SEPARATION OF STRUCTURES

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In a series of decisions—Free Enterprise Fund v. Public Company Accounting Oversight Board*,* Seila Law v. Consumer Financial Protection Bureau*, and* Collins v. Yellen*—the Supreme Court struck down for-cause removal restrictions over agency heads. These rulings fault structural elements of the respective agency—double-layer protections or single directorships—for violating separation of powers because they insulate the agency from presidential review and oversight. But while the Court increasingly relies on agency structures to adjudicate constitutionality, separation of powers scholarship has focused on the division of powers into legislative, executive, and judicial functions.*

This Article supplies the missing account of separation of structures, and in the process defends the legitimacy of the administrative state against its critics. It argues that an emphasis on an agency's institutional structure in adjudicating constitutionality is deeply rooted in constitutional design and the Founders' reception of ancient Greek and Roman political philosophy. By introducing the link between institutional design and the Constitution, separation of structures sketches a doctrinal terrain of how judicial adjudications of agency structure could proceed beyond the formalist approach latent in the Court's recent decisions. By shifting the doctrinal focus from the nature of political functions to the design of accountability mechanisms in governance structures, this Article provides strong support for the constitutionality of congressional delegation of legislative powers to agencies. This more capacious understanding of structural separation

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of powers accords with constitutional design and better accommodates the dynamic needs of modern regulation.

INTRODUCTION

Modern separation of powers doctrine is in disarray. While the Supreme Court routinely decides questions of interbranch conflict, agency structure, and delegation,[1] both its approaches and the cases' outcomes feature sharp disagreement and immense unpredictability. Much of the contemporary jurisprudence on the President's power to remove agency officials, for example, derives from two contrasting precedents. In *Myers v. United States*, the Court held that the Decision of 1789 gave the President constitutional entitlement to remove executive branch officials for any reason.[2] A mere nine years later, in *Humphrey's Executor v. United States*, the Court empowered Congress to specify for-cause removal conditions for independent agencies with quasi-legislative and quasi-judicial functions.[3] Today's debate tracks this disagreement: after *Morrison v. Olson* articulated an open-textured inquiry of whether removal restrictions impede the President's ability to execute his Take Care duties, the Court reversed course by adopting, in *Free Enterprise Fund v. Public Company Accounting Oversight Board* ("PCAOB"), a bright-line rule that dual-layered for-cause restrictions are unconstitutional.[4] Such incongruity extends to other spheres of doctrinal engagement. With respect to congressional grants of adjudicative authority to non-Article III tribunals, the Court has applied a pragmatic test and concluded that an agency's jurisdiction over common law counterclaims is constitutional; the Court has also taken a more formalist

[1] E.g., Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 582 (1952); Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2192 (2020); Stern v. Marshall, 564 U.S. 462, 469 (2011); Gundy v. United States, 139 S. Ct. 2116, 2129 (2019).

[2] 272 U.S. 52, 119 (1926).

[3] Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935); see also Aditya Bamzai, Taft, Frankfurter, and the First Presidential For-Cause Removal, 52 U. Rich. L. Rev. 691, 699–701 (2018) (recounting Justice Sutherland's attempts to distinguish *Humphrey's Executor* from *Myers* based on the term of years established in the FTC's organic statute and the quasi-legislative, quasi-judicial character of the FTC).

[4] Morrison v. Olson, 487 U.S. 654, 691–92 (1988); Free Enter. Fund v. PCAOB, 561 U.S. 477, 492 (2010); see Jack Goldsmith & John F. Manning, The Protean Take Care Clause, 164 U. Pa. L. Rev. 1835, 1841–43 (2016).

approach and held that such jurisdiction contravenes separation of powers.[5] When determining which officials are "inferior Officers" for the purposes of the Appointments Clause, the Court has characterized an independent counsel—not subordinate to any executive branch officers—as an inferior officer, while defining, a decade later, inferior officers as those supervised by principal officers.[6] The latest victims of this doctrinal quagmire are the Consumer Financial Protection Bureau ("CFPB") and the Federal Housing Finance Agency ("FHFA"): the Court—splintered along ideological lines—invalidated for-cause removal restrictions on those agencies' directors.[7]

Underpinning these doctrinal puzzles are patterns that only muddy the waters. The Court has announced, with some consistency, the purpose of its separation of powers doctrine: to erect "structural protections against abuse of power [that are] critical to preserving liberty."[8] But precisely how (or why) policing the confines of government bodies' distinct powers contributes to individual freedom is unclear,[9] and the mechanisms of effectuating that goal are unpredictable. The Court has considered a combination of three factors: function, power, and design. It has asked whether the function, or the type of authority, exercised by the government body is of the kind constitutionally assigned to it by its Vesting Clause: for example, whether the Commodities Futures Trading Commission's jurisdiction over common law claims represents an exercise of the judicial function.[10] It has asked whether the magnitude of one actor's authority impedes the ability of another to fulfill its constitutional responsibilities: for example, whether the CFPB has "potent enforcement powers" and "extensive adjudicatory authority."[11] It has also considered issues of institutional design: for example, whether congressionally mandated for-cause removal conditions create a double

[5] Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851–52 (1986); *Stern*, 564 U.S. at 482–83; see William Baude, Adjudication Outside Article III, 133 Harv. L. Rev. 1511, 1519–21 (2020) (reconciling non-Article-III adjudication with *functional* separation of powers); infra Figure 2.

[6] *Morrison*, 487 U.S. at 671; Edmond v. United States, 520 U.S. 651, 663 (1997); see United States v. Arthrex, Inc., 141 S. Ct. 1970, 1985–86 (2021).

[7] Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2192 (2020); Collins v. Yellen, 141 S. Ct. 1761, 1787 (2021).

[8] *Seila Law*, 140 S. Ct. at 2202 (quoting Bowsher v. Synar, 478 U.S. 714, 730 (1986)).

[9] Daryl J. Levinson, The Supreme Court 2015 Term—Foreword: Looking for Power in Public Law, 130 Harv L. Rev. 31, 37 (2016).

[10] *Schor*, 478 U.S. at 851.

[11] *Seila Law*, 140 S. Ct. at 2193.

layer of protection for executive personnel.[12] But precisely which factor the Court will emphasize (and the interaction among them) remains a puzzle. In particular, it is unclear whether considerations of design constitute an independent analysis or are merely parasitic upon issues of power and function. For these reasons, scholars have characterized separation of powers doctrine as a "hoary non sequitur"[13] and criticized it for its "[l]ack of progress."[14]

Academic commentary has not successfully explained the doctrinal variation.[15] Scholars have developed complex models to ground the Court's separation of powers jurisprudence. But those models only underscore disagreement over the fundamental building blocks of their theories. Relying on the Vesting Clauses, scholars have argued that the three constitutional branches of government are each assigned distinct functions.[16] These separation models, however, suffer from inconsistency with contemporary practice, not the least from the rise of the powerful administrative state.[17] Other scholars have committed to a more fluid balance among the branches and proposed judicial intervention as a means to restore accountability and good governance.[18] But these balance models offer little doctrinal determinacy and threaten nonjusticiability.[19]

[12] Free Enter. Fund v. PCAOB, 561 U.S. 477, 492 (2010); see also Lisa Shultz Bressman, What *Seila Law* Says About Chief Justice Roberts' View of the Administrative State, U. Chi. L. Rev. Online (Aug. 27, 2020), https://lawreviewblog.uchicago.edu/2020/08/27/seila-bressman [https://perma.cc/97HT-CNRH] (arguing that *Seila Law* changes existing jurisprudence by "let[ting] the structure of the agency determine the degree of presidential control over its principal officers").

[13] Stephen L. Carter, The Independent Counsel Mess, 102 Harv. L. Rev. 105, 105 (1988).

[14] M. Elizabeth Magill, The Real Separation in Separation of Powers Law, 86 Va. L. Rev. 1127, 1129 (2000); see also Jerry L. Mashaw, Of Angels, Pins, and For-Cause Removal: A Requiem for the Passive Virtues, U. Chi. L. Rev. Online (Aug. 27, 2020), https://lawreviewblog.uchicago.edu/2020/08/27/seila-mashaw [https://perma.cc/BMT9-NK6C] (characterizing the doctrine on for-cause removal as a "jurisprudential train wreck").

[15] See infra Part I.

[16] See infra notes 32–36 and accompanying text.

[17] See infra notes 40–48 and accompanying text. Strict separation-model theorists question the legitimacy of the modern administrative state, prominently by appeals to the nondelegation doctrine. E.g., Gary Lawson, Delegation and Original Meaning, 88 Va. L. Rev. 327, 332 (2002) (arguing that the "civics-book model of legislators legislating, executives executing, and judges judging has enormous intuitive—and legitimating—power," which explains the modern obsession with the nondelegation doctrine despite its disuse); Ilan Wurman, Nondelegation at the Founding, 130 Yale L.J. 1490, 1493–94 (2021) (arguing there is significant evidence the Founding generation adhered to a robust nondelegation doctrine that was keenly faithful to traditional separation of powers); see also infra Subsection IV.B.3.

[18] See infra notes 49–55 and accompanying text.

[19] See infra notes 56–57 and accompanying text.

Most attempts to combine the two main approaches are limited to specialized arenas and have not generated consensus.[20] The most recent scholarly strands have suggested exogenous approaches that abandon existing doctrinal molds altogether.[21]

This Article argues that, in contemporary discourse about separation of powers, an important piece of the puzzle is missing. The Article articulates a theory of separation of structures, which in its simplest version posits that political authority should depend not only on the *power* being exercised but also on the *institutional structure* of the government entity that exercises the power. Previous theories—separation and balance models alike—have focused exclusively on the nature or the magnitude of the contested *functions*: for example, whether an agency in the executive branch has performed actions that are adjudicative in nature (and therefore encroached on the judiciary), or whether Congress has assigned to itself so extensive an authority as to disrupt the distribution of powers among the constitutional branches.[22] But an account of separation of powers is incomplete without considering the *structural design* of the entity performing the contested functions: for example, whether an agency's unitary structure concentrates power and heightens the need for accountability, or whether a multimember body facilitates deliberation and expertise necessary for technical decision-making. The case law of the past decade has unmistakably established the relevance of institutional design.[23] This Article supplies this missing account of institutional structure in separation of powers.

Importantly, separation of structures originated in ancient Greek and Roman political theory, indelibly shaped the Founding generation's understanding, and formed an integral part of the constitutional design. Separation of powers—the structural *and* the functional strands—finds its genesis in Aristotle's typology of regimes, which divides constitutions into six types based on the numerosity of the governing class and constitution's compliance with (or deviation from) the normative ends of government.[24] Polybius, a second-century Greek historian, transforms

[20] See infra Section I.C.
[21] See infra notes 73–78.
[22] See infra Sections I.A–B.
[23] E.g., Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2191–92 (2020); Free Enter. Fund v. PCAOB, 561 U.S. 477, 492 (2010); Collins v. Yellen, 141 S. Ct. 1761, 1770–71 (2021).
[24] See infra Section II.A.

this typology into a theory of mixed government.[25] None of the basic Aristotelian constitutional forms (monarchy, aristocracy, and democracy), individually considered, instantiates desirable political design. The perfect constitution incorporates each regime type. Separation of structures remained highly influential in the early-modern period: Montesquieu subscribed to a version of the model,[26] and the English political theorists adapted it to justify the constitutional setup of England.[27] The Founding generation, well-versed in classical philosophy and ancient history, saw separation of structures and mixed government as background assumptions of any successful constitutional design.[28] Although the Founders ultimately abandoned the British (what I call the sociological) notion of mixed government, the structural provisions of the Constitution, with its institution of representation, evinced a return to Aristotelian separation of structures. The absence of separation of structures in contemporary discussion accounts in part for the doctrinal disarray and the scholarly disagreement.[29]

This Article makes three main contributions. First, it fleshes out the theory of separation of structures as distinct from contemporary scholarly approaches. Second, it writes the intellectual history of separation of structures, which has been an integral part of the separation of powers enterprise since its inception, including at the Founding. Third, it explores the scholarly and doctrinal implications of structural separation of

[25] See infra Section II.B.

[26] See infra Section II.D.

[27] See infra Section II.C.

[28] See infra Part III.

[29] Most scholars give only cursory treatment to the Aristotelian origins of separation of powers. See, e.g., Steven G. Calabresi, Mark E. Berghausen & Skylar Albertson, The Rise and Fall of the Separation of Powers, 106 Nw. U. L. Rev. 527, 529–36 (2012). Serious assessments of classical political philosophy's contribution to modern jurisprudence are outdated and cannot account for the dramatic rise of the administrative state. See John A. Fairlie, The Separation of Powers, 21 Mich. L. Rev. 393, 393–94 (1923); Arthur S. Miller, Separation of Powers: An Ancient Doctrine Under Modern Challenge, 28 Admin. L. Rev. 299, 300 (1976); Malcolm P. Sharp, The Classical American Doctrine of the "Separation of Powers," 2 U. Chi. L. Rev. 385, 386–87 (1935) (identifying Aristotle's *Politics* as containing the "original statement of the doctrine" of mixed regimes "closely related in classic American political writing to the separation of powers"). While Gordon S. Wood, The Creation of the American Republic, 1776–1787, at 152–53 (1998) rejects the mixed-regime view of separation of powers, John Hart Ely, The Apparent Inevitability of Mixed Government, 16 Const. Comment. 283, 292 (1999) acknowledges its inevitability. Part III argues that while Wood rightly points out the demise of the British theory, the Founders' rejection of the sociological version of mixed government in fact signaled a return to the basic Aristotelian model.

powers. In particular, adjudicating the constitutionality of agency structures requires methodological pluralism that incorporates the normative values underlying the structural design. That is, under separation of structures, current doctrine should evolve beyond the formalism heavily criticized by scholars. This structural framework thus provides a limiting principle to the doctrine of *Free Enterprise Fund*, *Seila Law*, and *Collins v. Yellen*. Further, congressional delegation to agencies cannot be conceptualized as a violation of separation of powers on the sole ground that delegation allows executive branch agencies to exercise legislative power. Instead, advocates of a muscular nondelegation doctrine often fail to recognize that agency *structure* can mitigate potential violations of *functional* separation of powers. Both implications are urgent in today's doctrinal milieu. Not only does the Court continue to entrench its agency-structure jurisprudence—it appears poised to extend the nondelegation doctrine.[30]

The remainder of the Article proceeds as follows. Part I situates separation of structures within the existing scholarly models. Part II turns to the classical and early-modern origins of separation of structures. Part III examines the adoption of separation of structures as part of Founding-era constitutional design. Part IV discusses doctrinal and scholarly implications.

I. CURRENT SCHOLARLY APPROACHES

Three approaches have dominated contemporary scholarship on separation of powers: separation models, balance models, and mixed or exogenous models.[31] This Part of the Article assesses each approach before situating separation of structures among them.

[30] See infra Subsection IV.B.3.

[31] I adopt the nomenclature of Aziz Z. Huq, Separation of Powers Metatheory, 118 Colum. L. Rev. 1517, 1526 (2018) (reviewing Josh Chafetz, Congress's Constitution: Legislative Authority and Separation of Powers (2017)). Scholarly approaches to separation of powers have traditionally been divided into formalist and functionalist camps. See Peter L. Strauss, Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?, 72 Cornell L. Rev. 488, 489 (1987). But as I explain, this formulation is unhelpful because the so-called *formalist* approach is in fact based strictly on *functions* and the types of authority exercised by government units. See infra notes 66–67 and accompanying text.

A. Separation Models

Separation models posit that the Constitution sets up distinct branches of the federal government and assigns distinct functions to each branch. A simplified version states: "Congress legislates, and it only legislates; the President sees to the faithful execution of those laws and, in the domestic context at least, that is all he does; the courts decide specific cases of law-application, and that is their sole function."[32] Scholars ground this thesis in the Vesting Clauses, which they read as granting a particular function (legislative, executive, or judicial) to a branch of government (and no other branch),[33] while demarcating "sharply defined and judicially enforceable lines among the three distinct branches of government."[34] Beyond constitutionally specified exceptions—for example, the ability of the House and Senate to impeach and convict, respectively, which involves core executive (prosecutorial) and judicial (adjudicative) functions—separation of powers doctrine must police any branch's encroachment on the constitutional duties of another branch.[35] A recent instantiation of this line of scholarship pushes its textualist

[32] Peter L. Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 Colum. L. Rev. 573, 577 (1984); accord Steven G. Calabresi & Saikrishna B. Prakash, The President's Power to Execute the Laws, 104 Yale L.J. 541, 544 (1994) ("Congress' grants of legislative powers must enable it to legislate, the President's grant of the executive power must enable him to execute all federal laws, and the federal judiciary's grant of the judicial power must enable the federal courts to decide certain cases and controversies."); INS v. Chadha, 462 U.S. 919, 951 (1983) ("The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility.").

[33] See Steven G. Calabresi, The Vesting Clauses as Power Grants, 88 Nw. U. L. Rev. 1377, 1377, 1390 (1994); Saikrishna B. Prakash & Michael D. Ramsey, The Executive Power over Foreign Affairs, 111 Yale L.J. 231, 256 (2001) ("[W]hen one compares the introductory clauses of the first three Articles, the Article II Vesting Clause must be read as a grant of power.").

[34] John F. Manning, Separation of Powers as Ordinary Interpretation, 124 Harv. L. Rev. 1939, 1943 (2011). But see Victoria Nourse, Reclaiming the Constitutional Text from Originalism: The Case of Executive Power, 106 Calif. L. Rev. 1, 19, 23 (2018) (arguing that some originalist-textualist commentaries have improperly enriched the meaning of select constitutional clauses and terms to advance their policy goals); Jack M. Beermann, An Inductive Understanding of Separation of Powers, 63 Admin. L. Rev. 467, 469–70 (2011) (criticizing the reliance on the Vesting Clauses in adjudicating separation of powers disputes); Jed Handelsman Shugerman, Vesting, 74 Stan. L. Rev. 1479, 1483 (2022) ("[A] closer study of the word 'vest' as used in the eighteenth century and as defined in the era's dictionaries, as well as a close reading of the Constitution and other early charters, all suggest that the word 'vest' and the Executive Vesting Clause did not imply indefeasibility or completeness.").

[35] See U.S. Const. art. I, § 2, cl. 5; id. art. I, § 3, cl. 6.

approach to an extreme and argues that the Constitution has *no* freestanding doctrine of separation of powers; instead, the judiciary should apply ordinary, nonpurposive tools of *statutory* interpretation to specific constitutional clauses that dictate the structure of our government.[36]

An influential outgrowth of separation models is the unitary executive thesis: the President must have direct control over all federal officers exercising the executive power.[37] Proponents ground the unitary executive thesis in constitutional text (e.g., Article II's Vesting Clause), historical practices, and applications of the Constitution's founding commitments to today's institutional and political landscape.[38] The unitary executive thesis has found expression in separation of powers doctrine, most conspicuously in *Myers v. United States* and *Seila Law v. CFPB*.[39]

Separation models suffer from inconsistency with contemporary practice.[40] In addition to legislating, Congress wields immense power over the execution of the laws through the appropriations and oversight process;[41] in addition to executing the laws, the President plays an outsized role in lawmaking through executive orders and his control over the powerful administrative state;[42] as soon as we depart from the outdated idea that judicial decision-making is to discover the "brooding

[36] Manning, supra note 34, at 1948–49.

[37] See Steven G. Calabresi & Kevin H. Rhodes, The Structural Constitution: Unitary Executive, Plural Judiciary, 105 Harv. L. Rev. 1153, 1158 (1992); Calabresi & Prakash, supra note 32; Steven G. Calabresi & Christopher S. Yoo, The Unitary Executive: Presidential Power from Washington to Bush passim (2008).

[38] Calabresi & Prakash, supra note 32, at 598; Saikrishna Bangalore Prakash, Imperial from the Beginning: The Constitution of the Original Executive 1–7, 18–19 (2015); Lawrence Lessig & Cass R. Sunstein, The President and the Administration, 94 Colum. L. Rev. 1, 4 (1994) (justifying the unitary executive "on the best reading of the framers' structure translated into the current, and radically transformed, context").

[39] Myers v. United States, 272 U.S. 52, 119 (1926); Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2197 (2020).

[40] See Huq, supra note 31, at 1529–30.

[41] See Brian D. Feinstein, Congress in the Administrative State, 95 Wash. U. L. Rev. 1187, 1192 (2018) (demonstrating that agency infractions, when subject to congressional oversight hearings, are 18.5% less likely to recur).

[42] Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245 passim (2001); Jessica Bulman-Pozen, Administrative States: Beyond Presidential Administration, 98 Tex. L. Rev. 265, 270 (2019) ("[M]ost significant policymaking comes from agency action rather than legislation.").

omnipresence in the sky,"[43] the federal judiciary makes policy.[44] Each constitutional branch of the government thus performs actions seemingly beyond what their Vesting Clauses and enumerated powers would allow. The unitary executive thesis similarly deviates from reality: despite recent decisions cementing presidential accountability for agency actions, the Supreme Court has never overruled *Humphrey's Executor v. United States*,[45] and many officials heading agencies with executive power remain subject to for-cause removal restrictions.[46] To be fair, separation-model scholars acknowledge (and lament) the incongruity between their theory and actual practice.[47] But for this reason, they are criticized for "slid[ing] into a backward-looking Burkean *cri de coeur*."[48]

B. Balance Models

By contrast, the balance models frame separation of powers not as strictly confining each branch within its constitutionally assigned functions but as maintaining a fluid balance of governmental powers.[49] Balance theorists reject the view that the constitutional text assigns crisply delineated functions to each branch of government.[50] Instead, some

[43] S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

[44] See, e.g., Thomas J. Miles & Cass R. Sunstein, Do Judges Make Regulatory Policy?: An Empirical Investigation of *Chevron*, 73 U. Chi. L. Rev. 823, 827 (2006) (arguing that federal judges engage in regulatory policymaking because "as the law now stands, the application of the *Chevron* framework, and hence the meaning of federal regulatory law, shows a significant effect from the political convictions of federal judges").

[45] See Cass R. Sunstein & Adrian Vermeule, The Unitary Executive: Past, Present, Future, 2020 Sup. Ct. Rev. 83, 85 (2021).

[46] See Kirti Datla & Richard L. Revesz, Deconstructing Independent Agencies (and Executive Agencies), 98 Cornell L. Rev. 769, 786 (2013) (listing agencies with statutory removal protections).

[47] Calabresi, Berghausen & Albertson, supra note 29, at 536–45.

[48] Huq, supra note 31, at 1533.

[49] Some of the leading balance models include Rebecca L. Brown, Separated Powers and Ordered Liberty, 139 U. Pa. L. Rev. 1513, 1516 (1991); Martin S. Flaherty, The Most Dangerous Branch, 105 Yale L.J. 1725, 1730 (1996); Abner S. Greene, Checks and Balances in an Era of Presidential Lawmaking, 61 U. Chi. L. Rev. 123, 124 (1994); Jon D. Michaels, An Enduring, Evolving Separation of Powers, 115 Colum. L. Rev. 515, 520 (2015).

[50] See, e.g., Curtis A. Bradley & Martin S. Flaherty, Executive Power Essentialism and Foreign Affairs, 102 Mich. L. Rev. 545, 546, 551 (2004) (challenging the Vesting Clause thesis, which the authors define as "the claim that the Article II Vesting Clause implicitly grants the President a broad array of residual powers not specified in the remainder of Article II" on both textual and historical grounds); Julian Davis Mortenson, Article II Vests the Executive Power, Not the Royal Prerogative, 119 Colum. L. Rev. 1169, 1169 (2019) (arguing that the Vesting Clause thesis is "demonstrably wrong").

theorists have proposed that the Court should restore a "balance of power" when interbranch conflicts "detract from fairness and accountability in the process of government" and thus threaten individual liberty.[51] Others have argued that tripartite separation of powers has given (and should give) way to a new administrative separation of powers, which employs institutional counterweights "to promote good governance, political accountability, and compliance with the rule of law."[52] Still more have emphasized "normative pluralism" (i.e., that separation of powers fosters a multiplicity of goals) and "institutional heterogeneity" within the federal government, the combination of which justifies the Court's dynamic methodologies when adjudicating separation of powers disputes.[53] What unifies these models is their commitment to maintaining a proper institutional balance among the branches of government to instantiate values embodied in the Constitution's design.[54] But due to their different normative underpinnings, balance theories do not endorse the same thesis defending one particular branch of government (unlike separation models, which often champion the unitary executive). Instead, they reach vastly different conclusions regarding which branch is too powerful in today's administrative landscape.[55]

Balance models' chief conceptual advantage is their ability to account for the messy institutional and functional arrangement of the federal government. But the fluid nature of balance models gives rise to a shortcoming: doctrinal indeterminacy. One scholar puts this criticism bluntly:

> [I]t is a hopeless enterprise to talk about balance among the branches of government. We have not come close to articulating a vision of what an ideal balance would look like. Even if we had tackled that normative

[51] Brown, supra note 49, at 1531, 1565–66.

[52] Michaels, supra note 49, at 520.

[53] See Aziz Z. Huq & Jon D. Michaels, The Cycles of Separation-of-Powers Jurisprudence, 126 Yale L.J. 346, 351–54 (2016).

[54] See Flaherty, supra note 49, at 1729–30; see also Josh Chafetz, Congress's Constitution, 160 U. Pa. L. Rev. 715, 723 (2012) (observing that Congress currently underutilizes powers that could be used to mitigate separation of powers controversies).

[55] Compare, e.g., Greene, supra note 49, at 138, 155–56 (characterizing the nondelegation doctrine as a constitutional norm whose underenforcement after the New Deal could result in "presidential tyranny" without congressional checks), with Michaels, supra note 49, at 520 (characterizing the rise of the administrative state, together with an administrative separation of powers, as promoting "good governance, political accountability, and compliance with the rule of law").

> question, we have no way to measure the distribution of power among the branches at any point in time and no method to predict the effect of an institutional arrangement.[56]

That is, balance theorists disagree on three issues: first, what constitutes the normative baseline for the constitutional equilibrium of powers (e.g., should powers be roughly divided among government bodies?); second, how to achieve that ideal equilibrium through doctrine (e.g., how should courts calibrate the distribution of power among the constitutional branches and agencies, even assuming that they know what the ideal balance commands?); third, how any particular structural innovation would affect the existing balance of powers. To be fair, balance theorists recognize these issues as features rather than bugs of their models. They simply concede (or even counsel) nonjusticiability of many separation of powers disputes.[57]

C. Mixed and Exogenous Approaches

A third approach covers both mixed and exogenous theories. Some scholars reject pure separation or balance models, instead drawing from both to devise theories that are rooted in functional division but which fulfill broader normative ends. In the context of criminal law, for example, one scholar has advocated maintaining a "strict enforcement of the separation of powers" and "a bright-line rule that disallows blending," but for the purpose of protecting liberty interests.[58] Likewise, another scholar has characterized separation of powers as preserving the integrity of a process that incorporates distinct stages of legislation, execution, and

[56] M. Elizabeth Magill, Beyond Powers and Branches in Separation of Powers Law, 150 U. Pa. L. Rev. 603, 604–05 (2001).

