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THE SEPARATION OF POWERS IN THE GLOBAL ARENA: PROMISES AND BETRAYALS

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The Missing Montesquieu
History and Fetishism in the New Separation of Powers Formalism

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An Introduction

These working papers were borne from the collaboration between The Jean Monnet Center at NYU School of Law and the IRPA (Istituto di ricerche sulla pubblica amministrazione - Institute for research on public administration). IRPA is a nonprofit organization, founded in 2004 by Sabino Cassese and other professors of administrative law, which promotes advanced studies and research in the fields of public law and public administration.

This paper serves as Introduction to the seminar on *The Separation of Powers in the Global Arena: Promises and Betrayals* that was held on December 16th, 2022 at the LUISS Guido Carli University in Rome.

The seminar's purpose has been to collect the contributions by international legal scholars to the study of the principle of the separation of powers and its transformations in a global context, and namely when adopted international and supranational institutions and challenged by global crises.

The seminar has gathered scholars with different legal backgrounds -history of institutions, international law, administrative law, environmental law- and with expertise at various levels, i.e. international, supranational and domestic.

The presentations discussed during seminar have resulted in seven papers, in addition to the present Introduction.

The principle of separation of powers, as theorized by Montesquieu, has been at the basis of modern democracies. With the evolution of democratic governance, however, it seems to have gained more a formal and normative value than a heuristic capacity as a principle capable of providing an interpretative key of the existing reality. Gradually that model, explicitly or implicitly adopted by democratic Constitutions, has suffered exceptions and deviations which the Covid-19 pandemic has even worsened.

In Western democracies the executive branch has often vested itself with legislating powers through decree-laws or equivalent. Parliaments have allowed this invasion, at the same time adding subsequent lengthy changes to these laws to meet local, sectorial, or corporate needs. In other instances, Parliaments have aimed at making the rules and applying them, through "self-executive" laws which are so detailed that they leave no room for any exercise of discretion by the administrations. The judicial branch has exercised regulatory powers in many sectors, expanding or shrinking principles or creating new rights and duties.

Exceptions and deviations are such as to make some scholars observe that the separation of powers no longer exists and has been replaced by different balances. Already in 1984 Lijphart argued, for example, that majoritarian democracies have been characterized by the concentration of powers on the executive, by the fusion of legislative and executive powers, and by the cabinet dominance over the legislative branch[1].

Although the literature on the separation of powers and on its crisis is very rich, the perspective from which this symposium intends to delve into the phenomenon is relatively novel as it aims to combine four elements.

First, the objective of the symposium is to analyse the phenomenon mainly through the lens of administrative law and from the point of view of public administrations. The articles deal with the principle of separation of powers and include the analysis of all the three branches and investigate the relationships among them. However, the focus of the symposium is mainly on exploring the *transformations in the exercise of administrative power* as a result of the intrusion by

[1] A. Lijphart, *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries*, New Haven / London: Yale University Press, 1984, *passim*.

the other branches into the administrative arena or, on the contrary, as a result of the appropriation by the executive branch of functions that are typically attributed to the other branches.

Second, the chosen perspective combines *different time planes*. The symposium looks, on one hand, at the origins of the principle of separation of powers, by identifying the "good promises" that through the principle were intended to be fulfilled. On the other hand, it should try to grasp the current trends, long-term o short-term, which militate in the direction of "betraying" the principle of separation of powers in its original meaning.

Third, in the analysis of "betrayals", the perspective will focus on the interaction between the principle of separation of powers and the direct and indirect *impact of globalization on this principle*. This interaction is examined under two respects: the first is that of the application of the principle by international and supranational organizations, established and operating to deal with global problems; the second is that of the impact that international and supranational bodies (and the regulation dictated by these bodies to address global problems) have had on the interpretation of the principle of separation of powers by the States. In this regard, without claiming to be exhaustive, three sectors have been chosen in which globalization, and the crises connected to it, have induced an alteration of the principle of separation of powers, determining a concentration of powers in the executive branch to the detriment of the legislative and the judiciary branch or, vice-versa, a subtraction of these powers from the executive branch by the judiciary. These sectors are democracy (and the democratic crisis, taking as case studies Poland and Hungary), health (and the consequences of the health crisis), and environment (and the consequences of the environmental crisis).

Finally, the perspective is mainly focused on the experience of American and European democracies.

More in detail, the first part on the promises and, thus, on the history of the principle of separation of powers includes two articles. *La constitution de l'Angleterre": Montesquieu and the reasons for separating the powers* by Pasquale Pasquino explores the historical evolution and interpretations of the separation of powers, from Montesquieu's influential work to contemporary political-constitutional systems. It examines Montesquieu's trinity of powers—legislative, executive, and judicial —and its role in shaping modern constitutionalism. The American

Constitution's system of checks and balances is analysed as a refinement of Montesquieu's doctrine. Challenges to this system, such as political party control and the growing power of executives, are discussed, along with the evolving role of constitutional courts. The article concludes by highlighting the need for a re-evaluation of the separation of powers in the 21st century, considering the dispersal of power among elected and non-elected entities in modern political systems.

Along these lines, the following article entitled *Montesquieu's legacy in the construction of American democracy* by Noah A. Rosenblum stems from the observation the most recent evolution of American constitutional law. While Montesquieu's ideas on separating government powers were central to late 18th-century American constitutional debates, the current Supreme Court majority, despite claiming fidelity to the Founders, largely overlooks his influence, opting instead for a selective and formalist interpretation of history.

This absence of Montesquieu prompts inquiries into the original meaning of separation of powers and its alignment with the Court's recent rulings. Thus, the article reconstructs the Supreme Court's evolving formalism on the separation of powers, tracing its roots back to opposition to the New Deal in the 1930s. It explores how this doctrine has reshaped American administrative law, particularly in recent years.

It, then, examines the Court's reliance on historical practices in recent cases but points out its selective disregard for historical evidence contradicting its formalistic interpretation of the separation of powers.

Finally, it delves into the pragmatic approach of the Founding Fathers towards separation of powers, suggesting they prioritized governance outcomes over rigid doctrinal adherence. It argues that Montesquieu's influence on American democracy lies in his understanding of how institutions shape political practices, a concept embraced by the Framers but overlooked by the modern Supreme Court.

The second part of the symposium, then, moves to analyse the role that the principle of separation of powers has in international and supranational organizations. The article entitled *Of Cheques and Balances: Separation of Powers in International Organizations Law* by Jan Klabbers explores the application of separation of powers principles within international organizations, a topic notably absent in current literature, especially if one excludes the European Union.

While international organizations are traditionally viewed as entities delegated tasks by member states, the paradigm of separation of powers, common in domestic governance, does not easily align with their collaborative nature. Unlike states, international organizations pursue specific goals outlined in their constitutive instruments, fostering cooperation among organs rather than checks and balances. Despite this, examining international organizations through the prism of separation of powers may offer insights into their evolving governance structures. The paper argues that while the autonomy of international organizations from member states is increasing, the development of a separation of powers doctrine remains limited, with recent funding practices further complicating the prospect. By exploring the impact of market-based funding on separation of powers, the paper underscores the challenges in controlling international organizations' activities, ultimately questioning the feasibility of implementing separation of powers within their governance frameworks. The analysis intentionally excludes the European Union and financial institutions due to their unique funding mechanisms and evolving roles beyond traditional international organization frameworks.

Indeed, a specific article of the symposium deals with the European Union. *The separation of powers and the administrative branch in the European Union* by Marta Simoncini explores the application of the principle of separation of powers to EU institutions. It examines how the EU's interpretation of this principle by the Court of Justice of the EU shapes the functioning of its administrative arm and argues that the principle has not contributed to framing the accountability of the EU administrative branch.

The analysis focuses on the limitations of the current framework in ensuring accountability within the administrative sphere, with specific attention to the non-delegation doctrine as interpreted by the Court of Justice. Despite efforts to uphold the principle of separation of powers, challenges remain in framing administrative accountability effectively within the EU context.

The third part of the symposium aims to provide a selective overview of the areas -democracy, environment, health- in which the principle of separation of powers has been especially challenged by global crises and it does so by focusing on some case studies.

With reference to democracy, the proliferation of democratic backsliding in many countries has been characterised *inter alia* precisely by the torsion of the principle of separation of powers. The decline of democracy globally has reverberated within the traditional structures of separation of powers, with authoritarian transitions notably emerging within the European Union, particularly in Hungary and Poland. The article entitled *The Dismantling of Power Sharing in Hungary and Poland. Two Roads to the Same Destination?* by Zoltán Szente and Wojciech Brzozowski shows that, despite their constitutional systems being labeled as "abusive constitutionalism", "illiberal democracy", or "populist constitutionalism", these countries share characteristics of anti-democratic transformations that undermine the system of checks and balances. This article delves into the nuanced constitutional changes in Hungary and Poland, examining how these regimes, while maintaining the facade of constitutional democracy, have weakened the division of power. It explores the methods employed by these governments to consolidate power while ostensibly adhering to democratic norms. Furthermore, the study investigates how contemporary challenges to separation of powers, such as the expansion of judicial power and multi-level constitutionalism, are addressed in these contexts. Through a comparative analysis, it seeks to discern whether the paths taken by Hungary and Poland represent distinct trajectories or share fundamental similarities. Ultimately, the paper aims to draw lessons from these experiences and their implications for the future of democratic governance.

