, so did the number of agencies with combined functions.<sup>52</sup>

Perhaps the most prominent attack during the New Deal period came from the American Bar Association (“ABA”). The ABA’s Special Committee on Administrative Law, established in 1933 and chaired first by O.R. McGuire and then by Roscoe Pound, pressed hard for a decade for legislative change.<sup>53</sup> The Committee’s primary concern was administrative adjudication, and its central proposal was creation of a single administrative court for all agency adjudication.<sup>54</sup> While “identifying constitutional infirmities with expanding administrative government was not the Special Committee’s focus,”<sup>55</sup> it repeatedly stressed the separation-of-powers point. In its 1936 report, for example, the Committee quoted the Supreme Court to the effect that separation of powers “is not merely a matter of convenience” but rather “basic and vital,”<sup>56</sup> and then complained:

Paradoxically, it is precisely this forbidden commingling of the essentially different powers of government in the same hands that is today the identifying badge of an administrative agency. For years, the actual development was obscured by a variety of euphemisms, such as “quasi-legislative,” “quasi-judicial,” and “administrative,” sometimes with the implication that a *fourth* power of government was involved, not subject to the constitutional safeguards imposed on the other three. Little if any distinction was made between executive, legislative, and judicial functions

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<sup>52</sup> For many the combination of functions was a feature, not a bug. *See, e.g.*, JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 11-12 (1938) (“[W]hen government concerns itself with the stability of an industry it is only intelligent realism for it to follow the industrial rather than the political analogue. It vests the necessary powers with the administrative authority it creates, not too greatly concerned with the extent to which such action does violence to the traditional tripartite theory of government organization.”).

<sup>53</sup> *See generally* Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 *HARV. L. REV.* 1, 57-59 (2017) [hereinafter Metzger, *1930s Redux*] (examining the origins of the ABA Special Committee); Dan Ernst, *The Special Committee on Administrative Law*, *LEGAL HIST. BLOG* (Sept. 27, 2008, 12:38 PM), <http://legalhistoryblog.blogspot.com/2008/09/special-committee-on-administrative-law.html> [<https://perma.cc/DF9F-FSK7>] (recounting history of ABA’s criticism and distrust of administrative agencies).

<sup>54</sup> Metzger, *1930s Redux*, *supra* note 53, at 58.

<sup>55</sup> *Id.* In this respect, Metzger contrasts the Committee with the Liberty League, a ferociously anti-New Deal organization active from 1934 to 1940. *Id.* That organization seems not to have much focused on the separation-of-powers arguments. *See* Jared A. Goldstein, *The American Liberty League and the Rise of Constitutional Nationalism*, 86 *TEMP. L. REV.* 287, 288-89 (2014) (“[T]he Liberty League argued for a return to what the movement identified as the fundamental national values of self-reliance, individualism, hard work, property rights, and freedom from government . . .”).

<sup>56</sup> *Report of the Special Committee on Administrative Law*, 61 *ANN. REP. A.B.A.* 720, 727 (1936) (quoting *O’Donoghue v. United States*, 289 U.S. 516, 530 (1933)).

when exercised by administrative agencies; the tendency was to confuse them and to treat them alike.<sup>57</sup>

The surge of separation-of-powers objections during the New Deal led to legislative requirements for separation of functions within agencies in the Administrative Procedure Act (“APA”).<sup>58</sup> Based on the principle that a prosecutor cannot be an impartial judge,<sup>59</sup> the APA keeps adjudication apart from investigation and prosecution by requiring that those tasks be performed by different people.<sup>60</sup> ALJs cannot “be responsible to or subject to the supervision or direction of” enforcement staff,<sup>61</sup> nor can they have communications with the enforcement staff relevant to the subject of their adjudications.<sup>62</sup> The APA did not create a scheme of complete separation because the heads of agencies were still vested with ultimate authority on adjudications, investigations, enforcement, and rulemaking<sup>63</sup> Below that level, strict separation of adjudicative and prosecutorial staff is required.

Although the compromise reflected in the APA did not satisfy everyone, for fifty years it seemed that the matter was reasonably settled. In a particular proceeding, the combination of functions—particularly that of judge and prosecutor—might create a plausible, or even actual, APA or due process

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<sup>57</sup> *Id.*; see also O.R. McGuire, *Administrative Law and American Democracy*, 25 A.B.A. J. 393, 394 (1939) (“Should our present tri-partite system continue to weaken, we are faced with the only possible alternatives of anarchy or the introduction of the final phase of Utopianism, a form of government on the Russian, Italian or German models—and let no one tell you the contrary.”).

<sup>58</sup> Most importantly, the Administrative Procedure Act, adopted in 1946, carves out protection for ALJs from influence by, or involvement with, investigators and prosecutors within the agency. 5 U.S.C. § 554(d); see Michael Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 COLUM. L. REV. 759, 761-79 (1981); see also U.S. DOJ, FINAL REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE 55-60 (1941) [hereinafter FINAL REPORT] (recommending structural protections of hearing examiners in order to “insure internal but nevertheless real and actual separation of the adjudicating and prosecuting or investigating functions”); Joanna Grissinger, *Law in Action: The Attorney General’s Committee on Administrative Procedure*, 20 J. POL. HIST. 379, 384-86 (2008) (discussing the committee’s proposals for separation of adjudicatory and prosecutorial functions within agencies). The separation of functions provisions are one instance of a general characteristic of the APA, viz., that it embodies a set of compromises to allow agencies to function while still protecting against what Roscoe Pound termed “administrative absolutism.” See POUND, *supra* note 51, at 28, 36; see also Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 FORDHAM L. REV. 17, 24-25 (2001).

<sup>59</sup> See FINAL REPORT, *supra* note 58, at 56.

<sup>60</sup> *Id.*

<sup>61</sup> See 5 U.S.C. § 554(d)(2).

<sup>62</sup> See *id.* § 554(d)(1).

<sup>63</sup> Asimow, *supra* note 58, at 761.

problem.<sup>64</sup> But viewed as an issue of constitutional law, it was widely accepted that combination of functions in individual agencies does not violate the constitutional principle of separation of powers.<sup>65</sup> Accordingly, in 1994, Lawson lamented that agencies' combination of functions "typically does not even raise eyebrows" and "[t]he post-New Deal Supreme Court has never seriously questioned the constitutionality of this combination of functions in agencies."<sup>66</sup>

Yet in the quarter century since, the idea of an anti-accumulation principle that invalidates combinations of functions has gained considerably more adherents. Scholars from otherwise opposed perspectives have pressed these challenges. Consider Professors Michael Dorf and Charles Sabel, on the one hand, and Philip Hamburger, on the other. In arguing for decentralization of government power generally, Dorf and Sabel contend that agencies' combination of functions violates separation of powers.<sup>67</sup> Like Lawson, they invoke a Madisonian principle, drawn from *The Federalist No. 47*, prohibiting "the combination of executive, legislative, and judicial power in one branch of government."<sup>68</sup> In the context of a wholesale challenge to the legality of

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<sup>64</sup> See, e.g., *Ward v. Village of Monroeville*, 409 U.S. 57, 58 (1972) (holding due process violated when mayor is responsible for village finances and major part of village income derives from traffic convictions in mayor's court); *Tumey v. Ohio*, 273 U.S. 510, 522-23 (1927) (holding mayor's personal financial interest in obtaining convictions in traffic court disqualifies him as disinterested adjudicator). As we discuss below, see *infra* text accompanying note 227, courts are fairly accepting of the combination of functions notwithstanding possible due process concerns. See *Withrow v. Larkin*, 421 U.S. 35, 47-48 (1975); *Marcello v. Bonds*, 349 U.S. 302, 311 (1955); *FTC v. Cement Inst.*, 333 U.S. 683, 702 (1948). But see *Wong Yang Sung v. McGrath*, 339 U.S. 33, 46 (1950) ("But that the safeguards [the APA] did set up were intended to ameliorate the evils from the commingling of functions as exemplified here is beyond doubt."). Such a concern will only arise in an adjudication, not a rulemaking. *Nat'l Small Shipments Traffic Conf., Inc. v. Interstate Com. Comm'n*, 725 F.2d 1442, 1448 (D.C. Cir. 1984) ("Neither federal statute nor the due process clause imposes a general separation-of-functions requirement on informal rulemaking by an agency."); *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1172 (D.C. Cir. 1980).

<sup>65</sup> Metzger, *1930s Redux*, *supra* note 53, at 60 (noting that "[b]y 1937, the Court had implicitly sanctioned the combination of legislative, adjudicatory, and executive functions against separation of powers attack"); Kevin M. Stack, *Agency Independence After PCAOB*, 32 CARDOZO L. REV. 2391, 2394-97 (2011) (noting that "[s]eparation-of-powers law has been silent on the consolidation of functions within agencies" and that the Supreme Court "has not held that combination of functions within the agency violates separation of powers"); cf. Lawson, *supra* note 18, at 1249 ("The post-New Deal Supreme Court has never seriously questioned the constitutionality of this combination of functions in agencies."). For an explicit rejection of the separation-of-functions objection under a state constitution, see *Hickenbottom v. McCain*, 181 S.W.2d 226, 229 (Ark. 1944).

<sup>66</sup> Lawson, *supra* note 18, at 1249; see also Brown, *supra* note 47, at 1556 (noting the "remarkable point . . . that the Supreme Court has never seriously questioned the validity of the commingling of legislative, executive, and judicial functions" in individual agencies).

<sup>67</sup> Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 438-39 (1998).

<sup>68</sup> *Id.* at 438.



administrative governance, Professor Hamburger objects to the administrative agencies' combination of functions in exactly the same terms. Noting that Montesquieu justified specialization of powers to prevent arbitrary decision making, Hamburger writes, "the combination of powers often leaves Americans at the mercy of administrative agencies."<sup>69</sup> When agencies have combined functions, Hamburger continues, "they come to enjoy a nearly freestanding coercive power, only distantly limited by the external formalities of authorizing statutes and deferential judicial decisions."<sup>70</sup>

These objections have also been raised in a growing number of concurring and dissenting opinions, both on the Supreme Court and in the lower courts, that challenge specific doctrines. Perhaps the most prominent and general judicial endorsement of the combination-of-functions objection appears in Chief Justice Roberts's dissenting opinion, joined by Justices Kennedy and Alito, in *City of Arlington v. FCC*.<sup>71</sup> There, the Chief Justice began with the go-to quote from *The Federalist No. 47*<sup>72</sup> before lamenting that "[a]lthough modern administrative agencies fit most comfortably within the Executive Branch, as a practical matter they exercise legislative power . . . executive power . . . and judicial power."<sup>73</sup> While the opinion stops well short of taking a view on the constitutionality of administrative agencies, the Chief Justice does note that this "accumulation" fits poorly with the "constitutional plan."<sup>74</sup> Similarly, in *Seila Law LLC v. CFPB*,<sup>75</sup> the Chief Justice invoked the combination of functions of the Director of the Consumer Financial Protection Bureau as part of the grounds

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<sup>69</sup> HAMBURGER, *supra* note 6, at 335. Hamburger's work cites Pound and is reminiscent of Pound's assertion that the modern American administrative state is a return to the evils of the British monarchy circa the 18th century, a central feature of which, of course, was the concentration of power in one person, with no countervailing ambition to counter the king's. POUND, *supra* note 51, at 54-55. For an even more explicit invocation of the monarchical comparison, see generally F. H. BUCKLEY, *THE ONCE AND FUTURE KING: THE RISE OF CROWN GOVERNMENT IN AMERICA* (2015).

<sup>70</sup> Hamburger, *supra* note 6, at 335; see also Philip A. Hamburger, *Vermeule Unbound*, 94 TEX. L. REV. 205, 220 (2016) (noting that statutory requirements of separation of functions within agencies leave the glass "half empty," which "is a dangerous threat to due process"); David McIntosh & William J. Haun, *The Separation of Powers in an Administrative State*, in LIBERTY'S NEMESIS: THE UNCHECKED EXPANSION OF THE STATE 239, 240 (Dean Reuter & John Yoo eds., 2016) (similar objection); Richard Murphy & Afsheen John Radsan, *Notice and an Opportunity to Be Heard Before the President Kills You*, 48 WAKE FOREST L. REV. 829, 876 (2013) (stating that combination of functions is a "seemingly wholesale violation of separation of powers"); Richard A. Epstein, *Why the Administrative State Is Inconsistent with the Rule of Law*, 3 N.Y.U. J.L. & LIBERTY 491, 496 (2008) (rejecting the "claim that the Constitution authorizes the creation of independent agencies with aggregated powers of a legislative, executive, and judicial nature").

<sup>71</sup> 569 U.S. 290, 312-13 (2013) (Roberts, C.J., dissenting).

<sup>72</sup> *Id.* at 312 (quoting THE FEDERALIST NO. 47, *supra* note 7, at 301 (James Madison)).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 313.

<sup>75</sup> 140 S. Ct. 2183 (2020).

for invalidating the Director's protection from removal.<sup>76</sup> In other opinions, as we address below,<sup>77</sup> Supreme Court Justices invoke these ideas as a basis for challenging deference doctrines. Other critics invoke them to challenge how adjudication is performed in the executive branch.

## II. THE ANTI-ACCUMULATION PRINCIPLE AND SEPARATION OF POWERS

This Part makes the case against the application of an anti-accumulation principle to the executive branch. In the absence of an actual provision in the text, the principle must be teased out of structural understandings. Most of those who do so are formalists; accordingly, this Part begins by arguing that a formal approach to separation of powers does not justify applying an anti-accumulation principle. Nor does *The Federalist No. 47*. This Part then argues that the accumulation of powers within an executive branch department or agency also is unproblematic under a more functional approach. In short, there is no anti-accumulation principle as a matter of constitutional law.

### A. *A Constitutional Prohibition on Accumulation?*

Most defenders of the anti-accumulation principle associate their views with formalism.<sup>78</sup> As such, they first determine what type of governmental power is being exercised and then insist that the entity exercising it be part of the constitutionally established branch vested with the relevant power.<sup>79</sup> But the formalist argument against agency combination of functions fails on its own terms.

First, the premise—that the Constitution bars commingling of powers—is overstated. Formalists view the constitutional scheme as one of rigid, siloed separation. The Constitution establishes distinct branches, each with its own task; therefore these powers cannot be blended within any given entity. The Constitution, however, does not assign exclusive tasks to each branch, as every

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<sup>76</sup> *Id.* at 2190, 2202, 2203-04 (noting that framers sought to “prevent the ‘gradual concentration’ of power in the same hands” and that the Director had been vested with powers to “issue final regulations, oversee adjudications, . . . [and] initiate prosecutions,” an accumulation which the Court treated as strengthening the challenge to the Director's removal protection (quoting THE FEDERALIST NO. 51, *supra* note 7, at 321 (James Madison))).

<sup>77</sup> See *infra* Section VI.A (addressing invocation of these arguments to challenge deference doctrines).

