

Toward Separation of Powers Realism

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Many wonder if the separation of powers is going to be reinvigorated by the new appointees to the federal judiciary. But that doctrine in practice means that occasionally alarming, but exceedingly rare, doctrinal innovations—finding venerable parts of the administrative state or portions of high-profile congressional statutes to be unconstitutional, for example—make no real-world difference because of the modest remedies paired with those innovations. This Article shows how weak the separation of powers doctrines have become; explains how, in the rare case that the doctrines require a remedy, the remedy is almost never what the plaintiff seeks or a constraint on the administrative state; and analyzes why judges of every ideological stripe have turned away from the doctrine. It adds a comprehensive study of the past two decades of practice by the Supreme Court and D.C. Circuit to the existing literature and argues that we would be better off abandoning efforts to reinvigorate the functional versions of the doctrines.

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“The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”—Chief Justice John Marshall¹

Introduction

Many observers have bemoaned the way that the rise of the administrative state has grown into something that is hard to square with the Constitution, which came into force before there was an administrative state.²

The complaints are various. Some object to the rise of the presidency, with power over government functions unimaginable to the Founders, from the regulation of pollution to the production of low-income housing.³ Others point to the independent agencies—the central bank, the securities and communications regulators—that are insulated from the president’s control and ask where they fit into the tripartite system of government contemplated by the Constitution.⁴ Still others believe that the powers separated by our founding

1. *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

2. Jerry Mashaw has convincingly refuted the notion that administrative law began only in 1890, with the creation of the Interstate Commerce Commission. Rather, Mashaw suggests, the administrative state has existed “[f]rom the earliest days of the Republic.” Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 YALE L.J. 1256, 1260 (2006) (“From the earliest days of the Republic, Congress delegated broad authority to administrators, armed them with extrajudicial coercive powers, created systems of administrative adjudication, and provided for judicial review of administrative action.”). But what did exist—four departments and few career offices—looked nothing like the modern federal administrative state, which employs 2.1 million civilian workers. CONG. RESEARCH SERV., R43590, FEDERAL WORKFORCE STATISTICS SOURCES: OPM AND OMB 6 (2019).

3. See, e.g., A. Michael Froomkin, *The Imperial Presidency’s New Vestments*, 88 NW. U. L. REV. 1346, 1375 (1994) (“Others, myself included, continue to see an imperial Presidency.”); Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2148 (2004) (discussing concerns that complacent judges could be “paving the way for an all-powerful Executive Leviathan”). Such claims are hoary chestnuts of administrative and constitutional law. See, e.g., ARTHUR SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 418 (1973) (“[W]hat kept a strong President constitutional, in addition to checks and balances incorporated within his own breast, was the vigilance of the nation.”); Robert M. Cooper, *Administrative Justice and the Role of Discretion*, 47 YALE L.J. 577, 577 (1938) (critics of the administrative state spoke of the “tyranny” and “despotism” of bureaucrats). Senator Henry Cabot Lodge believed that strong judges were required to prevent “an all powerful executive” from “depriv[ing] the representative bodies of all responsibility and turn[ing] them into mere machines of record.” HENRY CABOT LODGE, *The Public Opinion Bill*, in *THE DEMOCRACY OF THE CONSTITUTION: AND OTHER ADDRESSES AND ESSAYS* 1, 9 (1915). For a critique of these concerns, see Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 4 (2017).

4. See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 544 (1994) (“The claim made by unitary executives that the Constitution creates only three branches of government and that the President must be able to control the execution of all federal laws is easily understood and resonates strongly with the very earliest lessons we learn about

document have been irredeemably mixed in our agencies.⁵ Whatever their compliant, to these critics, as Chief Justice John Roberts has put it, “the danger posed by the growing power of the administrative state cannot be dismissed.”⁶

At first glance, it looks like courts are not dismissing that danger, especially these days. The Supreme Court this term heard a claim that a board created to take Puerto Rico through a quasi-bankruptcy had been unconstitutionally appointed—a case that could strike a newly created agency out of existence.⁷ That very same day, four Justices objected to the way a federal sex-offender-registration statute had been implemented by the Attorney General.⁸ Three of them argued that the statute delegated too much legislative power to the Department of Justice, an executive-branch body, and a fourth stated that in different context, he “would support th[eir] effort” to reinvigorate such constraints over the discretion of executive branch officials.⁹ Justice

our constitutional system.”); Geoffrey P. Miller, *Independent Agencies*, 1986 Sup. Ct. Rev. 41, 43 (stating that independent agencies are “exceedingly difficult to reconcile with a tripartite structure of government”); Julian E. Zelizer, *The Conservative Embrace of Presidential Power*, 88 B.U. L. Rev. 499, 499 (2008) (“[C]onservatives add that the gradual delegation of authority to independent agencies has resulted in unaccountable bureaucrats making big decisions that are beyond the control of elected officials.”); Stephen L. Carter, Comment, *The Independent Counsel Mess*, 102 HARV. L. REV. 105 (1988); see also *In re Aiken Cty.*, 645 F.3d 428, 442 (D.C. Cir. 2011), *subsequent mandamus proceeding*, 725 F.3d 255 (D.C. Cir. 2013) (Kavanaugh, J.) (claiming that “from communications regulation (the FCC) to labor regulation (the NLRB) to securities regulation (the SEC) to nuclear power regulation (the Nuclear Regulatory Commission) . . . those independent agencies are democratically unaccountable”). These claims are also longstanding, of course. See *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) (“The rise of administrative bodies . . . has deranged our three-branch legal theories.”); Robert E. Cushman, *The Constitutional Status of the Independent Regulatory Commissions* (pts. 1 & 2), 24 CORNELL L.Q. 13 (1938), 24 CORNELL L.Q. 163 (1939).