Alongside with the democratic crisis, the climate change crisis has impacted the principle of separation of powers. *Climate Change, Narrative, and Public Law Imagination* by Liz Fisher argues that the interaction between climate change and public law presents a complex narrative landscape, shaping the imagination of legal frameworks and responses. Current narratives predominantly emphasize strategic litigation as a means to achieve low carbon futures, yet these narratives oversimplify the role of public law and often lead to narratives of promises and betrayals. By taking the separation of powers as an example of narrative in action, the article explores alternative narratives that present law as offering institutional and reasoning capacities necessary for the large-scale transformations demanded by climate change. It argues for a broader engagement with the substance of public law in addressing climate change and highlights the importance of understanding narrative dynamics in shaping public law imagination. It examines the prevailing narrative surrounding

public law and climate change, and proposes an alternative narrative. It concludes by considering the implications of these narratives for administrative law imagination. While primarily focusing on examples from administrative law in the US, UK, and Commonwealth, the insights presented resonate across legal cultures and public law contexts.

The impact that the global health crisis, following the Covid pandemic, has had on the principle of separation of powers is analysed in the last article of the symposium. *Following in the footsteps of Ginsburg &Versteeg. The bound executive during the pandemic: Italy as a case study* by Elisabetta Lamarque examines the impact of the COVID-19 pandemic on constitutional guarantees by comparing the findings of a recent comparative law study with developments in the Italian legal system. The study largely confirms the hypothesis that despite the pandemic's centrality to policymaking, the Italian Executive faced democratic constraints from an independent judiciary and efficient parliamentary oversight. However, contrary to expectations, regional and local authorities did not significantly constrain the national Executive due to Italy's small size and the global nature of the health threat. The article argues that Italy lacked democratic safeguards against technical-scientific power, emphasizing the need to integrate such powers into checks and balances for safeguarding individual rights.

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The Missing Montesquieu

History and Fetishism in the New Separation of Powers Formalism

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Abstract

This Article uses the absence of Montesquieu from American Supreme Court decisions to highlight some problems with American separation of powers law. Recently, the Court has embraced a neoformalist approach, allegedly justified by the Constitution's "original meaning." Yet the Court never cites to Montesquieu, despite his influence, and rarely engages with early republic history. This Article uses scholarship on Founding era practice to show that 18th century understandings of separation of powers were not formalist. It thus uses Montesquieu to recover an alternative, more pragmatic and historically accurate understanding of separation of powers, in place of the Court's growing fetishism.

[1] Assistant Professor of Law, NYU School of Law. For comments and conversation, thanks to Sabino Cassese, Adam Cox, Christine Kexel Chabot, Chris Havasy, Julian Davis Mortenson, Elisabetta Morlino, Jeremy Waldron, and participants at the LUISS Guido Carli University seminar on The Separation of Powers in the Global Arena and the NYU Law summer faculty workshop. Special thanks to Andrea Scoseria Katz, my co-author on a related project, in discussion with whom several of these ideas were developed, and to Adam Littlestone-Luria and Angelo Pis-Dudot for expert and timely research assistance.

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Introduction

Recent developments in American constitutional law have generated an unusual historical puzzle. For many decades now, it has been well known that Montesquieu was the single most invoked European author in discussions of late 18th century American constitutionalism. And while he was most cited in conjunction with debates over federalism and the viability of a large republic, his arguments for separating government powers were a touchstone for discussions about constitutional design. His conviction that the government's powers should be kept separate to promote secure liberty was so well accepted, it became (in Madison's words) "the sacred maxim of free government."[2]

[2] THE FEDERALIST, No. 47.

That maxim has never been more influential than before today's United States Supreme Court. In a series of recent cases, its Republican-appointed majority has attempted to remake American administrative law in line with a simplistic vision of fully separated powers. This vision, it maintains, is in the Constitution and is the best way to promote liberty. To realize it, the Court is taking aggressive, invasive action: striking down tenure protections for important government officers, announcing far-reaching limits on Congress's ability to structure the administrative state, and even reaching into agencies to rearrange reporting lines.

The Court has justified its unprecedented power grab with a bizarre appeal to history. Its new formalist separation of powers is legitimate, it claims, because it reflects the meaning of the Constitution at the time it was enacted.

This sets up the puzzle: while the Constitution's Framers relied on Montesquieu, and the judges who make up a majority of the Supreme Court rely on the Framers, the current Court majority does not rely on Montesquieu at all.[3] Current justices invoke history as authoritative. But they offer precious little actual history of government practice or constitutional reasoning.[4] This is the puzzle of the missing Montesquieu. He can stand in synecdochically for Founding Era constitutional thinking writ large.[5]

That Montesquieu is missing from current Court opinions raises several questions. What did separation of powers mean at the Founding and in the first years of government under the Constitution? Does intellectual history or historical practice, which is now supposed to be authoritative, support the Court's new doctrine? What, in other words, would Montesquieu have made of the Court's recent separation of powers rulings?

This Article suggests he would not be a fan. It reviews recent legal scholarship about American government in the late 18th and early 19th century to argue that the Court's

[3] This is a recent development. The Supreme Court cited to Montesquieu in separation of powers cases regularly through the 1980s. *See* Matthew P. Bergman, *Montesquieu's Theory of Government and the Framing of the American* Constitution, 18 PEPP. L. REV. 1, 2 (1990). The sudden silence on Montesquieu corresponds with the rise of the new separation of powers formalism and, ironically, the rise of "originalism."

[4] See, e.g., Jed Shugerman, Indecisions of 1789 (forthcoming Penn L. Rev.) (noting the Court's selective use of early republic historical sources).

[5] *Cf.* Christopher S. Havasy, Joshua C. Macey, & Brian Richardson, *Against Political Theory in Constitutional Interpretation* (forthcoming Vanderbilt Law Review) (cautioning against conflating "Enlightenment political thought," which was itself varied, with the political theory of the Constitution or then contemporary political practices).

new separation of powers formalism breaks in basic ways with the Founding Era approach that Montesquieu stands for.

The Article begins, in Part I, by reconstructing the Supreme Court's new separation of powers formalism. It shows how the roots of the doctrine run back to political opposition to the New Deal in the 1930s. Part I then traces how the doctrine has evolved since the 1980s, and, in particular, has remade major aspects of American administrative law the last few years. Part II turns to the alleged importance of history to that remaking. It begins by explaining how, in recent cases, the Court has claimed to accord decisive authority to historical practice. But, as the Part shows, the Court has ignored important historical practices suggesting that the Constitution's Framers did not share its new formalistic understanding of the separation of powers.

Part III tries to make sense of the Framers' practices. It relies on new studies of Founding-era thinking to reconstruct how the generation that made the Constitution may have thought about the separation of powers. The Framers approached separation of powers pragmatically, to achieve concrete governance outcomes. This, the Article argues in closing, suggests a different aspect of Montesquieu's influence. His most important legacy for American democracy may not have been his commitment to a specific, doctrinal understanding of separation of powers, but the institutionalist thinking that gave rise to it. Montesquieu understood that institutions shape political attitudes and practices, which in turn shape those institutions. The Constitution's Framers understood this too. In this, the Framers were more faithful to Montesquieu and the spirit of the laws than the Supreme Court that claims to venerate them.

I. The New Separation of Powers Formalism in American Administrative Law

The United States is in the midst of a remarkable transformation in the judge-made law of public administration. In a series of recent decisions, the Supreme Court has upended decades of jurisprudence to implant a rigid, formalistic separation of powers into American administrative law. These decisions have largely advanced the Court's Republican majority's deregulatory goals, but that is not how they are justified. Rather, the judges claim that their rulings have been dictated by the jurisprudential principle of separation of powers.