<sup>78</sup> The leading example is surely self-described “fanatical” formalist Gary Lawson. See Gary Lawson, *Prolegomenon to Any Future Administrative Law Course: Separation of Powers and the Transcendental Deduction*, 49 ST. LOUIS U. L.J. 885, 888 (2005) (“[V]irtually the entire structure of the modern administrative state is either suspect or flagrantly unconstitutional under any plausible formalist account.”).

<sup>79</sup> See, e.g., *id.* at 888-89.

observer since Madison has acknowledged.<sup>80</sup> The president's veto power, his role in proposing legislation, and his ability to adjourn Congress are "legislative," as is the vice president's role as president of the Senate; the Senate's powers to confirm nominees and approve treaties are "executive" (unless the president's role in negotiating treaties is "legislative"); the House's impeachment power is executive; the Senate's "sole power" to try impeachments is judicial (alternatively the Chief Justice's role in presiding over presidential impeachment trials is "legislative"); and so on. The Constitution actually mingles powers quite a bit. Indeed, a prominent contemporary objection to the proposed Constitution was that it did so too much; but the strict separationists *lost* that argument.<sup>81</sup> It is still accurate to say that it does not mingle them as much as one finds at the top of a typical administrative agency, and perhaps that is the point. But it is far too simple to just note that the Constitution separates powers and agencies combine them.

Second, commingling at the agency level leaves the constitutional regime of separate powers entirely intact. Pursuant to that regime, Congress has passed legislation that created, empowered, constrained, and approved these agency structures.<sup>82</sup> It could eliminate them tomorrow. And through actual, threatened,

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<sup>80</sup> See THE FEDERALIST NO. 48, *supra* note 7, at 308 (James Madison) (noting that unless the three "departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the [separation-of-powers] maxim requires . . . can never in practice be duly maintained"). In the words of Lloyd Cutler, given all the intermingling, "[t]he followers of Montesquieu at the Philadelphia Convention at best won half a Loaf." Lloyd N. Cutler, *Some Reflections About Divided Government*, 18 PRESIDENTIAL STUD. Q. 485, 485 (1988) (describing the constitutional regime as "much more a sharing of powers than . . . a separation of powers"). We discuss Madison's endorsement of blended powers more fully below in regard to misreadings of *The Federalist No. 47*. See *infra* Section II.B.

<sup>81</sup> See, e.g., Cutler, *supra* note 80, at 485 ("[I]t is the fact that they did not achieve this sort of pristine separation that Montesquieu talked about, that was the principal ground of attack upon the Constitution during the ratification process."); William B. Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474, 480-81 (1989) (describing objections to the Constitution on this ground).

<sup>82</sup> For some skeptics, the simple fact that agencies are created through and by the three constitutionally separated powers itself refutes the arguments of the Gary Lawsons of the world. See Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of Auer*, 84 U. CHI. L. REV. 297, 311-12 (2017) ("The separation of powers is fully satisfied so long as the principal institutions set out in the Constitution—Congress, president, and judiciary—exercising their prescribed functions, devise and approve the scheme of agency authority that combines rulemaking and rule-interpreting power in the agency's hands. . . . If the constitutional institutions, operating as they were set up to operate, have decided that such an arrangement is both valid and wise, then respect for the separation of powers counsels approval of the arrangement."); Adrian Vermeule, *No*, 93 TEX. L. REV. 1547, 1564 (2015) (reviewing PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014)) ("Where on earth does Hamburger think combined agency functions come from? The combination of functions in agencies *results from* the operation of the system of separated legislative,

or feared interventions, the three constitutional branches all impose meaningful oversight on agencies, exercising that power separately.

Third, like all formalist arguments, this one is subject to a formalist response: the supposed constitutional violation is simply not possible. On the standard formalist account, agencies always and by definition exercise *only* executive power. That is all they do and all they can do. As Justice Scalia put it in *City of Arlington v. FCC*,<sup>83</sup> when agencies make rules and conduct adjudications, “these activities take ‘legislative’ and ‘judicial’ forms, but they are exercises of—indeed, under our constitutional structure they *must* be exercises of—the ‘executive Power.’”<sup>84</sup> From this perspective, the reason is straightforward: the Constitution does not permit officers of the executive branch—which agencies are—to exercise either Congress’s “legislative” power, or the judiciary’s “judicial” power. The Constitution vests “[a]ll legislative Powers . . . in a Congress,”<sup>85</sup> and in *Whitman v. American Trucking Ass’ns*,<sup>86</sup> Justice Scalia, writing for the Court, declared that “[t]his text permits no delegation of those powers.”<sup>87</sup> If no legislative power may be constitutionally delegated, then agencies never (constitutionally) exercise legislative power. So too with judicial

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executive, and judicial powers.”); Adrian Vermeule, *Optimal Abuse of Power*, 109 Nw. U. L. REV. 673, 691-92 (2015) [hereafter Vermeule, *Optimal Abuse*]. Vermeule and Sunstein are not arguing that the combination of functions is constitutional simply *because* it was set up and approved by the three branches. That argument eliminates judicial review. Rather, their claim is the narrower one that a separation-of-powers challenge in particular (not *any* claim of unconstitutionality) is unavailable against a structure that is itself the product of the constitutionally mandatory participation and agreement of the separate powers. Constitutional requirements have been met and purposes served by the process that produced the combination. We wonder whether this may still be too large a claim; taken to its full extension, it might mean that every judicial decision finding a statutory separation-of-powers violation was wrongly decided. In any event, for the reasons given in the rest of this article, we end up the same place as Sunstein and Vermeule even if from their point of view we have gone the long way round.

<sup>83</sup> 569 U.S. 290 (2013).

<sup>84</sup> *Id.* at 304 n.4 (quoting U.S. CONST. art. II, § 1, cl. 1); *see also* United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 85 (1932). This understanding is also central, for example, to *INS v. Chadha*, 462 U.S. 919 (1983). If the veto is “legislation” and so a single House cannot do it, why is it acceptable to leave it to the Attorney General, as *Chadha* did? *See id.* at 953-54. The answer is that it is only “legislation” if Congress (or part of Congress) does it. *See id.* at 953 n.16 (rejecting the argument that agency decision-making is an exercise of legislative power, even though it may “resemble ‘legislative’ action”).

<sup>85</sup> U.S. CONST. art I, § 1.

<sup>86</sup> 531 U.S. 457 (2001).

<sup>87</sup> *Id.* at 472. Justice Stevens, joined by Justice Souter, took issue with this characterization. *Id.* at 487-90 (Stevens, J., concurring) (calling for frank acknowledgement that agencies exercise legislative power, a fact that gave him no pause at all as long as they did so pursuant to a congressional delegation cabined by an intelligible principle). Of course, this view garnered only two votes and runs directly counter to the formalist principles we are discussing here.

power. As the Court declared in *Stern v. Marshall*,<sup>88</sup> Congress cannot confer “the Government’s ‘judicial Power’ on entities outside Article III.”<sup>89</sup> Therefore, agency adjudication is not an exercise of the judicial power by definition. Writing for three other Justices, Justice Kagan embraced this position in her plurality opinion in *Kisor v. Wilkie*.<sup>90</sup>

The conclusion from these premises is hard to resist (in formalist terms): if agencies cannot exercise “legislative power” (see *Whitman*) and cannot exercise “judicial power” (see *Stern v. Marshall*), then whatever they do is an exercise of executive power—and their combination of *functions* does not involve a combination of *powers*. The formalist understanding that each branch may exercise only its characteristic type of power precludes the possibility of an agency exercising a combination of constitutional powers. Combination cannot be a constitutional problem because it cannot *be*, period.<sup>91</sup>

This argument is formal in the extreme, perhaps convincing to property lawyers in England in the seventeenth century but too formal even for some committed contemporary formalists. The obvious functionalist response is to contend that *in effect* agencies are exercising not only executive but also legislative and judicial power. Recall the Chief Justice’s remark that “as a practical matter” agencies *do* exercise legislative and judicial power.<sup>92</sup> Suppose we accept that characterization. What, then, is the constitutional problem in formalist terms?

Most readily, it sounds in nondelegation. If an administrative agency is “as a practical matter” exercising not only executive but also legislative and judicial power, then, from the perspective of a formalist, there have been two constitutional violations: the executive branch is doing work exclusively vested with Congress and it is also doing work exclusively vested in the judiciary. As

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<sup>88</sup> 564 U.S. 462 (2011).

<sup>89</sup> *Id.* at 484. The Court has waffled on this point on some occasions. *See, e.g.*, *Freytag v. Comm’r*, 501 U.S. 868, 889 (1991) (“[T]he legislative courts possess and exercise judicial power . . . although not conferred in virtue of the third article of the Constitution.” (quoting *Williams v. United States*, 289 U.S. 553, 565-567 (1933))).

<sup>90</sup> 139 S. Ct. 2400, 2422 (2019) (Kagan, J., joined by Breyer, Ginsburg, & Sotomayor, JJ.) (“It does not violate the separation of powers, we have explained, because even when agency ‘activities take “legislative” and “judicial” forms,’ they continue to be ‘exercises of[] the “executive Power”’—or otherwise said, ways of executing a statutory plan.” (alteration in original) (quoting *City of Arlington v. FCC*, 569 U.S. 290, 304-05 (2013))).

<sup>91</sup> *See* Jack M. Beermann, *The Never-Ending Assault on the Administrative State*, 93 NOTRE DAME L. REV. 1599, 1607 (2018) (“[T]he accepted view is that agency heads may employ all three forms of governmental action because, . . . as the *Chadha* Court recognized, agencies are actually performing only executive functions when they make rules and adjudicate whether the rules, or a statute, have been violated.”).

<sup>92</sup> *Arlington*, 569 U.S. at 312 (Roberts, C.J., dissenting); *see also Whitman*, 531 U.S. at 488 (Stevens, J., concurring) (disagreeing with majority’s description of an EPA regulation as an exercise of “executive power” and asserting that “it would be both wiser and more faithful to what we have actually done in delegation cases to admit that agency rulemaking authority is ‘legislative power’”).

a logical matter if there is a combination of functions then there must have been a delegation (one that is, for the formalist, unconstitutional). In this sense, combination may work to flag a violation of the delegation doctrine. But the combination itself is not the violation; at a minimum to describe it that way is a form of double counting.

To conclude this Section, consider the following argument, or thought experiment. The Constitution vests legislative authority in Congress; it also divides the Congress into two houses.<sup>93</sup> The latter was a conscious decision, part and parcel of the separation of powers more generally. Indeed, for the framers, the division between the House and Senate was absolutely central to the overall structure of separated powers. In *The Federalist No. 10*, Madison stresses the advantages of a large republic divided into states in avoiding the triumph of faction.<sup>94</sup> In *The Federalist No. 51*, he constructs a corresponding argument about the separation of powers within the federal government.<sup>95</sup> Bicameralism was at the heart of this argument.<sup>96</sup> For Madison, the House and the Senate were themselves different “branches.”<sup>97</sup> Given that under the Constitution legislation must be enacted by a bicameral body, we might draw the lesson that when an agency writes regulations—an essentially legislative task—it must recreate the bicameral structure. Perhaps, for example, all agencies could have two heads: say one who served at the pleasure of the president and one who could be fired only for cause, whose mutual agreement was necessary for the promulgation of a regulation. In this way we would ensure that the constitutional plan was being observed.

To our knowledge, no one has made this argument. That is not a surprise; it is not a very good argument. It has no textual basis; it creates a freestanding requirement out of a particular structural arrangement that applies in a separate and distinct context to other entities; and it is hard to see what would be accomplished other than making regulations harder to produce. But in its method

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<sup>93</sup> See U.S. CONST. art. I, § 1.

<sup>94</sup> See THE FEDERALIST NO. 10, *supra* note 7, at 77 (James Madison).

<sup>95</sup> THE FEDERALIST NO. 51, *supra* note 7, at 322 (James Madison).

<sup>96</sup> See *id.*

<sup>97</sup> See *id.* (“In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit.”). As Larry Kramer explains, “Madison’s original theory of constitutional enforcement was political in nature, and the ‘departments’ Madison had in mind when he wrote about separation of powers were the House, the Senate, and the Executive.” Larry D. Kramer, “*The Interest of the Man*”: James Madison, *Popular Constitutionalism, and the Theory of Deliberative Democracy*, 41 VAL. U. L. REV. 697, 735 (2006); see also *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2203 (2020) (“[Having divided the federal government into three branches, the framers] did not stop there. Most prominently, the Framers bifurcated the federal legislative power into two Chambers: the House of Representatives and the Senate . . .”).

and premises this argument is identical to the claims of those invoking the anti-accumulation principle. If separation of powers applies at the agency level, so does bicameralism; they are equivalent principles—indeed, bicameralism is an aspect of separation of powers. But bicameralism applies to *Congress*, not to other governmental entities. So too for other instantiations of the principle of separation of powers, such as the anti-accumulation principle.

B. *Misreading Madison*

Proponents of the anti-accumulation principle have a problem: there just is no piece of text on which to hang the argument. The Constitution contains no separation of powers clause.<sup>98</sup> It reflects separation-of-powers principles through certain specific provisions but does not impose them beyond those specific provisions.<sup>99</sup>

Undaunted, proponents of the anti-accumulation principle *do* routinely invoke a text, almost as a matter of protocol. That text just is not in the Constitution. Rather, it is Madison's famous caution in *The Federalist No. 47* against the "accumulation" of "all powers, legislative, executive, and judiciary . . . in the same hands."<sup>100</sup> Stripped of its context, Madison's highly quotable aphorism appears to state a comprehensive rule of separation that would prohibit combination of functions in agencies. But that is a flagrant misreading of *The Federalist No. 47*. Madison's basic point is that one branch must not exercise the "whole" or the "complete" power of another branch, and that "the oracle," Montesquieu, did not propound a maxim prohibiting the blending of powers

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<sup>98</sup> See Manning, *Ordinary Interpretation*, *supra* note 24, at 1944 (noting that the "Constitution contains no Separation of Powers Clause" and "adopts *no freestanding principle of separation of powers*"). Gary Lawson and Patricia Granger argue that the Necessary and Proper Clause provides a textual foundation for general separation-of-powers principles in the design of government institutions. See Gary Lawson & Patricia B. Grander, *The 'Proper' Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 333-35 (1993). In particular, they suggest that for a law to be "proper" for "carrying into execution the powers of any department of the national government [it] must confine that department to its peculiar jurisdiction." *Id.* at 333. Accordingly, it might be argued that insofar as there exists (or existed) a freestanding separation-of-powers principle that prohibits the combination of different types of government power, that principle might be policed through the Necessary and Proper Clause's limitation on Congress. As argued in this Part, we do not believe there is such a freestanding principle, and therefore no restriction to attend to in determining whether a law is "proper."

<sup>99</sup> Manning, *Ordinary Interpretation*, *supra* note 24, at 1944-45.