[57] See, e.g., Flaherty, supra note 49, at 1828 ("The Supreme Court should rarely intervene in separation of powers conflicts. . . . [at least in part] because the functionalist baseline is inherently difficult—though not necessarily impossible—for the judiciary to police."); Nikolas Bowie & Daphna Renan, The Separation-of-Powers Counterrevolution, 131 Yale L.J. 2020, 2030 (2022) (championing a return to what the authors describe as "republican" separation of powers, which features political rather than judicial enforcement); see also Aziz Z. Huq, Removal as a Political Question, 65 Stan. L. Rev. 1, 5–6 (2013) ("[J]udicial enforcement of presidential removal authority will not reliably promote presidential control or democratic accountability.").

[58] Rachel E. Barkow, Separation of Powers and the Criminal Law, 58 Stan. L. Rev. 989, 996 (2006).

adjudication, but in furtherance of the broader value of articulated governance.[59]

By contrast, exogenous models often reject both separation and balance models and deny that separation of powers is grounded in normative values inherent in the Constitution.[60] That is, they challenge the assumption that constitutional text or structure should drive the development of separation of powers doctrine, pointing to broader human values and transformations in the modern political landscape. For example, some scholars argue that, due to the emergence of strong parties, separation of powers is threatened not by interbranch conflict but instead when a party-unified government shifts interbranch dynamics from competition to cooperation.[61] Other scholars have abandoned appeals to constitutional values entirely and focused on what institutional arrangement best advances social welfare (in one case arguing in favor of the executive).[62]

Mixed and exogenous models have brought a breath of fresh air but have not generated consensus. Some prominent mixed models are confined to specific doctrinal areas, such as criminal law.[63] Further, this Article's contention is that any mixed approach, like the separation and balance models it combines, cannot completely account for separation of powers doctrine because it overlooks institutional structure. Separation of powers also cannot be grounded solely in public welfare: the upshot of the doctrine in many cases is precisely that structural innovations, even if considered desirable in other respects, are subject to constitutional constraints.[64]

[59] Jeremy Waldron, Separation of Powers in Thought and Practice?, 54 B.C. L. Rev. 433, 434–35 (2013).

[60] See, e.g., Magill, supra note 14, at 1167–74; see also Huq, supra note 31, at 1535–36 (discussing Magill's exogenous model that criticizes both a functional understanding of separation of powers and a balance-focused theory).

[61] See Daryl J. Levinson & Richard H. Pildes, Separation of Parties, Not Powers, 119 Harv. L. Rev. 2311, 2316 (2006).

[62] Eric A. Posner & Adrian Vermeule, The Executive Unbound: After the Madisonian Republic 16–17 (2010).

[63] See Barkow, supra note 58.

[64] E.g., Buckley v. Valeo, 424 U.S. 1, 118–35, 140 (1976) (invalidating the innovative structure of the Federal Election Commission, despite its potential effectiveness in regulating federal elections); see Gillian Metzger, Appointments, Innovation, and the Judicial-Political Divide, 64 Duke L.J. 1607, 1636 (2015). An implication of separation of structures is precisely that some "exogenous" factors (i.e., structural considerations and their underlying normative values) become endogenous to constitutional doctrine.

D. Separation of Structures

A semantic clarification: scholars often characterize separation models as embodying a formalist approach and balance models as embodying a functional approach.[65] This nomenclature is imprecise.[66] As separation-model theorists have themselves stated, they advocate a strict "*functional* separation of powers."[67] That is, separation theorists take a formalist approach to separating the *functions* among the three constitutional branches of government and agencies. Likewise, balance theorists take a functionalist approach to separating those functions. *Both* focus on the functions of government—with respect to their nature or their magnitude.[68] The formalism/functionalism divide is thus a methodological distinction *within* the part of separation of powers doctrine that focuses on governmental functions. As this Article shows, structural separation of powers also admits of formalist and functionalist methodologies.[69]

Figure 1 summarizes the traditional conception of separation of powers.

[65] See Magill, supra note 14, at 1129–30; Strauss, supra note 31, at 489.

[66] For early criticism of the formalism/functionalism dichotomy, see William N. Eskridge, Jr., Relationships Between Formalism and Functionalism in Separation of Powers Cases, 22 Harv. J.L. & Pub. Pol'y 21, 29 (1998); see also Ronald J. Krotoszynski, Jr., Transcending Formalism and Functionalism in Separation-of-Powers Analysis: Reframing the Appointments Power After *Noel Canning*, 64 Duke L.J. 1513, 1516 (2015) (urging scholars to rethink the formalist/functionalist dichotomy in light of the Court's Appointments Clause jurisprudence).

[67] Calabresi et al., supra note 29, at 527 (emphasis added).

[68] Victoria Nourse also criticizes the singular focus on *functions*, reconceiving separation of powers as in terms of government units' shifting popular constituencies. Victoria Nourse, The Vertical Separation of Powers, 49 Duke L.J. 749, 752 (1999); V.F. Nourse, Toward a New Constitutional Anatomy, 56 Stan. L. Rev. 835, 841 (2004); Victoria Nourse, Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers, 99 Geo. L.J. 1119, 1124 (2011); see also Jacob Gersen, Unbundled Powers, 96 Va. L. Rev. 301, 304 (2010) (arguing that the more that government is constrained by the electoral process, the less need there is for a functional separation of powers). Nourse's theory represents an innovative reframing of the sociological model based on structural elements of the constitutional branches.

[69] See infra Figure 2; Subsections IV.B.2–3.

Figure 1. Separation of Powers: Traditional Scholarly Approaches

	Traditional Separation of Powers		
Methodological Approach	Formalism	Functionalism	Exogenous Models
Analytical Focus	Functions (Nature of Governmental Authority Exercised)	Power (Magnitude of Governmental Authority Exercised)	
Representative Jurisprudence	*Myers v. United States*; *Stern v. Marshall*	*Humphrey's Executor*; *Morrison v. Olson*	
Scholarly Model	Separation Models	Balance Models	

Under the traditional view, the analytical focus in adjudicating separation of powers disputes lies in the contested authority—i.e., functions (the nature of the authority, e.g., legislative, executive, or adjudicative) or power (the magnitude of the authority, e.g., whether it is too substantial to impede on another governing body's duties). Formalism characterizes the methodological approach of scholars and jurists who emphasize the nature of the contested authority. Relying on the Vesting Clauses, they aim to ensure that a government entity stays within the type of authority assigned to that entity, regardless of the concentration of power within it. Functionalism characterizes the methodological approach of scholars and jurists who emphasize the magnitude of the contested authority. Relying on ideas of checks and balances, they aim to ensure that no branch of government becomes too powerful, even if one occasionally exercises the type of authority usually assigned to another.

Traditional scholarship overlooks considerations of structural design, which, as this Article shall argue, has been an integral component of separation of powers since its inception. Figure 2 illustrates how separation of structures fits into existing scholarly paradigms.

Figure 2. Separation of Structures

	Traditional Separation of Powers		**Separation of Structures**	
Relevant Inquiry	Governmental Authority		Governmental Structure	
Methodological Approach	Formalism	Functionalism	Formalism	Functionalism
Analytical Focus	Functions (Nature of Governmental Authority Exercised)	Power (Magnitude of Governmental Authority Exercised)	Defined Markers of Impermissible Structure	Normative Values Underlying Structural Design
Representative Jurisprudence	*Myers v. United States*; *Stern v. Marshall*	*Humphrey's Executor*; *Morrison v. Olson*	*Free Enterprise Fund*; *Seila Law*?	*Seila Law*? *Collins v. Yellen*?
Scholarly Models	Separation Models	Balance Models	Select Exogenous Models	

Under this view, in resolving separation of powers disputes, courts should consider not only the contested authority but also the structure of the government entity exercising that contested authority. That elements of structural design can be independent markers of (un)constitutionality is a hallmark of recent separation of powers case law.[70] Within the analytical focus on governmental structure, however, two methodological possibilities exist. Courts may adopt a formalist or a functionalist approach, just as they do when their analysis focuses on the contested authority. The formalist approach to analyzing government structure, which the Court seemingly endorsed in *Free Enterprise Fund*, results in defined markers of impermissible structure. An obvious example is the dual-layered for-cause removal protections invalidated in the case of the Public Company Accounting Oversight Board.[71] The functionalist approach to analyzing government structure focuses on the normative values underlying the structural design. For example, constitutionality may require considering not whether an agency has a single head but whether the accountability and decisional vigor underlying the design are

[70] Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2192 (2020); Free Enter. Fund v. PCAOB, 561 U.S. 477, 483–84 (2010); Collins v. Yellen, 141 S. Ct. 1761, 1770 (2021).

[71] See *Free Enter. Fund*, 561 U.S. at 497 (singling out multiple-layered for-cause removal provisions as a "Matryoshka doll" that is constitutionally impermissible). Cf. Jane Manners & Lev Menand, The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence, 121 Colum. L. Rev. 1, 13 (2021) (reading "inefficiency, neglect of duty, and malfeasance in office" as *authorizing* presidential removal rather than *protecting* officers from removal).

appropriate.[72] The remainder of this Article develops and assesses this structural separation of powers.

The Court's recent separation of powers jurisprudence, particularly its invalidation of the CFPB's and the FHFA's structures, has inspired a lively scholarly discourse.[73] But this strand of scholarship similarly overlooks the central role of structure. Its focus is exogenous to separation of powers doctrine. Some scholars, for example, criticize the juristocratic turn of the Court, attributing its inclination to invalidate institutional arrangements agreed upon by Congress and the President to the misguided decision of *Myers v. United States*.[74] Instead of adjudicating the legal entitlements of the branches, the Court should adhere to a republican conception of separation of powers.[75] Under the republican model, the judiciary defers to the representative branches and the products of an interbranch legislative process.[76] Other scholars propose incorporating an antisubordination analysis into the separation of powers inquiry (because marginalized groups bear particularized costs of maintaining the government's balance of powers)[77] or have turned to the

[72] These functionalist concerns and normative values animated much of the D.C. Circuit's decision on the constitutionality of the CFPB's institutional structure (which the Ninth Circuit adopted in its decision in *Seila Law*). CFPB v. Seila Law LLC, 923 F.3d 680, 682 (9th Cir. 2019); PHH Corp. v. CFPB, 881 F.3d 75, 93 (D.C. Cir. 2018) (en banc) (explaining that the unitary structure of the CFPB, with its single head, generates decisional clarity), *abrogated by* Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2201 (2020).

[73] E.g., Matthew B. Lawrence, Subordination and Separation of Powers, 131 Yale L.J. 78, 86 (2021) (finding that prominent separation of powers tools disproportionately burdened marginalized communities and arguing for an integration of antisubordination ideals into separation of powers doctrine); Bowie & Renan, supra note 57, at 2030 (proposing a "republican" separation of powers that recenters the separation of powers analysis with the political branches); Z. Payvand Ahdout, Enforcement Lawmaking and Judicial Review, 135 Harv. L. Rev. 937, 941 (2022) (observing that the judiciary can and does play a significant role in constraining the executive branch through managerial developments in federal courts); David Zaring, Toward Separation of Powers Realism, 37 Yale J. on Reg. 708, 714 (2020) (suggesting that modern separation of powers doctrine provides only weak support for affording plaintiff relief); Robert L. Glicksman & Richard E. Levy, The New Separation of Powers Formalism and Administrative Adjudication, 90 Geo. Wash. L. Rev. 1088, 1095–97 (2022) (exploring the doctrinal implications of the new formalist approach to separation of powers taken by the Supreme Court). See generally Caleb Nelson, Vested Rights, "Franchises," and the Separation of Powers, 169 U. Pa. L. Rev. 1429, 1432–33 (2021) (exploring whether franchises could be understood as vested rights and where such grants would fit into the separation of powers framework).

[74] Bowie & Renan, supra note 57, at 2077.

[75] Id. at 2030.

[76] Id.

[77] Lawrence, supra note 73, at 86–89.

federal courts' managerial tools as sources of judicial power to check executive expansion.[78] By contrast, separation of structures is endogenous to separation of powers. Assuming that the federal judiciary continues to adjudicate separation of powers disputes, separation of structures aims to propel the doctrine to evolve beyond its much-criticized formalism.[79]

One final clarification: although traditional accounts of separation of powers neglect matters of design, administrative law scholarship has increasingly focused on agency structure.[80] This Article provides a missing link between this lively conversation in administrative law and constitutional doctrine. Agencies' institutional design not only involves assessing optimal bureaucratic structures but also deeply implicates constitutional concerns (both in the sense of the "small c" by constituting the fundamental governance structures of our polity[81] and in the sense of the "Large C" as demanded by the Constitution).

II. THE ARISTOTELIAN ORIGINS AND EVOLUTION OF SEPARATION OF POWERS

This Part of the Article traces the origins and the development of (in particular structural) separation of powers from Aristotle to the early-modern British theorists. It makes three main arguments. First, separation of powers originates from Aristotle's *Politics*, which divides constitutional regimes into categories and functional powers into distinct types. Importantly, the Aristotelian typology of regimes postulates a democratic structuring principle for all correct constitutions: both

[78] Ahdout, supra note 73, passim.

[79] See Glicksman & Levy, supra note 73, passim; Vicki C. Jackson, Accommodating an Old Constitution to the 21st Century State: of Law and Politics, *in* The Evolution of the Separation of Powers Between the Global North and the Global South 114, 128 (David Bilchitz & David Landau eds., 2018).

[80] Gillian E. Metzger, Administrative Constitutionalism, 91 Tex. L. Rev. 1897, 1903 (2013) (characterizing administrative constitutionalism as a result of developments in administrative-law scholarship, "which is increasingly focused on questions of institutional design and internal agency structure"); Gillian E. Metzger, Foreword: Embracing Administrative Common Law, 80 Geo. Wash. L. Rev. 1293, 1363–65 (2012) (summarizing recent scholarship on agencies' structural characteristics); Jacob E. Gersen, Designing Agencies, *in* Research Handbook on Public Choice and Public Law 333 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010) (providing a general overview of the theoretical priors and issues of political control associated with agency design).

[81] See, e.g., William N. Eskridge, Jr. & John Ferejohn, A Republic of Statutes: The New American Constitution 12–13 (2010) (arguing that the United States "enjoys a constitution of statutes supplementing and often supplanting its written Constitution as to the most fundamental features of governance").

aristocracy and monarchy are subject to electoral control.[82] That is, Aristotelian monarchy and aristocracy feature no monarch or landed nobility in the early-modern sense but are analytical types based on the numerosity of the decision-making body. Second, the Aristotelian model acquired a normative thrust through the rise of mixed-regime theory. Inspired by the Roman constitution, Polybius crafts an ideal mixed government featuring structural designs of all three Aristotelian constitutional types, with distinct functional powers assigned to each. Third, the classical model of separation of powers—embracing both functional and structural concerns—remained highly influential among early-modern thinkers, including Montesquieu and Blackstone. In England, theorists adapted it for the purpose of justifying the king in Parliament. As the next Part shows, both the classical (Aristotelian-Polybian) and the English models formed important background assumptions of the Founding Era's constitutional design.

A. Aristotle's Typology of Constitutions

A foundational work of political philosophy, Aristotle's *Politics* both criticizes prior (especially Platonic) political thought and defends Aristotle's own theory of the state, citizenship, and authority.[83] Central to the *Politics* is a division of constitutional regimes into three types based on the numerosity of the sovereign body—one, few, or the multitude.[84] Because any government may be oriented to the common good or motivated by private interest, each constitutional type has a correct and an incorrect version.[85] Aristotle thus identifies six distinct forms of government: monarchy/tyranny, aristocracy/oligarchy, and

[82] See infra Section II.A. See generally Samuel Issacharoff, Gerrymandering and Political Cartels, 116 Harv. L. Rev. 593 (2002) (discussing electoral competition and democracy).

[83] While all translations from the Greek, unless otherwise noted, are mine, I cite to a modern English-language scholarly edition for access to context. See Aristotle, Politics (C.D.C. Reeve trans., Hackett Publ'g Co. 1998) (c. third century B.C.E.) [hereinafter Aristotle's Politics]. I use the Bekker numbers for citation to pages. For a general scholarly survey of the *Politics*, see Richard Kraut, Aristotle: Political Philosophy (2002).

[84] See Aristotle's Politics, supra note 83, at 1279a25–27.

[85] For Aristotle, the substantive common good that a political community can achieve consists in the development, among its citizens, of intellectual and social excellences that enable human flourishing. See Donald Morrison, The Common Good, *in* The Cambridge Companion to Aristotle's Politics 176, 182–88 (Marguerite Deslauriers & Pierre Destrée eds., 2013). In contemporary philosophy, the capabilities approach approximates this view. See, e.g., Martha C. Nussbaum, Nature, Function, and Capability: Aristotle on Political Distribution, 6 Oxford Stud. Ancient Phil. 145 (1988).

polity/democracy.[86] Monarchy and tyranny feature a singular sovereign: the former aims at the common good while the latter at private advantage. Aristocracy and oligarchy endow a small decision-making class with political power, but only the former acts in the interest of all. Polity and democracy empower a large swath of the citizenry to participate in the political process, but the latter is motivated solely by what benefits the ruling majority.[87] Table 1 illustrates this typology of regimes:

Table 1. Aristotle's Typology of Constitutional Regimes

Size of the Governing Class (*politeuma*, 1279a25)	**Correct Constitutional Form** (*orthai politeiai*, 1279a29-30)	**Deviant Constitutional Form** (*parekbaseis*, 1279a31)
One	Monarchy (*basileia*, 1279a34)	Tyranny (*turranis*, 1279b5)
Few	Aristocracy (*aristokratia*, 1279a35)	Oligarchy (*oligarchia*, 1279b5)
The Multitude (*plēthos*, 1279a37)	Polity (*politeia*, 1279a39)	Democracy (*dēmokratia*, 1279b6)

Strikingly, "polity" (*politeia*) refers to the correct constitutional form of the rule of the multitude. *Politeia* is the *general* Greek term for "constitution,"[88] broadly conceived as the system of laws and practices of

[86] See Aristotle's Politics, supra note 83, at 1279a32–1279b8.

[87] One might consider Aristotelian democracy an instance of the tyranny of the majority.

[88] Scholars point to Isocrates's *Panegyricus* and Demosthenes's *Philippics*—both oratorial speeches—to support the proposition that *politeia* refers to a democracy. See 3 W.L. Newman, The Politics of Aristotle 193 (1902) (commenting on Aristotle's Politics, supra note 83, at 1279a37). Isocrates criticizes Sparta for "making war on the *politeiai* and establishing monarchies," listing a series of Spartan military expeditions against smaller Greek city-states (Mantinea, Thebes, and Olynthus) and related efforts to assist kingships and monarchies to expand their territories. See Isocrates, Panegyricus §§ 125–26, *in* Isocrates II 23, 58 (Terry L. Papillon trans., 2004). Although Isocrates's distinction between *politeiai* and monarchies may lead to an inference that the term *politeiai* refers to democratically constituted states, such an inference is unwarranted. While Mantinea and Olynthus were democracies, Thebes was a prominent oligarchy prior to the democratic reforms of 378 B.C.E. See Eric W. Robinson, Democracy Beyond Athens: Popular Government in the Greek Classical Age 97 (2011); Paul Cartledge, Democracy: A Life 195 (2016). After the conquest, Sparta instituted a strong pro-Spartan oligarchy instead of a moderate oligarchy. Isocrates's use of *politeiai* thus clearly encompasses constitutional forms beyond the democratic, and evidence from Demosthenes is unclear—whether *politeiai* there refers to democracies is a matter of editorial discretion. See Demosthenes, Second Philippic § 21, *in* Demosthenes, Speeches 1–17, at 100, 109 (Jeremy Trevett trans., 2011) (translating the term *politeiai* as "constitutionally governed states," which could encompass democracy or aristocracy).

a political community that structures the conditions of citizenship.[89] *Politeia* is thus variously described as the form of life of the city or "the soul of the state."[90] Aristotle's use of the general Greek term for "constitution" to denote the correct *democratic* constitution deserves explanation.

An assessment of Aristotle's political philosophy shows that the correct rule of the multitude supplies a structural principle for *all* constitutional forms: they must all aim at the common good. The most effective mechanisms for guaranteeing the regime's orientation toward the common rather than private interest are democratic: even Aristotelian monarchies feature electoral control and other forms of accountability or expressions of popular consent. Because the correct form of democracy supplies this overarching principle shared by *every* correct regime type, Aristotle gives it the name of *politeia—the constitution*.[91]

The remainder of this Section examines Aristotelian monarchy, aristocracy, and "polity" in greater detail. The Founders read the *Politics* in painstaking detail and often in the original Greek.[92] An accurate analysis of the Constitution's separation of powers provisions requires us to proceed with the working knowledge of classical political theory that the Founders possessed.

1. Monarchy

Aristotelian monarchy consists of five subdivisions, each of which incorporates what we would call democratic[93] institutions to ensure the regime's orientation toward the common good.

The first, heroic kingship, consists in the hereditary rule of one person.[94] Heroic kingship initially possesses broad powers over the

[89] See, e.g., Verity Harte & Melissa Lane, Introduction, *in Politeia* in Greek and Roman Philosophy 1, 1 (Verity Harte & Melissa Lane eds., 2013); Kraut, supra note 83, at 15.

[90] See Isocrates II, Panathenaicus § 138 (Terry L. Papillon trans., 2004) (c. 339 B.C.E.); see Aristotle's Politics, supra note 83, at 1295a40–41.

[91] Cf. Kevin M. Cherry, The Problem of Polity: Political Participation and Aristotle's Best Regime, 71 J. Pol. 1406, 1406 (2009) (arguing that polity constitutes "the most developed species within its genus [of constitutions]").

[92] See infra notes 191–99 and accompanying text.

[93] The terms "democratic institutions" and an "overarching democratic principle" that structures all Aristotelian constitutions denote democracy in a descriptive sense—what Aristotle would recognize as the rule of the multitude. I do not, in those contexts, refer to democracy in the normative Aristotelian sense, i.e., a deviant form of the rule of the multitude that does not look to the common good. See supra Table 1.

[94] Aristotle's Politics, supra note 83, at 1285b3–19.

conduct of warfare and the making of domestic policy; but over time, voluntary relinquishment and popular pressure reduce them into a single authority over certain religious rites.[95] Importantly, this subtype of monarchy originates not in the arbitrary decision of an individual, but in the king's benefaction of the multitude, who consent to the king's rule out of gratitude.[96] Its distinguishing features include its rule over "willing subjects," its possession of "limited, defined powers," and its establishment on the basis of law, which Aristotle famously defines as "reason free from desire."[97] The second subdivision of monarchy consists in the masterly rule of the non-Greek king, who exercises his authority due to the consent of the governed. Like heroic kingship, Aristotle concludes that non-Greek kingship constitutes a correct form of monarchy because "kings rule over willing subjects on the basis of law, while tyrants rule over unwilling subjects."[98]

The third subdivision of monarchy is a "dictatorship" or "electoral tyranny."[99] Despite the striking name of electoral *tyranny*, this regime is established on the basis of law, and rests on consent of the governed. Electoral tyranny has a distinctive genesis—the citizenry votes the king into office, for life tenure, a fixed duration, or to perform defined functions.[100] What distinguishes dictatorship from true tyranny is that the former is elective and rules over the willing.[101] Electoral "tyranny" foreshadows the later Roman practice of elected dictatorship, which Hamilton cites in Federalist 70's discussion of executive structure.[102] The fourth and fifth subtypes of monarchy are peripheral to Aristotle's typology, but they also evince elements of democratic design. For

[95] See id. at 1285b9–16.

[96] Id. at 1285b8. The word Aristotle uses for the multitude is *plēthos*—the same term for the sovereign body in a "polity" or democracy.

[97] See id. at 1285b5, 1285b21, 1287a32. Most readers will have encountered this definition in the film *Legally Blonde*, in which Professor Stromwell torments her Harvard Law School class with the authorship of the "immortal words": "The law is reason free from passion." Legally Blonde (Metro-Goldwyn-Mayer 2001); see also Stephen A. Siegal, The Aristotelian Basis of English Law: 1450–1800, 56 N.Y.U. L. Rev. 18, 21 (1981) (assessing the immense influence of Aristotle's notion of law in the early-modern period). Aristotle's "immortal words" were paraphrased by Hamilton in The Federalist No. 78, at 412 (Alexander Hamilton) (J.R. Pole ed., 2005), which describes the judiciary as possessing "neither force nor will, but merely judgment."

[98] See Aristotle's Politics, supra note 83, at 1285a26–27.

[99] Id. at 1285a29–1285b2.

[100] Id. at 1285a34–35.

[101] Id. at 1285b2.

[102] See infra note 213 and accompanying text.

example, in the Spartan institution of "permanent autocratic generalship," monarchy cannot tolerate absolute, unappealable power in *all* matters: the authority of the king is limited to military and extraterritorial affairs.[103]

Monarchy thus emphatically differs from tyranny. For Aristotle (and Founding-era theorists of mixed government), monarchy is a unitary rule subject to electoral control, popular consent, limited powers, and the rule of law—institutions that today instantiate *democratic* values. What distinguishes kingship from the democratic "polity" is institutional structure. The former assigns decision-making power to one, while the latter to the multitude. Both foster the common good by definition, and even monarchy uses democratic mechanisms to ensure this normative outcome.

This insight did not escape the Founders. James Wilson—a drafter of the Constitution[104] and one of Washington's first appointees to the Supreme Court—wrote in his *Lectures on Law*, delivered at the University of Pennsylvania in 1790:

> Aristotle, it seems, has said, that if a man *could* be found, excelling in *all* virtues, such an one would have a *fair title* to be king. These words may well be understood as conveying, and probably were intended to convey, only this unquestionable truth—that excellence in every virtue furnished the strongest recommendation, in favour of its happy possessor, *to be elected* for the exercise of authority.[105]

Wilson recognized that Aristotelian monarchy featured not a king untethered from the popular will but a sole decision-maker accountable to the citizenry through electoral control. The idea that monarchy concentrates power to effectuate the public good, while subject to

[103] Aristotle's Politics, supra note 83, at 1285a2–10. This is like the constitutional boundaries of presidential power: the President is the commander-in-chief, and his foreign-affairs powers are plenary and often immune from judicial review. U.S. Const. art. II, § 2; United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936) (describing "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations").