A. Anti-New Deal Antecedents

The political roots of this revolution trace back nearly one hundred years. In the 1930s the American federal government expanded its regulatory capacity dramatically. This redistributive "New Deal" bridled capitalism, reduced inequality, laid the foundations for decades of American economic prosperity, and won its champion, Democratic President Franklin Roosevelt, enduring popularity.[6] But it occasioned fierce resistance from some conservative quarters, especially rich businessmen.[7] Even as the Republican Party made an uneasy peace with the expanded American regulatory state, these anti-New Dealers held out, elaborating legal and philosophical critiques that they hoped would bring the New Deal state to heel.[8]

Their rump reaction would not find success for many decades.[9] In the 1980s, Republican President Ronald Reagan brought some anti-New Deal ideas into the mainstream.[10] Building on his success, scholars and policy entrepreneurs associated with the right-wing Federalist Society elaborated far-reaching critiques of administration to raise basic challenges to the regulatory state.[11] At first, their claims went nowhere. Some alleged that modern government violated separation of powers to such an extent that it needed to be scrapped;[12] their assertions were so extreme, they were difficult to credit.[13] But these positions nevertheless spread in conservative legal circles.[14] And the election

[6] *See generally* ERIC RAUCHWAY, WHY THE NEW DEAL MATTERS (2021).
[7] *See* KIM PHILLIPS-FEIN, INVISIBLE HANDS: THE BUSINESSMAN'S CRUSADE AGAINST THE NEW DEAL (2010).
[8] For how most Republicans learned to stop worrying and live with the administrative state, see JOANNA GRISINGER, THE UNWIELDY AMERICAN STATE (2012). On the centrality of the Administrative Procedure Act's "Fierce Compromise," see George Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. L. REV. 1557 (1996).
[9] For one attempt to narrate this history, see Ashraf Ahmed, Lev Menand, and Noah Rosenblum, *Building Presidential Administration* (forthcoming).
[10] *See* PHILIPS-FEIN, supra note X.
[11] On the recent resurgence of anti-administrativism, see Gillian Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 31-33 (2017).
[12] For an important early example, see Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994).
[13] When the conservative Columbia Law Professor Philip Hamburger wrote a provocative book entitled "Is Administrative Law Unlawful?," his Harvard Law counterpart gave it a devastating review entitled simply "No." *See* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014); Adrian Vermeule, *No*, 93 TEX. L. REV. 1547 (2015).
[14] *See* Cass R. Sunstein and Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393 (2015).

of Donald Trump, with his advisor's pledge to "deconstruct[] the administrative state," made what had once been fringe arguments truly unavoidable.[15]

The federal judiciary adapted, albeit slowly at first. The Supreme Court had occasionally used a rigid, formalist separation of powers to cabin regulatory activity in the past. Famously, in 1935, it struck down two important New Deal laws, arguably on separation of powers grounds.[16] And in the 1980s, Chief Justice Warren Burger used a simplistic notion of separation of powers to limit Congressional administrative innovations.[17] But these cases were anomalies. For the most part, the Court allowed administrative experimentation and took a practical approach to separation of powers in the administrative state. Thus, on the very same day in 1935 that it struck down the New Deal's National Industrial Recovery Act, it affirmed Congress's ability to insulate executive branch officials from Presidential removal.[18] And, in the late 1980s, after the Court had cabined Congress, Justice Antonin Scalia urged the extension of Burger's separation of powers formalism to the oversight of special prosecutors, but his colleagues rejected his entreaties 7-1.[19]

Only twelve years ago did the Court really begin to change course.[20] The case auguring the shift, *Free Enterprise Fund v. Public Company Accounting Oversight Board*, involved a minor question of administrative insulation.[21] In response to the Enron accounting scandal, Congress had passed the Sarbanes-Oxley Act, which created a

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[15] Philip Rucker and Robert Costa, *Banon Vows a Daily Fight for "Deconstruction of the Administrative State,"* WASH. POST (Feb. 23, 2017) https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643_story.html; on Donald Trump's campaign against the administrative state, see STEPHEN SKOWRONEK, JOHN A. DEARBON, AND DESMOND KING, PHANTOMS OF A BELEAGUERED REPUBLIC: THE DEEP STATE AND THE UNITARY EXECUTIVE (2021).

[16] *See* Panama Refining v. Ryan, 293 U.S. 388 (1935); Schechter Poultry v. United States, 295 U.S. 495 (1935).

[17] *See* INS v. Chadha, 462 U.S. 919 (1983) (striking down the one-house legislative veto on separation of powers grounds); Bowsher v. Synar, 478 U.S. 714 (1986) (striking down the Gramm-Rudman-Hollings Act, which had given important budgeting powers to the Comptroller General, on separation of powers grounds).

[18] *See* Humphrey's Executor v. United States, 295 U.S. 602 (1935).

[19] *See* Morrison v. Olson, 487 U.S. 654 (1988).

[20] *Accord* Richard H. Pildes, *Free Enterprise Fund, Boundary-Enforcing Decisions, and the Unitary Executive Branch Theory of Government Administration*, DUKE J. CONST. L & PUB. POL'Y 1 (Speciall Issue 2010) (identifying PCAOB as "the most expansive vision of presidential power over the structure of administrative agencies in perhaps ninety years").

[21] 561 U.S. 477 (2010). *See generally* Richard H. Pildes, *Separation of Powers, Independent Agencies, and Financial Regulation: The Case of the Sarbanes-Oxley Act*, 5 N.Y.U. J. LAW & BUS. REV. 485 (2009).

licensing and regulatory regime to oversee accounting firms. A new Oversight Board would be composed of members chosen by the Securities and Exchange Commission (SEC), which would also have the power to fire them for good cause shown. This was the same kind of protection the SEC Commissioners themselves enjoyed, although they were chosen and removable by the President. This arrangement meant that the members of the Oversight Board were insulated from the President by two layers of "for cause" removal protection. To remove a Board member, the President would have to convince the SEC it had cause to fire the Board member; failing that, the President could not fire the Board member directly, but would need to find cause to fire the SEC Commissioners and replace them with more pliable subordinates.[22]

In a 5-4 opinion, the Supreme Court ruled the scheme unconstitutional, resting its holding on a formalistic conception of separation of powers.[23] Chief Justice John Roberts opened the majority opinion by quoting from Burger, reviving the separation of powers formalism Scalia had unsuccessfully urged the Court to extend: "Our Constitution divided 'the powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial.'"[24] Therefore, Roberts reasoned, every government employee needed to fit into one (and only one) of the categories. Because the Constitution "vest[ed]" "the executive power" in a President "who must 'take Care that the Laws be faithfully executed,'" everyone fitting into the executive branch needed to be accountable to the President.[25] In other words, according to Roberts, the Constitution gave the President the power to oversee all non-judicial and non-legislative government employees.[26] Two layers of removal protection made this impractical, and so was not allowed. It restricted the President too much. "Perhaps an individual President might find advantages in tying

[22] This was, of course, by Congressional design: the aim of the law had been to make the Oversight Board responsive to the SEC's policy decisions. *See* Richard H. Pildes, *Putting Power Back into Separation of Powers Analysis*, 62 VAN. L. REV. EN BANC 85 (2009)
[23] *See* PCAOB, 561 U.S. at 508-09 (holding that, while "the existence of the Board does not violate the separation of powers," "the substantive removal restrictions . . . do" and striking them down on those grounds).
[24] *Id.* at 483 (quoting INS v. Chadha, 462 U.S. 919, 951 (1983)).
[25] *Id.* (quoting U.S. Const. Art. II. §§1, 3).
[26] *See id.* at 496-7, 499; *see also id.* at 513-14 ("The Constitution that makes the President accountable to the people for executing the laws also gives hum the power to do so. That power includes, as a general matter, the authority to remove those who assist him in carrying out his duties.")

his own hands," Roberts mused.[27] "But the separation of powers does not depend on the views of individual Presidents."[28]

The immediate practical consequences for the Oversight Board were small, despite the apparent severity of the violation: its members were allowed to keep their positions subject to at will removal by the SEC.[29] But the jurisprudential effects of Roberts' new separation of powers formalism were tremendous. Justice Stephen Breyer's dissent observed that the Court had abandoned the functional approach it had used in the vast majority of its previous separation of powers cases.[30] Congress had passed innumerable laws building out the government on the basis of that prior doctrine.[31] Roberts' opinion threw them all into question. Its "holding," Breyer worried, "threatens to disrupt severely the fair and efficient administration of the laws."[32]

B. The Gathering Storm

In the last three years, Breyer's fears have come true. In case after case, the Supreme Court has relied on the same separation of powers formalism to strike down regulatory schemes and limit Congress's power. Separation of powers is currently remaking the law of public administration.

An ominous warning sign appeared in *Gundy v. United States*.[33] The case emerged from an unlikely alliance between prominent progressive and libertarian lawyers.[34] They made common cause to challenge a central aspect of the Sex Offender Notification and Registration Act,[35] which, they contended, unconstitutionally delegated legislative power to the executive branch.[36]

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[27] *Id.* at 497.
[28] *Id.* (citing Freytag v. Commissioner, 501 U.S. 868, 879-880 (1991)).
[29] *See id.* at 508-09.
[30] PCAOB, 561 U.S. at 519 (Breyer, J., dissenting).
[31] *Id.* at 520-21.
[32] *Id.* at 514.
[33] 139 S. Ct. 2116 (2019).
[34] *See, e.g.*, list of amici curae, https://www.scotusblog.com/case-files/cases/gundy-v-united-states/.
[35] 34 U.S.C. § 20901 *et seq.*
[36] *See, e.g.*, Brief for Petitioner, *Gundy v. United States*, No. 17-6086 at 15-16.