<sup>100</sup> THE FEDERALIST NO. 47, *supra* note 7, at 301 (James Madison).

among the branches.<sup>101</sup> Properly read, *The Federalist No. 47* undercuts more than it supports a freestanding principle of complete separation.<sup>102</sup>

The argument in *The Federalist No. 47* is responsive. Madison seeks to counter the objection that the Constitution does not adequately heed “the political maxim that the legislative, executive, and judiciary departments ought to be separate and distinct,” and goes too far in “blend[ing]” the powers among the departments.<sup>103</sup> The first step in Madison’s response is to forcefully endorse the broad principle that the “accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”<sup>104</sup> Madison admits that if the federal Constitution were “chargeable with this accumulation” it would be a decisive objection.<sup>105</sup> But he goes on to explain that “the maxim on which [this objection] relies has been totally misconceived and misapplied.”<sup>106</sup> Madison then devotes the remainder of *The Federalist No. 47* to explaining how this maxim has been misunderstood, first in relation to Montesquieu and then in the context of the constitutions of the states.<sup>107</sup> Ironically, many modern invocations of the Madisonian principle do not recognize that his point in *The Federalist No. 47* was to argue against a broad understanding of the principle, and in defense of the ways in which the federal Constitution provides for only partial separation.

Madison recognized that the objection to the federal Constitution in his day, like objections to combination of functions, derives from readings of Montesquieu, “the oracle who is always consulted and cited” on this subject.<sup>108</sup> As Madison points out, Montesquieu developed his principles of government power in relation to the British Constitution<sup>109</sup> (perhaps an idealized version of it).<sup>110</sup> Yet under the British Constitution, Madison explains, the legislative,

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<sup>101</sup> *Id.* at 303. *Cf. Seila Law LLC*, 140 S. Ct. at 2227 n.2 (Kagan, J., concurring in part and dissenting in part) (noting that according to Madison, principle of separation of powers is subverted only “where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department” (quoting THE FEDERALIST NO. 47, *supra* note 7, at 302-03 (James Madison))).

<sup>102</sup> *Cf. Manning, Ordinary Interpretation, supra* note 24, at 2004 (noting that Madison provides no basis for a freestanding principle of separation that prohibits any blending and mixing of powers among departments).

<sup>103</sup> THE FEDERALIST NO. 47, *supra* note 7, at 301 (James Madison); *see also supra* note 81 and accompanying text.

<sup>104</sup> THE FEDERALIST NO. 47, *supra* note 7, at 301 (James Madison).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *See id.* at 304.

<sup>108</sup> *Id.* at 301.

<sup>109</sup> *See id.* at 301-02.

<sup>110</sup> *See* M.J.C. VILE, CONSTITUTIONALISM AND SEPARATION OF POWERS 93 (2d ed. 1998) (“When Montesquieu wrote of ‘England’ . . . he was writing of an imaginary



executive and judicial powers are “by no means totally separate and distinct from each other.”<sup>111</sup> Madison goes on to cite a host of ways in which the powers of one branch are shared with others; for instance, not only is the executive magistrate part of the legislative authority, but also one house of the legislature is the sole repository of judicial power in cases of impeachment.<sup>112</sup> Montesquieu could not have been ignorant of these obvious features of the British Constitution—rather, Madison writes, it was “[f]rom these facts” that Montesquieu must be read.<sup>113</sup> Specifically, Madison argues that when Montesquieu writes that “[t]here can be no liberty where the legislative and executive powers are united in the same person” . . . he did not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other.<sup>114</sup>

In light of the blending of these powers in the British Constitution, Madison argues that Montesquieu’s prohibition “can amount to no more than this, 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.”<sup>115</sup> Madison makes very clear that he views Montesquieu’s prohibition to apply to the exercise of the *entire* or *whole* power of one branch by another. This maxim, Madison writes, would be violated in the British context “if the king, who is the sole executive magistrate, had possessed also the complete legislative power . . . or if the entire legislative body had possessed the supreme judiciary . . . .”<sup>116</sup> By the same token, the Madisonian prohibition likewise does not bar the exercise by one branch of powers characteristic of another, but rather the accumulation of “all powers” or the “entire” or “complete” power of the legislature, executive, or judiciary “in the same hands.”<sup>117</sup>

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country . . . Montesquieu’s statements in this chapter differ considerably from what he actually knew to be the case in England.”).

<sup>111</sup> THE FEDERALIST NO. 47, *supra* note 7, at 302 (James Madison).

<sup>112</sup> *See id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 302-03; *see* Manning, *Ordinary Interpretation*, *supra* note 24, at 2004 (noting too that in *The Federalist No. 47* Madison reads Montesquieu as prohibiting only exercise of the *entire* power of one branch by another, not partial agency or absence of any controls over one another).

<sup>116</sup> THE FEDERALIST NO. 47, *supra* note 7, at 303 (James Madison); *see also* THE FEDERALIST NO. 48, *supra* note 7, at 308 (James Madison) (“It is agreed on all sides that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments.”).

<sup>117</sup> THE FEDERALIST NO. 47, *supra* note 7, at 301 (James Madison). Indeed, Madison is correcting against misreading two of Montesquieu’s most famous passages in precisely the way that combination-of-functions objectors do, as described above. *See supra* text accompanying notes 38-47. Madison writes that “[t]he reasons on which Montesquieu

Madison then turns to showing that in the constitutions of the states, in no instance are the powers of the several departments “absolutely separate and distinct” despite the fact that the maxim of separation of powers is stated “emphatically” and in some instances, “unequivocally.”<sup>118</sup> After this compilation of state practice, Madison concludes:

What I have wished to evince is that the charge brought against the proposed Constitution of violating the sacred maxim of free government is warranted neither by the real meaning annexed to that maxim by its author, nor by the sense in which it has hitherto been understood in America.<sup>119</sup>

This clarification prevents reliance on the Madisonian prohibition as a ground to object to agencies’ combination of functions. One could imagine the far-flung scenario in which the entire power of one branch was vested in another—suppose Congress enacted a statute that purposed to vest all judicial power in administrative agencies (or in Congress!). Such an extreme arrangement would violate the Madisonian prohibition properly understood. But no one claims that the combination of functions in administrative agencies amounts to agencies exercising the whole of the legislative or judicial power. Madison was at pains to show that the mere combination of some legislative and some judicial power in an executive office does not violate separation of powers.<sup>120</sup> It is intriguing, and a little worrisome, just how frequently the courts and commentators, for decades, have latched on to snippets of *The Federalist No. 47* in ways that entirely neglect Madison’s essential point, which was to correct the broad misreading of the maxims by his own contemporaries, misreadings commentators and jurists—including members of the Supreme Court—perpetuate.<sup>121</sup>

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grounds his maxim are a further demonstration of his meaning.” THE FEDERALIST NO. 47, *supra* note 7, at 303 (James Madison). He then cites Montesquieu’s statement, adding emphasis: “When the legislative and executive powers are united in the same person or body . . . there can be no liberty because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws to *execute* them in a tyrannical manner.” *Id.* (quoting MONTESQUIEU, *supra* note 47, at 173). Madison then quotes again: “Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*. Were it joined to the executive power, *the judge* might behave with all the violence of *an oppressor*.” *Id.* (quoting MONTESQUIEU, *supra*, at 173); *see also* VILE, *supra* note 110, at 93-96.

<sup>118</sup> THE FEDERALIST NO. 47, *supra* note 7, at 304 (James Madison).

<sup>119</sup> *Id.* at 308.

<sup>120</sup> *See id.* at 302 (noting that departments could have partial agency in each other, and some controls over each other).

<sup>121</sup> *See, e.g.,* Patchak v. Zinke, 138 S. Ct. 897, 905 (2018) (Thomas, J., plurality opinion) (citing THE FEDERALIST NO. 47, *supra* note 7, at 301 (James Madison) for support in noting that separated powers “prevents ‘[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands,’—an accumulation that would pose an inherent ‘threat to liberty’” (citation omitted)); Clinton v. City of New York, 524 U.S. 417, 450 (1998)

C. *Functional Failures*

Even if there is no formal separation-of-powers prohibition on the consolidation of functions in an agency, there might still be some functional separation-of-powers argument against such accumulations.

The functional objection might be stated as follows: the three constitutionally identified players are not actually wielding their constitutional authority; instead, agencies are wielding an amalgamation of all three types of authority. If such a broad power is exercised by administrative agencies, then having separation at the constitutional level is no protection. The formalities have been preserved, but in practice, agencies are wielding commingled government power that the Constitution means to be kept separate.<sup>122</sup> The premise of this argument is that commingling in an agency poses similar risks to commingling at the constitutional apex, or to the elimination of two branches of government, leaving one to do all the work. This Section argues that premise is false; commingling of functions within an agency does not pose the same dangers as the destruction of separation at the constitutional level.

Why might the commingling of functions be problematic? Perhaps because the unconstitutionality of agency combination of functions seems so self-evident to those who object to it, there is remarkably little effort to explain what exactly the functional problem is. Indeed, in general the benefits of separated powers are taken as so self-evident that, other than knowing but undeveloped references to tyranny and liberty, it is rare that the underlying justifications are fully worked out. As John Manning has written, “to the extent one can discern the purposes underlying . . . separation of powers, those purposes are vague, numerous, unranked, and often self-contradictory.”<sup>123</sup>

Nonetheless, some recurrent themes are found in the writings of the framers and later judges and commenters. Three justifications dominate: fairness, protection against the triumph of faction or other wrong-headed or abusive policies, and efficiency.<sup>124</sup> We consider each in turn.

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(Kennedy, J., concurring) (citing THE FEDERALIST NO. 47, *supra* note 7, at 301 (James Madison) for “axiom” that “[s]eparation of powers was designed to implement a fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty”).

<sup>122</sup> See Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 446-47 (1987) (“There is little competition among different administrative functionaries within agencies, with ‘ambition’ operating to ‘check ambition.’ More often, the administrators are expected and believed to act in concert; indeed, that expectation was one of the reasons for the creation of the agency.”).

<sup>123</sup> John F. Manning, *The Means of Constitutional Power*, 128 HARV. L. REV. 1, 55 (2014); see also M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1156, 1183-84 (2000) (“Other than declaring that the accumulation of functions is the ‘very definition of tyranny,’ courts and commentators rarely specify why governmental functions must be parceled out to separate institutions.” (footnote omitted) (quoting THE FEDERALIST NO. 47, *supra* note 7, at 301 (James Madison))).

<sup>124</sup> In this discussion, we focus on separation of powers in particular, not the

### 1. Fairness

Separation-of-powers arguments frequently rest on concerns about fairness. Most obviously, for example, the prosecutor should not also be the judge. This principle is absolutely applicable to agency operations and often merits, and receives, a structural response. The APA's separation of functions provisions directly address this concern.<sup>125</sup> In the present day, not everyone considers ALJs' guarantees of independence sufficient; private litigants do not trust them and think the proceeding is rigged in the agencies' favor.<sup>126</sup> Separation of powers may be invoked in these arguments, but the fundamental issue is not the separation-of-powers abstraction but the tangible, intuitive concern over fairness.<sup>127</sup> As we discuss below in Section III.C, this concern is best evaluated as a due process, not as freestanding separation-of-powers, issue.<sup>128</sup>

### 2. Faction

The triumph of faction that so preoccupied the framers, or at least James Madison,<sup>129</sup> also does not require division of agency functions.

Consider the risk that an agency might come to represent or be unduly responsive to a particular faction. Decades of debate over agency capture suggests that factional sway is a serious concern at the agency level.<sup>130</sup> Because the relevant interests are narrower, interest groups may be better defined, less diffuse, more focused, and more motivated than at the overall political level. Indeed, much of the consternation regarding deregulation by the Trump administration rests on the understanding that the agencies (and the White

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complementary but distinct principle of checks and balances. We do not dispute the value—indeed, necessity—of intra-governmental checks to avoid abuse, but one can have checks without separating functions. We consider the functional arguments sounding in checks and balances in Section III.C.

<sup>125</sup> See 5 U.S.C. § 554(d)(2).

<sup>126</sup> See *infra* notes 176-84 and accompanying text; see also Editorial, *Trump Is Politicizing the Federal Government Even Further. Step in, Congress.*, WASH. POST (July 22, 2018), [https://www.washingtonpost.com/opinions/trump-is-politicizing-the-federal-government-even-further-step-in-congress/2018/07/22/cb4ce8ee-8ac1-11e8-8aea-86e88ae760d8\\_story.html](https://www.washingtonpost.com/opinions/trump-is-politicizing-the-federal-government-even-further-step-in-congress/2018/07/22/cb4ce8ee-8ac1-11e8-8aea-86e88ae760d8_story.html).

<sup>127</sup> See, e.g., Michael B. Rappaport, *Replacing Agency Adjudication with Independent Administrative Courts*, 26 GEO. MASON L. REV. 811, 815 (2019) (noting, in the context of objections to the affront agencies pose to separation of powers, “serious causes for concern about the ALJ’s impartiality”).

<sup>128</sup> See *infra* Section III.C.2.

<sup>129</sup> See THE FEDERALIST NO. 10, *supra* note 7, at 77 (James Madison).

<sup>130</sup> See, e.g., Richard A. Posner, *The Concept of Regulatory Capture: A Short, Inglorious History*, in PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 49, 54 (Daniel Carpenter & David A. Moss eds., 2013).

House) are in the pockets of particular industries,<sup>131</sup> and those concerns resonate with many decades of concern over agency capture.<sup>132</sup> If separation of powers is a cure for capture, then arguably it is *especially* important for agencies.

But that is a big “if.” It is not clear that separating functions is or would be an effective remedy to agency capture. A three-branch EPA, or three EPAs (one for writing regulations, one for adjudicating, one for enforcement), would have three heads all appointed by and serving at the pleasure of the president. They would all have exactly the same likelihood or extent of capture by specific interests; they could be fired if they failed to be responsive to those interests. All the motivations and mechanisms through which interest groups might capture commingled agencies would be equally potent with regard to distinct, noncommingled agency entities. Moreover, the determinants of capture are multiple and complex, including the scope and nature of the agency’s mission, the extent of White House oversight and involvement, the relationship to Congress and congressional committees, the particular interests within the agency’s jurisdiction, and others. Commingling functions seems a very small and easily overwhelmed aspect of the capture problem.

Nor does separation of powers offer a remedy to the problem, voiced in some quarters, that tyranny results from too much government and not enough market.<sup>133</sup> It is undeniable that the modern federal regulatory regime is vast, that it sometimes goes too far, and that it would not be possible without administrative agencies. Thus, one standard argument for an enhanced nondelegation doctrine is that such a doctrine would result in less law, period; for some delegation opponents, the problem is that Supreme Court’s refusal to police delegations has facilitated an amount of regulation that would be

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<sup>131</sup> See, e.g., David Roberts, *Donald Trump Is Handing the Federal Government Over to Fossil Fuel Interests*, VOX (June 14, 2017, 7:56 AM), <https://www.vox.com/energy-and-environment/2017/6/13/15681498/trump-government-fossil-fuels> [<https://perma.cc/W58Z-VME3>]; Rachel Wilson, *Oil, Gas, and Coal Interests Filling Donald Trump’s “Swamp” with Cash*, CTR. FOR PUB. INTEGRITY (May 2, 2017), <https://publicintegrity.org/politics/oil-gas-and-coal-interests-filling-donald-trumps-swamp-with-cash/> [<https://perma.cc/4JYN-XFD7>] (noting heavy inauguration donations and lobbying activities by particular industries that were (in turn, it is implied) benefiting from regulatory rollbacks).