[104] See William Ewald, James Wilson and the Drafting of the Constitution, 10 U. Pa. J. Const. L. 901, 901 (2008) (discussing Wilson's contribution to the Constitution); Christopher Yoo, James Wilson as the Architect of the American Presidency, 17 Geo. J.L. & Pub. Pol'y 51, 52–53 (2019).

[105] James Wilson, Of the General Principles of Law and Obligation, *in* 1 The Works of the Honourable James Wilson 55, 72 (Phila., Lorenzo Press 1804).

democratic and rule-of-law constraints, would animate the Constitution's design of the presidency.[106]

2. Aristocracy

Unlike monarchy, aristocracy does not concentrate power. Instead, it cultivates intellectual (i.e., expertise) and temperamental (i.e., moderation) excellences in government. Proper aristocracy consists in a "constitution from individuals who are the most unqualifiedly virtuous."[107] That is, aristocratic decision-makers must be virtuous regardless of any arbitrary societal assumption about virtue—they must be objectively virtuous. Oligarchy, for example, values wealth as an indicator of excellence.[108] A wealthy person is therefore oligarchically good (i.e., good given the oligarchic assumption that the possession of wealth correlates with excellence) but not (necessarily) unqualifiedly good (because he is not necessarily a virtuous human being). By contrast, aristocracy features decision-makers with psychological conditions that Aristotle would characterize as ethical and intellectual excellences, including moderation and courage.[109]

Aristocracy (rather than oligarchy, the incorrect version of the rule of the few) is thus a meritocracy.[110] For example, the Carthaginian constitution, by selecting its rulers based on wealth, is not an aristocracy.[111] The ostensible justification was that only the wealthy can afford to govern without yielding to corruption, because they can afford a leisurely life. Aristotle nevertheless concludes that wealth is the incorrect metric: using wealth as an indicator of virtue makes everyone money-lovers—a process that destroys any probative value for excellence that wealth initially may have had.

The attraction of using wealth as a proxy for excellence and its ultimate failure to track virtue characterize the Founding-era debate on

[106] See infra Section III.B.

[107] See Aristotle's Politics, supra note 83, at 1293b3–4.

[108] See id. at 1294b10.

[109] See Richard Kraut, Aristotle's Ethics, Stan. Encyclopedia Phil. (July 2, 2022), https://plato.stanford.edu/entries/aristotle-ethics [https://perma.cc/VK97-BKJ6] (classifying Aristotelian excellences or virtues).

[110] See also David Keyt, Distributive Justice in Aristotle's *Ethics* and *Politics*, 4 Topoi 23, 28 (1985) (characterizing oligarchy as a "joint-stock company whose end is to enrich its shareholders" and aristocracy, in contrast, as "an ethical community directed to education and virtue").

[111] See Aristotle's Politics, supra note 83, at 1273a21–25.

constituting the Senate.[112] By the mid-eighteenth century, most American colonies instituted property qualifications for eligibility to vote or to serve in public office, on the assumption that the propertyless lacked autonomy and did not possess virtue.[113] That is, wealth signaled freedom to make political judgment *and* substantive excellence in the judgment itself. But in designing the Senate, the Founders rejected property qualifications and reverted to the Aristotelian model of selecting a small decision-making body capable of deliberation and moderating the democratic excesses of the House.[114]

Like monarchy, aristocracy features democratic institutions such as electoral control. Officials are elected based on excellence, and even the Carthaginian constitution assigns offices based on electoral success.[115] For Aristotelian separation of structures, aristocracy does not assume lineage, nobility, or the equation of wealth to political power. It aims at the common good of the people, who are entitled to choose the sovereign body of government in accordance with the candidates' intellectual and ethical excellences, even if the decision-making structure is of a small size.

3. Polity and Classical Democracy

Because monarchy and aristocracy feature mechanisms of popular accountability, they resemble components of modern democratic governments.

However, they differ from polity or democracy. Classical Athenian democracy featured direct and full political participation.[116] Radical egalitarianism meant the selection of decision-makers by lot: if all are equal in aptitude, then no one has a stronger claim to public office than

[112] See generally infra Subsection III.C.1 (discussing the original Senate's aristocratic design).

[113] Wood, supra note 29, at 218–19 ("Property had been defined not simply as material possessions but, following Locke, as the attributes of a man's personality that gave him a political character . . . ."); Robert J. Steinfeld, Property and Suffrage in the Early American Republic, 41 Stan. L. Rev. 335, 337, 340–41 (1989) ("[T]hose without property lacked autonomy and would inevitably fall under the sway of others." (citing 1 William Blackstone, Commentaries *171)).

[114] See infra Section III.C.

[115] Aristotle's Politics, supra note 83, at 1273a21–30, 1273b28–29, 1293b3–4.

[116] Mogens Herman Hansen, The Athenian Democracy in the Age of Demosthenes: Structure, Principles, and Ideology 3 (J.A. Crook trans., 1991); Alex Zhang, Ostracism and Democracy, 96 N.Y.U. L. Rev. Online 235, 240 (2021).

another. Election, by its nature, entails two antidemocratic propositions. First, choosing select citizens for offices implies that those citizens are superior in political ability than others—a nonegalitarian claim. Second, election results in a governing body that is necessarily smaller than the citizenry and deprives the majority of direct exercise of political power.[117] Electoral accountability is therefore integral to aristocratic or monarchical constitutional design, but not democracy. Through election, the regime narrows the decision-making body to the few (aristocracy) or to one individual (monarchy) *and* orients itself to the common good.

Aristotelian "polity"—the correct form of decision-making by the multitude—consists in a constitutional form mixed between democracy (in the classical sense) and oligarchy. In general, this means polity takes democracy as a starting point. It then either borrows oligarchic infrastructure or, in cases of quantifiable matters such as paying the poor to facilitate their involvement in the political process, institutes a mean between democracy and oligarchy, in order to meet the challenges inherent in the rule of the multitude.[118] For example, while the multitude is sovereign in a polity, not everyone can serve in every public office at the same time, even if public offices are many and for the short term.[119] Polity may then utilize the oligarchic institution of election to fill certain public offices, while keeping eligibility for office as open as possible. But even there, election to public office in a polity does not depend on the possession of certain qualities (such as intellectual and ethical excellence in aristocracy).

Further, the democratic principles that structure Aristotelian monarchy and aristocracy are made explicit in polity. That is, all three constitutional forms are democratic insofar as they depend on the consent of the governed. Monarchy and aristocracy feature mechanisms to ensure accountability to the nonsovereign multitude. But because accountability rests on a relationship between two parties in which one owes information, justification, and sanctions for unacceptable actions to the other,[120] accountability mechanisms are unnecessary in polity. For in

[117] See Section III.C (describing the Founders' views on representation as aristocratic).

[118] See Aristotle's Politics, supra note 83, at 1293b33–1294a5.

[119] See id. at 1317b20–34.

[120] See, e.g., Edward Rubin, The Myth of Accountability and the Anti-Administrative Impulse, 103 Mich. L. Rev. 2073, 2073 (2005); Andreas Schedler, Conceptualizing Accountability, *in* The Self-Restraining State: Power and Accountability in New Democracies 13, 17 (Andreas Schedler, Larry Diamond & Marc F. Plattner eds., 1999).

polity, the decision-maker is the governed itself. The principle of legitimation in polity is thus direct and explicit, while it is indirect and implicit in both monarchy and aristocracy.[121]

4. Summary of Aristotle's Typology

Table 2 illustrates Aristotle's typology of constitutional structures:

Table 2. Aristotle's Typology of Regimes

	Monarchy	**Aristocracy**	**Polity**
Decision-Making Body	One	Few	Multitude
Deviant Regime Form	Tyranny	Oligarchy	Democracy
Constitutional Object	The common good		
Criteria of Choosing Authority	Vigor and concentration of power (especially in military matters and foreign affairs)	Excellence, both intellectual (expertise) and ethical (moderation)	Lot, grounded in equality, or election (but not on the basis of excellence or vigor)
Accountability Mechanisms	Limited and defined powers; electoral control; rule-of-law norms	Electoral control	None
Ultimate Source of Authority	Consent of the governed (implicit)		Consent of the governed (explicit)

This analytical model is highly influential. Even Montesquieu, a pioneer of *functional* separation of powers, extensively discussed the Aristotelian model in the *Spirit of the Laws*.[122] Madison's definition of tyranny in Federalist 47 as "[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" reflects his Aristotelian assumption.[123]

John Adams adopted this analytical framework wholesale.[124] In a speech delivered in 1772, Adams stated:

[121] Aristotle's conception of the conditions of political authority resembles that of Weber. See Anthony T. Kronman, Max Weber 44–49 (1983) (assessing Weber's typology of authority, including traditional, legal-rational, and charismatic).

[122] See infra notes 166–72 and accompanying text.

[123] The Federalist No. 47, supra note 97, at 261 (James Madison) (emphasis added).

[124] Justice Breyer recognized Adams's commitment to an Aristotelian mixed regime. Stephen Breyer, Active Liberty: Interpreting Our Democratic Constitution 13, Tanner Lectures on Human Values at Harvard University (Nov. 17–19, 2004), https://tannerlectures.utah.edu/_resources/documents/a-to-z/b/Breyer_2006.pdf [https://perma.cc/9F7E-

> There are only Three simple Forms of Government.
>
> When the whole Power of the Society is lodged in the Hands of the whole Society, the Government is called a Democracy, or the Rule of the Many.
>
> When the Sovereignty, or Supreme Power is placed in the Hands of a few great, rich, wise Men, the Government is an Aristocracy, or the Rule of the few.
>
> When the absolute Power of the Community is entrusted to the Discretion of a single Person, the Government is called a Monarchy, or the Rule of one . . . .[125]

In a later treatise, Adams reaffirms this vision. Citing a debate in Herodotus's *Histories* about the comparative advantages of democracy, oligarchy, and monarchy,[126] Adams argues that only three innovations have been made to separation of powers since classical antiquity[127]: the invention of representation,[128] the separation of functional powers,[129] and

SV2S] ("John Adams . . . understood the Constitution as seeking to create an Aristotelian 'mixed' form of government."). There is debate about whether Adams's ideas were relevant by the time of the Founding. Wood, supra note 29, at 567–69. As Section III.A shows, the Founding generation abandoned the British sociological model but returned to the Aristotelian model of separation of structures.

[125] John Adams, Notes for an Oration at Braintree, Spring 1772, *in* 2 The Adams Papers: Diary and Autobiography of John Adams 56, 57–58 (L.H. Butterfield ed., 1961).

[126] See Herodotus, The Histories 3.80–82 (Robin Waterfield trans., 1998) (c. fifth century B.C.E.) (evaluating the relative strengths of democracy, which fosters equality before the law; oligarchy, which empowers the best men; and monarchy, which concentrates political authority in an exceedingly good ruler).

[127] See 1 A Defence of the Constitutions of Government of the United States of America, Against the Attack of M. Turgot, in His Letter to Dr. Price, Dated the Twenty-Second Day of March, 1778, *in* 4 The Works of John Adams 271, 284 (Charles Francis Adams ed., Bos., Charles C. Little & James Brown 1851) ("According to a story in Herodotus, the nature of monarchy, aristocracy, and democracy, and the advantages and inconveniences of each, were as well understood at the time of the neighing of the horse of Darius, as they are at this hour.").

[128] One might see representation as applying the principles governing Aristotelian polity to the United States. At its core, representation uses the oligarchic mechanism of election to limit the direct exercise of political power to a body substantially smaller than the electorate, thus resolving the problem that direct democratic rule cannot suit a large political community. The innovation of modern representation is that the elected office is supposed to represent the best interests of its local constituents. Polity requires no such relationship.

[129] See also Opinions of Historians, *in* 4 The Works of John Adams, supra note 127, at 435, 440 ("The distribution of power was, however, never accurately or judiciously made in [the Roman] constitution. The executive was never sufficiently separated from the legislative, nor

the rise of balanced legislatures with independent branches (i.e., additional distribution of legislative power to distinct institutions). Beyond these three innovations, separation of powers is an Aristotelian legacy.

5. Functional Separation

Aristotle also articulates a primitive typology of government functions into three types. The first deliberates about public affairs; the second determines the structure of government, including choosing officials and determining the range of their duties; the third adjudicates lawsuits.[130] This tripartition roughly parallels the modern idea of legislative, executive (which carries out the laws through officers institutionally organized into bureaucracies), and judicial powers.[131]

B. Polybian Innovation: Structural Separation

Polybius infuses a normative thrust into the Aristotelian separation of structures. He argues that successful constitutions *should* incorporate all three institutional structures. None of the correct regimes (monarchy, aristocracy, or democracy), individually considered, instantiates optimal design. The perfect constitution incorporates elements of each basic regime type.[132] The Roman constitution exemplifies this mixed state.[133] The consulship, which controls the lower magistrates, implements popular decrees, and holds broad military power, is a monarchy; the Senate, which investigates public crimes, passes decrees, and oversees the government's revenues, is an aristocracy; the people, with the right to inflict punishment, to try capital cases, and to reject Senate decrees, infuse into the state a democratic element.[134] Polybius thus normativizes the

had these powers a control upon each other defined with sufficient accuracy. The executive had not power to interpose and decide between the people and the senate."); infra Section II.D.

[130] See Aristotle's Politics, supra note 83, at 1297b40–1298a3.

[131] Montesquieu borrows this tripartition of government powers. Infra Section II.D. Montesquieu would also supply a normative thrust to this typology (i.e., separating those powers serves desirable ends). See infra notes 163–71 and accompanying text.

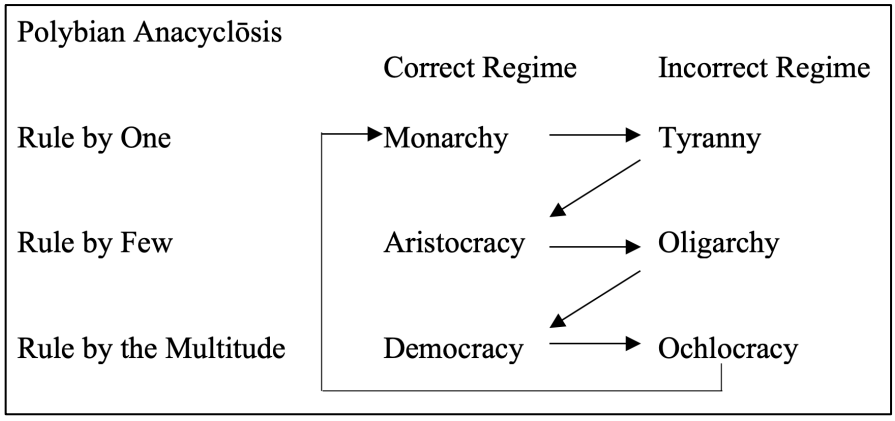
[132] 6 Polybius, The Histories 297 (W.R. Paton trans., 2011) (c. second century B.C.E). See generally Kurt von Fritz, The Theory of the Mixed Constitution in Antiquity: A Critical Analysis of Polybius' Political Ideas (1954) (providing an overview of Polybius's mixed-regime theory).

[133] See Polybius, supra note 132, at 329–31.

[134] See id. at 331–37.

Aristotelian model: effective constitution-making should incorporate the entire triad of monarchy, aristocracy, and democracy.

Polybius's justification for the mixed regime also rests on stability of the constitutional form. As a historian, Polybius was interested in the evolution of political institutions. He articulated the idea of *anacyclōsis*, that correct and deviant forms of the three regimes succeed each other in the perennial cycle of political change.[135] Figure 3 illustrates this cycle of transformations: the sole sovereign is prone to oppression and abuse of power; the aristocratic elite is corrupted by license and unrestrained rivalry; the democratic *hoi polloi* fall prey to fierce and virulent passions.[136] Any individual regime type degenerates into the incorrect version of itself. Institutional diversity in a compound government aids stability and preservation of its own design. A mixed regime is thus self-sustaining and self-curing.



The distribution of authority among different institutions in part accounts for the mixed regime's constitutional stability. It allows each institution to "counteract and cooperate" with others—an idea that proved influential under the name of "checks and balances" in the Founding Era.[137] The Roman consuls have plenary power over military affairs, but require senatorial approval to fund the army and rely on the people to

[135] See id. at 299–301.

[136] See Arthur M. Eckstein, Moral Vision in *The Histories* of Polybius 138–40 (1995); David E. Hahm, The Mixed Constitution in Greek Thought, *in* A Companion to Greek and Roman Political Thought 178, 192 (Ryan K. Balot ed., 2009).

[137] Polybius, supra note 132, at 337–41.

ratify treaties and armistices.[138] The Senate depends on the people to confirm its decrees and on the consuls to execute them.[139] The people, in turn, rely on the Senate for compensation of their work on public contracts, and need the consuls for protection from invasion.[140] This division of power thus ensures the preservation of the three basic forms of the Aristotelian typology—monarchy (consulship), aristocracy (Senate), and democracy (the people)—within the same state.

Polybius completes the classical separation-of-structures model. An effective constitution distributes authority based on features of the decision-making body (i.e., single, few, or many), rather than the nature of the authority exercised (i.e., legislative, executive, or adjudicative). Within each institution that embodies the values of democracy, aristocracy, and monarchy, one may find a mix of legislative, executive, and judicial functions. The precise combination of functions depends on their respective institutional excellences and defects.

Mixed government dominated American constitutionalism of the eighteenth century.[141] Adams explicitly endorsed this approach: "The best Governments of the World have been mixed. The Republics of Greece, Rome, Carthage, were all mixed Governments. The English, Dutch and Swiss, enjoy the Advantages of mixed Governments at this Day. . . . Liberty depends upon an exact Ballance, a nice Counterpoise of all the Powers of the state."[142] But more often, mixed government and structural separation functioned as unspoken assumptions of constitutional design—albeit no less important, and no less a part of the Constitution, than what generated controversy and debate.[143]

[138] Id.

[139] Id. at 341.

[140] Id. at 341–43.

[141] See Gilbert Chinard, Polybius and the American Constitution, 1 J. Hist. Ideas 38, 42–43 (1940) (discussing Polybius's influence on the Founders); see also Eckstein, supra note 136, at 17 ("In the eighteenth century . . . [Polybius] was employed primarily as a force in the political debates over republican theory and the 'mixed' constitution.").

[142] Adams, supra note 125, at 58, 60; see also id. at 60 n.3 (noting that Adams's comment (i.e., that liberty depends on a mixed regime of balanced powers), despite occurring a couple of pages after his classification of forms of government, is "doubtless meant for insertion at some point earlier in JA's development of his theme").

[143] For example, Federalist 40 is titled, without any suggestion of peculiarity, "The Powers of the Convention to Form a *Mixed* Government Examined and Sustained," posing the question of whether the constitutional "convention were authorized to frame and propose *this mixed* constitution." The Federalist No. 40, supra note 97, at 212 (James Madison) (emphases added).

C. The English Sociological Model of Mixed Government

In 1642, the English monarchy was in trouble. Due to discontent with government breakdowns and shifting distribution of wealth toward the landed and professional gentry, the Long Parliament delivered *Nineteen Propositions* to the Crown, demanding a greater share in governance.[144] These ambitious demands included the requirement of parliamentary approval for appointment to public offices and for transaction of any public matters.[145] Charles I rejected those demands in his *Answers to the Nineteen Propositions* ("*Answers*").[146] But any hope for conciliation was dashed by the end of the year. England descended into a civil war that ended with the execution of Charles I and a brief commonwealth—monarchy would not return until the Restoration in 1660.[147]

The *Answers* popularized mixed-regime theory in England, where it would dominate political theory until well into the nineteenth century.[148] Prior English political thought focused on maintaining a healthy balance between the King's prerogative and the liberties of the subject.[149] The *Answers*, however, justified Charles I's rejection of parliamentary demands by adopting the Aristotelian-Polybian framework: "There [are] three kindes of Government amongst men, Absolute Monarchy, Aristocracy and Democracy, and all these having their particular

[144] The Nineteen Propositions (June 1, 1642), *reprinted in* The Stuart Constitution, 1603–1688: Documents and Commentary 244, 244–45 (J.P. Kenyon ed., 1966); Colin Tyler, Drafting the *Nineteen Propositions*, January–July 1642, 31 Parliamentary Hist. 263, 309–12 (2012) (modern edition). See generally Lawrence Stone, The Causes of the English Revolution 1529–1642, at 67–91 (1996) (surveying explanations about the origins of the English civil war, including the instability of the regime itself, the seizure and sale of church property, which allowed accumulation of wealth among the gentry, the loss of confidence in the Crown, as well as the rise of a self-conscious opposition).

[145] See Tyler, supra note 144, at 309–10.

[146] XIX Propositions Made by Both Houses of Parliament to the King's Most Excellent Majestie: With His Majesties Answer Thereunto (York, Robert Barker 1642), *reprinted in* 1 The Struggle for Sovereignty: Seventeenth-Century English Legal Tracks 145, 171 (Joyce Lee Malcolm ed., 1999) [hereinafter Answers].

[147] See Charles J. Reid, Jr., The Seventeenth-Century Revolution in the English Land Law, 43 Cleveland St. L. Rev. 221, 224–30 (1995).

[148] David Lieberman, The Mixed Constitution and the Common Law, *in* The Cambridge History of Eighteenth-Century Political Thought 317, 319 (Mark Goldie & Robert Wokler eds., 2008); Corinne Comstock Weston, English Constitutional Doctrines from the Fifteenth Century to the Seventeenth: II. The Theory of Mixed Monarchy Under Charles I and After, 75 English Hist. Rev. 426, 432 (1960).

[149] See, e.g., Arihiro Fukuda, Sovereignty and the Sword: Harrington, Hobbes, and Mixed Government in the English Civil Wars 2–5, 17–21 (1997).

conveniencies and inconveniencies."[150] Monarchy facilitates unity in case of foreign invasion but suffers from the threat of tyranny; aristocracy generates sound counsel from the ablest people but suffers from faction and division; democracy begets liberty, courage, and industry but suffers from violence and licentiousness.[151] None of the three constitutional forms is individually sufficient to constitute good government. Instead, the English regime has been "moulded . . . out of a mixture of these [three Aristotelian types]," so that enjoying the comparative institutional advantages of each constitution requires that "Balance hangs even between the three Estates."[152] According to the *Answers*, the English legislative process reflects this balance: the King, the House of Peers, and the House of Commons, chosen by the people, each has a role in lawmaking.[153]

Although the *Answers* adopted the basic Aristotelian-Polybian framework, it made the striking innovation of assigning each constitutional form a social constituent (i.e., the three Estates). The unitary monarchy guards the interest of the monarch himself; the plural aristocracy guards the interest of the nobility through the House of Peers; the numerous democracy guards the interest of the commoners through the House of Commons. I call this the "sociological" model of mixed government, which assigns functional powers based on not only institutional design but also the underlying social class that the respective institution protects. It reflects a creative adaptation of the Aristotelian-Polybian model, which does not posit distinct societal constituencies for the three constitutional structures,[154] for the English context.

The sociological model would become the seventeenth- and eighteenth-century orthodoxy. Both royalists and parliamentarians during the civil war used it to justify their causes.[155] James Harrington used it to

[150] Answers, supra note 146, at 167.

[151] Id. at 168.

[152] Id. at 167.

[153] Id. at 168.

[154] The Roman Republic did not feature a tripartition of society that would easily fit into the Aristotelian analytical model. The consuls were elected magistrates who did not necessarily represent a fixed segment of society, and hereditary kingship had been abolished for centuries by the time of Polybius. See Peter Sidney Derow, Consul, *in* Oxford Classical Dictionary (Simon Hornblower, Antony Spawforth & Esther Eidinow eds., 4th ed. 2012).

[155] See Henry Ferne, The Resolving of Conscience 18 (London, W. Webb 1643) (explaining, from the royalist perspective, that the English mixed government maintains an "excellent temper of the three estates"); Philip Hunton, A Treatise of Monarchie 24–25 (London 1643) (explaining, from the parliamentarian perspective, that good government

ground his "equal Commonwealth," defined as "a Government . . . arising into the Superstructures or three Orders, the Senat[e] debating and proposing, the People resolving, and the Magistracy executing."[156] The three superstructures correspond to the Aristotelian prototypes of aristocracy, democracy, and monarchy.[157] As a critic has remarked, this theory of mixed government would enjoy "unrivalled supremacy" until the nineteenth century, and it was enormously influential during the Founding Era, in particular the 1770s.[158] The Founders ultimately rejected the sociological model when designing the federal Constitution, but this rejection did not extend to the broader model of separation of structures.[159]

D. Assignment of Functional Powers to Structural Forms

The early-modern period saw a second innovation in separation of powers theory: Montesquieu's assignment of functional powers to structural forms. Montesquieu's contribution is twofold. First, it gives Aristotle's basic tripartition of *functional* powers a normative thrust: government functions *should* be separated to advance the normative value of liberty. In this regard, Montesquieu makes the same contribution to functional separation of powers as Polybius has done to structural separation of powers. Second, Montesquieu connects the two strands of separation of powers by assigning functions to structures based on values underlying structural design. This Section explores both Montesquieu's innovation and briefly addresses Blackstone's enumeration of exceptions to strict functional separation.

The functional separation of powers theory primarily derives from Book XI of *The Spirit of the Laws*. In discussing the constitution of England, Montesquieu divides governmental functions into three kinds:

requires "Unity and strength in a Monarchy; Counsell and Wisedome in an Aristocracy; [and] Liberty and respect of Common good in a Democracy"); Fukuda, supra note 149, at 29–33.

[156] James Herrington, Oceana and Other Works 55 (John Tolland ed., London, A. Millar 1747); see also Fukuda, supra note 149, at 100–02 (discussing how a bicameral system, with the Senate proposing and the people resolving, represents the common interest).

[157] See James Cotton, James Harrington as Aristotelian, 7 Pol. Theory 371, 371 (1979) (arguing that key components of "Harrington's political thought consist[] in unmediated derivations from Aristotle").

[158] Weston, supra note 148, at 432. See generally Wood, supra note 29, at 197–256 (discussing the influence that the theory of mixed government had on the Founding Era in crafting the federal Constitution).

[159] See infra Subsection III.A.2.

the legislative power, the executive power with respect to the law of nations, and a second executive power with respect to civil laws.[160] The first executive power falls largely within duties performed by the executive branch, while the second executive power involves functions performed by the judiciary.[161]

This tripartition demands that functional powers, *in general*, cannot coincide: the same governmental entity should not exercise more than one type of authority at one time.[162] For example, if "legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty," because tyrannical laws will be implemented to further the legislature's abuses of power.[163] Likewise, judicial exercise of legislative powers enables adjudicators to apply arbitrary, ad hoc rules to cases and controversies.[164] Notice that the functional theory carves out distinct spheres of authority in accordance with the nature of that authority—whether it crafts, implements, or adjudicates laws. It aims to prevent *functional overlap* in the *processes of governance*. By contrast, separation of structures carves out distinct spheres of authority in accordance with the nature of the decision-making body exercising the authority—unitary, plural, or numerous. It aims to construct *structural diversity* within the *institutions of governance*.