5. Most regulators pass rules of general applicability and future effect; such rules are of the same character as congressional legislation. Agencies also investigate whether those rules have been violated—a prosecutorial role and, as Justice Scalia observed, “a quintessentially executive function.” *Morrison v. Olson*, 487 U.S. 654, 706 (1988) (Scalia, J., dissenting). If the agency concludes that there has been a violation, it will conduct an adjudication and impose a penalty—proceedings that mirror the judicial function. See WILLIAM F. FUNK & RICHARD H. SEAMON, *ADMINISTRATIVE LAW* 23-24 (4th Ed. 2014).

6. *City of Arlington v. F.C.C.*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting). Or, as Gary Lawson has put it, “the modern administrative state openly flouts almost every important structural precept of the American constitutional order.” Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1233 (1994); see also Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187 (2016).

7. See *United States v. Aurelius Inv., LLC* 139 S. Ct. 2737 (2019) (granting certiorari). As of the last writing, it had heard argument on the case, but had not decided it. For a review of the argument, see Amy Howe, *Argument Analysis: Justices Weigh Appointments Dispute – And Nature Of Puerto Rico Oversight Board*, SCOTUSBLOG (Oct. 15, 2019), <https://www.scotusblog.com/2019/10/argument-analysis-justices-weigh-appointments-dispute-and-nature-of-puerto-rico-oversight-board> [<https://perma.cc/WJ8E-PFKD>].

8. *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019).

9. *Id.* at 2131 (Alito, J. concurring); *id.* at 2143 (Gorsuch, J., dissenting) (“[T]his Court has upheld statutes that allow federal agencies to resolve even highly consequential details so long as Congress prescribes the rule governing private conduct. But it’s hard to see how the statute before us could be described as leaving the Attorney General with only details to dispatch.”).

Kavanaugh, who recused himself from the case, is thought to be sympathetic to the cause of the on-the-record four.¹⁰

Nor is the action confined to the most recent term of the Supreme Court. In 2018, the Court ruled that the way that the Securities and Exchange Commission (SEC) conducted its administrative adjudications was unconstitutional.¹¹ In 2014, it struck down a congressional statute for impermissibly interfering with the President's conduct of foreign affairs.¹² In 2010, it changed the job protections members of the Public Company Accounting Oversight Board enjoyed for constitutional reasons (PCAOB).¹³

Last year, Justice Kavanaugh concluded, when he was Judge Kavanaugh of the D.C. Circuit, that the Consumer Financial Protection Bureau (CFPB) enjoyed so much independence that it was unconstitutional, in what he said was "a case about executive power and individual liberty."¹⁴ The constitutionality of the CFPB and agencies structured like it, like the Federal Housing Finance Agency, is a question that the Court is taking up this term, as four circuit courts are addressing or have addressed cases on the matter.¹⁵

That all sounds like a lot. It might even appear to show that separation of powers doctrines really matter to the new generation of appellate judges and justices, at least when it comes to taming the administrative state.

But the separation of powers is one of those doctrines of the future whose present never seems to arrive, either on the merits or at the remedial stage. After all,

10. So many observers concluded after Justice Kavanaugh wrote that "Justice Gorsuch's thoughtful *Gundy* opinion raised important points that may warrant further consideration in future cases." Paul v. United States, 140 S. Ct. 342 (2019); see, e.g., Mark Joseph Stern, *Brett Kavanaugh Is Ready to Join the Supreme Court's Conservatives to Tear Down Key Federal Regulations*, SLATE (Nov. 25, 2019), <https://slate.com/news-and-politics/2019/11/kavanaugh-nondelegation-gundy-supreme-court.html> [<https://perma.cc/6J97-NG9J>]; see also Julie Suk Gersen *The Supreme Court Is One Vote Away from Changing How the U.S. Is Governed*, THE NEW YORKER, July 3, 2019, <https://www.newyorker.com/news/our-columnists/the-supreme-court-is-one-vote-away-from-changing-how-the-us-is-governed> [<https://perma.cc/SP5K-9924>] ("Kavanaugh's absence from the case [*Gundy*] likely changed its outcome").

11. *Lucia v. SEC*, 138 S. Ct. 2044 (2018).

12. *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015).

13. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 513-14 (2010).

14. *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 8 (D.C. Cir. 2016), *reh'g en banc*, 881 F.3d 75, 93 (D.C. Cir. 2018) (Kavanaugh, J., dissenting).