<sup>132</sup> See generally Sheldon Whitehouse, *How Government Can Root Out Agency Capture*, REGUL. REV. (June 15, 2016), <https://www.theregreview.org/2016/06/15/whitehouse-how-government-can-root-out-regulatory-capture/> [<https://perma.cc/GGR7-DEWX>]; Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039 (1997) (providing an overview of ebb and flow of the conviction that regulators are in the pocket of the regulated).

<sup>133</sup> See, e.g., J. Kennerly Davis, *Regulating Under the Rule of Law*, 19 FEDERALIST SOC’Y REV. 162, 171 (2018) (reviewing THOMAS A. LAMBERT, *HOW TO REGULATE: A GUIDE FOR POLICYMAKERS* (2017)) (lamenting the “consolidation of once separate government functions” as an aspect of a regulatory regime that is essentially “arbitrary”).

impossible if Congress had to make all rules itself.<sup>134</sup> But that it is not a separation-of-powers problem; it is a delegation problem. The same over-regulation concern would arise if Congress created a “junior-varsity Congress,” empowered *only* to write regulations and not to enforce them or adjudicate their violation.<sup>135</sup> Surely, for example, no OSHA critic breathes sighs of relief that the agency is less tyrannical, and regulates less than it otherwise would, because it lacks the adjudicatory powers most agencies have and so is less of an offense to separation-of-powers principles.<sup>136</sup>

### 3. Efficiency

Separation of powers also has been justified on the quite distinct ground of efficiency. This seems counterintuitive given the familiar story that the framers sought to err on the side of inefficiency and stalemate so as to preserve liberty. But separation of powers is also a synonym for “division of labor,” the essential goal of which is that jobs are done efficiently and effectively by people who know what they are doing and have a comparative advantage over other actors in doing them.<sup>137</sup>

Efficiency lacks the rhetorical power of appeals to liberty and against tyranny, so Supreme Court justices tend to ignore or reject it. Many oft-quoted and reverberant statements from the Supreme Court directly deny that separation of powers has anything to do with efficiency.<sup>138</sup> Nonetheless, the case for separated

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<sup>134</sup> See, e.g., *Environmental Regulations, the Economy, and Jobs: Hearing Before the Subcomm. on Env't and the Econ. of the H. Comm. on Energy and Com.*, 112th Cong. 44 (2011) (statement of Christopher DeMuth, American Enterprise Institute) (“The size, scope, reticulation, and minuteness of the modern ‘nanny state’ is an artifact of regulatory delegation: it could not have been achieved and it could not be managed through direct legislation.”).

<sup>135</sup> *Mistretta v. United States*, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting) (arguing that U.S. Sentencing Commission is unconstitutional precisely because it exercises *only* a legislative function and Constitution prohibits creation of such a “junior-varsity Congress”).

<sup>136</sup> See George Robert Johnson, *The Split-Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences*, 39 ADMIN. L. REV. 315, 315 (1987).

<sup>137</sup> See generally Louis Fisher, *The Efficiency Side of Separated Powers*, 5 J. AM. STUD. 113 (1971) (asserting that framers’ goals included efficiency and that they sought to realize that goal with separate executive).

<sup>138</sup> Justice Brandeis’s dissent in *Myers* sets the tone: “The doctrine of the separation of powers was adopted by the convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.” *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting); see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 613-14 (1951) (Frankfurter, J., concurring) (quoting *id.*). That sentiment is often echoed. See, e.g., *INS v. Chadha*, 462 U.S. 919, 944 (1982) (“[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government . . . .”); *United States v.*

powers *also* sounds in efficiency.<sup>139</sup> And now and again the Court acknowledges that there is something to this idea.<sup>140</sup>

Efficiency is in some tension with the other two goals. The Constitution's method for avoiding tyranny and the triumph of faction is to render lawmaking and enforcement inefficient.<sup>141</sup> But efficiency is relevant in three ways. First, as Aziz Huq and Jon Michaels point out, it does not necessarily conflict with the goals of avoiding tyranny and advancing liberty.<sup>142</sup> To the extent government acts to advance liberty, we should want it to do so efficiently. Second, inefficiency may be a value, but one can have too much of a good thing. The idea is to have the right amount.<sup>143</sup> Third, the goal of division of labor is not just speed but the quality that flows from specialization.<sup>144</sup>

So in inquiring whether agencies' combination of functions is problematic given the goals of separating powers, part of the inquiry is whether the combination is efficient. The traditional and still generally accepted answer is that it is. Indeed, the idea that agencies' work is enhanced by housing all three sorts of powers under one roof is one of the founding tenets of the modern

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Brown, 381 U.S. 437, 443 (1965) ("This 'separation of powers' was obviously not instituted with the idea that it would promote governmental efficiency. It was, on the contrary, looked to as a bulwark against tyranny."); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 863 (1986) (Brennan, J., dissenting) (arguing that value of judicial independence should not be traded off against concerns with efficiency).

<sup>139</sup> See William C. Banks, *Efficiency in Government: Separation of Powers Reconsidered*, 35 SYRACUSE L. REV. 715, 717 (1984); N.W. Barber, *Prelude to the Separation of Powers*, 60 CAMBRIDGE L.J. 5, 65 (2001) ("[I]t is efficiency, not liberty, which is at the heart of the separation of powers."); Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 346, 383-85 (2016) (describing Supreme Court's inconsistent reliance on "effective administration" as justification for separation of powers); Leslie M. Kelleher, *Separation of Powers and Delegations of Authority to Cancel Statutes in the Line Item Veto Act and the Rules Enabling Act*, 68 GEO. WASH. L. REV. 395, 408 (2000); Arthur Selwyn Miller, *An Inquiry into the Relevance of the Intentions of the Founding Fathers, with Special Emphasis upon the Doctrine of Separation of Powers*, 27 ARK. L. REV. 583, 587 (1973) ("Powers were separated in 1787 as much to promote efficiency as anything else."); Peter M. Shane, *Presidents, Pardons, and Prosecutors: Legal Accountability and the Separation of Powers*, 11 YALE L. & POL'Y REV. 361, 393 (1993) ("[T]he Constitution divides governmental powers both to permit the checking and balancing of each branch by the others, and also to insure that the mission assigned to each branch is most likely to be implemented effectively."); Jonathan Zasloff, *Taking Politics Seriously: A Theory of California's Separation of Powers*, 51 UCLA L. REV. 1079, 1125 (2004) ("To be sure, the separation of powers does not only serve to filter majority sentiment. Hamilton and Madison argued that it enhanced governmental efficiency." (footnote omitted)).

<sup>140</sup> See, e.g., *Schor*, 478 U.S. at 841.

<sup>141</sup> See *Myers*, 272 U.S. at 292-93.

<sup>142</sup> See Huq & Michaels, *supra* note 139, at 351.

<sup>143</sup> Cf. Vermeule, *Optimal Abuse*, *supra* note 82, at 676.

<sup>144</sup> See Kelleher, *supra* note 139, at 408.

administrative state.<sup>145</sup> For example, an agency that can both write regulations and adjudicate regulatory and statutory violations can choose the optimal policy-making form;<sup>146</sup> one or the other may be preferable depending on the circumstances.<sup>147</sup> Similarly, enforcement may be more effective and appropriate when carried out by those with expertise in the meaning and purpose of the regulations being enforced. And the combination of functions will promote consistency and coordination. A full, empirical assessment of these putative benefits is well beyond the scope of this project; but they are legitimate considerations.

In short, in the agency setting, separation of powers would be *inefficient*, and it is the combination of powers that promotes efficiency. The efficiency from specialization is achieved instead by a jurisdictional separation of subject matter.

#### 4. Summary

The foregoing suggests that no functional separation-of-powers argument requires separation of functions with the agency. Concerns about fairness can be addressed by due process. Separation at the functional level in the agency does not address concerns about agency capture, and the efficiency value may actually be better achieved by commingling of functions. Functional concerns offer no more justification for the anti-accumulation principle than do formal arguments.

### III. THE ANTI-ACCUMULATION PRINCIPLE AT THE MARGINS

The previous Part argued that there is no constitutional foundation for the anti-accumulation principle as applied to the overall structure of executive departments and agencies. Here we turn to instances in which the same principle is invoked to challenge not the basic structure but the allocation of specific responsibilities. A number of current controversies regarding agency power are debated at least in part in separation-of-powers terms, with skeptics arguing that this or that judicial doctrine is invalid because it makes an agency wear two hats. That is, these doctrinal debates all involve a choice between one approach that accentuates, or increases the degree of, the commingling versus an approach that minimizes the commingling.

Before turning to these specific doctrines, it is worth emphasizing one general point. If one accepts the constitutionality of the combination of agency functions

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<sup>145</sup> See, e.g., LANDIS, *supra* note 52, at 10-11 (“If in private life we were to organize a unit for the operation of an industry, it would scarcely follow Montesquieu’s lines.”); BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 1.5 (3d ed. 1991).

<sup>146</sup> The point in this paragraph is developed in Vermeule, *Optimal Abuse*, *supra* note 82, at 691-92.

<sup>147</sup> SEC v. Chenery Corp. (*Chenery II*), 332 U.S. 194, 202-03 (1947). See generally M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383 (2004) (noting that agencies can use array of policy-making tools that may be similar to legislating, enforcing, and adjudicating).



as a general matter, as we have argued, then invoking the anti-accumulation principle at the margins—that is, arguing that this or that specific activity or authority is invalid because it combines different powers or increases consolidation as compared to a chance baseline—is a nonstarter. These more specific instances are *a fortiori* given the general principle. In the discussion that follows, we do not repeat that there is no stand-alone separation-of-powers requirement that prohibits individual instances any more than there is such a requirement that prohibits overall structure. But that is still the case.

This is not to say that the particular doctrines discussed here are beyond question. Some raise difficult issues. But they are not separation-of-powers issues—they are due process issues. As we shall see, even those who purport to rely on separation-of-powers principles are in fact most concerned about fairness.

#### A. Deference Doctrines

The starkest example of invoking separation of powers to challenge an administrative law doctrine involves the deference doctrine articulated in *Auer v. Robbins*<sup>148</sup> and *Bowles v. Seminole Rock & Sand Co.*<sup>149</sup> *Auer* requires that a reviewing court give “controlling” weight to an agency’s interpretation of its own regulation unless that interpretation is “plainly erroneous or inconsistent with the regulation.”<sup>150</sup>

In an important article, John Manning challenged *Seminole Rock* on the ground that it contradicts the fundamental “constitutional premise that lawmaking and law-exposition must be distinct.”<sup>151</sup> Justice Scalia agreed, invoking Montesquieu when writing in a concurring opinion that it “seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well.”<sup>152</sup> A few years later, Justice Scalia expressed the point more forcefully, arguing that *Auer* violates a “fundamental principle of separation of powers,” namely that “the power to write a law and the power to interpret it cannot rest in the same hands,”<sup>153</sup> again with support from the same passage from Montesquieu.

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<sup>148</sup> 519 U.S. 452, 461-62 (1997).

<sup>149</sup> 325 U.S. 410, 414 (1945).

<sup>150</sup> *Auer*, 519 U.S. at 461 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)).

<sup>151</sup> See Manning, *Constitutional Structure*, *supra* note 18, at 654.

<sup>152</sup> *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 68 (2011) (Scalia, J., concurring) (“When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.” (quoting MONTESQUIEU, *supra* note 47, at 151-52)).

<sup>153</sup> *Decker v. Nw. Env’t Def. Ctr.*, 568 U.S. 597, 619 (2013) (Scalia, J., concurring in part and dissenting in part) (quoting MONTESQUIEU, *supra* note 47, at 151-52).

Before and since Justice Scalia's death, Justice Thomas has endorsed versions of the same argument.<sup>154</sup> More recently Justice Gorsuch has pressed it with particular force. In *Kisor v. Wilkie*,<sup>155</sup> the Supreme Court upheld *Auer* by a vote of five to four, with the Chief Justice joining the four more liberal Justices to form a majority.<sup>156</sup> However, there were five votes only for the judgment and portions of Justice Kagan's opinion that set out: (a) *limitations* on *Auer*'s application; and (b) the *stare decisis* justifications for not overruling it.<sup>157</sup> Justice Kagan's actual defense of *Auer* on the merits and rejection of the separation-of-powers objection attracted the votes of only three other Justices.<sup>158</sup> Justice Gorsuch, writing in concurrence for himself and three others, embraced the view that *Auer* "sits uneasily with the Constitution."<sup>159</sup> After recounting the distinct roles of each branch in our system of separated powers, Justice Gorsuch wrote: "*Auer* thus means that, far from being 'kept distinct,' the powers of making, enforcing, and interpreting laws are united in the same hands—and in the process a cornerstone of the rule of law is compromised."<sup>160</sup>

As an invocation of separation-of-powers law, this makes no sense for the reasons given above. But it is not even clear that for Justice Gorsuch separation of powers is the heart of the matter. Rather, the core concern seems to be adjudicatory fairness. Justice Gorsuch views *Auer* as requiring judges to interpret laws "to mean not what [the judge] thinks they mean, but what an executive agency says they mean."<sup>161</sup> That is a problem because executive officials, Justice Gorsuch explains, are not, and are not supposed to be, "wholly impartial."<sup>162</sup> As a result of the *Auer* doctrine, Justice Gorsuch strongly suggests, the individual is deprived of a fundamental aspect of a fair proceeding—an

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<sup>154</sup> See *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 126 (2015) (Thomas, J., concurring in the judgment) (challenging *Auer* because it results in "accumulation of government powers"); *Garco Constr., Inc. v. Speer*, 138 S. Ct. 1052, 1053-54 (2018) (Thomas, J., joined by Gorsuch, J., dissenting from the denial of certiorari) (same).

<sup>155</sup> 139 S. Ct. 2400 (2019).

<sup>156</sup> *Id.* at 2405-06.

<sup>157</sup> Justice Kagan delivered an opinion for the Court only with regard to Parts I (factual and procedural background), II-B (limitations of *Auer*), III-B (*stare decisis*), and IV (conclusions as applied). *Id.* at 2405.

<sup>158</sup> See *id.* at 2421 (rejecting this challenge). For a general account, emphasizing the closeness of the outcome, see Michael Herz, *Symposium: In "Gundy II," Auer Survives by a Vote of 4.6 to 4.4*, SCOTUSBLOG (June 27, 2019, 11:30 AM), <https://www.scotusblog.com/2019/06/symposium-in-gundy-ii-auer-survives-by-a-vote-of-4-6-to-4-4/> [<https://perma.cc/3JZC-YKK4>].