Scholars have recognized Montesquieu's contribution to *functional* separation of powers.[165] But functional separation is not the entirety (or

[160] See Montesquieu, The Spirit of the Laws 156–57 (Anne M. Cohler, Basia Carolyn Miller & Harold Samuel Stone eds. & trans., 1989) (1748).

[161] This distinction underscores that the core of executive power relates to foreign affairs and the provision of public safety through the military. Montesquieu would proceed to assign the first executive power to a monarchical element of government. See infra note 167 and accompanying text; supra Subsection II.A.1.

[162] However, for neither Montesquieu nor the Founders could functional powers *never* overlap. When functional powers *do* overlap and raise functional separation of powers concerns, elements of structural design must be present to mitigate those concerns. See infra notes 165–76; Subsection IV.B.2.

[163] Montesquieu, supra note 160, at 157; see Melvin Richter, The Political Theory of Montesquieu 57–105 (1977) (overview of Montesquieu's political theory); Hilary Bok, Baron de Montesquieu, Charles-Louis de Secondat, Stan. Encyclopedia Phil. (Apr. 2, 2014), https://plato.stanford.edu/entries/montesquieu [https://perma.cc/VPX5-CANG].

[164] Montesquieu, supra note 160, at 157.

[165] Bruce Ackerman, Goodbye, Montesquieu, *in* Comparative Administrative Law 38 (Susan Rose-Ackerman, Peter L. Lindseth & Blake Emerson eds., 2d ed. 2017); Calabresi et al., supra note 29, at 534 n.39. Although the Founders regarded Montesquieu as a central authority on separation of powers, they recognized the ancient origins of the theory. See The Federalist No. 47, supra note 97, at 262 (James Madison) (noting, from the editor's point of view, that "[l]ater specialists have noted the possible influence of the ancient philosopher

even the core) of Montesquieu's separation of powers theory.[166] A central tenet of Montesquieu's theory is the assignment of functional powers to structural forms of governance. A monarch should exercise executive power, because executive functions require taking immediate actions, which are "better administered by one than by many."[167] The multitude should exercise the legislative power, but a second legislative chamber must represent the nobility to win their political support.[168] The judiciary should be entrusted to the populace, but only through a publicly announced selection process that results in a temporary tribunal.[169] The ideal regime possesses a tripartite structure: a monarchy that exercises executive power, an aristocratic element that exercises part of the legislative power, and a democratic element that exercises part of the legislative and part of the judicial power. Montesquieu's theory thus incorporates separation of structures: it assumes institutional diversity by restricting the functional powers that each constitutional structure can exercise.

This is clear from Montesquieu's discussion of the Roman Republic. Book XI describes the Roman constitution as an unrivaled "harmony of power" mixing together "monarchical, aristocratic, and popular" elements.[170] This "flourishing" structure of republican governance broke

Polybius on theories of the mixed constitution, which may account for Madison's doubt about whether Montesquieu is the author of the doctrine"); Robert Shackleton, Montesquieu, Bolingbroke, and the Separation of Powers, *in* Essays on Montesquieu and on the Enlightenment 3, 6 (David Gilson & Martin Smith eds., 1988) (noting that Aristotle has "already divided government into deliberative, executive and judicial powers"). For a functional account of the American innovation in federalism, see generally Alison LaCroix, The Ideological Origins of American Federalism (2011).

[166] Richter, supra note 163, at 84–88; Peter T. Manicas, Montesquieu and the Eighteenth Century Vision of the State, 2 Hist. Pol. Thought 313, 324 (1981) (endorsing the view that Book XI of *The Spirit of the Laws* incorporates four different theories: (1) the classical (Aristotelian-Polybian) mixed-government doctrine, (2) an analysis of functional separation of powers, (3) Harrington's (sociological) model of balanced constitutions, and (4) the theory of checks and balances).

[167] Montesquieu, supra note 160, at 161.

[168] Id. at 160.

[169] Id. at 158.

[170] Id. at 170. Montesquieu's tripartition of regimes differs from Aristotle's and Polybius's. Montesquieu posits three basic forms of government: republics (subdivided into aristocratic and democratic republics), monarchy, and despotism. A principle of human passions animates each: political virtue (the love of laws and country) animates the democratic republic; moderation the aristocratic republic; honor the monarchy; and fear the despotic regime. See Paul A. Rahe, Forms of Government: Structure, Principle, Object, and Aim, *in* Montesquieu's Science of Politics: Essays on *The Spirit of Laws* 69–70 (David W. Carrithers, Michael A.

down, and Rome "suddenly lost its liberty" when the decemvirs (ten men tasked with writing down the laws of the Republic) rose to power during the political struggle between plebeians and patricians.[171] With the decemvirate wielding "all the legislative power, all the executive power, [and] all the power of judgment," tyranny follows.[172] Montesquieu's account is amenable to a functional interpretation: liberty is threatened when rulers wield an undivided mass of political power. However, behind this functional reading stands a structural moral. The rise of the decemvirs shows the degeneration of the *structuring* of the state into monarchical, aristocratic, and democratic elements. Instead of a mixed regime, Rome became an oligarchy with ten men at the helm. What contributed to Rome's loss of liberty—in Montesquieu's view—is not only the concentration of legislative, executive, and judicial powers in a single body, but also the destruction of a constitution that incorporates monarchy, aristocracy, and democracy, together with their respective values.

However, functional separation is not absolute. Blackstone's *Commentaries* transmitted specific deviations from strict functional separation to the Founding generation.[173] For Blackstone, strict noncoincidence of two functional powers within one body does not advance the liberty-protecting objective of separation of powers. Rather, to prevent any one governmental body's self-aggrandization, some functional powers must be shared. The monarch, for example, should have the authority to veto legislations.[174] The legislature is entitled to

Mosher & Paul A. Rahe eds., 2001); Bok, supra note 163. But in assigning functions to structures, Montesquieu reverts to the Aristotelian model of monarchy, aristocracy, and democracy, because despotism is not an ideal regime. That is, while Montesquieu does not accept the Aristotelian typology wholesale and criticizes Aristotle's fivefold division of monarchy, see Montesquieu, supra note 160, at 168, constructing the ideal constitution still rests on the Aristotelian-Polybian triad. See also Iain Stewart, Men of Class: Aristotle, Montesquieu and Dicey on 'Separation of Powers' and 'The Rule of Law,' 4 Macquarie L.J. 187, 200 n.60 (2004) (detailing how Montesquieu adopts Aristotle's three separate organs of governance).

[171] Montesquieu, supra note 160, at 175. The decemvirate—a commission of ten men—was created in 450 B.C.E. to produce a body of laws for the Republic (the "Twelve Tables") while holding supreme power. See Mary T. Boatwright, Daniel J. Gargola & Richard J.A. Talbert, The Romans: From Village to Empire 50–51 (2004).

[172] Montesquieu, supra note 160, at 175.

[173] See, e.g., Calabresi et al., supra note 29, at 534 n.39 (contending that that the American colonists understood Montesquieu's theory of separation of powers through the lens of Blackstone).

[174] See 1 William Blackstone, Commentaries *154.

investigate and impeach executive branch officials—powers clearly executive in nature.[175] Despite judicial independence, judges are nominated by the Crown, who consequently has a share in adjudicative power.[176] Functional separation thus admits of exceptions where authority *should* coincide within a structural category of governance.

* * *

This Part of the Article reconstructs the intellectual history of separation of powers. Three strands have emerged. First, separation of structures assigns political authority based on features of the decision-making body. The structural model finds its origins in Aristotle's typology of regimes, its normative component in Polybius's theory of mixed Roman state, and continued influence in the early-modern period. Second, functional separation of powers assigns political authority based on the nature of that authority. The functional model finds its origins in Aristotle's tripartition of governmental functions, its normative component in Montesquieu, and its refinement in Blackstone's Commentaries. Third, the sociological model subjects each structural form of governance (monarchy, aristocracy, and democracy) to a societal constituent. This model arises from Charles I's *Answers to the Nineteen Propositions of Parliament* and reflects a creative application of the Aristotelian-Polybian model to the English constitution.

III. SEPARATION OF STRUCTURES IN THE FOUNDING ERA

This Part of the Article examines the Founding Era. It argues that, although the Founders rejected the English sociological model, the Constitution evinces an application of the principles of classical (Aristotelian-Polybian) separation of structures. The Constitution establishes a monarchical presidency with an array of executive powers whose fulfillment requires vigor and decisional accountability, an aristocratic Senate with deliberation and moderation,[177] and a democratic House. All three of the Aristotelian prototypes are merged in one

[175] See id. at *154–55.

[176] See id. at *155 (arguing the merits of checks and balances generally); see also id. at *269 (discussing the Crown's authority to nominate judges).

[177] The passage of the Seventeenth Amendment, which provides for popular election of Senators, see U.S. Const. amend. XVII, has weakened the aristocratic nature of the Senate. Concomitant with this development, however, is a rise of the federal judiciary as an aristocratic institution. See infra Subsections III.C.2–3.

government and bound by a democratic structuring principle and accountability mechanisms, precisely as the classical model dictates.[178]

A. Preludes

This Section provides two preliminary notes before substantive discussions on constitutional separation of structures. First, it addresses the Founders' deep immersion in the Classics. Contemporary legal scholars have paid scant attention to this aspect of the Founders' intellectual heritage, but it is necessary for an accurate understanding of the Constitution. Second, it discusses the Founders' ultimate rejection of the English sociological model.

1. Founders and the Classics

The Founders had a deep intellectual affinity with the Classics, which formed the core of their education and underpinned their constitutional design.[179] The study of Greek and Latin occupied their school days: all colonial colleges required entry-level candidates to possess a reading knowledge of both languages, in addition to familiarity with all major classical authors.[180] At King's College, which Hamilton attended in 1773, the requirements for admission included knowledge of "Latin and Greek

[178] See supra Section II.A (showing that each of the correct constitutional prototypes—monarchy, aristocracy, and democracy—is subject to a democratic structuring principle that requires its orientation toward the common good).

[179] Carl Richard, for example, has termed this immersion in Greek and Roman literature and philosophy the "classical conditioning of the founders"—a heritage that "supplied them with the intellectual tools necessary to face . . . [the] world with some degree of confidence" and "an indispensable training in virtue which society could abandon only at its own peril." Carl J. Richard, The Founders and the Classics: Greece, Rome, and the American Enlightenment 12 (1994); see also David J. Bederman, The Classical Foundations of the American Constitution: Prevailing Wisdom, at ix (2008) (suggesting that the Framers "were as much influenced by . . . classical antiquity as they were by [the] Enlightenment . . . and by the exigencies" of their time); Gary Lawson & Guy Seidman, "A Great Power of Attorney": Understanding the Fiduciary Constitution 31–37 (2017) (discussing how classical authors influenced the Framer's understanding of government); Steven Gow Calabresi & Gary Lawson, The U.S. Constitution: Creation, Reconstruction, the Progressives, and the Modern Era 152–54 (Saul Levmore et al. eds., 2020) (positing that the "Mixed Regime of the One, the Few, and the Many" was reintroduced through the U.S. Constitution); Robert Natelson, A Republic, Not a Democracy?, 80 Tex. L. Rev. 807, 815–20 (2002) (exploring "the classical influence in the constitutional debate [by] count[ing] the classical citations in the surviving documents").

[180] See Bederman, supra note 179, at 4–7; Richard, supra note 179, at 12–14.

grammar, [Cicero's] *Orations*, [and] the first books of Virgil's *Aeneid*."[181] Instruction at the College of New Jersey, which Madison attended in 1769, included the works of Xenophon in Greek, as well as Horace, Virgil, and Cicero.[182] All institutions emphasized political philosophy: students at Harvard, which Adams attended in the 1750s, learned Aristotle's *Politics*.[183] The Founders' preferred methods of absorbing classical ideas differed. Jefferson advised reading the original while Adams thought Plato's Greek was "tedious toil" even with the help of Latin and vernacular translations.[184] But they all read the Classics in the original languages—if not with zeal, at least because knowledge of the Graeco-Roman past was a key to elite society.[185] Given this background, it is unsurprising that Adams justified resistance to British rule on the "revolution-principles" of Aristotle and Plato;[186] that Jefferson wrote in classical Greek as he praised, in private, natural aristocracy as the best form of government;[187] and that *The Federalist*—which the Supreme

[181] See John B. Pine, King's College and the Early Days of Columbia College, 17 Proc. N.Y. Hist. Ass'n 108, 114 (1919) (describing the advertisement for the College published on May 31, 1754); see also Thomas E. Ricks, First Principles, at xviii–xix (2020) (contending that the Founders "did not study Locke as much as they did the writings of the ancient world, Greek and Roman philosophy and literature: the *Iliad*, *Plutarch's Lives*; the philosophical explorations of Xenophon, Epicurus, Aristotle; and the political speeches and commentaries of Cato and Cicero").

[182] Joe W. Kraus, The Development of a Curriculum in the Early American Colleges, 1 Hist. Educ. Q. 64, 67 (1961).

[183] Id. at 65; Bederman, supra note 179, at 7 ("When John Adams matriculated at Harvard in the 1750s, John Jay at King's College in 1760, and Alexander Hamilton at King's in 1774, they were closely examined in their Latin and Greek.").

[184] Letter from Thomas Jefferson to Peter Carr (Aug. 19, 1785), https://founders.archives.gov/documents/Jefferson/01-08-02-0319 [https://perma.cc/LR9A-YK7J] (last visited Jan. 28, 2024) ("For the present I advise you to begin a course of antient history, reading every thing in the original and not in translations."); Letter from John Adams to Thomas Jefferson (July 16, 1814), https://founders.archives.gov/documents/Jefferson/03-07-02-0357 [https://perma.cc/4GBX-WEQM] (last visited Jan. 28, 2024).

[185] Despite his complaints about Plato's Greek, Adams's Library contained two sets of the entire Platonic corpus in the original, including the authoritative 1578 edition by Henri Estienne. See Bos. Pub. Libr., Catalogue of the John Adams Library 195–96 (1917). When Adams entered the legal profession, he hoped to compensate his lack of legal skills by his knowledge of Greek and Latin—a strategy that apparently was successful. See Dorothy M. Robathan, John Adams and the Classics, 19 New Eng. Q. 91, 92 (1946).

[186] Letter from John Adams to the Inhabitants of the Colony of Massachusetts Bay (Jan. 23, 1775), https://founders.archives.gov/documents/Adams/06-02-02-0072-0002 [https://perma.cc/365R-CYT3] (last visited Jan. 28, 2024).

[187] See Letter from Thomas Jefferson to John Adams (Oct. 28, 1813), *in* Thomas Jefferson: Political Writings 185, 186–87 (Joyce Appleby & Terence Ball eds., 2004).

Court has read as legislative history of the Constitution[188]—contains dozens of references to the ancient world.[189] What unified the Founding generation was the recognition that ancient history and political thought provided empirical data about the possibilities of government structures and normative ideas about the relative merits of the debated constitutional designs.[190]

In particular, the Founders understood and drew inspiration from classical political theory, including mixed regimes and Aristotle's typology of constitutions.[191] Their knowledge derived from two sources. First, they directly engaged with Aristotle and Polybius.[192] In an epistolary exchange, Jefferson assessed the relative merits of two translations of Aristotle's *Politics*.[193] Madison attended the lectures by

[188] Compare William N. Eskridge, Jr., Should the Supreme Court Read *The Federalist* but Not Statutory Legislative History?, 66 Geo. Wash. L. Rev. 1301, 1323 (1998) (arguing that reading *The Federalist Papers* is different than reading legislative history, because constitutional debaters, unlike modern political actors, "had strong incentives to represent political consensus or equilibrium accurately"), with John F. Manning, Textualism and the Role of *The Federalist* in Constitutional Adjudication, 66 Geo. Wash. L. Rev. 1337, 1339 (1998) (arguing that reading *The Federalist Papers* for interpretive purposes is clearly significant, inasmuch as they offer a contemporaneous understanding of the Founders' understanding of the Constitution, but that such reading must nevertheless take into account the fact that the papers are "nonetheless a piece of political advocacy, whose contents may at times reflect the exigencies of debate, rather than a dispassionate account of constitutional meaning").

[189] Louis J. Sirico, Jr., *The Federalist* and the Lessons of Rome, 75 Miss. L.J. 431, 433 (2006).

[190] E.g., The Federalist No. 34, supra note 97, at 176–77 (Alexander Hamilton) (relying on the Roman legislative assemblies' structure to show that states, after the adoption of the Constitution, would retain a coequal authority to tax anything but duties on imports).

[191] See generally Bederman, supra note 179, at 59–85 (noting the Polybian and Aristotlean provenance of a proto-idea of separation of powers between executive, legislative, and judicial functions); Richard, supra note 179, at 123–68.

[192] E.g., Adams, supra note 129, at 435–40 (quoting extensively from Book VI of Polybius's *The Histories* to support distribution of political power among several branches of government, instead of concentration within one popular assembly).

[193] Letter from Thomas Jefferson to Isaac H. Tiffany (Aug. 26, 1816), https://founders.archives.gov/documents/Jefferson/03-10-02-0234 [https://perma.cc/9NBZ-2U3R] (last visited Jan. 28, 2024). While speaking in Aristotelian language, Jefferson criticizes classical constitutional design for its ignorance of representation as an institution. Jefferson exaggerates: the Founders recognized that under the Roman constitution, for example, the plebeian tribunes were "representatives of the people." 1 The Records of the Federal Convention of 1787, at 151–52 (Max Farrand ed., 1911) [hereinafter Farrand's Records]. Further, Federalist 63 explicitly addresses the knowledge of the Greeks and Romans about the institution of representation. The Federalist No. 63, supra note 97, at 340–41 (James Madison).

John Witherspoon on government, which focused almost exclusively on Aristotle's *Politics* and began with a study of the division of constitutions into monarchy/tyranny, aristocracy/oligarchy, and polity/democracy.[194] Adams's library contained two editions of the *Politics* in Greek, as well as Latin and English translations.[195] Second, the Founders assimilated Aristotle through its reception in Renaissance and Enlightenment thought. Following Polybius, Machiavelli ascribed Rome's political success to its mixed government.[196] As discussed, seventeenth- and eighteenth-century English theorists adapted the classical model to English society.[197] Blackstone's influential *Commentaries* adopted Aristotle's basic framework, characterizing the English constitution as "selected and compounded from [the three usual species of government]."[198] Classical separation of structures thus permeated Founding-era thinking on constitutional design.[199]

Due to the decline of Classics within the higher-education curriculum, most legal scholars pay little attention to the enormous influence of classical political theory on the Founders. One goal of this Article is to establish that an accurate understanding of the Constitution's historical or original meaning requires acknowledging the Founders' debt to the Graeco-Roman past.

2. Rejection of the English Sociological Model

Some have argued that the Founders rejected the Aristotelian model in crafting the Constitution (and relatedly, that Adams's views did not gain widespread acceptance).[200] The invention of representation and the rise of

[194] Ralph Ketcham, James Madison: A Biography 42–43 (1971).

[195] Boston Public Library, supra note 185, at 15.

[196] See Richard, supra note 179, at 128.

[197] See supra Section II.C.

[198] 1 William Blackstone, Commentaries *52.

[199] See Bederman, supra note 179, at 74 ("[T]he concept of mixed government was profoundly influential for the Framing generation . . . ."); Richard, supra note 179, at 131; Wood, supra note 29, at 202 ("In fact, in most of the states the theory of mixed government was so axiomatic, so much a part of the Whig science of politics, that it went largely unquestioned . . . ."). Some contend that the 1787 Constitution reflects a departure from the classical Aristotelian model. See Wood, supra note 29, at 602–04. But see infra Subsection III.A.2.

[200] E.g., Wood, supra note 29, at 567–69. But see Daniel Wirls & Stephen Wirls, The Invention of the United States Senate 46–49 (2004) (crediting Adams's *Thoughts on Government* as a main influence in instituting bicameralism). More explicit in its criticism of Wood's thesis is Elaine K. Swift, The Making of an American Senate: Reconstitutive Change

popular sovereignty meant that the power of each government entity depends on the people. One scholar contends: "Americans had destroyed the age-old conception of mixed government . . . . [They] had retained the forms of the Aristotelian schemes of government but had eliminated the substance, thus divesting the various parts of the government of their social constituents."[201] By contrast, others acknowledge (even lament) the inevitability of mixed government both as a Founding-era construct and as part of contemporary American constitutionalism.[202]

As Part II suggests, the former camp of scholars draws an inaccurate inference. To be sure, the Founders rejected the sociological model: the President, for example, sits atop a unitary structure but does not represent the interests of a constituent independent from the people.[203] But departure from the English model is no rejection of classical separation of structures. The original structural model dictates no social constituency but mandates the *democratic* orientation of all regimes through accountability mechanisms like electoral control.[204] The Founders' use of representation to discipline "the Aristotelian schemes of government," which (key scholars concede) the Constitution retains, thus signals a

in Congress, 1787–1841, at 10 (1996), which argues, "[C]ontrary to arguments offered by Wood . . . , the framers intended the Senate first and foremost to resemble in its form the British House of Lords," but with important modifications to its powers based on an idealized understanding of what role the House of Lords should play in a constitution. My view counters both Wood's assumption that the "substance" of the Aristotelian scheme lies in a tripartition of society into the Crown, the gentry, and the populace—which was a British innovation—and Swift's conclusion that the Senate was an idealized replica of the House of Lords. Instead, the Senate's deviations from the House of Lords reflect a return to classical separation of structures.

[201] Wood, supra note 29, at 603–04.

[202] See Ely, supra note 29, at 289–91.

[203] In fact, scholars attribute to the President a national constituency distinct from Congress's more parochial concerns. Compare Herbert Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum. L. Rev. 543, 552 (1954) (noting that a "full national constituency" holds accountable the President, who must "balance the localism and the separatism of the Congress by presenting programs that reflect the needs of the entire nation"), with Jide Nzelibe, The Fable of the Nationalist President and the Parochial Congress, 53 UCLA L. Rev. 1217, 1217–24 (2006) (acknowledging but criticizing the "deeply ingrained assumption" that the presidency has a more national focus than Congress). See generally Nourse, The Vertical Separation of Powers, supra note 68 (reconceiving departmental power as a set of relationships between the people and state actors).

[204] See supra Subsections II.A.1–2, Table 2.

return to the classical separation of structures rather than its rejection.[205] Put differently, structure itself emanates values: the decision-making of one in charge inevitably differs from a plural body that must reach agreement, or a numerous body where compromise or pork-barreling substitutes the impracticable requirement of consensus. Even when all three entities are held accountable to the people (as both the Aristotelian model and the Constitution demand), their combination evinces a balancing of constitutional and bureaucratic structures essential to good governance.

B. Monarchy and the Presidency

This Section argues that the Founders structured the presidency as a monarchy in our Constitution to ensure "vigour and expedition" in executive power.[206] The presidency's resemblance to kingship has generated intense scholarly debate. Some contend, in furtherance of the unitary executive thesis, that the Founders designed the President as "an elective monarch," even if subject to constitutional limitations.[207] They conclude that Article II establishes an office "reach[ing] kingly proportions," whose singular concentration of power often exceeded that of European monarchs.[208] The Constitution therefore introduced a "monarchical republic."[209] By contrast, others argue against the "Royal Residuum" theory, according to which the "executive power" vested by Article II refers to "a particular bundle of substantive powers held by the British Crown."[210] They note that the term for nonstatutory powers held by the Crown was "royal prerogative," of which executive power formed only a small part.[211] They conclude that the President only has power to

[205] See Wood, supra note 29, at 604. This is not to deny the novelty of the Founders' contribution: the Constitution created a distinctive array of accountability mechanisms, as explored in Sections III.B–D.

[206] The Federalist No. 70, supra note 97, at 377 (Alexander Hamilton).

[207] Saikrishna Bangalore Prakash, Imperial from the Beginning: The Constitution of the Original Executive 10 (2015).

[208] Id. at 18.

[209] Id. at 13.

[210] Mortenson, supra note 50, at 1172, 1175.

[211] Id. at 1173.

execute the laws—an "empty vessel" dependent on the political judgment of Congress.[212]

This debate overlooks an important distinction. The *power* vested by Article II is executive authority, not the royal prerogative, as one camp argues. However, the *structure* established by Article II is monarchical (in the Aristotelian sense—subject to democratic control and accountability), as the other camp contends. Article II reflects the structural and functional models of separation of powers in interaction, by assigning duties to carry out the laws to a sole decision-maker. Both camps are correct: the Constitution creates a monarchical, not pluralist, structure to exercise executive, not kingly, power.

Federalist 70 argues extensively for structuring the presidency as a monarchy—a singular executive accountable to the people. First, past experience shows the impracticability of plurality. The Roman Republic "take[s] refuge in the absolute power of a single man, [the dictator]."[213] The dual nature of the consulship led to "dissentions" and "mischiefs to the republic" until the two consuls divided their respective administrative powers.[214] Vesting appointment power in an executive council in addition to the governor also diverted blame.[215] Second, disagreement within a plural executive generates "personal emulation and even animosity," "embarrass[es]" and "enervate[s]" the administration of laws, and segregates the political community into "irreconcilable factions," each with a voice in the magistracy.[216] Third, a divided executive "conceal[s] faults" and creates an epistemic problem by muddling accountability and enabling politicians to shift blame for policy failures.[217] Fourth, a multimember executive is unlikely to protect liberty. Its membership must be large enough to prevent combination, but numerosity magnifies the

[212] Id. at 1269. See generally Michael W. McConnell, The President Who Would Not Be King: Executive Power Under the Constitution (2020) (propounding the idea that the framers primarily allocated traditionally royal power to Congress rather than to the President).

[213] The Federalist No. 70, supra note 97, at 374 (Alexander Hamilton). The Roman dictator was an office appointed by the consul during an emergency, of fixed duration (six months or the duration of the crisis, whichever was shorter), and subject to constraints in its powers. See Boatwright et al., supra note 171, at 50.

[214] The Federalist No. 70, supra note 97, at 375–76 (Alexander Hamilton). While Hamilton does not refer to any particular conflict between two consuls, examples abound: Julius Caesar clashed intensely over land redistribution with his co-consul, Marcus Calpurnius Bibulus, who tried to veto all of Caesar's policy measures. Boatwright et al., supra note 171, at 234–35.