The Court rebuffed the attack, but not without signaling its receptivity. A four-justice plurality found that the case raised no non-delegation issues.[37] A fifth justice, Samuel Alito, concurred in the judgment only, observing that, "[i]f a majority of this Court were willing" to tackle the delegation question, he "would support that effort."[38] But, since at that moment, no such majority was forthcoming, "it would be freakish to single out the provision at issue here for special treatment."[39]

The dissent, authored by Justice Neil Gorsuch and joined by Roberts and Justice Clarence Thomas, accepted that the statute was an unconstitutional delegation on the basis of the new separation of powers formalism. Gorsuch opened his writing with an echo of Roberts' earlier writing in *Free Enterprise*: the observation that the Constitution endows the legislature alone with the power to make "new federal laws restricting liberty," because, by the Constitution's terms, "different aspects of the people's sovereign power" are vested in "different entities."[40] "[E]ach of these vested powers," Gorsuch went on, "ha[s] a distinct content."[41] And it is one of the responsibilities of the federal courts to make sure that "content" and "entities" remain appropriately matched up and segregated—to "polic[e] the separation of powers" by "enforcing . . . the separation-of-powers triangle."[42] The law at issue in *Gundy*, the dissent believed, sought to give legislative powers to an executive branch agent.[43] It was thus in violation of the separation of powers and so unconstitutional.

Gundy was decided by an eight-judge court. Justice Brett Kavanaugh had not been confirmed when the case was argued and so took no part in its consideration.[44] But, soon after his confirmation, he signaled his agreement with Gorsuch's dissent. The occasion was a companion case to *Gundy*, a petition for certiorari out of the Sixth Circuit involving a similar defendant in a similar situation and raising the same non-delegation

[37] *See* 139 S. Ct. at 2121 (plurality).
[38] *Id*. at 2131 (Alito, J., concurring).
[39] *Id*.
[40] *Id*. at 2131, 2133 (Gorsuch, J., dissenting).
[41] *Id*. at 2133.
[42] *Id*. at 2135, 2142.
[43] *See id*. at 2143-44.
[44] This helps explain why Justice Alito wrote a separate concurrence, concurring in the judgment alone, despite his stated agreement with the dissent. Had he joined the dissent, the appeals court judgment below, finding no unconstitutional delegation, would have been affirmed by a divided court in a memorandum opinion. By concurring in the judgment, Alito opened the door for Gorsuch to pen his dissent—and thus signal to future litigants the Court's openness to further non-delegation challenges.

argument.[45] When the Court finally denied the petition,[46] Kavanaugh wrote a short separate statement, specifically to note his agreement with Gorsuch's *Gundy* dissent. He called Gorsuch's opinion "thoughtful" and "scholarly," and observed that it "raised important points that may warrant further consideration in future cases."[47]

Kavanaugh's statement read Gorsuch's dissent narrowly. He glossed it as a proposal to strengthen the Court's so-called major questions doctrine on constitutional grounds.[48] But his agreement with Gorsuch was much more thorough-going. They shared the same formalist separation of powers vision.

This was clear from Kavanaugh's earlier jurisprudence. Kavanaugh had written a lower court opinion in *Free Enterprise* that anticipated the separation of powers formalism of Roberts' eventual opinion in the case. He did the same in *PHH Corp. v. Consumer Financial Protection Bureau* (CFPB), a case decided not long before his nomination to the Supreme Court. The suit involved a constitutional challenge to the structure of the CFPB, an agency Congress had created as part of its Dodd-Frank reforms to address the provision of consumer financial products.[49] The head of the agency was removable by the President only "for cause," thus enjoying a certain degree of protection from direct presidential supervision.[50] PHH alleged that, given the CFPB's expansive powers, removal protection trenched on the President's executive authority; this in turn was a violation the new formal separation of powers.[51]

Kavanaugh agreed with PHH—twice over. He did so first as the author of a panel opinion accepting PHH's constitutional argument, then again as the author of a dissent after the D.C. Circuit took the case *en banc* and reversed his judgment.

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[45] *See* Ronald W. Paul v. United States, 17-8830, Petition for Certiorari.
[46] It was, in fact, an event of some drama. The defendant in *Gundy* had petitioned for rehearing, arguing that, while the Court rarely granted rehearings, it did so in situations where, due to a temporary vacancy, the Court reached a different decision than it might have with a full complement of justices. *See* Gundy v. United States, 17-6086, Petition for Rehearing. The petition, filed in July, was held for more than four months, and distributed to conference 7 times. It was finally rejected only at the end of November, the same day Kavanaugh issued his statement in *Paul*.
[47] *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., concurring).
[48] *Id*. *Cf.* Brian Chen & Samuel Estreicher, *The New Nondelegation Regime*, 102 TEX. L. REV. (forthcoming 2024) (arguing that the major questions doctrine can function as a tool of constitutional avoidance, achieving the goals of the nondelegation doctrine with less disruption).
[49] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 111-203 § 1011 *et seq*., codified at 12 U.S.C. § 5491 *et seq.*
[50] *See* 12 U.S.C. § 5491 (c)(3).
[51] *See* Opening Brief for Petitioners, *PHH Corp. v. CFPB*, 2015 WL 5695665, at *45-46.

In both cases, Kavanaugh grounded his reasoning in the same separation of powers formalism seen in *Free Enterprise* and echoed in Gorsuch's *Gundy* dissent. His argument even had a parallel structure. Kavanaugh began his panel opinion by observing that the Constitution "separate[s] the executive power from the legislative and judicial powers."[52] It does this, in part, by "lodg[ing] full responsibility for the executive power in the President."[53] For administration to be constitutional, then, "the President must be able to control subordinate officers in executive agencies."[54] Independent agencies, whose heads are not removable by the President at will, constitute a problematic "headless fourth branch of the U.S. Government," "a significant threat to the constitutional system of separation of powers and checks and balances."[55] That threat is moderated where the agencies are headed by multimember commissions who check each other.[56] But, Kavanaugh concluded, it became constitutionally intolerable where such independent agencies were led by a single director.[57]

A majority of Kavanaugh's colleagues at the time disagreed with him.[58] After they reversed his panel judgment, Kavanaugh only redoubled his commitment to separation-of-powers formalism. He repurposed his panel opinion as a dissent and sharpened its rhetoric. The Constitution "speak[s] with unmistakable clarity about who controls the executive power": the President.[59] To allow the CFPB to operate as it did effected, in his eyes, an impermissible diminution of presidential authority.[60]

Kavanaugh's writings in *PHH* put his brief statement in *Gundy*'s companion case in a different light. They suggested a fundamental agreement with Gorsuch in *Gundy* about separation of powers, the relations between the branches, and the reach of the President's authority. Adding Kavanaugh to the four *Gundy* skeptics made it clear that the "fundamental assault on the legitimacy of the administrative state, under the banner of 'the separation of powers'" was on the verge of a decisive victory.[61]

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[52] *PHH Corp. v. CFPB*, 839 F.3d 1,5 (D.C. Cir. 2016).
[53] *Id.*
[54] *Id.*
[55] *Id.* at 6.
[56] *See id.*
[57] *Id.*
[58] *See* 881 F. 3d. 75, 80 (D.C. Cir. 2018) (*en banc*).
[59] *Id.* at 164 (Kavanaugh, J., *dissenting*).
[60] *Id.* at 166-67.
[61] Cass Sunstein & Adrian Vermeule, *The New Coke* 2016 SUP. CT. REV. 41, 42.

C. The Current Crisis

It finally came in 2020. With Kavanaugh confirmed, the Supreme Court took up a challenge to the CFPB that was identical to the one he had heard before in *PHH*. This time, though, the court he was on had the votes to accept his reasoning. In *Seila Law v. CFPB*,[62] Roberts again wrote a Kavanaugh dissent into law. And, just as in *Free Enterprise*, he did it by relying on separation of powers formalism.

"The question before us," the opinion began, was "whether this arrangement"—having a single headed agency with for cause removal protection—"violated the Constitution's separation of powers."[63] To the Court, the constitutional separation of powers was a simple matter of division. The Constitution gave all executive power to the President, and so required that all executive branch officers "remain accountable to the President, whose authority they wield."[64] To do that, they needed to hold their positions at the President's pleasure, since "it is only the authority that can remove such officials that they must fear and, in the performance of their functions, obey."[65] As the head of the CFPB was a powerful executive officer, and not an inferior officer or a "mere legislative or judicial aide," he needed to be accountable to the President.[66] The separation of powers thus demanded that he be removable by the President at will.