<sup>159</sup> *Kisor*, 139 S. Ct. at 2437 (Gorsuch, J., concurring, joined by Thomas, Alito, and Kavanaugh, JJ.).

<sup>160</sup> *Id.* at 2439.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* (citing Archibald Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 HARV. L. REV. 370, 390 (1947)).

impartial adjudicator.<sup>163</sup> A due process concern is thus at the heart of the formalist internal separation-of-powers objection to *Auer*.

The same is true of challenges to the *Chevron* doctrine. *Chevron*, as is familiar to all students of administrative law, requires courts to accept any reasonable agency interpretation of an ambiguous statute the agency administers.<sup>164</sup> Justice (then-Judge) Gorsuch's concurring opinion in *Gutierrez-Brizuela v. Lynch*<sup>165</sup> argues that *Chevron* violates the prohibition on delegation of legislative power,<sup>166</sup> is an "abdication of the judicial duty,"<sup>167</sup> and violates a freestanding separation-of-powers principle.<sup>168</sup> As Justice Gorsuch sees it, "[u]nder [*Chevron*'s] terms, an administrative agency may set and revise policy (legislative), override adverse judicial determinations (judicial), and exercise enforcement discretion (executive)."<sup>169</sup> He frames this problem in terms of separation of powers: while "[n]one of this is to suggest that *Chevron* is 'the very definition of tyranny,'" it is "an arrangement . . . that seems pretty hard to square with the Constitution of the founders' design."<sup>170</sup> Again, if the problem is the commingling of functions, there is no formal or functional constitutional prohibition on that arrangement.

Justice Gorsuch's actual objection to *Chevron*, like the objections to *Auer*, sounds in due process. Justice Gorsuch makes the due process concern explicit: "Transferring the job of saying what the law is from the judiciary to the executive," which is what he understands *Chevron* to do, "unsurprisingly invites the very sort of due process (fair notice) and equal protection concerns the framers knew would arise if the political branches intruded on judicial functions."<sup>171</sup> For Justice Gorsuch, what *Chevron* threatens is notice of the law. Under *Chevron*, he writes, the public is not charged with awareness of the "the fairest reading of the law that a detached magistrate can muster" but with awareness of whether the statute would be deemed ambiguous and the agency's interpretation reasonable.<sup>172</sup> The problem with deference, then, is that it undercuts the principle that those who may be penalized for failure to comply with a law must have notice of what the law requires. Justice Gorsuch also identifies a related retroactivity concern with *Chevron*. Under *Chevron*, the individual must also be alert to the prospect that the agency will adopt new

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<sup>163</sup> *Id.*

<sup>164</sup> *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984).

<sup>165</sup> 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

<sup>166</sup> *Id.* at 1154-55 ("But even taking the forgiving intelligible principle test as a given, it's no small question whether *Chevron* can clear it.").

<sup>167</sup> *Id.* at 1152.

<sup>168</sup> *Id.* at 1154.

<sup>169</sup> *Id.* at 1155.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 1152.

<sup>172</sup> *Id.*

interpretations “only retroactively in administrative adjudications.”<sup>173</sup> *Chevron*’s structural failure, on this view, is the due process problem of failure to give adequate notice of the law.

For Justice Gorsuch, the due process problems of *Chevron* run deeper still, including undermining the fairness of proceedings before the agency. He argues that the rationale for withholding *Chevron* deference in criminal matters<sup>174</sup> also applies to civil matters. If the court will not defer to the prosecutor’s interpretation of a criminal statute because doing so would be unfair to the defendant, the fairness concern also applies in civil matters where the consequences for individuals can also be grave.<sup>175</sup>

### B. Agency Powers

The anti-accumulation principle has also been invoked by commentators to challenge specific agency powers. For illustrative purposes, we focus on two of those challenges: agency adjudication and the Attorney General’s “refer-and-review” authority in immigration matters.

Recent years have seen extensive litigation over the appointment, removability, and use of ALJs, particularly by the Securities and Exchange Commission (“SEC”).<sup>176</sup> In *Lucia v. SEC*,<sup>177</sup> the Supreme Court held that SEC ALJs are officers of the United States and therefore can only be appointed in accordance with the Appointments Clause.<sup>178</sup> Alongside this litigation, commentators have argued that granting an agency adjudicative power violates

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<sup>173</sup> *Id.*

<sup>174</sup> *Abramski v. United States*, 573 U.S. 169, 191 (2014) (“[C]riminal laws are for courts, not for the Government, to construe.”). *But see* Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469 (1996) (arguing in favor of applying *Chevron* in the criminal setting).

<sup>175</sup> *Gutierrez-Brizuela*, 834 F.3d at 1156 (Gorsuch, J., concurring) (“And try as I might, I have a hard time identifying a principled reason why the same rationale doesn’t also apply to statutes with purely civil application.”). Philip Hamburger presses this point as well. In applying *Chevron*, as Hamburger sees it, judges “exercise systematically biased judgment,” which violates not only their basic duties as judicial officers but also the Fifth Amendment’s guarantee of due process. Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187, 1211 (2016).

<sup>176</sup> *See, e.g.*, Ilan Wurman, *Constitutional Administration*, 69 STAN. L. REV. 359, 372 (2017) (referring to the SEC as “perhaps the worst offender” among federal agencies that enforce their own rules in adjudications before their own judges, who obligingly always rule in favor of the agency).

<sup>177</sup> 138 S. Ct. 2044 (2018).

<sup>178</sup> *Id.* at 2053. In a straightforward opinion by Justice Kagan, the Court ruled that ALJs were doing essentially the same sort of work, with the same sort of supervision and authority, as the special trial judges on the U.S. Tax Court that were held to be inferior officers in *Freytag v. United States*, 501 U.S. 868 (1991). *Id.* at 2053-56. Justice Breyer would have reached the same result on statutory grounds. *Id.* at 2057 (Breyer, J., concurring). Justice Sotomayor, joined by Justice Ginsburg, dissented, arguing that ALJs are mere employees. *Id.* at 2066 (Sotomayor, J., dissenting).

separation of powers.<sup>179</sup> In this vein, Richard Epstein criticizes the “cozy arrangement” under which the SEC “promulgates extensive regulations that have the force of law, which it then enforces against individual defendants, often in an SEC tribunal.”<sup>180</sup> While Epstein describes the problem as one of separation of powers,<sup>181</sup> his actual concern throughout is with fairness.<sup>182</sup> His title complains of a “miscarriage of justice.” He wants litigants to have “the procedural protection given by an Article III court” and insists that “major enforcement actions intended to curtail the liberties of the ordinary people of the United States” be adjudicated by an Article III court (though social security and immigration cases need not be—a distinction that reflects pure due-process balancing rather than any distinction sounding in the nature of the power exercised).<sup>183</sup> And he decries—the greatest outrage—the SEC’s handpicking the ALJ for a particular matter rather than relying on random assignment.<sup>184</sup>

To take a second example, the Attorney General’s authority over immigration decisions has also prompted challenges invoking separation of powers. Outside of the Social Security Administration (“SSA”), the nation’s largest regime of administrative adjudication and mass justice are the immigration courts. There are sixty-six such courts, staffed by 535 judges, located around the country.<sup>185</sup> Immigration Judges (“IJs”) are not ALJs; they are Department of Justice (“DOJ”) attorneys appointed by the Attorney General and “subject to such supervision and [required to] perform such duties as the Attorney General shall prescribe.”<sup>186</sup> Immigration Judges hold hearings and make the initial

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<sup>179</sup> Oliver J. Dunford, *SEC ALJs and the Accumulation of Power*, DAILY J. (Jan. 22, 2018), <https://www.dailyjournal.com/articles/345761-sec-aljs-and-the-accumulation-of-power> [<https://perma.cc/WVL2-XRFC>] (arguing that the appointments clause problem arises precisely because “Congress has granted to these *executive* agents vast *legislative* and *judicial* authority without requiring their appointment through the appointments clause”).

<sup>180</sup> Richard A. Epstein, *Miscarriage of Justice at the SEC*, DEFINING IDEAS (Apr. 30, 2018), <https://www.hoover.org/research/miscarriage-justice-sec> [<https://perma.cc/2S6V-WCJA>].

<sup>181</sup> *See id.* (“Even if the ALJ had been appointed by the SEC, separation of powers is heavily compromised if any executive branch official can appoint a judicial officer to decide cases that are brought by its own enforcement division . . .”).

<sup>182</sup> *See id.* (noting that whether the SEC’s procedures “satisfy the Fifth Amendment” is a “hard question,” since “[t]he words ‘due process’ are supposed to offer strong protections against even the appearance of bias”).

<sup>183</sup> *See id.*; *see also* Mathews v. Eldridge, 424 U.S. 319, 335, 347-48 (1976) (establishing balancing test to determine what process is due when the government deprives a person of life, liberty, or property).

<sup>184</sup> Epstein, *supra* note 180.

<sup>185</sup> *Office of the Chief Immigration Judge*, U.S. DOJ (Aug. 2, 2021), <https://www.justice.gov/eoir/office-of-the-chief-immigration-judge> [<https://perma.cc/K4JX-6MUU>].

<sup>186</sup> 8 U.S.C. § 1101(b)(4).

determination whether individuals are deportable and, if so, whether they can and should receive discretionary relief from removal.<sup>187</sup>

Although judicial review of IJ decisions is limited,<sup>188</sup> DOJ regulations have created two layers of internal agency review. First, either side can appeal to the Board of Immigration Appeals (“BIA”), a twenty-one-member body whose members are also appointed by the Attorney General.<sup>189</sup> In addition, the Attorney General can refer any BIA decision to herself *sua sponte*.<sup>190</sup> Attorneys General have exercised this “certification” or “refer-and-review” power with varying frequency over the years. The practice was common during the second Bush administration, and the then-Attorney General, Alberto Gonzales, has celebrated refer-and-review “as a powerful tool through which the executive branch can assert its prerogatives in the immigration field.”<sup>191</sup> Jeff Sessions, too, was enthusiastic.<sup>192</sup> Perhaps the most prominent instance during Sessions’s time in office was his much-publicized ruling in *A-B-*,<sup>193</sup> which overruled a 2014 BIA precedent that had recognized domestic violence as a ground for asylum.<sup>194</sup> Sessions’s ruling was later set aside by the D.C. Circuit.<sup>195</sup>

Among others, Stephen Legomsky assails refer-and-review, viewing it as one part of a suite of DOJ structures that compromise the decisional independence

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<sup>187</sup> A helpful overview of the process is Catherine Y. Kim, *The President’s Immigration Courts*, 68 EMORY L.J. 1, 21-22 (2018).

<sup>188</sup> 8 U.S.C. § 1252(a)(2).

<sup>189</sup> 8 C.F.R. § 1003.1(a)(1) (2021) (establishing BIA); *Id.* § 1003.3(a)(1) (allowing either party to appeal adverse decisions to the BIA).

<sup>190</sup> *Id.* § 1003.1(h)(1)(i).

<sup>191</sup> Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General’s Review Authority*, 101 IOWA L. REV. 841, 841 (2016).

<sup>192</sup> Dara Lind, *Jeff Sessions Is Exerting Unprecedented Control over Immigration Courts—by Ruling on Cases Himself*, VOX (May 21, 2018, 1:06 PM), <https://www.vox.com/policy-and-politics/2018/5/14/17311314/immigration-jeff-sessions-court-judge-ruling> [<https://perma.cc/T2Y7-EFPG>]. Attorney General Sessions’s interventions were generally in the direction of making removal more likely. *See, e.g.*, S-O-G- & F-D-B-, 27 I. & N. Dec. 462, 463 (Att’y Gen. 2018) (restricting the authority of immigration judges to terminate or dismiss removal proceedings); L-A-B-R-, 27 I. & N. Dec. 405, 419 (Att’y Gen. 2018) (restricting immigration court discretion to grant continuances of removal proceedings); Castro-Tum, 27 I. & N. Dec. 271, 272 (Att’y Gen. 2018) (rejecting the practice of administrative closure of removal proceedings in the immigration courts and instructing immigration courts to expeditiously decide cases); E-F-H-L-, 27 I. & N. Dec. 226, 226 (Att’y Gen. 2018) (directing BIA to refer matter to Attorney General and vacating IJ decision).

<sup>193</sup> 27 I. & N. Dec. 316 (Att’y Gen. 2018) (narrowing criteria for the membership in a “particular social group” required for asylum seekers fleeing private violence).

<sup>194</sup> *Id.* at 317. *See generally* *Recent Adjudication—Asylum Law—Attorney General’s Certification Power—Attorney General Holds that Salvadoran Woman Fleeing Domestic Violence Failed to Establish a Cognizable Particular Social Group*, 132 HARV. L. REV. 803 (2018).

<sup>195</sup> *Grace v. Barr*, 965 F.3d 883, 887 (D.C. Cir. 2020).

of immigration judges.<sup>196</sup> Much of his separation-of-powers discussion is focused on and relevant to the Article III judiciary and its role in checking the other branches.<sup>197</sup> But he also offers a somewhat Lawsonian objection to refer-and-review and other aspects of the Attorney General's influence over adjudicators. "[T]he direct threat is to decisional independence, with all its implications for fair process. In addition, however, the same people who perform the law-enforcement functions—arresting, detaining, and prosecuting—also influence the outcome of the adjudication, thereby neutralizing the checks and balances that separation-of-powers principles are meant to protect."<sup>198</sup> While acknowledging that due process concerns are "directly" implicated by the Attorney General's review authority, Legomsky offers separation of powers as a distinct interest that is also threatened.<sup>199</sup>

Legomsky may be correct that refer-and-review should be abandoned. The Attorney General may be the wrong person (or DOJ the wrong agency) to make these decisions, the use of individual adjudications as vehicles for broader policy decisions has well-known risks, and sua sponte self-referrals may be unfair. But because there is no constitutional principle of anti-accumulation, these are policy arguments, not constitutional ones.

### C. *Why Due Process Does Not Matter—and Why It Does*

The invocation of due process concerns in the midst of anti-accumulation arguments suggests that flagging a threat to individual fairness strengthens the argument that there has been a separation-of-powers violation. Do these arguments make sense?

#### 1. Combinative Constitutional Argument

The Supreme Court generally considers constitutional clauses in isolation.<sup>200</sup> A given statute or action might violate this provision or that one, but the different constitutional challenges are considered in turn. Sometimes, however, the Court

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<sup>196</sup> See Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1671-75 (2010) [hereinafter Legomsky, *Restructuring*]; see also Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 388 (2006) [hereinafter Legomsky, *Deportation*].

<sup>197</sup> Legomsky, *Restructuring*, *supra* note 196, at 1686-88.

<sup>198</sup> Legomsky, *Deportation*, *supra* note 196, at 387.