[215] The Federalist No. 70, supra note 97, at 378 (Alexander Hamilton).

[216] Id. at 376–77.

[217] Id. at 377–78.

dangers of a successful conspiracy: the Roman decemvirs more effectively usurped political authority than any single individual.[218] Indeed, neither unity nor plurality can avert the menace of unrestrained power—the fact that the colonists resisted primarily the Parliament was a recent illustration.[219]

Hamilton's contentions echoed the debate at the Federal Convention, where the Founders intensely contested the singular structure of the presidency. James Wilson defended unity in the executive, which confers "energy[,] dispatch[,] and responsibility to the office."[220] Wilson argued that the singular executive needed not take the British Crown as a model. The geographic magnitude of the United States called for "the vigour of Monarchy," but its political conditions and popular attitudes were against a King and were "purely republican."[221] This trade-off—between granting the national government sufficient power to administer its laws over a vast territory and restricting its executive authority insofar as necessary to protect liberty—resulted in a singular executive branch without singular powers. That is, monarchical structure did not have to possess monarchical powers but merely facilitated carrying out the executive powers that Article II did enumerate.

By contrast, Edmund Randolph criticized the presidency as "the foetus of monarchy."[222] He proposed to endow equal vigor in executing the laws in a multimember executive: a triumvirate of three citizens from different districts of the union.[223] Others shared Randolph's criticism of a singular executive and characterized the presidency as a "more dangerous monarchy" than the British Crown—one that was "elective."[224] But both Wilson and Randolph agreed that Article II's executive structure was

[218] Id. at 380; see supra notes 171–72 and accompanying text (examining the decemvirate).

[219] 1 Farrand's Records, supra note 193, at 71.

[220] Id. at 65–66.

[221] Id. at 71; see also id. at 86–87 (statement of John Dickinson) (arguing that "a firm Executive could only exist in a limited monarchy," characterizing limited monarchy as "*one* of the best Governments in the world," but dismissing it as "out of the question" due to the "spirit of the times").

[222] Id. at 66; id. at 92 ("A single Person may be considered the foetus of a Monarchy."); accord id. at 74 (voicing criticism that the Executive "would savor too much of a monarchy"); see also id. at 83, 187.

[223] See id. at 92; see also id. at 88 (arguing that "plurality" is "equally competent to all the objects of the [executive] department" as unity). But see id. (statement of Pierce Butler) (contending that a plurality of persons could never effectuate dispatch).

[224] Id. at 101 (statement of George Mason); see also id. at 113 (arguing that extensive executive powers vested in one person "degenerate[s] . . . into a monarchy").

monarchical. Their disagreement lies in whether singular *structure* aggrandizes the presidency with kingly *powers*.

For the prevailing camp, the answer was a resounding no. A central tenet of the Aristotelian model subjects singular structures to extraordinary mechanisms to ensure accountability.[225] The Founders built almost all of the Aristotelian model's accountability mechanisms into executive structure. The President has limited powers: as discussed, the British Crown could not serve as a blueprint.[226] The Founders subjected the President to electoral control—another Aristotelian accountability mechanism for monarchy.[227] The electoral procedure for the "chief magistrate" originally featured even more structural protections than the Aristotelian model. The President was *democratically* accountable to the people and *aristocratically* accountable to the Electoral College. This was intended to balance "the sense of the people" against the need to "anal[y]z[e] the qualities adapted to the station [of the presidency]" in deliberation free from popular "heats and ferments."[228] Expertise and the ability to moderate any excesses of democracy are quintessential qualities of aristocracy.[229] Presidential electors today no longer exercise independent judgment but generally follow the results of the popular elections of their states.[230] But the monarchical structure of the Executive still incorporates singular safeguards like sharply limited power and electoral accountability to the entire nation.[231] The values underpinning structural design and functional powers inform each other. Executive power calls for particular institutional designs (monarchy); singular institutional structures also demand substantive functional safeguards (limited executive power).

[225] See supra Table 2 (listing limited and defined powers, electoral control, and rule-of-law norms as accountability mechanisms of Aristotelian monarchy).

[226] See supra notes 220–21 and accompanying text.

[227] See supra Subsection II.A.1.

[228] The Federalist No. 68, supra note 97, at 363–64 (Alexander Hamilton).

[229] See supra Table 2 (listing intellectual (expertise) and ethical (moderation) excellences as the defining qualities of Aristotelian aristocracy); see also infra Section III.C (describing how the "deliberative moderation and expertise of the Senate . . . result from its institutional compactness").

[230] See, e.g., Norman R. Williams, Reforming the Electoral College: Federalism, Majoritarianism, and the Perils of Subconstitutional Change, 100 Geo. L.J. 173, 182 (2011).

[231] The demise of the Electoral College as an aristocratic check on the appointment of the President signals a return to the Aristotelian model, which only posits democratic accountability for monarchy.

This Founding-era debate remains deeply relevant to contemporary separation of powers doctrine. In *PHH Corp. v. CFPB*, the en banc D.C. Circuit held the CFPB constitutional in part because its singular structure aids execution and enables accountability, precisely as Federalist 70 argues. The majority remarks that the CFPB's "consolidation of regulatory authority that had been shared among many separate independent agencies allows the President more efficiently to oversee the faithful execution of consumer protection laws."[232] Further, "[d]ecisional responsibility is clear now that there is one, publicly identifiable face of the CFPB who stands to account . . . . The fact that the Director stands alone atop the agency means he cannot avoid scrutiny through finger-pointing, buck-passing, or sheer anonymity."[233]

The Supreme Court similarly engaged with these arguments in *Seila Law*, even though it ultimately found the other side persuasive. For Chief Justice Roberts (writing for the majority), the singular structure of a government entity is justified by its electoral accountability to the entire nation—a feature that the CFPB lacks, and a defect that other accountability mechanisms (e.g., powers limited to consumer-finance regulation) cannot remedy.[234] The *Seila Law* Court takes a more formalist approach to structural separation. Fixed accountability mechanisms must accompany certain structural design: e.g., nationwide electoral control for any singular decision-making body with budgetary autonomy. This approach contrasts with an upshot of the demise of the Electoral College as an aristocratic institution. The latter suggests the malleability of accountability mechanisms: the combination of those procedures and mechanisms that legitimate monarchy could evolve together with the development of political and governance norms. After all, the lack of an aristocracy to moderate any democratic excess in presidential elections does not render the presidency illegitimate.

[232] PHH Corp. v. CFPB, 881 F.3d 75, 93 (D.C. Cir. 2018) (en banc), *abrogated by* Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2201 (2020).

[233] *PHH Corp*., 881 F.3d at 93.

[234] *Seila Law*, 140 S. Ct. at 2203.

C. Aristocracy, Senate, and Federal Courts

1. The Senate

Structural considerations animated the design of the original Senate. Federalist 62 and 63 advance four justifications for structuring the Senate as an aristocracy. First, the Senate checks the democratic excesses of the House. A unicameral legislature, due to the numerosity of its membership, tends "to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders, into intemperate and pernicious resolutions."[235] An institution designed to correct this "infirmity" must itself be impervious to demagoguery and the heat of the political moment—and "ought to be *less numerous*."[236] Second, Madison contends that American government has too much popular fidelity and little legislative expertise: good government requires both, so Senators ought to be motivated by a "permanent" devotion to the "study of the laws."[237] Third, the Senate must evince a "due sense of national character," which cannot be found in a "numerous and changeable body" but only in "a number so small."[238] Lastly, "due responsibility in the government to the people" requires not only adherence to immediately desirable measures but also commitment to longstanding norms, which advance the public welfare in their "gradual and perhaps unobserved operation."[239] The latter, again, requires a less numerous body. The deliberative moderation and expertise of the Senate thus result from its institutional compactness.[240]

The aristocratic Senate is subject to mechanisms to ensure accountability and orientation toward the common good. The original, dual-layered method of appointment means that Senators must first

[235] The Federalist No. 62, supra note 97, at 334 (James Madison).

[236] Id. (emphasis added). Madison advanced similar arguments at the Federal Convention, contending that the "use of the Senate [would] consist in its proceeding with more coolness, with more system, & with more wisdom, than the popular branch," so that the weight of senatorial judgment "would be in an inverse ratio to [its] number." 1 Farrand's Records, supra note 193, at 151.

[237] The Federalist No. 62, supra note 97, at 334 (James Madison). This objective in the formation of the Senate matters more for the duration of its office than with its numerosity—it becomes more relevant to the discussion of the federal judiciary in Subsection III.C.3, *infra*.

[238] The Federalist No. 63, supra note 97, at 337 (James Madison).

[239] Id. at 338.

[240] That is, as a matter of constitutional meaning. As an empirical claim, it is subject to debate. See Matthew Stephenson, Does Separation of Powers Promote Stability and Moderation?, 42 J. Legal Stud. 331, 362 (2013).

answer to their respective state legislatures—an electorate already more attuned to aristocratic excellences—that are then made accountable to the people.[241] But the Senate should ultimately be faithful to popular sentiments: during the federal convention, Madison analogized the Senate to the Roman tribunate, "appointed to take care of the popular interests."[242] Madison continued:

> [T]he people by reason of their numbers could not act in concert; were liable to fall into factions among themselves, and to become a prey to their aristocratic adversaries. The more the representatives of the people therefore were multiplied, the more they partook of the infirmaties of their constituents, the more liable they became to be divided among themselves either from their own indiscretions or the artifices of the opposite factions, and of course the less capable of fulfilling their trust.[243]

Madison's reference to the "Roman Tribunes" illuminates our understanding of the original Senate. The plebeian tribunes (*tribuni plebis*) were representatives of the Roman people and *counteracted* the Roman Senate, which had a more aristocratic membership.[244] Madison's point is not that the federal Senate should *represent* American aristocracy, which did not exist in the form of a landed nobility.[245] Rather, the Senate infuses an aristocratic element into the federal structure, to ameliorate the faction, partisanship, and legislative myopia of the democratic House.[246] Again, the Constitution shifted from the British sociological model, where each government institution corresponds to a social

[241] Subsection III.C.3 examines in greater detail the processes of electoral filtration and distillation.

[242] 1 Farrand's Records, supra note 193, at 152. During the Roman Republic, the ten plebeian tribunes (*tribuni plebis*) could veto the consuls' public actions to protect the broader population from the magistracy. See Boatwright et al., supra note 171, at 62.

[243] 1 Farrand's Records, supra note 193, at 152.

[244] See Mary Beard, SPQR: A History of Ancient Rome 225–26 (2015).

[245] See also Claire Priest, Creating an American Property Law: Alienability and Its Limits in American History, 120 Harv. L. Rev. 385, 387–98 (2006) (arguing that the American legal treatment of land as commodity marked a decided departure from England, "a society in which political and social authority was vested in a landed class that perpetuated itself through long-term ownership of real property").

[246] See also Wirls & Wirls, supra note 200, at 11–38 (discussing two sources considered by the Founders when designing the American Senate: the Roman model of mixed government and liberal constitutionalism); id. at 105 tbl.5.1 (summarizing important decisions that were made in the construction of the Senate).

constituency,[247] to a classical model, which assigns government functions based on institutional design.

The Senate reflected both a continuity from earlier practice and an innovation. The Founders had always envisioned bicameralism as an aristocratic solution to the dangers of majoritarian democracy.[248] In 1776, Adams urged that "a distinct assembly be constituted, as a mediator between the two extreme branches of the legislature, that which represents the people, and that which is vested with the executive power."[249] In his draft Virginia constitution, Jefferson proposed the election of Senators by the lower House for life tenure,[250] because "a choice by the people themselves is not generally distinguished for it[]s wisdom."[251] This idea that senatorial election selected an aristocracy from the multitude survived into the Constitution. But the precise method to effect that goal shifted. Early in the Revolutionary period, property ownership was used as a proxy for the aristocratic excellences of moderation, expertise, and independence. Massachusetts's constitution, drafted in 1780 by John Adams, allocated representation in the General Court based on the tax revenues collected from each district.[252] Contemporary politicians explained that Senators ought to be "selected for their Wisdom, remarkable Integrity, or that weight which arises from property and gives Independence and Impartiality to the human mind," and that the Senate would therefore constitute a "refinement of the first choice of the

[247] Wood, supra note 29, at 199–201.

[248] See generally Wood, supra note 29, at 197–98, 206–09 (discussing the Senate, which would be comprised of social and intellectual elites, and which would embody the aristocratic element of a mixed republic); see also Wirls & Wirls, supra note 200, at 39–49 (surveying the functions and purposes of state senatorial institutions between the Revolution and the Federal Convention, which reflected "doubts about popular judgment and . . . provisions for prudence").

[249] John Adams, Thoughts on Government 486 (George W. Carey ed., Regnery Publ'g, Inc. 2000) (1776); see also Wirls & Wirls, supra note 200, at 46 (crediting Adams's *Thoughts on Government* as a main driving force toward bicameralism in the Founding Era).

[250] See Thomas Jefferson, First Draft of the Virginia Constitution (June 1–13, 1776), https://founders.archives.gov/documents/Jefferson/01-01-02-0161-0002 [https://perma.cc/LA5L-GQ5Y] (last visited Jan. 28, 2024) ("[T]he house of Senators shall . . . consist of not less than [15] <*nor more than* [ ]> members who shall be appointed by the house of Representatives & when appointed shall be in for life . . . .").

[251] Letter from Thomas Jefferson to Edmund Pendleton (Aug. 26, 1776), *in* 1 The Papers of Thomas Jefferson 503, 503 (Julian P. Boyd ed., 1950).

[252] See Mass. Const. ch. I, § 2, art. I (1780) ("[T]he General Court, in assigning the numbers to be elected by the respective Districts, shall govern themselves by the proportion of the public taxes paid by the said districts . . . .").

people."[253] Wealth was perceived to guard against the lure of corruption—Senators' livelihood would not rest on bribes—and to enable study and moral development. The federal Senate thus represents an innovation upon past practice: property is no longer a formal requirement for membership. Instead, the Founders chose institutional plurality and electoral filtration.[254]

The Senate as the Founders envisioned no longer exists. The Seventeenth Amendment provided for popular election of Senators.[255] Admissions of new states[256] have produced an institution of 100 members, substantially larger than the original House of Representatives.[257] The two structural elements—size and election by state legislatures—designed to foster senatorial expertise and moderation have both disappeared. Today's Senate is as animated by partisanship and ideological extremism as the House that it is supposed to moderate.[258] The increased use of the filibuster means that any consensus-building is facilitated more by obstructionism than by collegiality.[259] Less conspicuously, the demographics of the two houses' membership have converged.[260] While

[253] Letter from William Hooper, Delegate from North Carolina to the Continental Congress, to the Congress at Halifax (Oct. 26, 1776), *in* 10 The Colonial Records of North Carolina 862, 868 (William L. Saunders ed., 1890).

[254] At the Federal Convention, James Wilson was the only proponent of the Senate's popular election. His proposal was crushed by a 10-1 vote. Todd J. Zywicki, Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment, 73 Or. L. Rev. 1007, 1013 (1994).

[255] U.S. Const. amend. XVII (providing for popular election of Senators).

[256] See generally Gregory Koger, Filibustering: A Political History of Obstruction in the House and Senate 81 fig.5.1 (2010) (illustrating chamber size from 1789 to 1901).

[257] John H. Aldrich & Ruth W. Grant, The Antifederalists, the First Congress, and the First Parties, 55 J. Pol. 295, 322–23 app.1 (1993) (listing 65 members of the first House of Representatives).

[258] See, e.g., Chris Cillizza, Senate Has Become More Partisan, Less Collegial—More Like the House, Wash. Post (Apr. 7, 2013, 12:45 PM), https://www.washingtonpost.com/politics/senate-has-become-more-partisan-less-collegialmore-like-the-house/2013/04/07/611756de-9f92-11e2-82bc-511538ae90a4_story.html [https://perma.cc/VZG3-MMWT].

[259] See Eric Schickler & Gregory J. Wawro, Filibuster: Obstruction and Lawmaking in the U.S. Senate 1–23 (2006).

[260] The Constitution requires Senators to be at least thirty years old to guarantee their intellectual and social capacity, associated with age and experience in life, of counteracting the excesses of the democratic House. U.S. Const. art. I, § 2, cl. 2; id. § 3, cl. 3; The Federalist No. 62, supra note 97, at 331 (James Madison) ("[T]he nature of the senatorial trust . . . require[s] greater extent of information and stability of character . . . ."). In the 112th Congress, the gap in both age and educational attainments of Senators and Representatives is negligible. See R. Eric Petersen, Cong. Rsch. Serv., R42365, Representatives and Senators: Trends in Member Characteristics Since 1945, at 1, 4, 12–15 (2012).

the Senate remains subject to democratic accountability mechanisms, its function to channel intellectual and moral excellences has largely diminished.

2. The Rise of the Federal Judiciary as an Aristocracy

The evolution of the Senate has not put an end to aristocratic structures in the federal government.[261] From its inception, the structural protections afforded to the federal judiciary to guarantee its independence have served similar functions as senatorial structure. Federal judges hold life tenure and a right to undiminished salary—more powerful instruments of autonomy than the Senator's lengthy term.[262] The nomination process involves input from the President (the monarchy) and the Senate (originally the aristocracy but now a democratic-federalism structure[263]). This results in a filtration mechanism like the original selection method of the Senators. Most senatorial actions require (1) the approval (presentment) or initiative (nomination or treaty-making) by the monarchical President;[264] (2) the participation of the states (as Senators were chosen by state legislatures before the Seventeenth Amendment[265]); and (3) a proxy of democratic accountability in the form of selection by *popularly elected* state legislatures.[266] The appointment of Article III judges incorporates similar safeguards, requiring (1) nomination by the monarchical President;[267] (2) the federalism component of Senate confirmation;[268] and (3) a proxy of democratic accountability in the form of selection by the popularly elected President and Senators.[269]

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[261] See Ely, supra note 29, at 283–92.

[262] U.S. Const. art. III, § 1. The Supreme Court has consistently recognized these structural protections as central to the separation of powers scheme of the Constitution; a recent example may be found in *Stern v. Marshall*, 564 U.S. 462, 483–84 (2011).

[263] See Wechsler, supra note 203, at 546–48.

[264] U.S. Const. art. I, § 7, cl. 2; id. art. II, § 2, cl. 2; INS v. Chadha, 462 U.S. 919, 954–55 (1983) (holding that, barring precisely delineated exceptions, congressional implementation of policy requires "bicameral passage followed by presentment to the President").

[265] U.S. Const. art. I, § 3, cl. 1, *amended by* U.S. Const. amend. XVII.

[266] See, e.g., Wirls & Wirls, supra note 200, at 45, 80–90.

[267] U.S. Const. art. II, § 2, cl. 2 (authorizing the President to nominate "Judges of the supreme Court, and all other Officers of the United States").

[268] Id. (requiring the advice and consent of the Senate); U.S. Const. art. V ("[N]o State, without its Consent, shall be deprived of its equal Suffrage in the Senate.").

[269] See, e.g., Christopher L. Eisgruber, The Next Justice: Repairing the Supreme Court Appointments Process 1–16 (2007) (surveying the modern partisan confirmation battles of Supreme Court Justices).

Numerosity of the Article III branch also structures it as an aristocracy. Atop the hierarchy of federal courts sit nine Justices. Nine is not a magic number. But the language of Article III, vesting the judicial power in "*one* Supreme Court," suggests that Congress cannot expand the membership of the Court to destroy its ability to function as *one* adjudicative body.[270] The Judicial Conference has argued against increasing the number of Article III judgeships: the small number of federal judges preserves independence and the quality of the bench, both conducive to the constitutional judicial power.[271] Of course, the benefits of institutional plurality—as opposed to unity or numerosity—extend beyond the design of the *constitutional* branches. In the panel opinion of *PHH Corp. v. CFPB*, then-Judge Kavanaugh focused on the absence of pluralist agency structure (i.e., multimember commission), which better guards individual liberty by facilitating a diversity of viewpoints and their ventilation.[272] Contemporary scholars have explained the deliberative,[273] collegial,[274]

[270] U.S. Const. art. III, § 1 (emphasis added); see Akhil Reed Amar, America's Unwritten Constitution: The Precedents and Principles We Live By 353–56 (2012) ("[J]ustices must tightly cohere into one highly unified and centralized entity."). The Ninth Circuit, whose en banc hearings only involve a fraction of its active judges (eleven of twenty-nine), might be a court whose size has fragmented its unity. See Pamela Ann Rymer, The "Limited" En Banc: Half Full, or Half Empty?, 48 Ariz. L. Rev. 317, 317–18 (2006).

[271] Jud. Conf. of the U.S., Report of the Federal Courts Study Committee 7 (1990) (explaining that federal judges must be "sufficiently *few in number* to feel a personal stake in the consequences of their actions") (emphasis added).

[272] PHH Corp. v. CFPB, 839 F.3d 1, 26–27 (D.C. Cir. 2016), *rev'd en banc,* 881 F.3d 75, 77 (D.C. Cir. 2018), *abrogated by* Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2192, 2197 (2020).

[273] Datla & Revesz, supra note 46, at 794 ("[A] multimember structure can foster more deliberative decision making, a higher level of expertise, and continuity of policy."). But cf. Cass R. Sunstein, Infotopia: How Many Minds Produce Knowledge 45–48, 57–60, 65–73 (2006) (documenting group deliberative failures).

[274] Marshall J. Breger & Gary J. Edles, Established by Practice: The Theory and Operation of Independent Federal Agencies, 52 Admin. L. Rev. 1111, 1113 (2000) ("[M]ulti-member organizations . . . tend[] toward accommodation of diverse or extreme views through the compromise inherent in the process of collegial decisionmaking.").

de-partisan,[275] aggregative,[276] and capture-avoiding[277] benefits of institutional compactness.[278]

This structural design has enabled the judiciary to fulfill a senatorial function—checking the democratic excesses of Congress—through judicial review.[279] *Marbury v. Madison* symbolizes the power of the Court to obstruct the judgment of the political branches when it runs counter to constitutional norms that advance effective governance in their "gradual and perhaps unobserved operation"[280]—a senatorial function. Alexis de Tocqueville famously argued that the American legal profession provided "the most powerful existing security against the excesses of

[275] See Harry T. Edwards, The Effects of Collegiality on Judicial Decision Making, 151 U. Pa. L. Rev. 1639, 1645 (2003) (arguing that collegiality, conceived of as "a *process* that helps to create the conditions for *principled* agreement, by allowing all points of view to be aired and considered" "in an atmosphere of civility and respect" remedies partisan and ideological divides). Collegiality is by definition impossible within a single decision-maker, and near impossible to achieve in a group characterized by numerosity. See also Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), https://founders.archives.gov/documents/Jefferson/01-12-02-0274 [https://perma.cc/JJ9C-RNQP] (last visited Jan. 28, 2024) (noting that decision-maker's desire for respect and reputation "loses its efficacy in proportion to the number which is to divide the praise or the blame").

[276] Recent Legislation, Dodd-Frank Act Creates the Consumer Financial Protection Bureau, 124 Harv. L. Rev. 2123, 2128 (2011) (noting that multimember decision-making "reduces the variance of policy and improves accuracy through aggregation"). The aggregative argument is age-old: Aristotle makes it by comparing democratic decision-making to a potluck, where the aggregation of different people's dishes (or wisdom) often outshines one eminent individual's. Aristotle's Politics, supra note 83, at 1286a25–30; Daniela Cammack, Aristotle on the Virtue of the Multitude, 41 Pol. Theory 175, 175–76 (2013); Josiah Ober, Democracy's Wisdom: An Aristotelian Middle Way for Collective Judgment, 107 Am. Pol. Sci. Rev. 104, 109–11 (2013).

[277] Rachel E. Barkow, Insulating Agencies: Avoiding Capture Through Institutional Design, 89 Tex. L. Rev. 15, 41 (2010). This insight also traces its origins to Aristotle, who argues that group deliberation is more incorruptible than individual thinking. Aristotle's Politics, supra note 83, at 1286a30–35.

[278] But see Adriaan Lanni & Adrian Vermeule, Constitutional Design in the Ancient World, 64 Stan. L. Rev. 907, 920–25 (2012) (describing the potential disadvantages, in terms of incoherence, diminished accountability, and increased decision-making costs, of a multimember entity in the context of constitutional design).

[279] See generally Keith E. Whittington, Repugnant Laws: Judicial Review of Acts of Congress from the Founding to the Present (2019) (providing a comprehensive overview of the instances where the United States Supreme Court has examined the constitutionality of a federal statute).

[280] The Federalist No. 63, supra note 97, at 338 (James Madison); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803); see also William Michael Treanor, Judicial Review Before *Marbury*, 58 Stan. L. Rev. 455, 456–58 (2005) (arguing that judicial review was well established even before *Marbury*).

democracy."[281] Lawyers' specialized knowledge gives them "a separate station in society," assimilating "the tastes and . . . the habits of the aristocracy."[282] The legal profession is "antidemocratic" insofar as it endeavors to "divert[] [democracy] from its real tendency" toward tyranny of the majority, but it does so without "overthrow[ing] [democratic] institutions."[283] Today's Supreme Court routinely moderates the legislative judgment of Congress, and its countermajoritarian tendencies have been well explored in scholarship.[284]

The structure of federal appellate courts also features pluralist bodies (whether three-judge or en-banc panels) that promote deliberative and moderating excellences.[285] Scholars have documented the "panel effects" of appellate decision-making: judges do not stably vote for outcomes based on their policy preferences but appear influenced by preferences of other judges on their panel.[286] Because judges' votes are influenced by the composition of the respective panels, and assuming that few circuits are overwhelmingly dominated by judges of the same ideology, panel decision-making tends to moderate case outcomes.[287] One leading school

[281] Alexis de Tocqueville, Democracy in America 254 (Henry Reeve trans., N.Y.C., George Adlard 1838).

[282] Id. at 254–55.

[283] Id. at 256–57.

[284] Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 16–23 (1962); Michael J. Klarman, Majoritarian Judicial Review: The Entrenchment Problem, 85 Geo. L.J. 491, 492–502 (1997); see Barry Friedman, The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five, 112 Yale L.J. 153, 155–62 (2002).

[285] See 28 U.S.C. § 46(c) (three-judge panels); Fed. R. App. P. 35 (en banc review); see also John O. McGinnis, Comparing the Court and the Fed: Democratic Dilemmas of Elite Institutions, 57 Wake Forest L. Rev. 173, 197 (2022) (discussing the institutional features of the Supreme Court).