The Court similarly relied on separation of powers formalism two years later, when it took up Kavanaugh's earlier suggestion in the *Gundy* companion case: constitutionalizing the major questions doctrine. Until recently, scholars could debate whether the major questions doctrine even existed; it had only been invoked a handful of times, without consistency, and did not seem to have a clear test or effects.[67] But Gorsuch's *Gundy* dissent had raised its prominence, and the Trump administration began

[62] 591 U.S. __ (2020) (slip op)
[63] *Id.* at 1.
[64] *Id.* at 12.
[65] *Id.* (internal quotation marks and emendations omitted) (quoting *Bowsher*, 478 U.S. at 726).
[66] *Id.* at 17.
[67] *See* Natasha Brunstein & Richard L. Revesz, *Mangling the Major Questions Doctrine*, 74 ADMIN. L. REV. 317 (2022). For important early analyses and critiques, inspired by the Court's use of the major questions doctrine in *King v. Burwell*, see Blake I. Emerson, *Administrative Answers to Major Questions*, 102 MINN. L. REV. 2019 (2018); Lisa Heinzerling, *The Power Canons*, 58 WM & MARY L. REV. 1933, 1954-1962 (2017).

arguing the issue whenever possible.[68] In a shadow-docket opinion about the Biden administration's test-or-vaccine mandate for large employers,[69] Gorsuch invoked the major questions doctrine again, but it was merely a concurrence and the Court's position remained unclear.[70]

The doctrine finally received full endorsement in *West Virginia v. EPA*, decided several months later.[71] The case concerned the authority of the Environmental Protection Agency to impose a particular regulatory plan on power plants to fight climate change. As it happens, the plan was never implemented and the carbon emissions savings it sought to achieve had already been met when the Court decided the case. Nevertheless, the Court held that the Agency did not have the power to implement the plan. The Court conceded that the plain text of the agency's organic statute was arguably capacious enough to justify something like the plan. But the "unprecedented" nature of the plan and the "breadth" of authority the agency claimed gave the Court pause.[72] The Court simply could not believe that Congress had intended for the agency to have the power to do something so far-reaching.[73]

This made the case a "major questions" matter.[74] The Court accepted the label, observing that it "refer[red] to an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted."[75] Where an agency claimed such expansive authority, it would need to show "clear congressional authorization" to overcome the Court's "skepticism."[76]

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[68] *See* Brunstein & Revesz, supra note X. For a recent survey of the explosion of new literature on the major questions doctrine, as a result of its post-*Gundy* prominence, see the helpful bibliography by Beau Baumann, *The Major Questions Doctrine Reading List*, YALE J. ON REGUL. NOTICE & COMMENT (Nov. 21, 2022) https://www.yalejreg.com/nc/the-major-questions-doctrine-reading-list-by-beau-j-baumann/.

[69] On the rise of the Shadow Docket, and what makes it different from cases heard in the normal course, see STEPHEN VLADECK, THE SHADOW DOCKET (2023)

[70] NFIB v. OSHA, 595 U.S. __ (2022) (slip op). The Court had earlier relied on FDA v. Brown & Williamson, often treated as one of the earlier major questions cases, in striking down the CDC eviction moratorium. *See* Alabama Assn. of Realtors v. HHS, 594 U.S. __ (2021) (slip op).

[71] 597 U.S. __ (2022) (slip op).

[72] *Id.* at 24 ("unprecedented"), 25 ("breadth").

[73] *See* id. at 25 ("There is little reason to think Congress assigned such decisions to the Agency.")

[74] *See id.* at 20.

[75] *Id.*

[76] *Id.* at 28 (internal quotation marks and citation omitted).

Scholars have debated the legal foundation for the Court's ruling since it came out.[77] But the Court itself found its *ratio decidendi* in the same constitutional separation of powers formalism it had relied on before. The foundational assumption on which the doctrine rested, the Court explained, was a presumption about Congress: "Congress intends to make major policy decisions itself."[78] This was partly a "practical understanding of legislative intent," but it was also a matter of "separation of powers."[79] Congress makes laws, not the executive branch. For an agency to exercise power, it must trace its authority back to a Congressional delegation. If the agency action looked like expansive new lawmaking in the absence of a new congressional statute, it raised the fear that the executive branch might be trenching on Congressional prerogative. The major questions doctrine was thus a clear statement rule of statutory interpretation with a constitutional separation of powers purpose in the background. Perhaps it invoked a silent constitutional avoidance canon to read statutes to minimize non-delegation concerns. At a minimum, it allowed the Court to impose a particular separation of powers vision on the government.

The legal revolution *Seila Law* and *West Virginia* commenced is very much still in process. The reach of the new major questions doctrine remains unsettled.[80] And the Court's post-*Seila Law* removal doctrine continues to ramify.[81] Many important puzzles are still unsolved, including what makes a question "major," how Congress can specify its delegations clearly, which executive branch officials may be insulated from executive control, and under what circumstances agencies can act independently of direct presidential supervision. The only thing that seems certain is the importance of

[77] *Compare e.g.* Kristin E. Hickman, *Thoughts on West Virginia v. EPA*, YALE J. ON REGUL. NOTICE & COMMENT (July 5, 2022) (arguing that the doctrine is "subconstitutional") *with* Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 263 (2022) (arguing that the Court's recent MQD cases, including *West Virginia v. EPA*, are "separation of powers cases in the guise of disputes over statutory interpretation").

[78] West Virginia v. EPA, slip op at 19 (internal quotation marks and citation omitted).

[79] *Id.*

[80] This may have been the aim: the structure of the doctrine may be such as to remain inherently open-ended and encourage controversy over what kinds of delegations count as "major." *See* Daniel Deacon and Leah Litman, *The New Major Questions Doctrine*, VA. L. REV. (forthcoming).

[81] In *Collins v. Yellen*, the Court relied on *Seila Law* for a new bright-line rule: no single headed agency administrators with for cause removal protection. *See* 594 U.S. __ (2021). And in *United States v. Arthrex*, it relied on *Seila Law* to rearrange reporting lines inside agencies. *See* 504 U.S. ___ (2021).

separation of powers. It provided the legal rationale for this jurisprudential shift. And it seems likely to continue to inform the Court's radical remaking of administrative law.

II. Separation of Powers at the Founding: Evidence From the Early Republic

The Republican-appointed majority on the Supreme Court does not recognize that its new separation of powers formalism is an innovation. To the contrary, it claims that it embodies the original meaning of the Constitution. The claim is dubious. Still, the Court's recent obsession with history has encouraged a myriad of studies on the public administration of the early republic. This new research allows us to say with some confidence that separation of powers in the early republic looks nothing like the Court's new doctrine. In particular, it was not rigidly formalistic.

A. Why Do Americans Care So Much About the 18th Century?

The Court's new separation of power formalism has usually been justified on three grounds: constitutional text, democratic theory, and historical practice. But the Court is eager to show all three justifications working together. And, at the end of the day, the Court's current majority rests its Constitutional decisions on the "original meaning" of the Constitution, which it claims is fixed and is the law's sole correct interpretation.

Seila Law epitomizes this tendency. As noted, the opinion opens with the Constitution's text. The second paragraph of the opinion quotes from Article II. But text can only take the Court so far. The federal Constitution famously lacks a "separation of powers" clause. The absence is noteworthy as some state constitutions *do* include such textual provisions.[82] Moreover, the text of the Constitution does not specify the composition or powers of the different government institutions in equal detail and never says anywhere that all government activities must be "housed" (whatever that would mean) under one of the institutions created by the Constitution's first three Articles.

[82] *See, e.g.*, MASS. CONST. PART I. ART. XXX ("In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.)

Confounding attempts at clear divisions, the Constitution assigns powers promiscuously between the President, the Congress, and the federal courts. So, for example, it allows the courts of law to appoint inferior officers, if vested with the power by Congress, even though appointment might be considered an executive power.[83] It gives the President a qualified veto over legislation, even though that might be considered part of the legislative power.[84] And it requires Congress to prescribe the regulations for the armed forces and declare war, even though these were traditionally Royal prerogatives,[85] and so might have been thought part of the executive power.[86] It is therefore difficult to derive a commitment to formal separation of powers just from the Constitution's text.

For this reason, the Court has bolstered its argument with a functionalist appeal to democratic theory. As it explained in *Seila Law*, American government operates according to a "straightforward" "constitutional strategy."[87] According to the Court, the Constitution made "the President the most democratic and politically accountable official in government,"[88] to be held "directly accountable to the people through regular elections."[89] Only the President gets to exercise undivided power; everywhere else in the government power needs to divided.[90] In this way, the people's rights will be kept safe from government encroachment even as the state can operate with dispatch, and the people will be able to effectively focus their attention on a single individual to hold the government responsible.[91]

There are some problems with this democratic theory though. As a threshold matter, it seems difficult to reconcile with the text of the Constitution. The selection procedure for the President specified in the Constitution puts his election in the hands of

[83] *See* U.S. Constitution Art. II § 2.
[84] *See* U.S. Constitution Art. I. § 7.
[85] *See* U.S. Constitution Art. I § 8. On the military royal prerogatives, and the way they were taken away from the executive and redistributed to Congress, see MICHAEL MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING, 188-89 (2020).
[86] Note, too, that the capacities and limitations of the Congress, the President, and the courts were not all listed exclusively in Articles I, II, and III, respectively. This is more evidence for the proposition that the Constitution does not follow a strict separation of powers.
[87] Seila Law, 591 U.S. __ , slip op at 23.
[88] *Id.* at 22.
[89] *Id.* at 23.
[90] *See id.* at 22-23.
[91] *See id.* 22.

an electoral college chosen by the states, not "directly" in the hands of the people.[92] Moreover, the Constitution does not require the states to choose their electors in any particular way. In any case, the Constitution does seem to have a definite position on which branch is supposed to be the most democratic and embody the will of the people, but it is not the President. It is the House of Representatives, whose electors are to have the same "qualifications requisite for electors of the most numerous branch of the state legislature" and whose members' short two-year terms—the shortest in the federal government—keep them regularly solicitous of their constituents' votes.[93]

There are numerous other problems with the Roberts Court's democratic theory. It ignores the democratic *bonafides* of other political actors, including especially the bureaucracy.[94] It remains willfully ignorant of the political behavior of actual voters. And it gives shockingly short shrift to Congress.[95]

But, at least from the Roberts Court's own perspective, the starkest problem with its functional argument is methodological. Simply put: the Republican-appointed judges on the Court do not generally allow functional considerations to be dispositive in Constitutional adjudication.