<sup>199</sup> See Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, 13 BENDER'S IMMIGR. BULL. 3, 3-4 (2008). The author, who was then president of the National Association of Immigration Judges, objects to the conflict of interest and violation of checks and balances resulting from having the Attorney General, the nation's chief prosecutor, also "act[] as the boss of the judges who decide whether an accused non-citizen should be removed from the United States" and also supervise the Office of Immigration Litigation, which represents the government in immigration cases in the courts of appeals. *Id.*

<sup>200</sup> Michael Coenen, *Combining Constitutional Clauses*, 164 U. PA. L. REV. 1067, 1069-70 (2016).

combines constitutional clauses to reach a conclusion of invalidity that would not have been supportable under each clause on its own.<sup>201</sup> This approach can take different forms: relying on two different rights to find a violation, combining a weak argument that the government lacks authority to act with a stronger argument that the action infringes a right, or aggregating government powers to validate an action.<sup>202</sup> In these cases, as Michael Coenen writes, the Court has “combine[d] the clauses by adding up or summing together separate conclusions of partial clausal consistency (or inconsistency) to produce an overall conclusion of total constitutionality (or unconstitutionality).”<sup>203</sup> In other words, each constitutional clause or argument on its own may not be sufficient for invalidity (or validity), but their cumulative effect establishes a violation (or authorization).

In this manner, might due process (i.e., fairness) concerns bolster the separation-of-powers objection to the combination of functions in agencies sufficiently to turn the color of constitutional litmus paper?<sup>204</sup> They do not. As a practical matter, in cases in which due process is claimed to augment a separation-of-powers challenge, litigants face no obstacles to bringing a due process claim. Litigants in agency adjudications frequently seek review of the adjudicative determination, including on the ground that the adjudication violated due process.<sup>205</sup> Those challenges include claims that the agency adjudicator was not sufficiently impartial.<sup>206</sup> Perhaps due process doctrine underprotects procedural rights and rights to notice. Perhaps not. But if the fundamental objection is to the protections afforded by due process doctrine, then the remedy lies in reconstructing due process doctrine.

Moreover, where the Court has used multiple clauses in combination, each clause contributes something distinct to the argument for a constitutional violation (or authorization). But there is no separation of powers clause. If, as argued in previous Parts, there is no freestanding separation-of-powers principle that prohibits combination of some functions within the executive branch, then the idea of combination here is merely a distraction. A constitutional argument without foundation when combined with due process concerns amounts only to

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<sup>201</sup> *Id.* at 1075-76.

<sup>202</sup> *See id.* at 1077-91.

<sup>203</sup> *Id.* at 1092.

<sup>204</sup> *Cf.* *Abrams v. United States*, 250 U.S. 616, 629 (1919) (Holmes, J., dissenting) (doubting whether “enough can be squeezed from these poor and puny anonymities to turn the color of legal litmus paper”).

<sup>205</sup> *See, e.g., Reno v. Flores*, 507 U.S. 292, 306 (1993); *Bank of La. v. Fed. Deposit Ins. Corp.*, 919 F.3d 916, 921 (5th Cir. 2019); *Cal. Pac. Bank v. Fed. Deposit Ins. Corp.*, 885 F.3d 560, 572-73 (9th Cir. 2018); *Reddy v. Commodity Futures Trading Comm’n*, 191 F.3d 109, 124 (2d Cir. 1999).

<sup>206</sup> *See, e.g., Keith v. Barnhart*, 473 F.3d 782, 783 (7th Cir. 2007); *Islam v. Gonzales*, 469 F.3d 53, 57 (2d Cir. 2006); *Abdulrahman v. Ashcroft*, 330 F.3d 587, 595 (3d Cir. 2003).



those due process concerns—zero plus due process equals due process. The remedy is with due process, not separation of powers.<sup>207</sup>

## 2. The Combination of Functions and Due Process

The point of the foregoing is not that the combination of functions in administrative agencies raises no due process concerns. It certainly does. Rather, our position is that those concerns should be assessed for what they are. We would abandon imaginary concerns over separation of powers and focus on the real question, which is whether and when the concentration of authority within an agency creates an unacceptable threat to impartial decision-making.<sup>208</sup>

It is wholly appropriate, then, that while (until the recent rumblings) the Supreme Court has shown no concern about the combination of functions as a separation-of-powers problem, it *has* taken due process objections seriously. To be sure, it has consistently held that there is no per se due process violation when a single individual has both investigatory or prosecutorial and adjudicatory functions.<sup>209</sup> However, it has acknowledged that in particular circumstances

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<sup>207</sup> Rebecca Brown has argued forcefully that the best account of separation of powers incorporates considerations of individual liberties. *See* Brown, *supra* note 47, at 1516 (arguing that “when government action is challenged on separation-of-powers grounds, the Court should consider the potential effect of the arrangement on individual due-process interests”). For Brown, separation-of-powers claims are best viewed as a species of due process violations; accordingly, ostensible separation-of-powers violations can be cured by the presence of due process protections. *Id.* at 1516-17. We are unconvinced that the two issues interact in the way Brown suggests, at least with regard to the executive branch, though we agree that the central concern here is due process.

<sup>208</sup> In this, we agree with Justice Marshall. Concurring in *Touby v. United States*, the 1991 decision rejecting outright separation-of-powers challenges to the combination of functions, *see supra* note 24, Justice Marshall wrote:

I wish to emphasize . . . my understanding of the breadth of the Court’s constitutional holding. I agree that the separation of powers doctrine relates only to the allocation of power *between* the Branches, not the allocation of power *within* a single Branch. But this conclusion by no means suggests that the Constitution as a whole is indifferent to how permissibly delegated powers are distributed within the Executive Branch. In particular, the Due Process Clause limits the extent to which prosecutorial and other functions may be combined in a single actor. Petitioners raise no due process challenge in this case, and I do not understand anything in today’s decision as detracting from the teachings of our due process jurisprudence generally.

*Touby v. United States*, 500 U.S. 160, 170-71 (1991) (Marshall, J., joined by Blackmun, J., concurring) (citation omitted).

<sup>209</sup> *Withrow v. Larkin*, 421 U.S. 35, 52, 55 (1975) (upholding the combination of investigatory and adjudicative functions in a state medical licensing board); *Marcello v. Bonds*, 349 U.S. 302, 311 (1955) (rejecting contention that special inquiry officer being subject to supervision of agency officials “charged with investigative and prosecuting functions . . . strips the hearing of fairness and impartiality”); *Hortonville Joint Sch. Dist. v. Hortonville Educ. Ass’n*, 426 U.S. 482, 493 (1976) (rejecting claim “that the Board was biased because it negotiated with the teachers on behalf of the school district without reaching

exposure to facts uncovered in an investigation might preclude fair and effective consideration at a subsequent adversary hearing and so deny due process.<sup>210</sup> More recently, in a non-agency context, the Court held that a judge could not hear a case on which he had previously worked as a district attorney.<sup>211</sup> Relying on the criminal case of *In re Murchison*<sup>212</sup> and the general principle that “no man

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agreement and learned about the reasons for the strike in the course of negotiating”); *Richardson v. Perales*, 402 U.S. 389, 410 (1971) (rejecting challenge to hearing examiner developing facts on behalf of the agency). Kristin Hickman and Richard Pierce summarize: “The Supreme Court has never held a system of combined functions to be a violation of due process, and it has upheld several such systems.” KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 7.8 (6th ed., 2022-1 cumulative supplement 2021). The lower courts have also consistently rejected such claims. *See, e.g.*, *Ethicon Endo-Surgery, Inc. v. Covidien LP*, 812 F.3d 1023, 1029-31 (Fed. Cir. 2016) (rejecting due process challenge to having same panel of administrative judges institute and then decide review of patent validity); *Moore v. Bd. of Educ. of Johnson City Schs.*, 134 F.3d 781, 786 (6th Cir. 1998) (upholding arrangement under which school superintendent is both the investigator and the official responsible for rendering an opinion leading to a teacher’s termination); *Greenberg v. Bd. of Governors of Fed. Rsv. Sys.*, 968 F.2d 164, 167 (2d Cir. 1992); *Simpson v. Off. of Thrift Supervision*, 29 F.3d 1418, 1424 (9th Cir. 1994) (finding no due process violation when person who commenced the proceeding subsequently judged it); *Sheldon v. SEC*, 45 F.3d 1515, 1518 (11th Cir. 1995); *Beard v. Gen. Servs. Admin.*, 801 F.2d 1318, 1323 (Fed. Cir. 1986); *Frank’s Livestock & Poultry Farm, Inc. v. United States*, 905 F.2d 1515, 1518 (Fed. Cir. 1990); *Marine Shale Processors, Inc. v. U.S. EPA*, 81 F.3d 1371, 1385 (5th Cir. 1996); *Elliott v. SEC*, 36 F.3d 86, 87 (11th Cir. 1994); *FTC v. Cinderella Career & Finishing Schs.*, 404 F.2d 1308, 1315 (D.C. Cir. 1968) (“Congress has . . . vested administrative agencies with both the . . . power to act in an accusatory capacity . . . and with the responsibility of ultimately determining the merits of the charges . . .”). *See generally* Michael Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 COLUM. L. REV. 759, 782-84 (1981) (describing character of combination of functions in administrative agencies).

<sup>210</sup> *Withrow*, 421 U.S. at 52 (declining to adopt any rigid rule for combined functions in adjudications, the acceptability of which will turn on particular circumstances); *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (plurality opinion) (requiring that the propriety of Hamdi’s capture be decided by a “neutral decisionmaker” rather than his captors); *id.* at 553 (Souter, J., concurring in part and dissenting in part) (acknowledging that due process required at least as much procedural protection for Hamdi as the plurality had outlined); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 40-41 (1950) (explaining that a fundamental purpose of the APA was “to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge”); *Humphries v. County of Los Angeles*, 554 F.3d 1170, 1197 (9th Cir. 2009) (“[A] single person, charged with investigating serious allegations of child abuse, may not adjudicate those allegations for placement on the CACI and serve as appellate commissioner in review of his own decision. The risk of perpetuating any original error is too great.”); *White v. Ind. Parole Bd.*, 266 F.3d 759, 767 (7th Cir. 2001) (noting that due process would block an officer who investigated a charge of prison misconduct from sitting on a prison disciplinary board charged with determining whether to reduce the prisoner’s “good-time” credits).

<sup>211</sup> *Williams v. Pennsylvania*, 579 U.S. 1, 8-9 (2016).

<sup>212</sup> 349 U.S. 133, 139 (1955) (holding that it violates due process for judge acting as one-person “grand jury” also to have the power to try witness for contempt for committing perjury during hearing).

can be a judge in his own case”<sup>213</sup> the Court found the risk of bias unacceptably high. “Having been a part of [the accusatory] process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused.”<sup>214</sup> Generalized, that same concern is present when the head(s) of an agency are involved in initiating or authorizing an investigation and then making a final determination as to whether there has been a violation. And potentially the same concerns could be present, though more attenuated, when different individuals all employed by the same agency undertake those tasks.

Likewise, there are serious questions about possible bias in agency adjudication. For decades, observers have seen a risk that if a prosecutor or investigator then becomes the adjudicator she may rely on extra-record evidence or have developed a distorting will to win.<sup>215</sup> At the agency-head level, as Philip Elman famously contended a generation ago,<sup>216</sup> prejudgment and the reality or appearance of bias and unfairness are very real concerns (even if these concerns have proven difficult to confirm).<sup>217</sup>

And it is easy to imagine inappropriate activity connected to commingling—handpicking ALJs for particular cases, for example<sup>218</sup>—that would violate due process. But that prospect stops well short of saying that ALJs must be presumed to be unconstitutionally biased. Congress and individual agencies have engaged in serious efforts to protect against unfairness arising from the combination of functions. The APA’s separation of functions provisions,<sup>219</sup> guarantees of

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<sup>213</sup> *Williams*, 579 U.S. at 8-9 (quoting *In re Murchison*, 349 U.S. at 136).

<sup>214</sup> *Id.* at 9 (alteration in original) (quoting *In re Murchison*, 349 U.S. at 137).

<sup>215</sup> *See, e.g.*, FINAL REPORT, *supra* note 58, at 56.

<sup>216</sup> Philip Elman, *Administrative Reform of the Federal Trade Commission*, 59 GEO. L.J. 777, 810-12 (1971); Philip Elman, *A Note on Administrative Adjudication*, 74 YALE L.J. 652, 653-54 (1965); *Dean Foods Co.*, 70 F.T.C. 1146, 1311 (1966) (Elman, Comm’r, dissenting) (noting that “counsel for the Commission . . . were insensitive or indifferent to these considerations [concerning impartiality] in presenting the Commission’s position before the Court of Appeals”). For a more recent echo of Elman’s campaign, see generally Andrew N. Vollmer, *Accusers as Adjudicators in Agency Enforcement Proceedings*, 52 U. MICH. J.L. REFORM 103 (2018).

<sup>217</sup> *See* Special Comm., *Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission*, 58 ANTITRUST L.J. 43, 119-24 (1989) (concluding after study and debate that unity of functions in the FTC should be maintained); Richard A. Posner, *The Behavior of Administrative Agencies*, 1 J. LEGAL STUD. 305, 343 (1972) (concluding that the combination of functions did not skew the FTC toward pursuing complaints that would or should otherwise have been dismissed).

<sup>218</sup> *See, e.g.*, Resource Agency Hearings and Alternatives Development Procedures in Hydropower Licenses, 81 Fed. Reg. 84389, 84392 (Nov. 23, 2016) (to be codified at 7 C.F.R. pt. 1; 43 C.F.R. pt. 45; 50 C.F.R. pt. 221) (final rule) (rejecting factual premise of commenter’s assertion that Department of Interior ALJs lack neutrality in part because individual judges are handpicked for particular cases).

<sup>219</sup> 5 U.S.C. § 554(d). For an overview see A GUIDE TO FEDERAL AGENCY ADJUDICATION 148-59 (Jeffrey B. Litwak ed., 2d ed. 2012).

independence for ALJs,<sup>220</sup> and the application of the Model Code of Judicial Conduct to ALJs and other administrative judges,<sup>221</sup> to name a few, all matter.

In sum, the received wisdom is correct: structural protections are important; the combination of functions poses due process risks; it may be unacceptable in some cases; but it is not per se a violation of due process. Due process will not deliver the across-the-board facial invalidation sought by those relying on the anti-accumulation principle. But, in cases where the risks of bias go beyond broad presumptions, due process provides a remedy.<sup>222</sup>

#### IV. CHECKING THE EXECUTIVE WITHOUT SEPARATION OF POWERS

The rise of the executive branch has prompted another group of scholars and commentators to turn to separation of powers as a framework for motivating, grounding, and conceptualizing the executive branch and reforms. What they share with proponents of the anti-accumulation principle is the idea that general separation-of-powers principles speak to the internal structure of the executive branch. They differ in that they view separation of powers in broadly functionalist or perhaps even metaphorical terms. While these reformers are asking the right set of questions—what are the critical checks on executive power?—like proponents of the anti-accumulation principle, their separation-of-powers vocabulary is more limiting than illuminating. Separation of powers pertains to their analyses in only the most abstract way as a shorthand for institutional designs that constrain power. But use of that constitutional shorthand has its own risks and limitations.