[286] See Pauline T. Kim, Deliberation and Strategy on the United States Courts of Appeals: An Empirical Exploration of Panel Effects, 157 U. Pa. L. Rev. 1319, 1322–24 (2009) (surveying literature on panel effects); Frank B. Cross, Decision Making in the U.S. Courts of Appeals 148–77 (2007) (illustrating the importance of ideological influence on the panel effect); Cass R. Sunstein, David Schkade, Lisa M. Ellman & Andres Sawicki, Are Judges Political? An Empirical Analysis of the Federal Judiciary 17–45 (2006) (surveying over 6,000 three-judge panels and confirming the power of ideology on the panel effect); Richard L. Revesz, Environmental Regulation, Ideology, and the D.C. Circuit, 83 Va. L. Rev. 1717, 1719 (1997) (finding that the party affiliation of other judges on the sampled panels had a greater impact on a judge's vote than their own affiliation).

[287] Deliberation can also lead to group polarization: members of a deliberating group may "move toward a more extreme point in the direction indicated by the members' predeliberation tendencies." Cass R. Sunstein, The Law of Group Polarization, 10 J. Pol. Phil. 175, 176 (2002) (emphasis omitted). However, the effects of group *de*polarization overall outweigh the effects

explains panel effects by reference to deliberative norms: judges persuade each other by information exchange, reasoned argument, and collegial engagement, in an error-reducing process that moderates their own ideological biases.[288]

3. Representation as an Aristocratic Institution

In addition to the federal judiciary, representation carries unmistakable undertones of aristocracy. In Federalist 63, Madison explains that ancient constitutional design incorporated representation, and uses it to illustrate the federal Constitution:

> [I]t is clear that the principle of representation was neither unknown to the antients, nor wholly overlooked in their political constitutions. The true distinction between these and the American governments lies *in the total exclusion of the people in their collective capacity* from any share in the *latter*, and not in the *total exclusion of* the *representatives of the people*, from the administration of the *former*.[289]

The Founders did not invent democratic representation. Rather, the modern innovation consists in a complete *exclusion* of the people themselves, acting in a collective rather than represented capacity, from government. The hallmark of the 1787 Constitution is *complete delegation*: the political community as a whole has no power to govern itself (through, for example, a national referendum).[290] After all, the

of group polarization in Article III adjudication. For group polarization is facilitated by enclave deliberation (by like-minded people), and "deliberating groups will tend to depolarize if they consist of equally opposed subgroups and if members have a degree of flexibility in their positions." Id. at 180. Most appellate panels feature a combination of judges with different political leanings. See Adam S. Chilton & Marin K. Levy, Challenging the Randomness of Panel Assignment in the Federal Courts of Appeals, 101 Cornell L. Rev. 1, 38–39 (2015) (finding evidence of nonrandomness in four different circuit courts).

[288] See Edwards, supra note 275, at 1645; Lewis A. Kornhauser & Lawrence G. Sager, The One and the Many: Adjudication in Collegial Courts, 81 Calif. L. Rev. 1, 48–49 (1993); see also Sean Farhang & Gregory Wawro, Institutional Dynamics on the U.S. Court of Appeals: Minority Representation Under Panel Decision Making, 20 J.L. Econ. & Org. 299, 308 (2004) (surveying the deliberative model of panel effects).

[289] The Federalist No. 63, supra note 97, at 341 (James Madison).

[290] In *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118 (1912), a corporation challenged an Oregon tax assessment of two percent on the gross revenue derived from telephone businesses in the state. Because the tax measure was adopted through a voter initiative, the corporation argued: "Government by the people directly is the attribute of a pure democracy and is subversive of the principles upon which the republic is founded. Direct

Founders considered the new federal government a republic, not a pure or radical democracy found in classical antiquity.[291]

Madison's observation in Federalist 63 accentuates how *un*democratic, or even *anti*democratic, representation can be as a device for transferring political authority from the people to the few.[292] Representation concentrates power among an elite that is but a fraction of the society that it represents. Indeed, the Founders saw representation as an *aristocratic* institution that allows, in Jefferson's language, a "natural aristocracy among men," or "a race of veritable ἄριστοι [*aristoi*]" to emerge.[293] This aristocratic institution operates through two distinct mechanisms, which I call filtration and distillation.

Under filtration, the citizenry has no direct authority to elect candidates to office but is entitled to choose those who do. As envisioned by the Founders, Senators, the President, and federal judges were all subject to electoral filtration. Jefferson laid out the rationale behind filtration:

> I have ever observed that a choice by the people themselves is not generally distinguished for it's wisdom. This first secretion from them is usually crude and heterogeneous. But give to those so chosen by the people a second choice themselves, and they generally will chuse wise men. For this reason it was that I proposed the representatives (and not

legislation is, therefore, repugnant to that form of government with which alone Congress could admit a State to the Union." Id. at 123.

[291] See also The Federalist No. 10, supra note 97, at 52 (James Madison) (observing that a main difference between the democracy and mixed republic consists in the latter's "delegation of the government . . . to a small number of citizens elected by the rest").

[292] Writing in the context of the Guarantee Clause, some argue that the Founders saw republicanism in contradistinction to monarchy and aristocracy. Akhil Reed Amar, The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem, 65 U. Colo. L. Rev. 749, 758 (1994); Jack M. Balkin, Republicanism and the Constitution of Opportunity, 94 Tex. L. Rev. 1427, 1432 (2016). But separation of structures suggests a more complex picture. Republican governments feature democratic accountability to the people, but they incorporate monarchical and aristocratic structures to carry out government functions. It might surprise some readers that constitutional separation of powers involves at its core institutional structures bearing the names of monarchy and aristocracy. But in the Founders' understanding, pure democracy featured radical egalitarianism and direct rule of the people: a President, a Supreme Court, or an IRS commissioner selected by lottery from all adult citizens would make most of us—even the most ardent democrats—uneasy.

[293] Letter from Thomas Jefferson to John Adams, supra note 187, at 186–87; see Wood, supra note 29, at 218 ("This emphasis on wealth and property [as a qualification for senatorial eligibility] was symptomatic of the Americans' frustration in segregating their natural aristocracy."). ἄριστοι (*aristoi*) is the ancient Greek superlative term for "best men" and is the root for aristocracy—the rule of the best.

> the people) should chuse the Senate, and thought I had notwithstanding that made the Senators (when chosen) perfectly independent of their electors.[294]

Filtration therefore inserts a second-order election in the process of selecting public officials. An already elected body of electors—vetted by the entire political community based on an aggregated set of considerations—can better choose the candidates most qualified for office. Today, filtration remains central to the selection of federal judges, leadership positions within Congress, and officers of the United States (including agency heads).[295]

Distillation entails selecting a small number of people to occupy offices that govern a large citizenry. In contrast to filtration, distillation does not require second-order elections or limit the electorate in the selection of governmental posts. Instead, it increases the ratio of eligible voters to their representatives. That is, filtration modifies voter eligibility and the political process, while distillation modifies the product, concentrating power among the few victors in federal elections.

In Federalist 10, Madison theorizes three advantages of this electoral device. First, distillation "refine[s] and enlarge[s] the public views, by passing them through the medium of a chosen body of citizens," so that "the public voice pronounced by the representatives of the people, will be more consonant to the public good, than if pronounced by the people themselves."[296] Put differently, distillation facilitates deliberative democracy by enabling rational discussion[297] and avoiding the confusion, impracticality, and haste of direct democracy. It brings a peculiar kind of discursive benefit of structure.[298] Second, a large republic (and a large ratio of citizens to representatives) "present[s] a greater option, and consequently a greater probability of a fit choice" in elections.[299] That is, the size of the governing elite within a representative republic is generally fixed—neither too small, "to guard against the cabals of a few," nor too

[294] Letter from Thomas Jefferson to Edmund Pendleton, supra note 251, at 503.

[295] Principal officers of the United States are selected by the President, and inferior officers, subject to the supervision of others accountable to the President, are selected by the President, courts of law, or heads of departments. Buckley v. Valeo, 424 U.S. 1, 132 (1976).

[296] The Federalist No. 10, supra note 97, at 52 (James Madison).

[297] Amy Gutmann & Dennis Thompson, Why Deliberative Democracy? 3–4 (2004).

[298] See Heather K. Gerken, Federalism as the New Nationalism: An Overview, 123 Yale L.J. 1889, 1894–97 (2014) (discussing the idea of discursive benefits of structure).

[299] The Federalist No. 10, supra note 97, at 53 (James Madison).

large, "to guard against the confusion of a multitude."[300] A large republic therefore runs a higher likelihood of finding in its citizens the ideal combination of expertise and moderation for public service. Third, distillation increases the difficulty of election. In a large republic, "it will be more difficult for unworthy candidates to practise with success the vicious arts, by which elections are too often carried."[301] Because fewer contenders will be placed in the national spotlight, and because they must appeal to a diversity of voters, few can escape electoral scrutiny.

While filtration has diminished as an electoral device, distillation has gained ground: the growth of U.S. population means that the ratio of residents to, for example, Representatives has increased from roughly 60,000:1 to over 710,000:1 in the 2010s.[302]

Both filtration and distillation are *aristocratic* devices. They transfer authority from the undifferentiated body of citizens to a few selected to exercise political power. Madison recognized that the Constitution created not a democracy but a mixed republic, characterized by "delegation of the government . . . to a small number of citizens elected by the rest."[303] Jefferson more explicitly equates "natural aristocracy [to] . . . the most precious gift of nature," suggesting that "that form of government is the best, which provides the most effectually for a pure selection of these natural aristoi into the offices of government."[304] Distillation, according to Jefferson, accomplishes precisely this task—"to leave to the citizens the free election and separation of the *aristoi* from the pseudo-*aristoi*, of the wheat from the chaff."[305] Representation thus is not an instrument of direct democracy but an accountability mechanism for aristocratic structures in government.

[300] Id. at 52.

[301] Id. at 53.

[302] Drew Desilver, U.S. Population Keeps Growing, but House of Representatives Is Same Size as in Taft Era, Pew Rsch. Ctr. (May 31, 2018), https://www.pewresearch.org/fact-tank/2018/05/31/u-s-population-keeps-growing-but-house-of-representatives-is-same-size-as-in-taft-era [https://perma.cc/F946-ELS8].

[303] The Federalist No. 10, supra note 97, at 52 (James Madison).

[304] Letter from Thomas Jefferson to John Adams, supra note 187, at 187.

[305] Id. at 187–88.

D. Democracy and the House

Toward the end of the Federal Convention, Edmund Randolph posed the following question in examining the Origination Clause[306]:

> When the people behold in the Senate, the countenance of an aristocracy; and in the president, the form at least of a little monarch, will not their alarms be sufficiently raised without taking from their immediate representatives, a right [of drafting bills of revenue] which has been so long appropriated to them[?][307]

As Randolph alludes, the House of Representatives was structured as a democracy, its proximity and responsiveness to the popular will in contrast to the aristocratic Senate and the monarchical presidency. The House featured "an immediate dependence on, and an intimate sympathy with, the people" on account of its numerosity and frequency of elections.[308] The Founders subjected the House to electoral distillation—both as a necessary institution of republicanism and to lessen, even without senatorial oversight, "the confusion and intemperance of a multitude."[309] However, the House was the only constitutional branch structured without filtration: "electors [of representatives] are to be the great body of the people."[310] Given the experience of "antient republics," where the entire citizenry decided matters of policy and were often led astray by demagogues, Madison counseled against expanding the membership of the House beyond what was needed for "diffusive sympathy" with the people—an expansion that could result in a "democratic" appearance but an "oligarchic" "soul."[311] Madison argued that population growth could increase the size of the House to 400, which should allay fears about the entity's small size.[312] The House was therefore designed as a democracy highly responsive to popular needs, but subject to distillation to prevent numerosity from rendering it an

[306] U.S. Const. art. I, § 7, cl. 1 ("All Bills for raising Revenue shall originate in the House of Representatives . . . .").
[307] 2 Farrand's Records, supra note 193, at 278–79.
[308] The Federalist No. 52, supra note 97, at 286 (James Madison).
[309] The Federalist No. 55, supra note 97, at 301 (James Madison).
[310] The Federalist No. 57, supra note 97, at 310 (James Madison).
[311] The Federalist No. 58, supra note 97, at 317 (James Madison) (emphasis omitted).
[312] The Federalist No. 55, supra note 97, at 302 (James Madison).

instrument of oligarchy. It was the "grand depository of the democratic principle of the government."[313]

* * *

Founding-era evidence provides a clear picture of constitutional separation of *structures*. The Founders not only divided functional powers but also designed distinct structures—single, plural, and numerous decision-making bodies—where those powers would reside. The assignment of functional powers depends on the decision-making structure and its associated values, and structural design also depends on the powers an entity is assigned to exercise. As suggested by the Aristotelian model, all structures are subject to democratic accountability through electoral control.[314] Further, the Founders designed mechanisms that make constitutional structures accountable to each other—with the sole exception of the House.[315]

The anti-Federalists—opponents to the ratification of the Federal Constitution—also recognized this tripartition and separation of structures, characterizing the President as a "king," the Senate as "the aristocracy of the country," and the House as "the democrati[c] branch."[316]

Table 3 illustrates this separation of structures. The constitutional-structural framework largely builds on Aristotle's typology of regimes.[317] All institutional structures are made accountable to the people, and to

[313] Wechsler, supra note 203, at 546 (quoting 5 Debates on the Adoption of the Federal Constitution, in the Convention Held at Philadelphia in 1787, at 136 (Washington, D.C., Jonathan Elliot ed., 1845) (statement of George Mason)).

[314] See supra Subsections II.A.1–2.

[315] See Jide O. Nzelibe & Matthew C. Stephenson, Complementary Constraints: Separation of Powers, Rational Voting, and Constitutional Design, 123 Harv. L. Rev. 617, 626 (2010) (emphasizing the checks that each branch of government provides on the others). The gradual demise of filtration as an accountability mechanism and the concomitant rise in importance of distillation signal the return to the Aristotelian model, which only demands the regime's accountability to democracy. The Seventeenth Amendment and current efforts to democratize the Senate accord with this development. See Jonathan S. Gould, Kenneth A. Shepsle & Matthew C. Stephenson, Democratizing the Senate from Within, 13 J. Legal Analysis 502, 504 (2021).

[316] Speech of Patrick Henry at the Virginia State Ratifying Convention (June 5, 1788), *in* The Anti-Federalist: Writings by the Opponents of the Constitution 297, 308 (Herbert J. Storing ed., 1985); Brutus XVI, N.Y. J. (Apr. 10, 1788), *reprinted in* The Anti-Federalist, supra, at 189; Letter III from the Federal Farmer to the Republican, N.Y. J. (Oct. 10, 1787), *reprinted in* The Anti-Federalist, supra, at 44.

[317] See supra Section II.A.

other constitutional governance structures.[318] Both ex ante and ex post accountability mechanisms are present, with the political branches subject to both sets (since officeholders must be elected and can be voted out of office), and the judiciary subject to more significant ex ante and minimal ex post (mostly through impeachment) accountability to ensure independence while exercising the Article III power.[319] Montesquieu's theory on the assignment of functional powers remains influential: the monarchy executes, while democracy legislates with the moderation of aristocracy.[320] The judiciary's design deviates from Montesquieu, featuring not democratic rule but independence and insulation from the popular will.[321] The English sociological model has vanished, at least as a matter of explicit constitutional provisions: while the elite might retain a stronger grasp on aristocratic than democratic structures, all entities are accountable to the people rather than distinct social constituents.[322]

[318] For example, the President is made accountable to both pluralist and numerous structures (i.e., federal courts and Congress). Accountability is thus a more complex concept than the unitary executive thesis suggests. It consists not only in administrative substructures' (i.e., agencies') accountability to the President but also in the President's accountability to other constitutional structures. Unconstrained presidential control of agencies (e.g., as advocated by some unitary-executive theorists) undermines the latter. See Heidi Kitrosser, Accountability in the Deep State, 65 UCLA L. Rev. 1532, 1542–44 (2018); Heidi Kitrosser, The Accountable Executive, 93 Minn. L. Rev. 1741, 1745 (2009). Further, judicial enforcement of the unitary executive thesis may not even result in enhanced agency accountability to the President alone. See Edward H. Stiglitz, Unitary Innovations and Political Accountability, 99 Cornell L. Rev. 1133, 1180–81 (2014).

[319] See also Nixon v. United States, 506 U.S. 224, 234–35 (1993) (holding judicial review of impeachment proceedings inconsistent with the "Framers' insistence that our system be one of checks and balances" because "impeachment was designed to be the *only* check on the Judicial Branch" to ensure "judicial accountability"). Compare Saikrishna Prakash & Steven D. Smith, How to Remove a Federal Judge, 116 Yale L.J. 72, 76 (2006) (arguing that impeachment is not the only constitutionally sanctioned means of checking the judicial branch), with James E. Pfander, Removing Federal Judges, 74 U. Chi. L. Rev. 1227, 1245–46 (2007) (critiquing Prakash and Smith's argument by pointing to flaws in their historical analysis). Ex post democratic accountability is minimal on individual judges but can be substantial on federal courts as an institution. See John A. Ferejohn & Larry D. Kramer, Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint, 77 N.Y.U. L. Rev. 962, 976–77 (2002).

[320] See supra notes 167–68 and accompanying text.

[321] Cf. supra note 169 and accompanying text (invoking Montesquieu's argument that the judiciary should be entrusted to the populace, but only through a publicly announced system that results in a temporary tribunal).

[322] Cf. supra Section II.C (discussing the English sociological model of mixed government).

Table 3. Constitutional Separation of Structures

Structural Form	Monarchy	Aristocracy		Democracy
Decision-Making Body	One	Few		Multitude
Constitutional Branch	Presidency	Senate	Judiciary	House
Primary Functional Power	Executive	Legislative	Adjudicative	Legislative
Normative Values of Associated Structure	Vigor and expedition in executing the laws	Expertise and moderation; capacity of checking democratic excesses		Responsiveness to popular desires
Accountability Mechanisms to Monarchy	None	None (except partial accountability through the requirement of presentment)	Filtration through presidential nomination	None (except partial accountability through the requirement of presentment)
Accountability Mechanisms to Aristocracy	Filtration through Electoral College (superseded since electors exercise no independent judgment)	Filtration through selection by state legislature (superseded by the Seventeenth Amendment)	Filtration through Senate confirmation	None (except partial accountability, in the early republic, through the requirement of bicameralism)
Accountability Mechanisms to Democracy	Distillation through national election	Distillation (degree varying by state) through statewide popular election	Distillation through the proxy of President	Distillation (to a smaller degree) through district-wide popular election
Ultimate Source of Authority	Consent of the governed (implicit)			

One final note: this structural paradigm is liquidated in the design of early administrative agencies. For example, the First Congress created one of the very first independent agencies—the Sinking Fund Commission, an agency tasked with the purchase of public debt and composed of the Vice President, Chief Justice, Attorney General, Secretary of State, and Secretary of the Treasury.[323] That is, at least two

[323] Christine Kexel Chabot, Is the Federal Reserve Constitutional? An Originalist Argument for Independent Agencies, 96 Notre Dame L. Rev. 1, 4–5 (2020). See generally William Baude, Constitutional Liquidation, 71 Stan. L. Rev. 1, 8–13 (2019) (explaining that constitutional liquidation rested on the assumption that textual indeterminacies would be settled by subsequent practice).

members of the Commission could not have been removed by the President. This design reflects the structural principles illustrated in Table 3. First, the Sinking Fund Commission is a plural decision-making structure, which requires fewer accountability mechanisms than singular ones, thus permitting more agency independence. Second, all members of the Commission are subject to ex ante accountability mechanisms in appointment, and the presence of those mechanisms mitigates the need for one particular form of accountability, at-will removal.

IV. SCHOLARLY AND DOCTRINAL IMPLICATIONS

This Part of the Article examines, in turn, the scholarly and doctrinal implications of separation of structures.

A. Scholarly Implications

1. Beyond Separation and Balance Models

This Article has three main implications for contemporary separation of powers scholarship: (1) introducing separation of structures as a distinct strand of the theory; (2) incorporating into constitutional decision-making a large institutional-design literature, previously thought to be exogenous to the constitutional aspects of administrative law;[324] and (3) using this conceptual link with the Founding Era to defend the structural legitimacy of the administrative state against alleged deviation from constitutional norms.

As Part I has shown, separation and balance models have dominated the scholarly landscape, with theorists advocating stringent functional division or a fluid equilibrium among governmental powers. But neither separation nor balance models fully explain the Court's doctrine or the values animating the design of our governance institutions. Separation models clash with the reality of current practice, while balance models struggle to articulate the optimal balance essential to justiciability.[325] Part of the conceptual difficulty stems from overlooking separation of structures as a distinct strand of constitutional design. Not only did the Founders vest different functions in distinct branches of government, they

[324] Supra Section I.C.
[325] Supra notes 40–48, 56–57 and accompanying text.

also constituted different structures, with varying accountability mechanisms, to accommodate and carry out those powers.

Contrary to separation models, separation of structures implies that an insistence on segregating functional powers is misguided. Instead of demarcating fixed boundaries dividing legislative, executive, and judicial functions only, separation theorists should consider whether a government body's structural design aligns with its alleged encroachment on the powers of another. For example, whether an executive agency has engaged in legislative activities in violation of separation of powers depends not only on the categorization of the activity but also on whether its pluralist structure renders it a permissible vehicle for that activity. That is, even the highly formalist approach that separation theorists advocate does not result in strict separation of *functions*, because it does not account for *structures*. Instead of a tripartition of government into Congress/legislation, President/execution, and courts/adjudication, separation theorists may conceptualize the partition as numerosity/legislation, singularity/execution, and plurality/adjudication.

First, with respect to balance models, separation of structures recommends assessing the desirable distribution of not only powers but also structures in government. Balance theorists have faced challenges in identifying the optimal equilibrium among legislative, executive, or adjudicative solutions to our society's problems. Reconceptualizing that equilibrium in terms of the allocation of power to singular, pluralist, and numerous decision-making structures (and their underlying values) helps introduce concrete metrics to this endeavor.

Second, separation of structures encourages thinking beyond the balance and separation models. It incorporates an extensive institutional-design literature into the constitutional discourse. Scholars have already articulated how institutional design may enhance government entities' accountability, information acquisition and use, constitutional-interpretive capacity, power-shifting goals, democratic responsiveness, and credibility.[326] This research has been thought exogenous to

[326] E.g., Jerry L. Mashaw, Accountability and Institutional Design: Some Thoughts on the Grammar of Governance, *in* Public Accountability: Designs, Dilemmas, and Experiences 115, 115–17 (Michael W. Dowdle ed., 2006) (introducing a taxonomy of institutional features that advance different kinds of accountability); Christopher R. Berry & Jacob E. Gersen, Agency Design and Political Control, 126 Yale L.J. 1002, 1010–12 (2017); Stephanos Bibas, Prosecutorial Regulation Versus Prosecutorial Accountability, 157 U. Pa. L. Rev. 959, 1016 (2009) (suggesting reforms to internal structure to promote accountability); Sunstein, supra note 273, at 49–50; Matthew C. Stephenson, Information Acquisition and Institutional Design,

constitutional doctrine. But as this Article shows, central to separation of powers is the design of institutional structures that best channels the fulfillment of distinct government functions. These exogenous theories are in fact endogenous to constitutional adjudication of agency structure.

Third, some scholars have criticized the rise of the administrative state—a vast regulatory apparatus untethered from the separation of powers commitment of the Constitution.[327] The criticism has manifested in the recent debate on delegation and has given rise to a wholesale attack on the so-called "headless fourth branch."[328] One approach, for example,

124 Harv. L. Rev. 1422, 1483 (2011); Adrian Vermeule, The Parliament of the Experts, 58 Duke L.J. 2231, 2239 (2009); Adrian Vermeule, Second Opinions and Institutional Design, 97 Va. L. Rev. 1435, 1448–57 (2011) (highlighting the institutional benefits of second opinions in government decision making); Elizabeth Garrett & Adrian Vermeule, Institutional Design of a Thayerian Congress, 50 Duke L.J. 1277, 1291 (2001) (discussing the moderating and legitimating effects of deliberation as feature of institutional design); Michael C. Dorf, Legal Indeterminacy and Institutional Design, 78 N.Y.U. L. Rev. 875, 888, 980 (2003) (considering various institutional design elements to address issues of legal indeterminacy); K. Sabeel Rahman & Jocelyn Simonson, The Institutional Design of Community Control, 108 Calif. L. Rev. 679, 742–43 (2020) (highlighting the capacity of democratic movements to challenge and shape elements of institutional design in the context of local policing); Adrian Vermeule, Mechanisms of Democracy: Institutional Design Writ Small 2–3 (2007); Barkow, supra note 277, at 19, 37–38; Samuel Issacharoff & Daniel R. Ortiz, Governing Through Intermediaries, 85 Va. L. Rev. 1627, 1627–28 (1999); Eric A. Posner & Adrian Vermeule, The Credible Executive, 74 U. Chi. L. Rev. 865, 867–68 (2007); see also Anne Joseph O'Connell, Bureaucracy at the Boundary, 162 U. Pa. L. Rev. 841, 875–88 (2014) (discussing the design of boundary organizations, including how it may foster political legitimacy).

[327] Gary Lawson, The Rise and Rise of the Administrative State, 107 Harv. L. Rev. 1231, 1231 (1994) (arguing that the "post-New Deal administrative state is unconstitutional" and represents a "bloodless constitutional revolution"). By "unconstitutional," Professor Lawson means "at variance with the Constitution's original public meaning." Id. at 1231 n.1. One of this Article's implications is that the original meaning of the Constitution contains a more capacious understanding of separation of powers. But see Jerry L. Mashaw, Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law 6 (2012) (arguing that Congress has always delegated discretion to administrative officials, and that "there has been no precipitous fall from a historical position of separation-of-powers grace to a position of compromise").

[328] See, e.g., Gundy v. United States, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting); Julian Davis Mortenson & Nicholas Bagley, Delegation at the Founding, 121 Colum. L. Rev. 277, 278–79 (2021); Nicholas R. Parrillo, A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s, 130 Yale L.J. 1288, 1294 (2021); Wurman, supra note 17, at 1498. See generally Gillian E. Metzger, The Supreme Court 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege, 131 Harv. L. Rev. 1, 8–51 (2017) (summarizing the contemporary political, judicial, and academic attacks on the administrative state); Jack Beermann, The Never-Ending Assault on the Administrative State, 93 Notre Dame L. Rev. 1599, 1599 (2018) (exploring the "primary contours of the attack" on the administrative state); Jody Freeman & Sharon Jacobs, Structural Deregulation, 135 Harv. L. Rev. 585, 587 (2021)

has faulted the administrative state for "reviv[ing] the extralegal government familiar from the royal prerogative," which the Constitution was supposed to remedy.[329] Separation of structures alleviates these concerns by bridging the gap between Founding-era constitutional design and contemporary anxiety about the structures channeling administrative power. In particular, concerns about the excessive power of agencies miss the point, given the diversity of agency structures. Most agencies are subject to presidential control and fall under the executive branch, thus triggering the combination of legislative, executive, and adjudicative authorities that some perceive as a threat to liberty. However, agencies are structured in different ways—as single, plural, and numerous decision-making bodies (or a combination thereof).[330] This entails differential distribution of monarchical, aristocratic, and democratic excellences—which the Founders themselves saw as effectively fulfilling distinct functional powers. Given the phenomenon of subdelegation, each agency might feature its own separation of structures in its operation.[331] This structural diversity of administrative apparatus thus diminishes separation of powers concerns.