This was on display most dramatically in a challenge to New York State's firearms regulations, which the Court decided last year. In *New York State Rifle & Pistol Association v. Bruen*, the Court struck down several states' handgun licensing requirements (including New York's), by a vote of 6-3, with all the Republican-appointed judges in the majority and the all the Democratic-appointed judges dissenting.[96] The Court's rationale was peculiar, but apparently related to history. It explained that the licensing regimes must fail because they did not match historically analogous firearms regulation from the time the Constitution was drafted.[97] Of course a government might prefer, for functional reasons, to regulate firearms in a way that was not analogous to what

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[92] *See* U.S. Constitution Art. II § 1.
[93] *See* U.S. Constitution Art. I § 2.
[94] *See* Cristina Rodriguez and Anya Bernstein, *The Accountable Bureaucrat*, 132 YALE L. J. (forthcoming); Blake Emerson, *Liberty and Democracy Through the Administrative State*, 73 HASTINGS L. J. 371 (2022).
[95] *See* Beau Baumann, *Americana Administrative Law*, 111 GEO. L. J. (forthcoming)
[96] 507 U.S. __ (slip op).
[97] *See id.* at 15 ("The government must . . . justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation."); s*ee also id.* at 21 (explaining how, to defend firearms regulation from a constitutional challenge, "the government [must] identify a well-established and representative historical *analogue*").

had been done in the late eighteenth century. But that was irrelevant. The Constitution itself specified the limits of acceptable behavior, functionalism be damned.[98] Speaking for himself and his five Republican colleagues, Thomas asserted that the "meaning [of the Constitution] is fixed according to the understandings of those who ratified it."[99] To interpret a Constitutional provision, it was thus necessary to look to its "text and historical understanding".[100] This meant turning especially, even exclusively, to the history from the time the text was written,[101] since "[c]onstitutional rights are enshrined with the scope they were understood to have *when the people adopted them*."[102]

Thomas stated that there was nothing exceptional about the approach the Court took in *Bruen*. Rather, he believed that the text and history standard "accords with how we protect other constitutional rights"[103] and "many other constitutional claims."[104] While this assertion is open to doubt, it is true that in its recent neoformalist separation of powers cases the Court has similarly sought to reconcile its analysis with Founding era history. Thus, in *Seila Law*, Roberts cited early republic sources, including *The Federalist*, the writings of George Washington, and the debates of the First Congress, to justify his position.[105] And he reinforced his democratic theory by attributing it to the Founding Fathers. The plebiscitary presidentialist governance strategy he found at work in the Constitution, he said, really belonged to "the Framers," whose distinctive views about legislative and executive power it was his job to apply.[106]

This is not the place to rehearse the many problems with this kind of judicial originalism or the faulty historical reasoning in *Bruen* and *Seila Law*.[107] For the purposes

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[98] *See id*. at 17.
[99] *Id*. at 19.
[100] *Id*. at 17.
[101] *See id*. at 25 ("[N]ot all history is created equal.")
[102] *Id*. (internal quotations marks and citation omitted; emphasis as in original).
[103] *Id*. at 15.
[104] *Id*. at 16.
[105] *See, e.g.*, *Seila Law*, slip op at 12, 22.
[106] *Id*. at 22.
[107] For recent book-length critiques, see JONATHAN GIENAPP, AGAINST CONSTITUTIONAL ORIGINALISM: A HISTORICAL CRITIQUE (forthcoming); ERWIN CHEMERINSKY, WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM (2022); ERIC J. SEGALL, ORIGINALISM AS FAITH (2018). For one critique of the historical reasoning in *Bruen*, see Jill Lepore, *The Supreme Court's Selective Memory*, NEW YORKER (Jun. 24, 2022) https://www.newyorker.com/news/daily-comment/the-supreme-courts-selective-memory-on-gun-rights. For my critique of the historical reasoning in *Seila Law*, see *The Supreme Court Just Made the President More Powerful*, WASH. POST (July 14, 2020) https://www.washingtonpost.com/outlook/2020/07/14/supreme-court-just-made-president-more-

of this Article, what matters is the structure of the Court's reasoning in constitutional cases, as evinced here. The Court claims to be guided by a historically rich interpretation of the words of the Constitution. The challenge, for the Court, is to understand what the Constitution's text would have meant to the people who wrote and ratified it. That just is, the Court claims, what the Constitution actually means.

B. Separation of Powers at the Founding Was Not Formalist

While the Court's obsession with history bodes ill for American jurisprudence and the future of meaningful self-government, it has provided a small silver lining for historical scholarship. By elevating history into a major source of constitutional meaning, the Court has stimulated a boom in the study of the constitutional history of the early United States.[108] As a result, we now have many excellent studies offering real insight into how the late 18th and early 19th century American state operated and how different groups of educated elites, especially lawyers and elected officials, thought about their government.

Generalizing from rich historical accounts is often fraught. Nevertheless, this new scholarship does make one conclusion unavoidable, at least with respect to separation of powers: public administration at the Founding was not rigidly formalistic. In other words, the basic historical premise underlying the neoformalist separation of powers revolution is false. Government operations in the early republic were flexible and pragmatic, without a clear line separating powers from each other and with a high tolerance for cross-branch engagement.

Some of the best examples of this come from Christine Kexel Chabot's careful study of the statutes enacted in the First Congress. Much academic and legal debate has focused on the creation of the Departments of Foreign Affairs, War, and Treasury—the first three executive departments, created by the government soon after Congress convened in

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powerful/. Note that even most scholars who call themselves "originalists" in the United States have now broken with the Supreme Court's approach. For the most recent epicycle, see Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777 (2022).

[108] Notable, on this count, is the creation last year of the new peer-reviewed Journal of American Constitutional History, which is a reaction to the "increasing[] shadow" of "law office history" "over both scholarship and jurisprudence"—an indicator of this very research boom. *See Call for Papers*, J. OF AM. CONST. HIST. (2022) https://jach.law.wisc.edu/.

1789.[109] But much less attention has been devoted to the many other public administration schemes, structures, and statutes enacted in the first years of government under the Constitution. By looking at those laws and the institutional design choices they embody, Chabot argues, we can develop a much richer picture of what separation of powers at the Founding meant.[110]

What she finds is striking: a government not wedded to formalistic divisions but committed to "pragmatic" arrangements.[111] Chabot's main target is the theory of the "Unitary Executive," a doctrine according to which all non-judicial and non-legislative power can only be exercised subject to the discretion of the person of the President.[112] As a result, she is especially attuned to what some scholars have called the "internal separation of powers" within the executive branch: decisions to structure the government in a way that does not allow the President to exercise, personally, the whole power of the executive branch.[113] But in refuting the originalist case for the unitary executive theory, Chabot uncovers many examples of the early federal government blurring the separation of powers, without serious objection, worry, or sometimes, even remark.

Consider, for example, an unusual institution known as the Sinking Fund.[114] One of the problems facing the new United States was how to manage its large debt.[115] In England, sinking funds had been used in public finance to retire some debt while maintaining public confidence in outstanding debt. But the funds suffered from a major defect: governing coalitions would sometimes "raid[]" their monies and use them for

[109] The so-called "Decision of 1789" has been a set piece of American jurisprudence and scholarship for over a hundred years. See Noah A. Rosenblum & Andrea Scoseria Katz, Becoming the Administrator-in-Chief: *Myers* and the Progressive Presidency, COLUM. L. REV. (forthcoming); Jed Shugerman, *The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity*, 171 U. PA. L. REV. (2023). For an early, influential scholarly treatment, see CHARLES C. THACH, JR., THE CREATION OF THE PRESIDENCY, 1775-1789: A STUDY IN CONSTITUTIONAL HISTORY (1923).

[110] *See* Christine Kexel Chabot, *Interring the Unitary Executive*, 98 NOTRE DAME L. REV. 129, 133 (2022).

[111] *Id.* at 138.

[112] *See id.* at 137.

[113] *See, e.g.*, *id.* at 163-172. On the internal separation of powers, see Noah A. Rosenblum, *The Antifascist Roots of Presidential Administration*, 122 COLUM. L. REV. 1 (2022); Rebecca Ingber, *Bureaucratic Resistance and the National Security State*, 104 IOWA L. REV. 139 (2018); Gillian Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L. J. 423 (2009); Neal Kumar Katyal, *Internal Separation of Powers* 115 YALE L. J. 2314 (2006).

[114] *See* Christine Kexel Chabot, *Is the Federal Reserve Constitutional? An Originalist Argument for Independent Agencies*, 96 NOTRE DAME L. REV. 1 (2020).