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<sup>220</sup> 5 U.S.C. §§ 1305, 3105. ALJs are also exempt from performance ratings, evaluation, and bonuses. *Id.* § 4301(2)(D); 5 C.F.R. § 930.206 (2021). The Office of Personnel Management, not the employing agency, controls an ALJ's compensation and tenure. 5 U.S.C. § 5372; 5 C.F.R. §§ 930.201-930.211. Almost any disciplinary action against ALJs may be taken only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for a hearing. 5 U.S.C. § 7521.

<sup>221</sup> MODEL CODE JUD. CONDUCT, APPLICATION § I(B) (2011) (“A judge, within the meaning of this Code, is anyone who is authorized to perform judicial functions, including an officer such as a . . . member of the administrative law judiciary.”).

<sup>222</sup> Under the due process approach, a constitutional violation may exist where the combination of functions is eyebrow-raising but not fatal, yet when combined with other features becomes unacceptable. For example, Saurabh Vishnubhakat concludes that the Patent Office's inter partes review regime is likely unconstitutional. Saurabh Vishnubhakat, *Constitutional Structure in the Patent Office 4* (Sept. 19, 2021) (unpublished manuscript) (available at <https://ssrn.com/abstract=3988952>). Combination of functions is part of the problem—not because of separation-of-powers concerns (appropriately, in our view, that phrase is not mentioned) but because, given additional details of inter partes review, including the office's pecuniary interest in particular outcomes, it creates significant due process concerns. *Id.* at 27-29. We are agnostic about Vishnubhakat's bottom line concerning inter partes review, but his focus on due process rather than separation of powers strikes us as exactly right.

A. *The Puzzling Persistence of Three-Branch Thinking*<sup>223</sup>

Some scholars arguing that separation of powers operates or should operate within the executive branch are reassured when they are able to identify rivalries internal to the executive branch that approximate the rivalries the framers envisioned among the constitutional branches. Jon Michaels is perhaps the leading example. He articulates an account of checks and balances that focuses not on Congress, the courts, and the President, but on three “subconstitutional counterweight[s].”<sup>224</sup> The first consists of political appointees.<sup>225</sup> This group is countered by the civil service, the career staff that in any agency hugely outnumbers the political appointees.<sup>226</sup> As others have pointed out,<sup>227</sup> the career staff is in many respects an “institutional rival” to the political leadership.<sup>228</sup> The third check or counterweight is the public at large, civil society.<sup>229</sup> Through the use of Freedom of Information Act, notice-and-comment procedures, and judicial review, Michaels posits, the public exercises a distinctive set of constraints on agency policy-making.<sup>230</sup>

Michaels describes the resulting arrangement of mutual constraint as an “administrative separation of powers” where political appointees, civil servants, and civil society have “dispositional characteristics” similar to the three constitutional branches.<sup>231</sup> The political appointees at the top of the agency organizational chart are the counterpart of the President.<sup>232</sup> The civil service—technocratic, objective, neutral, and there for the long haul—is the counterpart of the judicial branch.<sup>233</sup> And civil society corresponds to the broadly representative and deliberative legislative branch.<sup>234</sup> Michaels argues that the

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<sup>223</sup> Cf. Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980).

<sup>224</sup> Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 534 (2015) [hereinafter Michaels, *Separation of Powers*]; see also MICHAELS, CONSTITUTIONAL COUP, *supra* note 11, at 59-63 (indicating civil servants’ “conflicting interests, competing commitments, and different sources of accountability” as compared with agency leaders).

<sup>225</sup> Michaels, *Separation of Powers*, *supra* note 224, at 538-40.

<sup>226</sup> *Id.* at 540-47.

<sup>227</sup> See, e.g., Jennifer Nou, *Bureaucratic Resistance from Below*, YALE J. REGUL. (Nov. 16, 2016) [hereinafter Nou, *Bureaucratic Resistance*], <https://www.yalejreg.com/nc/bureaucratic-resistance-from-below-by-jennifer-nou/> [<https://perma.cc/4FY5-7NGU>] (describing various techniques available to career staff to slow or derail initiatives of new political appointees); see also Katyal, *supra* note 2, at 2328-35 (endorsing civil service protections on the model of foreign service officers).

<sup>228</sup> Michaels, *Separation of Powers*, *supra* note 224, at 541.

<sup>229</sup> *Id.* at 547-51.

<sup>230</sup> *Id.* at 548-50.

<sup>231</sup> *Id.* at 525, 530.

<sup>232</sup> *Id.* at 538-40.

<sup>233</sup> See *id.* at 540-47.

<sup>234</sup> *Id.* at 547-51.

rivalry, difference of interest, and contestation among these three bodies replicate those of the three constitutional branches, and serve the same overall functions.<sup>235</sup> “This reproduction” of the constitutional branches, Michaels writes, “helps mark the administrative state as a constitutionally coextensive, legitimate, and worthy enterprise, one that redeems, refashions, and arguably upgrades the framers’ central structure . . . even as State power extends beyond the boundaries of its 1787 architecture.”<sup>236</sup>

One might readily agree that these three collections of persons—agency heads, civil servants, and the interested public—have interests and capacities that at times diverge and thus can create greater resistance to, or ease the way for, agency or executive action. The 2020 congressional testimony of members of the foreign service concerning President Trump’s dealings with the Ukrainian government illustrate that career staff may use resistance, voice, and exit to demonstrate their disagreement with, and possibly influence, the course of presidential or a political appointee’s leadership.<sup>237</sup> Moreover, the civil service can slow policy, show extreme dissatisfaction through departure, and help reveal misdeeds.<sup>238</sup> So too, interest groups and industry can have a dramatic effect on administrative action through direct and indirect lobbying as well as litigation.<sup>239</sup> But Michaels is taking things a step further. He argues that “there is something special about these three administrative players in particular. Individually and collectively, they channel the dispositional characteristics and institutional obligations of the three great constitutional branches.”<sup>240</sup>

One objection to his account would be that these three players only very loosely “channel the dispositional characteristics and institutional obligations”<sup>241</sup> of the President, courts, and Congress. The fit is far from perfect, as Michaels acknowledges.<sup>242</sup> A second objection would be that if one is looking for institutions that constrain agencies and channel the dispositional

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<sup>235</sup> MICHAELS, CONSTITUTIONAL COUP, *supra* note 11, at 64-66.

<sup>236</sup> *Id.* at 66.

<sup>237</sup> For an overview of various officials’ statements, see House Intel. Comm., *President Trump’s Abuse of Power*, U.S. HOUSE OF REPS. PERMANENT SELECT COMM. ON INTEL., <https://intelligence.house.gov/defendourdemocracy/> [<https://perma.cc/53U7-Q9RX>] (last visited Feb. 25, 2022).

<sup>238</sup> See Nou, *Bureaucratic Resistance*, *supra* note 227; see also Jennifer Nou, *Civil Servant Disobedience*, 94 CHI.-KENT L. REV. 349, 356-61 (2019) (discussing more extreme forms of noncooperation from civil service).

<sup>239</sup> See, e.g., Rachel Augustine Potter, *Regulatory Lobbying Has Increased Under the Trump Administration, but the Groups Doing the Lobbying May Surprise You*, BROOKINGS INST. (July 11, 2018), <https://www.brookings.edu/research/regulatory-lobbying-has-increased-under-the-trump-administration-but-the-groups-doing-the-lobbying-may-surprise-you/> [<https://perma.cc/SH5S-KTDD>].

<sup>240</sup> MICHAELS, CONSTITUTIONAL COUP, *supra* note 11, at 16.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* at 65-66 (analogizing his reconceptualization to *West Side Story*’s reworking of *Romeo and Juliet*).

characteristics of the President, courts, and Congress there are others closer at hand: namely, the President, courts, and Congress. All three have important and continuing roles in agency oversight.

But the fundamental objection goes to the determination to replicate the constitutional tripartite arrangement. Michaels values checks and rivalry of interest, which is fair enough.<sup>243</sup> Indeed, it is a long-standing and mainstream view that despite the combination of functions, agencies are meaningfully constrained by numerous checks and balances and that this is a good thing.<sup>244</sup> But why should the appropriate—indeed, necessary—checks be three in

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<sup>243</sup> *Id.* at 63-75.

<sup>244</sup> Peter Strauss has provided the leading and most sustained account. See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578 (1984) (conceptualizing separation-of-powers “in terms of separation of functions and checks and balances”); see also Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 487 (1989) (emphasizing function of judicial review to enforce statutory limits on agencies). Most obviously, these constraints are found in the carefully designed provisions of the APA: notice and comment for rulemaking, separation of functions between investigators and adjudicators, and judicial review. See 5 U.S.C. §§ 551-596. But they also include oversight by the White House and Congress, interagency competition, elaboration by all three branches of the bare-bones notice-and-comment requirements in the APA, the Freedom of Information Act, and numerous other complex formal and informal structures that create a web of inputs and constraints for agency actors.

The grandfather of this familiar approach was James Landis, who wrote that “the fact that there is this fusion of prosecution and adjudication in a single administrative agency does not imply the absence of all checks. It implies simply the absence of the traditional check.” LANDIS, *supra* note 52, at 98. He identified six such checks: agencies operate within a narrow subject matter; partly as a result, each agency develops a professionalism and set of norms that constrain it; it must support any order with findings of fact (Landis was focused on the adjudicating rather than the rulemaking agency, which arose later); individual outcomes will be limited by the need to further sound policy; many agencies are independent of direct executive control (it is a little odd to label this feature a “check”); and agency action is subject to judicial review. See *id.* at 98-100. Hence, Landis observed: “It is the relationships of the administrative to the three departments of government that are important.” *Id.* at 88. Landis’s list is a combination of what have come to be known as “internal” and “external” checks. See Metzger, *Interdependent*, *supra* note 12, at 439-40 (describing the shared control of courts and agency personnel over agency actions).

Earlier in *The Administrative Process*, Landis states that he was “not too greatly concerned with the extent to which such [administrative] action does violence to the traditional tripartite theory of governmental organization.” LANDIS, *supra* note 52, at 12. Some scholars read that as a candid, if cavalier, acknowledgement that the New Deal agencies *do* do violence to that theory and so are unconstitutional. See, e.g., Eric R. Claeys, *Judicial Engagement and Civic Engagement: Four Case Studies*, 19 GEO. MASON L. REV. 887, 896 (2012). As we read Landis, however, he is firmly in the Strauss camp, acknowledging that agencies are not organized along the same lines as the overall constitutional structure, but certain that that arrangement poses no constitutional difficulties. See Charles H. Koch, Jr., *James Landis: The Administrative Process*, 48 ADMIN. L. REV. 419, 422 (1996) (“Landis saw the administrative process as both faithful to the doctrine [of separation of powers] and an instrument for its modernization.”).

number, much less mirror the three constitutional branches? For formalists, the answer is straightforward and a necessary consequence of their methodological commitments.<sup>245</sup> Because the current executive branch combines the three powers that the Constitution requires be separate, the only remedy is to re-segregate them in accordance with the anti-accumulation principle. But for a functionalist like Michaels, liberated to toss aside the particular entities of the constitutional arrangement, the necessity to identify three and only three corresponding substitutes is an unexplained and self-imposed restriction.<sup>246</sup>

Yet Michaels appears to accept the anti-accumulation principle. For him, consolidating powers in an agency is at least incongruent with, if not violative of, a constitutional principle of separation of powers.<sup>247</sup> That concern sends him on a search for a solution that will replicate the lost three-part separation, only within the executive branch.<sup>248</sup> Part II argues that there is no anti-accumulation principle that requires dividing authority in accordance with the lines of the three branches internal to the executive.<sup>249</sup> If that argument is sound, it is unnecessary to justify internal checks on executive power as replicating the three constitutional branches. The search for a tripartite response to the growth of executive power results from the initial diagnosis, namely, that the combination of functions in the executive violates separation of powers. Once that diagnosis is abandoned, there is no reason to reimagine a tripartite solution to render executive power consistent with separation of powers.

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<sup>245</sup> See, e.g., Epstein, *supra* note 70, at 492 (“In effect, the new vision rests on a quid pro quo of constitutional dimensions: we can take away those particular limitations that the Constitution provides so long as we substitute in alternative protections against the concentration of power that work as well as the ones they supplant. The weakness of this argument should, I think, be evident on its face, at least to anyone who does not share the Progressive vision of good government.”).

<sup>246</sup> See MICHAELS, CONSTITUTIONAL COUP, *supra* note 11, at 64. Even if there is some value in the numerological approach, it is not clear that three is the right number. For example, one could argue for four: President, Courts, House, Senate. (If that were the approach, the difference between political and career staff might better correspond to House and Senate, respectively, than to President and Courts.) Or five: President, Courts, House, Senate, and the States. Or maybe it’s only two, since the executive branch is already accounted for by virtue of the agencies being a part thereof, so one only needs to come up with counterparts for Congress and the courts.

The strain resulting from the tripartite constraint shows in the way Michaels is forced to lump together a large number of diverse and distinct entities under the “civil society” banner—interest groups, industry, the press, the judiciary (via judicial review sought by members of the public), individual members of the public—in order to hold the total number of quasi-branches to merely three. See Michaels, *Separation of Powers*, *supra* note 224, at 547-51.

<sup>247</sup> See MICHAELS, CONSTITUTIONAL COUP, *supra* note 11, at 57 (“After all, agencies combined and centralized powers that the framers had separated across three great branches.”); see also *id.* at 52 (noting that creation of administrative agencies brought “heretofore separated powers . . . under one roof”).

<sup>248</sup> See *id.* at 64.

<sup>249</sup> See *supra* Part II.



B. *Checking and Balancing Internal to the Executive Branch*

Some proponents of internal separation of powers are even more thoroughly functionalist. They worry that the growth of executive power creates the prospects for abuse, unfairness, concentrated power, mission-creep, and capture.<sup>250</sup> They do not turn to separation of powers to find proxies for the three branches of government internal to the executive but rather as a vocabulary for talking about enhanced constraint and checks on executive power.<sup>251</sup> They propose institutional reforms, such as creation of tribunals internal to the executive branch for evaluating the legality of presidential action, enhanced tenure protections, overlapping jurisdiction of agencies, and more reporting requirements to Congress.<sup>252</sup> Or they see separation of powers as a unifying concept to understand the ways in which Congress fragments power within and among agencies, creates executive branch monitors, requires multiple agencies to agree, and so on.<sup>253</sup>

Consider two examples. First, as part of an effort to construct an internal separation of powers, Katyal proposes establishing an executive branch adjudicator, protected from removal by a good cause standard, that would take over the Office of Legal Counsel's ("OLC") current role of deciding inter-agency disputes and leave OLC with the function of advising the President and other executive branch officials.<sup>254</sup> For Katyal, separating the dispute-resolution role would prevent the client-driven advisory functions from infecting the independent judgment required for resolving disputes.<sup>255</sup>

A second example: Sharon Jacobs posits that given the constitutional importance of separation of powers, "it would be surprising if the idea's impact were not felt in subconstitutional domains,"<sup>256</sup> including internal to the executive branch. She argues that a wide variety of institutional arrangements reflect statutory separation of powers and statutory checks and balances, including: delegating authority along functional lines (adjudicative, prosecutorial, and

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<sup>250</sup> See, e.g., Sharon B. Jacobs, *The Statutory Separation of Powers*, 129 YALE L.J. 378, 389 (2019).