Further, insofar as conservative criticism is "juristocratic,"[332] separation of structures provides judicially manageable standards for assessing government structures. Agencies carry out tasks that combine legislative-policymaking, executive-enforcement, and judicial-adjudicative functions (and choose freely from those approaches[333]). A singlehanded focus on policing *functional* division is therefore unlikely to be fruitful (beyond a call to invalidate many agencies wholesale).

(describing how "[c]ritics of the modern administrative state characterize the federal bureaucracy as an imperious and unaccountable behemoth that threatens core principles of democratic governance").

[329] Philip Hamburger, Is Administrative Law Unlawful? 28 (2014). But see Adrian Vermeule, No, 93 Tex. L. Rev. 1547, 1548 (2015) (reviewing Hamburger, supra) (criticizing the "book's arguments [as] premised on simple, material, and fatal misunderstandings of what is being criticized").

[330] Datla & Revesz, note 46, at 792–97. Regulatory delegation (i.e., delegating to regulated entities the discretion to interpret regulatory goals) entails even more heterogeneity in administrative structures. See Kenneth A. Bamberger, Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State, 56 Duke L.J. 377, 380–81 (2006).

[331] Jennifer Nou, Subdelegating Powers, 117 Colum. L. Rev. 473, 475–81 (2017).

[332] See Bowie & Renan, supra note 57, at 2024–25.

[333] SEC v. Chenery Corp., 332 U.S. 194, 202–03 (1947).

Separation of structures introduces much-needed factors on structural design for further doctrinal development.

2. Methodology: Historical Arguments and the Classics

This Article makes a methodological contribution. Jurists on both the Supreme Court and lower federal courts have stated that in rethinking nondelegation or the powers of the administrative state, they are being faithful to a historical tradition and commitment to the separation of powers. They point almost exclusively to early modern sources for support, in particular the political philosophy of John Locke.[334] It is beyond the scope of this Article to articulate exogenous values in favor of or against this broader jurisprudential move and the increasing reliance on historical arguments to design structural-constitutional doctrine. But *if* the Court wants to do history, it should do it right. As this Article has shown, grasping the intellectual history of American separation of powers requires an understanding of the Classics—at least as sophisticated as the Founders' own. Greek and Roman political theories formed the foundation of the Founders' constitutional design.[335] The attempt to construct a republic (and animosity with Britain) meant that the Founders looked to ancient republics as the foremost historical examples, even if imperfect, of what the Constitution could accomplish.[336] Thus, to get the history right, courts cannot simply cite a few words from Locke or Blackstone,[337] but need to engage substantively with the rich classical tradition of separation of powers that finds its genesis in Aristotle and Polybius. Of course, this may very well be beyond the expertise of lawyers.

[334] Gundy v. United States, 139 S. Ct. 2116, 2133–34 (2019) (Gorsuch, J., dissenting) (citing John Locke, The Second Treatise of Civil Government and a Letter Concerning Toleration § 141 (J.W. Gough ed., Basil Blackwell Oxford 1948) (1690)); Jarkesy v. SEC, 34 F.4th 446, 460 (5th Cir. 2022) (citing Locke, supra, § 141).

[335] See supra Parts II–III.

[336] E.g., Thomas Paine, Rights of Man: Part the Second 33 (London, J.S. Jordan, 2d. ed. 1792) ("What Athens was in miniature, America will be in magnitude.").

[337] See also Christopher S. Havasy, Joshua C. Macey & Brian Richardson, Against Political Theory in Constitutional Interpretation, 76 Vand. L. Rev. 899, 903 (2023) (arguing against the use of early modern, particularly Enlightenment, political theory in constructing constitutional meaning).

B. Doctrinal Implications

This Section explores three doctrinal applications of separation of structures: interbranch conflict, agency structures, and delegation.

1. Interbranch Conflict and Formalism in Structural Separation

Separation of powers disputes often arise when one constitutional unit of government allegedly encroaches on the authority of another. Interbranch conflicts fall into two main categories: (1) functional overlap (one branch performs functions different in nature from the powers vested in it), and (2) structural innovations (e.g., Congress, exercising its power under the Necessary and Proper Clause) that modify the structures of other branches.[338] First, separation of structures suggests that functional overlap is not fatal. The Constitution does not aim at strict insulation of functions, but partitions both functions and structures to synthesize a composite to implement government powers. Proper doctrinal analysis thus requires an assessment of the institutional competence of the branch exercising the disputed power.

Second, separation of structures weighs against structural innovations within the constitutional branches themselves. The federal structure has evolved since the Founding Era. However, the evolution has resulted from constitutional amendments or was anticipated by the Founders. The Senate has lost its pluralist structure, but the Seventeenth Amendment sanctioned its popular election, and the Constitution contemplated its transformation to a numerous decision-making body by providing for the admission of new states.[339] The federal judiciary has emerged as a pluralist body, but its original structural design accorded with an aristocracy. The Constitution thus evinces a commitment to an established structural separation that has evolved only due to changes in the Constitution itself. This commitment justifies a formalist approach to adjudicating structural innovations in interbranch conflicts.

Bowsher v. Synar is instructive.[340] Congress enacted the Balanced Budget and Emergency Deficit Control Act of 1985 to reduce the federal deficit. The Act required Office of Management and Budget and Congressional Budget Office to report budget estimates to the

[338] U.S. Const. art. I, § 8, cl. 9; id. art. I, § 8, cl. 18.
[339] U.S. Const. art. IV, § 3, cl. 1; id. amend. XVII.
[340] 478 U.S. 714 (1986).

Comptroller General.[341] The Comptroller submits a report to the President, who was required by § 252 to mandate budget reductions according to the Comptroller General's report.[342] The Comptroller is nominated by the President with advice and consent of the Senate (from a pool of candidates recommended by a congressional commission).[343] Notably, the Comptroller is removable only by impeachment or joint resolution for cause.[344] The Supreme Court struck down the reporting provision of the Act as violating separation of powers.[345]

Separation of structures explains this outcome. In creating the Comptroller General and empowering her to mandate spending reductions, Congress has made a structural modification that can be conceptualized in two ways. The Comptroller may operate as an addition to the Executive: the President alone no longer controls budgetary matters but shares that authority. Congress has therefore transformed the presidency's singular structure (which facilitates vigor and decisional accountability) into a pluralist structure that the Founders rejected. The Comptroller may also operate as a creature within Congress with quasi-legislative power to allocate the budget. Congress has therefore transformed its own numerous structure (which facilitates democratic responsiveness) into one that incorporates a singular substructure that controls spending reductions.[346] Either violates separation of structures.

2. Agency Design: Structural Separation's Doctrinal Terrain

Separation of powers cases also arise where litigants challenge the structure of the agency after adverse administrative determinations. In agency-design disputes, separation of structures fills the gaps left by existing scholarship. Its doctrinal terrain admits of formalism in extreme

[341] Pub. L. No. 99-177, § 251, 99 Stat. 1037, 1063–72 (1985).
[342] Id. § 252.
[343] 31 U.S.C. § 703(a)(1)–(2) (2018).
[344] Id. § 703(e)(1).
[345] *Bowsher*, 478 U.S. at 734.
[346] This is not to invalidate any *sub*structural diversity within the constitutional branches—Congress features pluralist and singular decision-making substructures whose approval successful legislation must secure. See William N. Eskridge, Jr., Vetogates, *Chevron*, Preemption, 83 Notre Dame L. Rev. 1441, 1444–46 (2008); Daniel B. Rodriguez & Barry R. Weingast, The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation, 151 U. Pa. L. Rev. 1417, 1435–36 (2003); Jesse M. Cross & Abbe R. Gluck, The Congressional Bureaucracy, 168 U. Pa. L. Rev. 1541, 1543–45 (2020).

cases, but functionalist engagement with the normative values underlying institutional structure is at its core. The Founders did not anticipate the problems that a modern society faces or the concomitant rise of an administrative state to address them. Unlike structural division of the *constitutional* branches, they did not commit to a fixed set of accountability mechanisms for an agency whose functions do not correspond to the original constitutional structures.

As a threshold matter, while most agencies are subject to presidential control (e.g., through appointment or removal), separation of structures does not dictate their singular design. Rather, a government entity can be made accountable to the President without assimilating its structure: federal courts are good examples—pluralist, aristocratic structures made accountable ex ante to a single decision-maker by presidential nomination.[347] Agencies often combine functions that straddle the legislative/executive/adjudicative divide. One agency can combine multiple structures, e.g., by empowering a single decision-maker to enforce and a pluralist structure to deliberate.[348] Multiple agencies can have different structural designs and compete for jurisdiction over one

[347] See supra Table 3.

[348] See Michaels, supra note 49, at 529–67 (arguing for a separation of powers within the administrative state—manifesting in tripartite checks and balances among agency leadership, civil service, and civil society—that justifies its constitutionality); see also Gillian E. Metzger, The Internal Relationship Between Internal and External Separation of Powers, 59 Emory L.J. 423, 429–30 (2009) (describing the internal separation of powers and how it can serve as an institutional check on executive power). See generally Neal Kumar Katyal, Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within, 115 Yale L.J. 2314 (2006) (proposing a set of mechanisms similar to existing internal separation of powers apparatuses to better check executive power in foreign affairs). By contrast, separation of structures does not identify the precise forces within the administrative state that balance each other. Instead, a particular combination of functional powers can justify the formation of an agency that features within itself a separation of structures like the federal government. See also Daphna Renan, Pooling Powers, 115 Colum. L. Rev. 211, 211, 220–23 (2015) (explaining the phenomenon of "pooling" and how it combines distinct agency features to create joint structures "capable of ends that no single agency could otherwise achieve"); Sharon B. Jacobs, The Statutory Separation of Powers, 129 Yale L.J. 378, 395 (2019) ("Because the separation of powers, as an ethos, does not prescribe particular arrangements but merely suggests the application of general principles, the statutory separation of powers takes many forms. It need not adhere strictly to the Founders' brand of divided authority."); Rachel E. Barkow, Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law, 61 Stan. L. Rev. 869, 869, 887–93 (2010) ("[F]ederal prosecutors' offices could be designed to curb abuses of power through separation-of-functions requirements and greater attention to supervision."). In addition to Congress, agency heads often (re)structure their agencies in response to information needs. Jennifer Nou, Intra-Agency Coordination, 129 Harv. L. Rev. 421, 429–30 (2015).

regulatory subject matter.[349] That is, *sub*structural and *inter*structural diversity is permissible and may even be mandatory given a set of assigned functions.

Recent case law vindicates the importance of structural design. In *Free Enterprise Fund v. PCAOB*, the Court held the structure of the PCAOB unconstitutional for its "multilevel protection from removal" that, in Chief Justice Roberts's words, "safely encase[d] [officials] within a Matryoshka doll."[350] *Free Enterprise Fund* therefore counsels against innovations in accountability mechanisms. Partial accountability (due to for-cause removal restrictions) to a pluralist decision-making body (the SEC) that already enjoys the independence of aristocratic structures cannot justify the PCAOB's broad policymaking and enforcement powers. A decade later in *Seila Law v. CFPB*, the Court invalidated the for-cause removal restriction on the CFPB's director, because its singular "configuration is incompatible with our constitutional structure."[351] *Seila Law* therefore counsels against innovations in numerosity, when combined with diminished accountability mechanisms and insulation from government units subject to electoral control. Insofar as these two cases signal greater scrutiny of the agency's structures and institutional organization, they move the Court's jurisprudence in the right direction.

Separation of structures explains the Court's invalidation of the CFPB's structure. Functional separation of powers (whether employing functionalist or formalist methodologies) cannot account for the decision.[352] The CFPB packs rulemaking (legislative), enforcement (executive), and adjudication (judicial) powers into one agency[353]—a combination that violates functional division. However, many other agencies feature similar combinations of powers without triggering any

[349] Daniel A. Farber & Anne Joseph O'Connell, Agencies as Adversaries, 105 Calif. L. Rev. 1375, 1378–79 (2017); Jody Freeman & Jim Rossi, Agency Coordination in Shared Regulatory Space, 125 Harv. L. Rev. 1131, 1134–35 (2012); Jacob E. Gersen, Overlapping and Underlapping Jurisdiction in Administrative Law, 2006 Sup. Ct. Rev. 201, 202–03.

[350] 561 U.S. 477, 484, 497 (2010); see also Benjamin Eidelson, Reasoned Explanation and Political Accountability in the Roberts Court, 130 Yale L.J. 1748, 1825 (2021) (arguing that the Court's recent decisions "reflect an overarching concern about political accountability").

[351] 140 S. Ct. 2183, 2202 (2020).

[352] See supra Figures 1, 2.

[353] Markham S. Chenoweth & Michael P. DeGrandis, Out of the Separation-of-Powers Frying Pan and into the Nondelegation Fire: How the Court's Decision in *Seila Law* Makes CFPB's Unlawful Structure Even Worse, U Chi. L. Rev. Online (Aug. 27, 2020), https://lawreviewblog.uchicago.edu/2020/08/27/seila-chenoweth-degrandis [https://perma.cc/9AJF-V4RN].

doubt on their constitutionality. The FTC, FERC, NLRB, and the Federal Reserve all have adjudicatory, rulemaking, and litigation authority independent of the DOJ.[354] Instead, the CFPB is distinctive for its singular institutional organization, which separation of structures subjects to most exacting accountability mechanisms (e.g., electoral control, defined powers, and ex ante / ex post accountability to aristocracy and democracy). But a single decision-maker sits atop the CFPB. Its director enjoys for-cause removal protection and independence from the Executive (with no ex post accountability). It enjoys budgetary autonomy and insulation from the congressional appropriations process.[355] Under separation of structures, monarchical design without singular accountability mechanisms risks deviation from the common good.

Separation of structures also suggests limits to *Seila Law*'s formalism, which generates the incorrect perception that structural separation necessarily leads to constraints on the administrative state. Commentators have already cautioned that the decision results in narrow congressional latitude in designing subunits of government and erodes protections for independent agencies, including multimember commissions.[356] Such pessimism is premature. *Seila Law*'s rejection of singular decision-makers does not invalidate monarchical substructures wholesale, but merely requires the addition of accountability mechanism(s) commensurate with structural design. After all, the decision left undisturbed the CFPB's powers and only made its director removable at will. Further, singular structure is necessary to trigger the ban of for-cause removal. The majority repeatedly distinguishes a single directorship from a multimember commission.[357] The Chief Justice specifically notes that Congress could pursue "alternative responses to the problem—for example, converting the CFPB into a multimember agency."[358] This

[354] Datla & Revesz, supra note 46, at 800 tbl.5, 809 tbl.7.

[355] E.g., *Seila Law*, 140 S. Ct. at 2193–94, 2204.

[356] Bowie & Renan, supra note 57, at 2094; Patricia A. McCoy, Constitutionalizing Financial Instability, U. Chi. L. Rev. Online (Aug. 27, 2020), https://lawreviewblog.uchicago.edu/2020/08/27/seila-mccoy [https://perma.cc/B7RT-WKMS]; see also Jack M. Beermann, *Seila Law*: Is There a There There?, U. Chi. L. Rev. Online (Aug. 27, 2020), https://lawreviewblog.uchicago.edu/2020/08/27/seila-beermann [https://perma.cc/KQ5Z-R7WT] ("[I]f the Supreme Court were to effectively prohibit independent agencies . . . , the Court would be negating Congress's power to 'make all laws which shall be necessary and proper' to effectuate federal powers and would be substituting the Court's judgment for Congress's on matters of important policy and political salience.").

[357] *Seila Law*, 140 S. Ct. at 2193, 2199, 2200, 2211.

[358] Id. at 2211.

recommendation implies a relaxed accountability requirement for pluralist structures.

This sliding scale in which the stringency of a *particular* ex post accountability mandate (i.e., removal) depends on structural design is precisely what separation of structures recommends. As Chief Justice Roberts concludes, singular decision-makers, coupled with the absence of ex post accountability mechanisms, triggers a more exacting separation of powers scrutiny. But as structural design moves from singularity to plurality and numerosity, internal unity fades, and the possibility of dissension and (substantive or methodological) fragmentation grows, along with the need for deliberation and compromise—all of which justifies a more functionalist approach. The dissent in *Seila Law* contends that single persons are in fact far more accountable and easier to supervise than multimember bodies.[359] But accountability need not be equalized: pluralist and numerous institutions—characterized by expertise/moderation and democratic responsiveness, respectively—require less potent accountability mechanisms than singular structures whose principal virtue is the concentration of power itself. The presidency features a single decision-maker and more decisional accountability. Few claim that it should be subject to less accountability because of its singular structure.

However, Justice Kagan, dissenting, rightly argues that removal is only one of many mechanisms that ensure democratic control. Other options include "appointments practices, procedural rules, internal organization, oversight regimes, historical traditions, cultural norms, and (inevitably) personal relationships."[360] Judicial inquiry into *one* accountability mechanism (e.g., removal) should consider other practices that may strengthen (or weaken) the democratic responsiveness of a governance structure. The *Seila Law* majority implicitly appeals to this insight by noting the CFPB's budgetary autonomy and how its director's five-year term insulates her from even the ex ante accountability of appointment. This "wealth of features" is the Founders' innovation on the classical Aristotelian model to which they returned.

Rejection of the CFPB's structure thus represents a localized exercise of formalism within a broader terrain of functionalist analysis more

[359] Id. at 2225, 2242 (Kagan, J., dissenting); see also Jennifer Nou, Agency Self-Insulation Under Presidential Review, 126 Harv. L. Rev. 1755, 1763 (2013) (discussing indicia of agency independence beyond for-cause removal).

[360] *Seila Law*, 140 S. Ct. at 2237.

deferential to congressional structuring of the administrative state.[361] Separation of structures departs from existing approaches that cast the Court's recent emphasis on agency structure as signaling a formalist turn. Two scholars write: "Prominent decisions invalidating statutory provisions governing appointment and removal of officers of federal administrative agencies reflect a strong formalistic flavor."[362] But this conclusion depends on a purely functional conception of separation of powers.[363] Because institutional structures are independent markers of (un)constitutionality, doctrinal inquiry can (and should) evolve beyond the Court's much-criticized formalism.

The majority's approach in *Collins v. Yellen* is thus misguided. There, the Court struck down for-cause removal protections on the single director of the FHFA, the conservator of two congressionally chartered mortgage corporations, Fannie Mae and Freddie Mac.[364] Numerous features of the FHFA diminish the need for accountability in the form of at-will removal. The FHFA administers only one statute, regulates primarily federally chartered corporations, and has limited rulemaking or enforcement authority with modest tenure protection.[365] The majority rejects these features one by one, in the process suggesting that courts are not well-equipped to assess the powers of disparate agencies.[366] However, judicial competence to evaluate the administrative state's institutional design is foundational to structural cases like *Free Enterprise Fund*. And while one feature may not justify attenuated need for presidential oversight through removal, a combination of features may. Justices Sotomayor and Breyer's concurrence/dissent therefore sketches a more promising path toward functionalist engagement.[367]

[361] See also Richard H. Pildes, *Free Enterprise Fund*, Boundary-Enforcing Decisions, and the Unitary Executive Branch Theory of Government Administration, 6 Duke J. Const. L. & Pub. Pol'y 1, 11–13 (2010) (discussing how *Free Enterprise Fund* may have been a "boundary-enforcing decision" rather than a paradigm-shifting one given that "the Court has long upheld the constitutionality of independent agencies, such as the SEC, in which the head of the agency can be removed by the president only for good cause").

[362] Glicksman & Levy, supra note 73, at 1090 .

[363] Id. at 1092–93 ("In the separation of powers context, [formalism] means that there are three distinct categories of governmental power . . . each of which is subject to bright-line rules concerning its scope and the manner in which it is exercised."); see Huq, supra note 57, at 6–7, 35.

[364] 141 S. Ct. 1761, 1770 (2021).

[365] Id. at 1784–87.

[366] Id.

[367] Id. at 1802–09 (Sotomayor & Breyer, JJ., concurring in part and dissenting in part).

Further, separation of structures answers the threshold question posed by *Collins v. Yellen*. Concurring, Justice Thomas suggests that an impermissible removal provision does not taint actions undertaken by the insulated officer.[368] He posits a two-part separation of powers inquiry: first, ask in which branch the officer is located, and second, determine whether the officer's powers belong to that branch. Justice Thomas reasons that an impermissible removal restriction "does not take an otherwise executive officer outside the Executive Branch,"[369] finding no separation of powers violation because an impermissibly insulated executive officer still performs executive functions. This counterintuitive outcome rests solely on functional division. As this Article argues, structural deviation from constitutional mandates taints agency determination as much as functional deviation.

Separation of structures thus allows the political branches greater latitude to structure the administrative state.[370] If Congress constitutes a pluralist or numerous decision-making body, the overall demand for accountability lessens. The institution's principal governance virtue shifts from *process* and *implementation* values whose substantive merits are parasitic on the content of the implemented policy, e.g., energy in execution, to *substantive* norms like deliberation or popular responsiveness. Further, the presence of other accountability mechanisms that enhance democratic control diminishes the need to rely on removal. The judiciary's design serves as a constitutional illustration. Federal courts are subject to maximal ex ante accountability to the President and the Senate through rigorous appointment practices. They are subject to minimal ex post accountability (only through impeachment). Figure 3 illustrates the doctrinal terrain of separation of structures, which avoids Justice Kagan's criticism of a "static version of governance[] incapable of responding to new conditions and challenges."[371]

[368] Id. at 1793 (Thomas, J., concurring).

[369] Id. at 1792.

[370] I intentionally refer to the political branches rather than Congress alone. Scholars have shown that the Executive can unilaterally structure the administrative state. E.g., Renan, supra note 348, at 218. Under strict functional-division theories, pooling of administrative power violates the Constitution. Not only does the President engage in the legislative function of government design, the combination of agency authority also increases functional overlap. However, separation of structures suggests a more fluid analysis that considers the combined institutional structure and the degree to which it is subject to both presidential and congressional oversight.

[371] *Seila Law*, 140 S. Ct. at 2226 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part).

Figure 3. Doctrinal Terrain of Separation of Structures as Applied to Removal[372]

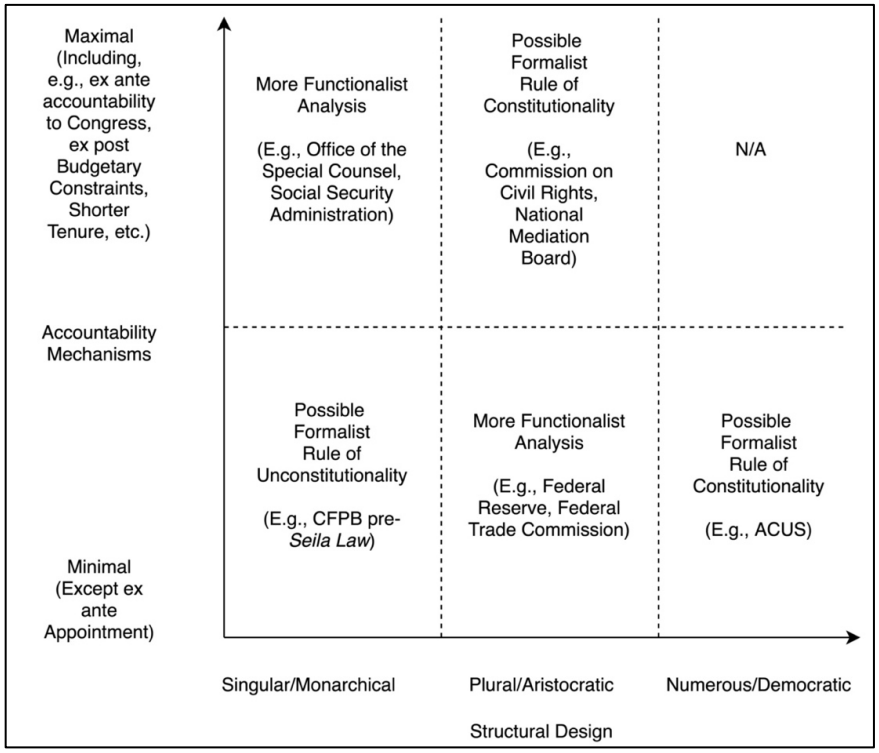


Figure 3 illustrates the doctrinal terrain of separation of structures as applied to *one* ex post accountability mechanism—removal. On the

[372] See 5 U.S.C. § 1211(b) (2018) (Office of Special Counsel: for-cause removal; five-year tenure; single-headed structure; no litigation or adjudication authority); 42 U.S.C. § 902 (2018) (Social Security Administration: for-cause removal; six-year tenure; single-headed structure; no litigation authority); 12 U.S.C. §§ 241–42, 248(p), 1818 (2018) (Federal Reserve: for-cause removal; fourteen-year staggered terms; multimember structure; litigation and adjudication authority); 15 U.S.C. §§ 41, 56 (2018) (Federal Trade Commission: for-cause removal; seven-year staggered terms; litigation and adjudication authority); 42 U.S.C. § 1975 (2018) (Commission on Civil Rights: for-cause removal; six-year terms; multimember structure; partisan-balance requirement; no litigation or adjudication authority; no budgetary autonomy); 45 U.S.C. § 154 (2018) (National Mediation Board: for-cause removal; three-year tenure; multimember structure; partisan-balance requirement; no litigation or adjudication authority; no budgetary autonomy). With between 75 and 101 members, the Administrative Conference of the United States is one of the only institutions in the administrative state featuring numerosity in its structure. 5 U.S.C. § 593 (2018).

horizontal axis, as structural design moves from singularity to plurality and numerosity, the stringency of mandated accountability mechanisms (and of the constitutional inquiry) diminishes—from formalist rules of unconstitutionality to functionalist engagement, and to formalist rules of constitutionality. On the vertical axis, as *other* accountability mechanisms (i.e., not removal) are incorporated into structural design, the need for a *particular* accountability mechanism (i.e., removal) also diminishes.