[115] *See id.* at 33.

purposes other than "debt redemption."[116] This, of course, undermined their purpose. The challenge, then, was to create a government entity with the power to manage government debt but sufficient insulation from day-to-day governance to resist cooptation.

The Sinking Fund was the solution that Hamilton and the First Congress came up with. It was an ordinary sinking fund with an unusual structure. It was headed by five commissioners designated by statute: the Secretary of the Treasury, the Secretary of State, the Vice President of the United States, the Attorney General, and the Chief Justice.[117] The Commission would have the power to purchase federal debt securities on the open market. But it could only act if at least three of the commissioners and the President voted to do so.[118] And the Commissioners each represented different government powers. The Secretaries and Attorney General were appointed by the President. But the Vice President was elected independently of the President, and, in the First Congress, was seen less as an executive branch actor than as the President of the Senate, his other constitutional role.[119] The Chief Justice, for his part, was the head of a completely different branch of government and enjoyed life tenure. In other words, the Sinking Fund commissioners included representatives from all three branches of government—the executive, the legislature, and the judiciary—without anyone finding it problematic. This insulated it from ordinary political pressures. If one faction in one branch wanted to raid the fund, it would have to contend with counter-pressure from independent political actors. This, of course, was the very purpose of its design.

The Sinking Fund was not the only such formalistic-separation-of-powers-violating arrangement used by the First Congress. As Chabot documents in detail, "independent structures were knowingly and continually woven into the regulatory fabric of the early republic."[120] The Congress created Deputy Marshals, who could exercise

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[116] Chabot, *Interring the Unitary Executive*, *supra* note X, at 172 (internal quotation marks and citation omitted).
[117] *See id*. at 172-173.
[118] *See id*. at 173. Note that open market purchases were subject to the "approbation" of the President, which Chabot thinks meant a kind of veto. *See* Chabot, *Is the Federal Reserve Constitutional?*, *supra* note X, at 39-40.
[119] *See* Chabot, *Is the Federal Reserve Constitutional?*, *supra* note X, at 35.
[120] Chabot, *Interring the Unitary Executive*, *supra* note X, at 138.

significant federal law enforcement powers, but served at the pleasure of the judiciary.[121] It empowered port collectors to appoint private merchants to aid in assessing customs duties.[122] And it turned judges into preliminary fact-finders about fines and penalties that would be reviewed, revised, and ultimately imposed, by the Secretary of the Treasury.[123] This is not to mention the voluminous work on prosecution in the early republic, which could involve many actors enjoying significant independence from the President, or even the federal government itself.[124]

None of these decisions is particularly difficult to understand in context. Congress was trying to set up a functional government covering a massive territory with a very small staff.[125] And it tried to come up with practical ways to address obvious governance risks, like conflicts of interest and inadequate information. What these solutions reveal, then, are early state builders' commitment to functionalism over formalism. Or, to be more accurate and less anachronistic: if we think these historical actors were committed to separation of powers, whatever separation of powers meant to them was not what it means to the Supreme Court today. The early republic apparently tolerated a fair amount of crossing between the branches, mixing of powers, and even the creation of regulatory entities, like the Sinking Fund, that were not under the thumb of the head of any one branch.

III. Montesquieu's Institutionalist Legacy

The mixing of powers at the Founding makes Montesquieu's legacy obscure. His place in late 18th and early 19th century constitutional thinking is undisputed. And yet the early republic seemed not to follow a strict separation of powers.

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[121] *See id.* at 185.
[122] *See id.* at 186-87.
[123] *See id.* at 188.
[124] *See id.* at 189-90; *see generally* NICHOLAS PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780-1940 (2013).
[125] On the challenges of administration in the early republic, see generally BRIAN BALOGH, A GOVERNMENT OUT OF SIGHT: THE MYSTERY OF NATIONAL AUTHORITY IN NINETEENTH-CENTURY AMERICA (2009). On the small-footprint state as a deliberate governance strategy, see GARY GERSTLE, LIBERTY AND COERCION: THE PARADOX OF AMERICAN GOVERNMENT (2015).

This apparent contradiction is resolved through a better understanding of what separation of powers meant at the Founding and to Montesquieu. New legal scholarship suggests that the Constitution's Framers had a pragmatic understanding of separation of powers as a practical solution to concrete governance problems. This, ultimately, resonates with Montesquieu's own thinking too.

A. Conceptualizing Separation of Powers in the Early Republic

The design choices of the Constitution and early republic reveal that the Framers did not have a formalistic conception of the separation of powers. In fact, as recent work by Julian Davis Mortenson suggests, they did not have a particularly conceptual understanding of separation of powers at all. In a series of law review articles (and an ongoing book project), Mortenson has tried to reconstruct how the Founders thought about the government's basic powers. To answer the question, he reviewed vast quantities of 18th century legal and political writing, with special attention to the texts known to be most influential for Founding Era constitutional thinking.[126]

He has found past thinking has no easy present analog. We cannot directly map the way we think about the government's fundamental powers today onto Founding Era thought. So, for example, the contemporary Court majority treats "executive power" as if it were a category with specific substantive content—including some subject-area powers and excluding others. But Mortenson shows this is not correct. The executive power, he demonstrates, is simply the power to execute the laws.[127] In other words, it is not a category with specific substantive, subject-area content; it is an empty vessel to be filled with what the legislature decides.[128]

The line between executive power and legislative power was, therefore, necessarily blurry. One power could just as easily be the other. Consider an important example elaborated by Nicholas Parrillo, about the direct tax of 1798. To administer this tax,

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[126] *See* Julian Davis Mortenson, *Article II Vests The Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1187 (2019); Julian Davis Mortenson, *The Executive Power Clause*, 168 U. PA. L. REV. 1269 (2020).

[127] *See* Mortenson, *Article II*, *supra* note X at 1191, 1230-34; Mortenson, *Executive Power*, *supra* note X, at 1315-19.

[128] *See* Mortenson, *Article II*, *supra* note X, at 1234-35; Mortenson, *Executive Power*, *supra* note X, at 1334-45.

Congress empowered boards of commissioners to adjust valuations—and so the effective tax rate—at their discretion. These commissioners seem to have been exercising executive power; certainly they were officers of the United States, appointed by the President and confirmed by the Senate.[129] And yet, it is undisputed that the Congress could have achieved the same results by simply passing a law making the adjustments itself. Setting tax rates—often considered a core legislative function—could thus be an exercise of the legislative or executive power, depending on the circumstances.

More generally, it appears that Congress could make nearly any policy legislative or executive, as it chose. In other words, the so-called "non-delegation doctrine" is anachronistic. Recent scholarship, produced in response to the Court's formalistic turn and Gorsuch's *Gundy* opinion, described in Part I.B, confirms this. Parrillo has carefully analyzed every pre-ratification piece of evidence proffered for the existence of a non-delegation doctrine and found them misleading.[130] Mortenson and his colleague Nicholas Bagley have documented dozens of early laws delegating lawmaking power and carefully reviewed the corresponding legislative debates; they find that "the people who drafted and debated the Constitution rarely even gestured at nondelegation objections to laws that would supposedly have been anathema to them."[131] And Chabot has added more examples to their already long list.[132]

For the Founders, the concern was not with delegation, but creating a "complete government." The Articles of Confederation, which organized the state that preceded the Constitution, created something famously ineffectual. It could pass some laws, some of the time. But it could not reliably articulate the will of the people. And it could not implement what laws it passed on its own. The Constitution would not reproduce these mistakes. It would erect a government with the power not only to formulate laws, but adjudicate their application to individual cases, and follow through with their implementation. This, in the language of the time, was a "complete government."[133]

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[129] *See* Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power*, 130 YALE L. J. 1288, 1304 (2021).
[130] *Id.* at 2021 n. 44.
[131] Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 282 (2021); *see also id.* at 332. Mortenson and Bagley's analysis has occasioned significant discussion. See Mortenson & Bagley, *Delegation at the Founding: A Response to the Critics*, COLUM. L. REV. (forthcoming).
[132] *See* Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 GA. L. REV. 81 (2021).
[133] *See* Mortenson, *Executive Power*, *supra* note X, at 1321.

To a complete government, separation of powers served two important functions. First, it was a mechanism of implementation. Separation of powers was a way of parsing the different phases of the governmental process: making laws, figuring out their application, then executing them.[134] Identifying these phases and assigning them to specific government entities ensured that the resulting government would be complete. Second, by assigning the different phases of governance to *different* entities, the Constitution tended to secure liberty. The Founders recognized that there would be risks if the power of a complete government were captured by a single agent. Separation of powers helped ensure that, while the government remained complete, it would remain a general government, and not be subverted by particular interests.

Importantly, in this scheme, separation of powers did not operate as a shibboleth. It was always functional. Separation of powers accomplished specific goals. The ultimate goal was the creation of a complete government. Separation of powers helped accomplish that while securing liberty. In some cases that might require a firm division of powers, but in other cases not. The guiding question would be what arrangement would best advance the twin goals of completeness and security. Maintaining a formalistic separation of powers for its own sake would have seemed a foolish rigidity.