<sup>251</sup> See generally *id.* (discussing separation of powers as structural principle that underlies congressional delegations to agencies).

<sup>252</sup> See, e.g., Katyal, *supra* note 2, at 2317; ACKERMAN, *supra* note 4, at 143 (proposing creation of nine-member Supreme Executive Tribunal within executive branch). For a critical assessment of Ackerman's *The Decline and Fall of the American Republic*, see Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1742-48 (2011) (book review).

<sup>253</sup> Jacobs, *supra* note 250, at 386-405 (providing example of congressional delegations which fragment authority and create checks against any one agency exercising authority without the input or cooperation of others).

<sup>254</sup> See Katyal, *supra* note 2, at 2337. Bruce Ackerman also argues for creating an executive branch tribunal. See ACKERMAN, *supra* note 4, at 141-79.

<sup>255</sup> Katyal, *supra* note 2, at 2337.

<sup>256</sup> Jacobs, *supra* note 250, at 386.

rulemaking);<sup>257</sup> delegating authority to multiple agencies,<sup>258</sup> including between independent and executive agencies;<sup>259</sup> inter-agency vetoes;<sup>260</sup> emergency overrides;<sup>261</sup> and mixing the heads of some agencies among the leadership of others.<sup>262</sup>

A place to start in evaluating these kinds of reforms is Peter Strauss's classic article on the separation of powers.<sup>263</sup> Strauss distinguishes between the demands of separation of powers applicable to the named constitutional actors—the President, the Congress, and the Supreme Court—and the organization of each branch.<sup>264</sup> “[F]or any consideration of the structure given law-administration below the very apex of the governmental structure,” Strauss writes, “the rigid separation-of-powers compartmentalization of governmental functions should be abandoned in favor of analysis in terms of separation of functions and checks and balances.”<sup>265</sup> On the one hand, these reformers accept Strauss's basic point. They do not aim to replicate the compartmentalization of government functions internal to the executive branch or to exclude “non-executive” functions from it. On the other hand, they still invoke the language of separation of powers as the fundamental ground for their theories and proposals. They argue that the statutory reforms and structures they praise not only lessen the chances of abuse of power or capture, but also implement something constitutionally inspired, required, or grounded—“internal separation of powers” or “statutory separation of powers.”<sup>266</sup>

What does the constitutional vocabulary of separation of powers add to these proposals and theories? Our answer is: not much. Perhaps Katyal's reform proposals are appropriate and viable, perhaps not. But how does this proposal relate to separation of powers? Virtually every delegation to an agency designates separate persons to perform separate functions. They separate adjudicative personnel from prosecutors, designate different persons to perform watchdog functions from those they monitor, and divide those who propose and adopt rules.<sup>267</sup> And if Congress does not set things up this way, the agency itself

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<sup>257</sup> *Id.* at 396.

<sup>258</sup> *Id.* at 397.

<sup>259</sup> *Id.* at 398.

<sup>260</sup> *Id.* at 400.

<sup>261</sup> *Id.* at 402.

<sup>262</sup> *Id.* at 404.

<sup>263</sup> See Strauss, *supra* note 244.

<sup>264</sup> *Id.* at 575-77.

<sup>265</sup> Strauss, *supra* note 244, at 578; see also *id.* at 577 (noting that agencies exercise all three powers “in a web of other controls—judicial review and legislative and executive oversight”—which “are thought to give reasonable assurance against systemic lawlessness”).

<sup>266</sup> Jacobs, *supra* note 250, at 381.

<sup>267</sup> See *id.* at 401 (discussing arrangement in which Congress has authorized the Department of Energy to propose rules that the Federal Energy Regulatory Commission is required to consider on an expedited basis).

does.<sup>268</sup> But not every institutional arrangement that divides power or tasks among separate officials derives from a constitutional mandate of separation of powers. Katyal's actual concern seems not to arise from a devotion to a formal conception of separation of powers but out of a belief that a separate adjudicative body will be a more effective check on executive power since the "litigant" will not also be a client.<sup>269</sup> While we are agnostic on the merits, that justification is coherent. But it does not gain any weight by claiming it is required by a principle of constitutional structure. "Separation of powers" is operating in Katyal's proposal merely as a shorthand for the general idea that institutional structures will divide and constrain power by giving separate roles to separate people.<sup>270</sup>

So too with Jacobs. Her micro-institutional analysis yields many insights into which types of institutional arrangements work and for what purposes.<sup>271</sup> But again, these matters of institutional design implicate separation of powers only in a highly abstract sense. To be sure, Congress has long placed some agencies closer to the levers of presidential control and some further away.<sup>272</sup> And likewise, Congress has long vested authority in overlapping and fragmented ways so as to mitigate risks of dominance.<sup>273</sup> Congress faces these questions of institutional design whenever it creates or delegates more authority to an agency. But what is illuminated by registering these recurrent features of institutional design in constitutional terms? Here, too, the vocabulary of separation of powers is merely a stand-in for general ideas about allocating and dividing power.

At most, these theories take inspiration from aspects of constitutional separation of powers. For instance, they praise structures that create separation of persons—requiring that some roles be handled by separate people—a fundamental strategy of separation of powers.<sup>274</sup> Likewise, they endorse "veto points" and requirements for multiple officers or agencies to sign off before the

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<sup>268</sup> In any agency organization chart, the broad strokes are a function of statute and the myriad details a function of the agency's self-organization and sub-delegations. *See, e.g.*, Darrel J. Grinstead, Hogan & Hartson LLP, *Statutory Framework for the Organization and Management of the U.S. Department of Health and Human Services*, in *HHS IN THE 21ST CENTURY: CHARTING A NEW COURSE FOR A HEALTHIER AMERICA* 209, 210-213 (Leonard D. Schaeffer, Andrea M. Schultz & Judith A. Salerno eds., 2009); *HHS Organizational Chart*, U.S. HHS (July 14, 2021), <https://www.hhs.gov/about/agencies/orgchart/index.html> [<https://perma.cc/NY28-EW2Q>].

<sup>269</sup> *See* Katyal, *supra* note 2, at 2335-42.

<sup>270</sup> *Id.* at 2346.

<sup>271</sup> Jacobs, *supra* note 250, at 386.

<sup>272</sup> *See* DAVID E. LEWIS, *PRESIDENTS AND THE POLITICS OF AGENCY DESIGN* 60 (2003) (describing how congressional majorities and unified versus divided government make a difference to the insulation of agencies from presidential control).

<sup>273</sup> *See* Jacobs, *supra* note 250, at 389.

<sup>274</sup> *See* VILE, *supra* note 110, at 36 (discussing how separation of persons became part of separation of powers); Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 *CORNELL L. REV.* 1045, 1050 (1994) (extrapolating from the Constitution's Incompatibility Clause).

government can take action; those protections do create a “check” and can, in the right conditions, create a “balance.” At this level of abstraction and dilution, however, separation of powers is, at best, merely an organizing label for division of authority, whether within the executive branch, the federal government as a whole, or a school or corporation.

The point can be summarized by analogy to Arthur Leff’s much-read review of Richard Posner’s *Economic Analysis of Law*.<sup>275</sup> Leff compares the adventures of Posner’s hero, Economic Analysis, to those of the heroes of picaresque novels such as *Tom Jones* or *Huckleberry Finn*.<sup>276</sup> In these works, “the world presents itself as a series of problems; to each problem [the particular personal vision of the hero] acts as a form of solution; and the problem having been dispatched, our hero passes on to the next adventure.”<sup>277</sup> So too Economic Analysis “ride[s] out into the world of law,” dispatching “one after another almost all of the ambiguous villains of legal thought.”<sup>278</sup> Much the same could be said of these reformers’ presentation of *their* hero, Separation O. Powers. Leff suggests that it is possible that not *every* legal doctrine is best explained and evaluated in terms of efficiency.<sup>279</sup> Similarly, not *every* governmental structure necessarily reflects, or should reflect, the separation of powers.

### C. *The Danger of Constitutional Vocabulary*

Couching all decisions regarding institutional design within the rubric of separation of powers is not only unhelpful, it is risky. Like most constitutional vocabulary, “separation of powers” comes with baggage. First, framing particular proposals in separation-of-powers terms implicitly claims a superiority to possible alternatives by virtue of being grounded in constitutional law. But the sense in which these proposals are thus grounded is so highly diluted—they are frequently just using “separation of powers” for the broadest idea of checked and constrained government—that there is no reason to privilege one set of proposals over another because of their framing or vocabulary.

Second, and more significant, the vocabulary of separation of powers privileges a limited set of ideas about institutional design. Both the formal and functional vocabulary of separation of powers focus on separating persons into functional roles and the existence of multiple veto points. But that is a relatively confined and abstract vocabulary given the wealth of issues involved in agency design. For example, a rigid separationist approach would not invite analysis of the conditions under which having agencies engaging in redundant tasks in a decentralized manner has advantages over centralization and unification of those

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<sup>275</sup> See Arthur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974) (reviewing RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* (1973)).

<sup>276</sup> *Id.* at 451.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.* at 452.

<sup>279</sup> See *id.* at 473.

tasks—a central question of the design of national intelligence agencies examined in the report of the 9/11 Commission.<sup>280</sup> To properly analyze that question, as Anne Joseph O’Connell explains, requires assessing the benefits and costs of redundancy as opposed to unification. That involves evaluation of a host of factors, including: the importance of combatting “group think” in a unified structure; competition among agencies resulting in better information or approaches balanced against greater coordination costs; increased monitoring costs; and loss of returns to scale in a larger, unified agency.<sup>281</sup> So too, the separation-of-powers vocabulary forecloses consideration of whether delegation of authority to individual officials, as opposed to the President, can create incentives for greater accountability to statutory requirements. When an official other than the President must sign off on a course of action, that individual faces the very real prospect of liability ranging from criminal sanctions to disbarment and public embarrassment.<sup>282</sup> These questions of institutional design—and others like them—call for a more nuanced, context-specific, and empirically informed analysis than provoked by the vocabulary of separation of powers.<sup>283</sup>

Third, the vocabulary of separation of powers suggests judicial review as the central accountability mechanism or at least that priority should be given to institutional schemes which facilitate judicial review. Judicial review has been a fundamental feature of separation-of-powers law since the founding of the republic. While judicial enforcement is an important check on legality, it is also an incomplete one. Most administrative action is never subject to judicial review, and when review comes at all it is often many years after the fact.<sup>284</sup> But effective legal constraint requires ex ante controls before the agency makes a choice.<sup>285</sup> Ex ante controls require managerial structures that allow early

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<sup>280</sup> NAT’L COMM’N ON TERRORIST ATTACKS, THE 9/11 COMMISSION REPORT 399-428 (2004), <https://govinfo.library.unt.edu/911/report/911Report.pdf> [<https://perma.cc/3ZXZ-4CS3>].

<sup>281</sup> See Anne Joseph O’Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CALIF. L. REV. 1655, 1676-82 (2006) (introducing these considerations).

<sup>282</sup> See Rebecca Ingber, *Congressional Administration of Foreign Affairs*, 106 VA. L. REV. 395, 450-51 (2020) (explaining incentives created by accountability).

<sup>283</sup> See generally Alejandro E. Camacho & Robert L. Glicksman, *Exploring the Structural Dimensions and Functions of Delegated Authority*, 15 REGUL. & GOVERNANCE (ANNIVERSARY ISSUE) S102 (2021) (exploring allocations of authority dimensions of (a) centralized/decentralized, (b) overlapping/distinct, and (c) coordinated/independent); M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers*, 150 U. PA. L. REV. 603, 658 (2001) (advocating for moving beyond separation of powers, towards a work “much closer to the ground—investigating the relevant decisionmakers, the context in which they act, the process by which they will reach their decisions, and the constraints on their actions”).

<sup>284</sup> See Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1264 (2017) (elaborating some weaknesses of judicial review).

<sup>285</sup> See LAURA A. DICKINSON, *OUTSOURCING WAR AND PEACE: PRESERVING PUBLIC VALUES IN A WORLD OF PRIVATIZED FOREIGN AFFAIRS* 145-53 (2011) (arguing that internalization of norms can be a more effective check than external controls).

intervention and clear internal guidelines. Managerial powers must include not only the power to nullify a lower-level official's action but also the capacity to teach and instill respect for internal norms.<sup>286</sup> The separation-of-powers framing may also unduly prioritize reforms which are judicially enforceable, thus missing other critical contributors to systemic legality.

#### CONCLUSION

It is always tempting to look to the Constitution for salvation. And no structural principle in the Constitution is more celebrated, more familiar, or seen as more a testament to the genius of the framers than the separation of powers. The Supreme Court tells us that it is “the central guarantee of a just government”<sup>287</sup> and “essential to the preservation of liberty.”<sup>288</sup> It thus seems almost churlish to argue that it is a mistake to invoke that principle in constitutionalizing restrictions on the internal structures of the executive branch. But mistake it is.

Alluring though constitutional principles can be, this Article sounds a cautionary note about their transposition from their original setting. Separation of powers may be a splendid or flawed system for allocating authority among the constitutionally established branches of government. But that the framers adopted a particular structure for the apex of government—and grounded it in the idea that the accumulation of different types of power in the same hands is to be avoided—provides no grounds to suppose that the internal structures of the component parts must also follow those same lines.

This conclusion has important consequences for current debates. It means that there is no foundation for the resilient claim, now enjoying support on the Supreme Court, that an anti-accumulation principle exists and invalidates the combination of functions within executive branch agencies. That principle misreads James Madison's *The Federalist No. 47* and lacks any constitutional foundation. As a result, the anti-accumulation principle provides no basis to call into question doctrines or institutional arrangements where there is some arguable combination of functions. Deference doctrines such as *Auer* and *Chevron* may be sound or not, but the fact that they involve interpretation by the executive branch is not the problem. ALJs may be too beholden to their employing agency to provide a neutral adjudication, but if so, that is a due process problem. The executive branch as a whole may have grown too powerful, but if so, the solution is legislative restructuring and invigorated congressional action, not judicial intervention on the ground that individuals within the branch wear too many hats.

It is also a mistake to rely solely on separation-of-powers abstractions to reform the internal structure of the executive branch. While separation of powers

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<sup>286</sup> Metzger & Stack, *supra* note 284, at 1265-66.

<sup>287</sup> Freytag v. Comm'r, 501 U.S. 868, 870 (1991).

<sup>288</sup> Mistretta v. United States, 488 U.S. 361, 380 (1989).

provides useful categories, it is hardly a comprehensive vocabulary. Framing executive branch reform in terms of separation of powers, even in the sense of broad checks and balances, still shoehorns the conversation into an artificially limited menu of design choices.