Figure 3 illustrates an additional implication. Unlike the constitutional branches that feature only three structures, the regulatory state contains hundreds of institutions with divergent designs and powers. Administrative structural diversity is a matter of conscious choice rather than accident: before the APA, proposals to create an administrative judiciary and to institute more *functional* division were considered and decisively rejected. The 1941 *Final Report of the Attorney General's Committee on Administrative Procedure* discussed the possibility of presidential appointment, with Senate confirmation for fixed terms, of a "separate corps" of judges, "not attached to specific agencies," like the central-panel system of ALJs used in state administrative procedure.[373] The majority report rebuffed this suggestion: ALJs need to specialize in the work of their respective agencies, and each agency can "appoint as many [ALJs] as are necessary for [its administrative] proceedings."[374] The decision to empower each agency to appoint its own adjudicators reflects the broader program of tolerating functional combinations within individual agencies and distributions of powers across divergent structures. This legacy survives today: beyond limited mechanisms of centralized review (e.g., the Office of Information and Regulatory Affairs), agencies possess wide-ranging, independent powers to litigate, adjudicate, and make rules.[375]

[373] Att'y Gen.'s Comm. on Admin. Proc., Final Report 47 (1941); see also George B. Shepherd, Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics, 90 Nw. U. L. Rev. 1557, 1594–98 (1996) (discussing the history and organization of the Attorney General's Committee on Administrative Procedure). For proposals and rejections of central-panel ALJs after the APA, see Joseph J. Simeone, The Function, Flexibility, and Future of United States Judges of the Executive Department, 44 Admin. L. Rev. 159, 167–72 (1992). See also James F. Flanagan, Redefining the Role of the State Administrative Law Judge: Central Panels and Their Impact on State ALJ Authority and Standards of Agency Review, 54 Admin. L. Rev. 1355, 1362–82 (2002) (analyzing the history and structure of various state central-panel ALJs).

[374] 5 U.S.C. § 3105 (2018); Attorney General's Committee, supra note 373, at 47.

[375] See generally Datla & Revesz, supra note 46 (surveying the powers of various administrative agencies and arguing that all administrative agencies are "executive").

By opting for functional dispersion—that is, spreading functional capacities across different institutions organized to solve problems in substantive subject areas—the administrative state also chose structural diversity. It must (and did) design various entities to house the dispersed functions. As Figure 3 suggests, these structural and functional variations in the administrative state trigger different methodologies for adjudicating separation of powers disputes. Like functional theories, separation of structures accommodates both formalist and functionalist doctrines.[376] This methodological pluralism, of which *Seila Law* constitutes but a small part, is key to building a more dynamic model of jurisprudence as the Court ventures further into the structural territory of separation of powers.

3. Delegation

This Article provides insights for the nondelegation doctrine, which governs the extent to which Congress can assign legislative functions to government entities supervised by another branch.[377] The doctrinal settlement—for almost a century—is that Congress may do so if it articulates intelligible principles to guide the delegee's exercise of authority.[378] This inquiry is not demanding.[379]

Gundy v. United States had appeared poised to find a violation of the nondelegation doctrine for the first time since 1935.[380] *Gundy* has sparked intense debate.[381] The battle is fought on originalist grounds, or at least

[376] Huq & Michaels, supra note 53, at 354–56; see also supra Figure 2 (showing that separation of structures uses formalist and functionalist methodological approaches). It is beyond the scope of this Article to provide blueprints or specific doctrinal instantiations of, for example, a functionalist engagement—they will be the subject of future research.

[377] E.g., Eric A. Posner & Adrian Vermeule, Interring the Nondelegation Doctrine, 69 U. Chi. L. Rev. 1721, 1721 (2002) ("[T]he 'nondelegation doctrine[]' . . . holds that Congress must supply an 'intelligible principle' to guide its agents' exercise of statutory authority."); David J. Barron & Elena Kagan, *Chevron*'s Nondelegation Doctrine, 2001 Sup. Ct. Rev. 201, 201 ("This nondelegation doctrine, of course, refers to Congress's ability to hand over to a given agency official the authority to make policy decisions.").

[378] Gundy v. United States, 139 S. Ct. 2116, 2129 (2019); see also Thomas W. Merrill, Presidential Administration and the Traditions of Administrative Law, 115 Colum. L. Rev. 1953, 1960–61 (2015) (discussing the meaning of an "intelligible principle").

[379] *Gundy*, 139 S. Ct. at 2129.

[380] See A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935) (invalidating an "attempted delegation of legislative power").

[381] See generally Mortenson & Bagley, supra note 328 (arguing that the Founding generation did not incorporate a nondelegation requirement into the Constitution); Aditya Bamzai, Delegation and Interpretive Discretion: *Gundy*, *Kisor*, and the Formation and Future of Administrative Law, 133 Harv. L. Rev. 164 (2019) (assessing the Court's resolution of the

on the assumption that the Founders' practices and intellectual heritage are central to resolving the constitutional question. In defense of the administrative state, some rely on the Founders' political theories and the First Congress's practices to argue against the existence of any "discernible, legalized prohibition on delegations of legislative power."[382] They contend that the people—the ultimate source of sovereignty—have already delegated the legislative power to Congress: nothing in the nature of legislation prevents its redelegation by Congress to executive branch officials and agencies.[383] Due to the Founders' fluid understanding of separation of powers, executive branch agencies in fact exercise executive power when they follow congressional directives and promulgate binding rules on private parties.[384] Those scholars conclude that the Founders shared no commitment to a general prohibition of delegation beyond the anti-alienation principle (that the legislature cannot transfer its lawmaking power without the right of reversion).[385] Another scholar examines the powers of the federal boards of tax commissioners that administered the direct tax on private real estate in the 1790s. With a broad statutory mandate to revise real-estate valuations "as shall appear to be just and equitable," the federal boards exercised immense, coercive, and

nondelegation issue in *Gundy*); Parrillo, supra note 328 (defending regulatory power against originalist critiques, on the basis of Congress's broad delegation of power to the federal boards of tax commissioners to administer the direct tax of 1798); Wurman, supra note 17 (arguing that the Founding generation endorsed the nondelegation doctrine as part of their commitment to separation of powers); Keith E. Whittington & Jason Iuliano, The Myth of the Nondelegation Doctrine, 165 U. Pa. L. Rev. 379, 379 (2017) (contending that "the nondelegation doctrine never actually constrained expansive delegations of power," and that "the traditional narrative behind the nondelegation doctrine is nothing more than a myth"); F. Andrew Hessick & Carissa Byrne Hessick, Nondelegation and Criminal Law, 107 Va. L. Rev. 281 (2021) (responding to *Gundy* and arguing that delegations in criminal law should be subject to more searching review); Kristin E. Hickman, Nondelegation as Constitutional Symbolism, 89 Geo. Wash. L. Rev. 1079, 1079–80 (2021) (contending that a departure from the intelligible principle test of delegation would result only in "incremental and symbolic" doctrinal change); Joseph Postell, The Nondelegation Doctrine after *Gundy*, 13 N.Y.U. J.L. & Liberty 280 (2020) (discussing implications of reviving the nondelegation doctrine); Jennifer L. Mascott, *Gundy v. United States*: Reflections on the Court and the State of the Nondelegation Doctrine, 26 Geo. Mason L. Rev. 1 (2018) (discussing *Gundy* and its potential outcomes before the Court's decision); Lisa Heinzerling, Nondelegation on Steroids, 29 N.Y.U. Env't L.J. 379 (2021) (arguing against some of the conservative justices' preferred nondelegation inquiries).

[382] Mortenson & Bagley, supra note 328, at 280.

[383] Id. at 294–99; see also Nou, supra note 331, at 474–75.

[384] Mortenson & Bagley, supra note 328, at 313–32.

[385] Id. at 280.

discretionary regulatory power.[386] This power was immune from judicial review and widely accepted as constitutional.[387] These studies show that originalists cannot faithfully support a revival of the nondelegation doctrine.[388]

Conservative jurists and commentators contend that delegation violates separation of powers as understood by the Founders.[389] In *Whitman v. American Trucking Ass'ns*, the Court upheld against a nondelegation challenge the EPA's authority to set air quality standards "'requisite to protect the public health' with 'an adequate margin of safety.'"[390] Concurring, Justice Thomas suggested that some delegations of legislative power are invalid despite an intelligible principle and noted his willingness "to address the question whether [the Court's] delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers."[391] In *Gundy*, a plurality upheld the Attorney General's authority to promulgate registration rules for offenders convicted before the enactment of the Sex Offender Registration and Notification Act ("SORNA").[392] However, Justice Alito indicated his "support" for reconsidering the intelligible principle doctrine.[393] Justice Gorsuch (along with the Chief Justice and Justice Thomas) went further. Quoting John Locke, he argued that Congress's delegation of legislative power—broadly defined as "the power to 'prescribe general rules for the government of society'"—violates the separation of powers.[394] Instead of an intelligible principle, Justice Gorsuch would ask whether Congress is delegating an interstitial function (i.e., whether Congress has only authorized executive branch officials to fill statutory gaps).[395] This approach would grant federal courts vast discretion in deciding whether

[386] Parrillo, supra note 328, at 1304 (emphasis omitted) (quoting Valuation and Enumeration Act of 1798, ch. 70, § 22, 1 Stat. 580, 589 (1798)).

[387] Id. at 1429–37.

[388] Mortenson & Bagley, supra note 328, at 282 ("The nondelegation doctrine has nothing to do with the Constitution as it was originally understood. You can be an originalist or you can be committed to the nondelegation doctrine. But you can't be both.").

[389] See, e.g., Postell, supra note 381, at 283 ("Normatively, the nondelegation doctrine is most commonly derived from the principle of separation of powers.").

[390] 531 U.S. 457, 465 (2001) (quoting 42 U.S.C. § 7409(b)(1)).

[391] Id. at 487 (Thomas, J., concurring).

[392] 139 S. Ct. 2116, 2121 (2019) (plurality opinion).

[393] Id. at 2131 (Alito, J., concurring).

[394] Id. at 2133 (Gorsuch, J., dissenting) (quoting Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136 (1810)).

[395] Id. at 2136, 2139.

an agency's statutory authority is policymaking or interstitial.[396] Judicial revival of the nondelegation doctrine reflects academic commentary that the Founders' conception of separation of powers forecloses congressional delegation of legislative power.[397]

The battle is not over yet. The Court's composition has changed: Justice Barrett has replaced Justice Ginsburg (part of the *Gundy* plurality). Justice Kavanaugh took no part in *Gundy* but has since indicated his willingness to reconsider the nondelegation doctrine.[398] In *Jarkesy v. SEC*, the Fifth Circuit offered a vehicle for this reconsideration and held that Congress violated separation of powers by delegating to the SEC the power to choose enforcement actions in Article III courts or within the agency.[399] The court explained that the SEC's authority to choose which proceedings deserve the procedural protections of Article III adjudication (e.g., right to jury trial under the Seventh Amendment) constituted legislative function.[400] The Fifth Circuit also struck down, under the Supreme Court's separation-of-structures jurisprudence, SEC ALJs' for-cause removal restrictions.[401]

Conceptually, nondelegation arguments reflect a *formalist* notion of *functional* division.[402] It depends on three premises about the Founders' understanding of separation of powers: (1) only Congress exercises legislative or lawmaking power; (2) executive branch agencies and

[396] Mortenson & Bagley, supra note 381, at 287.

[397] See, e.g., Hamburger, supra note 329, at 28; Gary Lawson & Guy Seidman, "A Great Power of Attorney": Understanding the Fiduciary Constitution 114 (2017); Larry Alexander & Saikrishna Prakash, Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated, 70 U. Chi. L. Rev. 1297, 1304–05 (2003).

[398] Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari) ("Justice Gorsuch's scholarly analysis of the Constitution's nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases.").

[399] 34 F.4th 446, 459 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 2688 (2023); see Constitutional Thunder Out of the Fifth Circuit, Wall St. J. (May 22, 2022, 4:27 PM), https://www.wsj.com/articles/constitutional-fifth-circuit-court-appeals-securities-and-exchange-commission-sec-jarkesy-administrative-state-supreme-court-constitutional-11653236377 [https://perma.cc/KQ6U-CPQU] ("[R]ein[ing] in the runaway administrative state . . . . is an essential project of the conservative judicial movement . . . .").

[400] *Jarkesy*, 34 F.4th at 461 ("[Congress] gave the SEC the ability to determine which subjects of its enforcement actions are entitled to Article III proceedings with a jury trial, and which are not. That was a delegation of legislative power."); see 15 U.S.C. § 78u-2(a) (2018) (authorizing the SEC to assess civil penalties).

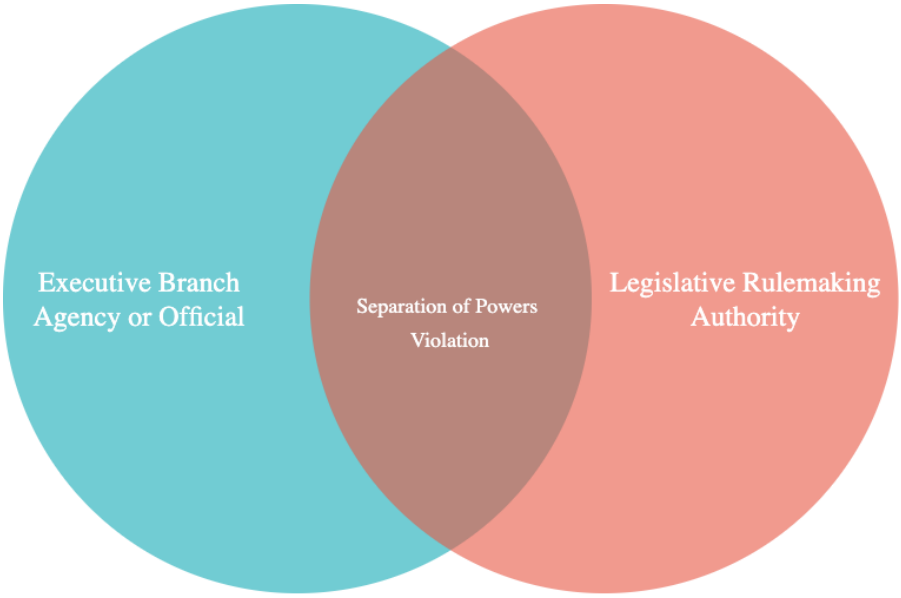
[401] *Jarkesy*, 34 F.4th at 464.

[402] See supra Part I & Figure 2 (theorizing separation models as formalist approaches to functional separation).

officials can only carry out the laws made by Congress; and (3) the authority to make generally applicable rules that bind private parties falls within legislative power. Executive branch agencies thus violate separation of powers by promulgating generally applicable, private-rights regulations despite statutory delegation. Because nondelegation insists that government units stay within their assigned *functions* without regard to their concentration of *power*, it is formalist. By focusing exclusively on government *authority* without regard to institutional *structure*, it reflects a functional separation of powers. (Justice Gorsuch's *Gundy* dissent hints at considering the magnitude of the delegated power.[403] But even then, such an approach stays within functional separation of powers.)

Figure 4 illustrates the thrust of these nondelegation arguments: a substantial overlap between executive branch agency and the legislative rulemaking function violates separation of powers.

Figure 4. Nondelegation: Traditional View



[403] Gundy v. United States, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting) ("[SORNA] purports to endow the nation's chief prosecutor with the power to write his own criminal code governing the lives of a half-million citizens."); see supra Section I.D.

But as this Article has argued, separation of *structures* is integral to the Founders' separation of powers enterprise.[404] In designing governance units, the Founders emphasized institutional design, including accountability mechanisms, numerosity of the decision-making body, and their associated values.[405] Nondelegation relies on incorrect assumptions: separation of powers does not require strict functional division (i.e., prohibiting an executive branch agency's exercise of legislative power). Instead, structures are equally important. Just as adjudication of agency structures presents a fluid doctrinal terrain,[406] structures and functions themselves form a sliding scale. That is, accountability and liberty safeguards in institutional structure may offset concerns about *functional* separation of powers violations. For example, an executive branch agency that promulgates binding rules pursuant to a statutory delegation of authority may present, overall, attenuated separation of powers concerns if it incorporates rigorous safeguards in its institutional design (e.g., at-will removal by the President and oversight procedures by Congress). Similarly, functional safeguards in the authority exercised by an agency may offset concerns about *structural* separation of powers violations. For example, an executive branch agency with few structural safeguards (e.g., for-cause removal and budget autonomy) may accord with the Constitution if it exercises only enforcement powers (executive in nature). Because both functional division and structural diversity are integral to separation of powers, potential violation of one is not outcome-determinative. If the Court is serious about its separation-of-structures jurisprudence developed in *Free Enterprise Fund*, *Seila Law*, and *Collins v. Yellen*, it must consider both function and structure to assess whether an agency action, pursuant to a congressional delegation of authority, violates the Constitution.[407]

Separation of structures thus explains why the *Gundy* plurality got it right. *Gundy* concerns the Attorney General's authority to promulgate registration rules for pre-enactment offenders under SORNA. For

[404] See supra Parts II–III.

[405] See supra Part III.

[406] See supra Figure 3.

[407] Free Enter. Fund v. PCAOB, 561 U.S. 477, 492 (2010); Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2197 (2020); Collins v. Yellen, 141 S. Ct. 1761, 1783 (2021). Beyond building accountability into agency design, Congress can mitigate democratic deficits in agency rulemaking by subjecting to voter scrutiny its own decision to delegate. Martin H. Redish, Pragmatic Formalism, Separation of Powers, and the Need to Revisit the Nondelegation Doctrine, 51 Loy. U. Chi. L.J. 363, 399–400 (2019).

proponents of a muscular nondelegation doctrine, this power to make coercive, generally applicable rules intrudes the functional territories assigned exclusively to Congress, and thus violates separation of powers. By contrast, existing scholarship might characterize the Attorney General's authority as executive rather than legislative, insofar as she acts pursuant to Congress's directive.[408] Separation of structures goes further. Even assuming that the Attorney General exercises the legislative power as an executive branch official, the inquiry does not end.[409] Mere overlap between legislative power and executive entity is not outcome-determinative. Rather, courts should consider elements of *structural* design that mitigate concerns stemming from *functional* separation of powers. Those structural elements are present in *Gundy*. To be sure, the Attorney General is a single department head, which also raises structural separation of powers concerns. But she is subject to maximal accountability mechanisms by institutional design: she is a principal officer and must be appointed by the President with Senate confirmation;[410] she is removable at will; and she is subject to congressional oversight with no budget autonomy. These structural designs mitigate any nondelegation concerns rooted in functional separation of powers.[411] The *Gundy* plurality's decision to uphold SORNA's delegation of rulemaking authority thus coheres better with the Court's structural jurisprudence.

Figure 5 illustrates the richer analysis of nondelegation issues after incorporating structural principles. Importantly, mere functional overlap is not fatal because functions and structures form a sliding scale. That is, the presence of accountability safeguards in institutional structure can offset potential violations of functional separation of powers, and vice versa. Courts must consider whether an agency's structure attenuates any separation of powers concerns. In the case of many executive agencies, those accountability safeguards are there in their design.

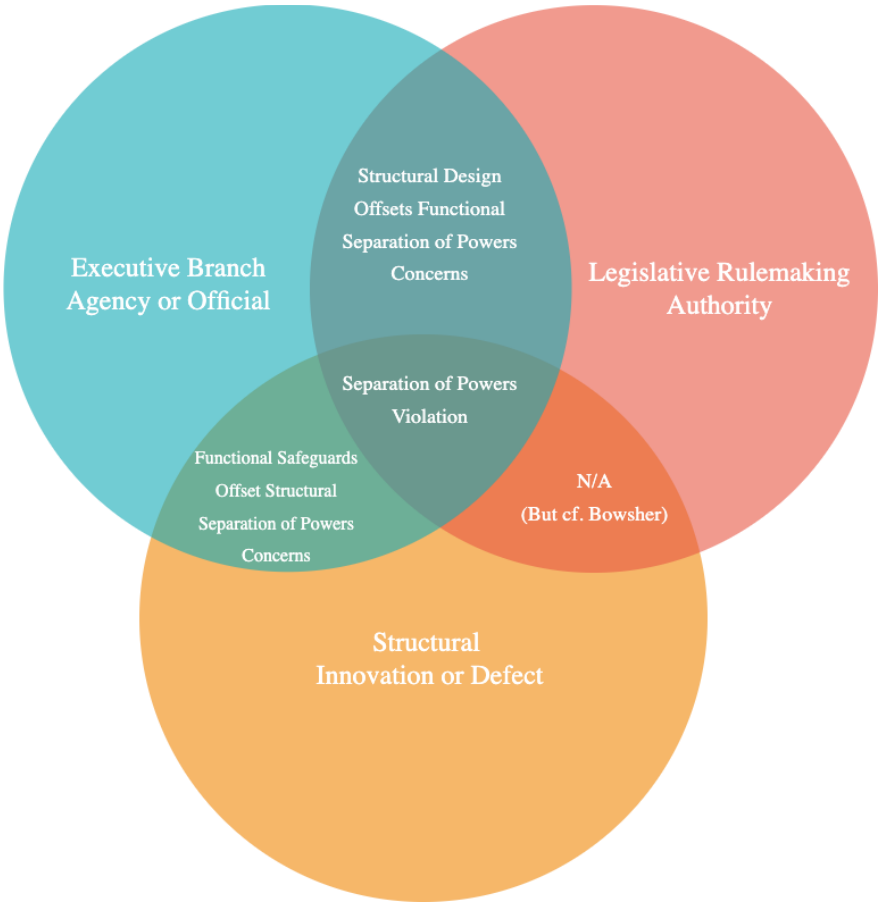
[408] See Mortenson & Bagley, supra note 381, at 313–32.

[409] Of course, given the analysis of Mortenson & Bagley, id., such an assumption is questionable. In addition, as discussed in Part II, Montesquieu explicitly articulated a vast conception of executive power that included, inter alia, *judicial* functions. See supra note 161 and accompanying text.

[410] Buckley v. Valeo, 424 U.S. 1, 125–26 (1976).

[411] This is not to say that agencies must replicate the precise degree or kinds of accountability safeguards as Congress. As scholars have observed, agency rulemaking instantiates certain democratic-normative values lacking in congressional legislation. See Edward H. Stiglitz, Delegating for Trust, 166 U. Pa. L. Rev. 633, 657 (2018).

Figure 5. Nondelegation: Structural Model



This analysis shows the distinctive contribution of separation of structures to the delegation debate. Beyond early-Congress practices, the existing literature's conceptual focus is to show that the Founders had a fluid understanding of separation of powers (e.g., executive branch officials were recognized to exercise executive, rather than legislative,

power when they follow congressional directives).[412] This approach aims to avoid accusations of functional overlap *within* the same framework on which opponents to the administrative state rely. But defenders of the administrative state need not retreat into the territory of functional division. Instead, the battle should be fought on a broader terrain of both functional *and* structural separation of powers. That is, separation of structures strengthens existing arguments against a muscular nondelegation doctrine. Even if agencies exercise legislative power by promulgating general rules, their institutional structure may eliminate any functional separation of powers concerns. Given the administrative state's structural diversity, institutional-design questions are even more important in the agency context. Under separation of structures, functional overlap is not fatal.

Importantly, the contribution of separation of structures holds even if the battle for nondelegation shifts into one for the major questions doctrine. In June 2022, the Supreme Court held that Congress did not delegate to the EPA authority to adopt a regulatory scheme to "force a nationwide transition away from the use of coal to generate electricity."[413] After *West Virginia v. EPA*, the Court could apply the major questions canon to find an absence of congressional delegation in a statute, instead of holding such delegation unconstitutional. However, the Court justified the major questions doctrine itself on "both separation of powers principles and a practical understanding of legislative intent."[414] Separation of structures thus suggests that the foundations of the major questions doctrine are shaky.

The delegation debate also highlights this Article's methodological contribution: a complete picture of constitutional meaning requires understanding the Founders' debt to the classical world, which may yield more progressive insights. Commentators advocating a muscular nondelegation doctrine primarily rely on early-modern political theories,

[412] See Mortenson & Bagley, supra note 381, at 313–32; supra notes 381–88 and accompanying text.

[413] West Virginia v. EPA, 142 S. Ct. 2587, 2616 (2022).

[414] Id. at 2609; see also Mila Sohoni, The Major Questions Quartet, 136 Harv. L. Rev. 262, 298–99 (2022) (observing that the "only inkling" of nondelegation concerns in the *West Virginia* majority opinion is the Court's reference to "separation of powers principles" (quoting *West Virginia*, 142 S. Ct. at 2609)).

including Locke, Montesquieu, and Blackstone.[415] Indeed, both the Fifth Circuit in *Jarkesy v. SEC* and the *Gundy* dissenters cite to the same passage from Locke's *Second Treatise of Government*, and mistake the anti-alienation principle, which concerns governmental legitimacy and the people's right to self-determination, for a statement of the nondelegation doctrine.[416] Conservative commentators' and jurists' reliance on early-modern thought reflects their formalist commitment to functional division, the main innovation of the early-modern period on separation of powers.[417] However, nondelegation proponents overlook separation of structures, which was equally influential on the Founders (not to mention Locke and Montesquieu themselves).[418] The Founders were steeped in the classical tradition: they were trained as experts in Greek and Roman political philosophy and history, and applied their vast knowledge of the classical world to their design of our governance structures.[419] Ignoring this strand of the Founders' intellectual heritage and commitment is a mistake, in particular for scholars who refuse to believe that the Constitution foreclosed any effective, majoritarian solution (e.g., through agencies) to the array of problems faced by a modern society.

CONCLUSION

This Article introduces a structural framework of separation of powers. Recent doctrinal and scholarly development has reached a saturation point, generating sharp disagreement and immense unpredictability. Much of this quagmire stems from the absence of an account of separation of structures. By supplying the missing account, this Article suggests new avenues of research and doctrinal engagement in adjudicating agency structures and delegation disputes. This framework also has the effect of defending the structural legitimacy of the administrative state, providing

[415] Mortenson & Bagley, supra note 381, at 285, 286 (noting that nondelegation proponents rely on "evidence . . . heavy on citations to theorists like Locke, Montesquieu, and Blackstone" and "selected medieval and early-modern English material").

[416] Gundy v. United States, 139 S. Ct. 2116, 2133–34 (2019) (Gorsuch, J., dissenting) (quoting John Locke, The Second Treatise of Civil Government and a Letter Concerning Toleration § 141 (J.W. Gough ed., Basil Blackwell Oxford 1948) (1690)); Jarkesy v. SEC, 34 F.4th 446, 460 (5th Cir. 2022) (citing Locke, supra, § 141).

[417] See supra notes 402–07 and accompanying text.

[418] See supra Part III.

[419] See supra Subsection III.A.1.

the political branches wider latitude to design it and to meet the needs of modern regulation.