B. The Real Spirit of the Laws

This was not all an innovation of the Constitution. Separation of powers existed in some of the State Constitutions that preceded it and had existed in many other governments in world history with which the Framers were familiar. Nor can their interest in separation of powers be attributed entirely to Montesquieu. Scholarship on the history of separation of powers shows that its importance was appreciated at least as early as Bracton, in the 13th century and its roots trace back into Antiquity.[135]

Still, there is significant evidence to support the apparent influence of Montesquieu in particular on the Founding generation. In a celebrated essay, Donald Lutz surveyed a representative sample of American political and constitutional writing

[134] *See* Mortenson, *Article II*, *supra* note X, at 1216.
[135] *See id.* at 1215; *see generally* M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS (1967).

from 1760-1805 and counted citations to European authors. He found that, while "there was no one European writer, or one tradition of thought, that dominated American political reading and writing" during that time, "if there was one man . . . it was probably not Locke but Montesquieu."[136] Montesquieu was cited more than any other individual author, nearly three times more than any author except for Blackstone; he was cited throughout the period; and was particularly cited in discussions of constitutional design.[137]

Many other studies confirm Lutz's findings. Paul Spurlin devoted a book to documenting the far reach of Montesquieu's reception in America.[138] In a subsequent article assessing Montesquieu's influence on the framing of the Constitution, he offered a nuanced assessment. Montesquieu may not have "cause[d] a definite change in direction" in the Constitution's crafting.[139] But "[w]henever the name of an author was mentioned in the countless discussions of the separation of powers . . . that name, with one exception, was always Montesquieu."[140] In this way, Montesquieu gave a language to the Framers for their preoccupations.

Perhaps surprisingly, Montesquieu was often invoked by critics of the Constitution. He was cited with particular vehemence during the state ratification debates. And there, while he was named by all sides, Anti-Federalists relied on him especially to indict the Constitution's separation of powers.[141] Much like the current Supreme Court, they demanded that "all legislative powers [be assigned] to Congress, all executive powers to the president, and all judicial powers to judges," and argued that Montesquieu's teachings required such a perfect separation as well.[142]

Yet, as Federalists then and scholars since have charged, this was a misreading of Montesquieu. James Muller has observed that it was contradicted by Montesquieu's own

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[136] Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 AM. POL. SCI. REV. 189, 190 (1984).
[137] *See id.* at 193 Table 2, 192.
[138] *See* PAUL MERRILL SPURLIN, MONTESQUIEU IN AMERICA, 1760-1801 (1940).
[139] Paul Merrill Spurlin, *Montesquieu and the American Constitution*, 97 *in* THE FRENCH ENLIGHTENMENT IN AMERICA (1984).
[140] *Id.* at 98.
[141] On Anti-Federalist objections to the inadequate separation of powers in the Constitution, see Joshua C. Macey & Brian M. Richardson, *Checks, Not Balances*, 101 TEX. L. REV. 89 (2022).
[142] James W. Muller, *The American Framers' Debt to Montesquieu*, 92 *in* THE REVIVAL OF CONSTITUTIONALISM (1988).

description of the government of the United Kingdom, which, according to Montesquieu himself, provided his model for a government of separated powers.[143]

Read carefully, we see that far from requiring a perfect separation of powers, Montesquieu demanded mixing. One of the key goals of good government, for Montesquieu, was "liberté politique"—that is, "cette tranquilité d'esprit qui provient de l'opinion que chacun a de sa sûreté."[144] It was to achieve that security that the powers of a complete government needed to be divided.[145] But the goal was tranquility, not separation. And to achieve it would require not only separating powers but also giving different government bodies sufficient power to check would-be tyranny. The different parts of the government must both depend on each other and occasionally be able to frustrate each other.[146] This, of course, is the famous theory of checks and balances. Power must be made to counteract power, for Montesquieu just as for the Framers.[147] And that requires some mixing. It is impossible with a perfect separation.

This reveals Montesquieu's own pragmatic understanding of the separation of powers. For him, it is a means to an end. Even in the famous Chapter 6 of Book 11, where he describes the Constitution of England and the importance of the principle, Montesquieu discusses many instances in which a perfect separation of powers must be abandoned, in the name of advancing liberty. This is not a surprise. As Liz Magill persuasively argued, no theorist has been able to isolate what a specific "power" is, so a perfect separation of powers is not theoretically possible anyway.[148]

More important than the slogan "separation of powers"—for Montesquieu as for the Framers—was the kind of polity it was supposed to erect. The slogan was the byword

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[143] *See id.* at 100. Note, however, that scholars contest whether Montesquieu's account of the United Kingdom's government was accurate at the time. *See, e.g.*, WILLIAM SELINGER, PARLIAMENTARISM (2019); Noah A. Rosenblum, *Parliamentarism Recidivus*, NEW RAMBLER (Apr. 16, 2020) https://newramblerreview.com/book-reviews/political-science/parliamentarism-recidivus.

[144] MONTESQUIEU, DE L'ESPRIT DES LOIS, Tome 1, Livre 11, Ch. 6 at 244 (1748) (spelling modernized).

[145] *See id.* at 244-45 ("Lorsque dans la même personne ou dans le même Corps de Magistrature, la puissance législative est réuni à la puissance exécutrice, il n'y a point de Liberté, parce qu'on peut craindre que le même Monarque ou le même Sénat ne fasse des Lois tiranniques pour les exécuter tiranniquement. . . . Tout serait perdu si le même homme ou le même Corps des Principaux, ou des Nobles, ou du Peuple, exerçaient [les] trois pouvoirs.") (spelling modernized).

[146] *See id.* at 257-59.

[147] *See* Muller, *supra* note X, at 100-101.

[148] *See* M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 604 (2001). *See also* Macey and Richardson, *supra* note XX, at 94 (observing that "[t]he Constitution's defenders . . . argued that it was difficult, if not impossible, to develop pure or inherent definitions of legislative and executive powers").

for a government designed to be efficacious, so that it might protect and promote *liberté politique*. Separation of powers' specific contribution to making such a polity has never been especially clear. Conceptually, many of the benefits ascribed to the principle owe as much to closely related concepts, such as the simple fact of dividing power, as Jeremy Waldron has brilliantly observed.[149] In any case, *L'Esprit des Lois* is frustratingly telegraphic and conclusory on this point. It never wrestles in detail with questions of institutional design.

The Framers who cited Montesquieu, however did. They did not merely invoke Montesquieu's name. They went through with designing a government that, they believed, embodied "separation of powers" and the goals it served. Their practice shows us what they thought the principle meant not as an object of abstract speculation but a strategy of governance.[150] And it is, we see, for them as for Montesquieu, a particular kind of liberal government: one that mixes and matches powers in pursuit of the twinned goals of state capacity and secure freedom, the one as a buttress to the other.

Call it Montesquieu's project in action. He sought to harmonize the older tradition of the mixed constitution, based on separate social orders, with the modern era of positive lawmaking, to design the ideal state.[151] Those who invoked his name participated in the same project. But they did it by enacting laws and building institutions rather than writing books. The *esprit* of separation of powers was in how it helped them do it.

Conclusion

We are now in a position to resolve our framing puzzle. The current Supreme Court has not cited to Montesquieu in recent cases for a simple reason: Montesquieu does not support its neoformalist revolution. For the same reason, the Court has had to avoid engaging with the actual history of the early republic, despite its stated judicial philosophy, which accords that history decisive importance.

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[149] *See* Jeremy Waldron, *Separation of Powers in Thought and Practice*, 54 B.C. L. REV. 433, 438-440 (2013).
[150] *See* Samuel Issacharoff and Trevor Morrison, *Constitution by Convention*, 108 CAL. L. REV. 1913, 1915 (2020).
[151] *See* Jacob T. Levy, *The Separation of Powers and the Challenge to Constitutional Democracy*, 25 REV. OF CONST. STUDIES 1 (2020-21).

Early republic practice was very close to Montesquieu. Like Montesquieu, the Framers took a functional approach to separation of powers. They embraced it where it served the goals of a complete government and promoted *liberté politique*. But where governance aims required departures, they did not hesitate to combine powers. Indeed, they could not keep their vaunted checks and balances, which Montesquieu himself championed, without abandoning the quest for perfect division.

The Framers' loyalty to Montesquieu is easy to understand. They were familiar with his writing, they shared many goals, and he gave them a language to talk about their own work. Both the Framers and Montesquieu were wrestling with how to craft the fundamental laws to make the best state. And both recognized that separation of powers, used judiciously and in some circumstances, could be a useful tool for building a complete, free government.

The current Supreme Court's formalistic approach to separation of powers is much harder to understand. To them, it is not a principle of institutional design. It seems more like a fetish. The Justices are obsessed with impurity. They believe it is their job to patrol an impossible boundary between the powers, preventing contamination. As justification, they invoke words not in the Constitution and point vaguely to tyrannical threats. Behind their unreasoned protestations, the historically informed reader hears the words of Montesquieu and the republic's Framers. But their insights are not to be found in the Court's current jurisprudence.

There is, here, a juridical irony. The allegedly "originalist" Supreme Court would have much to gain from genuinely turning back to the some of the Early Republic's "original" commitments.