15. For a report on the current state of play regarding the constitutionality of the CFPB, see Alan S. Kaplinsky, *DOJ Agrees CFPB is Unconstitutional but Opposes Grant of Certiorari in State National Bank of Big Spring Case*, NAT'L L. REV. (Dec. 13, 2018), <https://www.natlawreview.com/article/doj-agrees-cfpb-unconstitutional-opposes-grant-certiorari-state-national-bank-big> [<https://perma.cc/JBF9-CFCA>] ("Despite agreeing on the merits with State National Bank of Big Spring (SNB) and the other petitioners for certiorari that the CFPB's structure is unconstitutional, the Department of Justice has filed a brief in which it argues that the U.S. Supreme Court should deny the petition."). The pending challenges are before the Fifth and Second Circuits; the D.C. and Ninth Circuits have upheld the constitutionality of the agency. For a discussion, see Jessica Ring Amundson, *No Circuit Split Yet on Constitutionality of CFPB*, LEXOLOGY (May 7, 2019), <https://www.lexology.com/library/detail.aspx?g=ba3c130e-be2b-4937-a69c-ced02f999483> [<https://perma.cc/2HEV-PCMU>]. The Fifth Circuit held the FHFA to be unconstitutionally structured in *Collins v. Mnuchin*, 938 F.3d 553 (5th Cir. 2019).

the sex-offender regulatory scheme that drew those four-pointed constitutional inquiries survived judicial review, and it was novel only because it was a close case.¹⁶ I collected every separation of powers case heard in the last 20 years by the Supreme Court and the D.C. Circuit. In 42 separation of powers challenges heard by the D.C. Circuit in that period, only 4 were ultimately successful, and only two of those struck down a statute on its face.¹⁷ At the Supreme Court, which chooses its own cases, separation of powers claims are increasingly prevalent, but of the 13 times the Court has analyzed the doctrines, only once has it given plaintiffs the relief they sought.¹⁸

If anything, the rise of the administrative state, rather than creating fertile grounds for separation of powers plaintiffs, has, with its weight and importance, made the courts more inhospitable to those claims. In the 1,309 cases in which the Supreme Court reviewed congressional action between 1794 and 2018, 162 have involved a separation of powers challenge.¹⁹ Of those, 41 have been successful, on either an as applied or a facial challenge—a challenging-but-not-impossible 25% success rate.²⁰ In other words, up until 20 years ago plaintiffs won 25% of the time. In past 20 years, the success rate has fallen to about 8%.

But it is those rare times when separation of powers cases succeed that things get even more interesting. For when it comes to finding a remedy for the assorted constitutional problems with our regulatory apparatus, the courts have fallen over themselves to assure everyone that unconstitutional agency powers should continue to be exercised almost exactly as before. The plaintiffs in the SEC and the PCAOB cases found themselves in the same situations they were in before their lawsuits.²¹ If the CFPB ever is held to be unconstitutional, then-Judge Kavanaugh promised that his preferred fix would “not affect the ongoing operations” of the Bureau.²² In *Buckley v. Valeo*, one of the very few cases that struck an agency out of existence, the Supreme Court gave legal effect to every decision the Federal Election

16. *Gundy v. United States*, 139 S. Ct. 2116, 2130 (2019). (“[I]t is small wonder that we have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.”).

17. *See infra* Part III.

18. *See id.* The Court held that the line item veto violated the bicameralism and presentment clauses, a clear win for the plaintiffs. *Clinton v. City of New York*, 524 U.S. 417 (1998). The only other statute struck down on its face, requiring the State Department to treat American passports issued in Israel in a particular way, was struck down in the manner sought by the administrative state. *Zivotofsky v. Kerry*, 576 U.S. 1059 (2014).

19. I reviewed the Judicial Review of Congress database and sorted all of the cases that raised separation of powers challenges from those that reviewed congressional action on some other ground. Keith E. Whittington, *Judicial Review of Congress Database*, PRINCETON (May 5, 2019), <https://scholar.princeton.edu/kewhitt/publications/judicial-review-congress-database> [<https://perma.cc/2HDG-9MEY>].

20. I sorted successful separation of powers challenges from failed ones in the database. *See id.*

21. *See infra* notes 136, 123 and accompanying text.

22. *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 8 (D.C. Cir. 2016), *reh'g en banc*, 881 F.3d 75, 93 (D.C. Cir. 2018) (Kavanaugh, J., dissenting).

Commission had made because its unconstitutional makeup “should not affect the validity of the Commission’s administrative actions and determinations to this date.”²³ It also kept the agency in business until Congress could fix the separation of powers problems with the original construction of the regulator.²⁴

Accordingly, while Chief Justice Roberts, among others, has suggested that the modern administrative state is due for a reckoning under reinvigorated separation of powers doctrines, the reality is quite different. There has been a campaign to articulate some standards about a right but to almost never pair it with a remedy. In *Marbury v. Madison*, Chief Justice John Marshall concluded that liberty meant the “right of every individual to claim the protection of the laws, whenever he receives an injury.”²⁵ Modern separation of powers jurisprudence does the opposite. Daryl Levinson has argued that this is often a feature of constitutional law—that the connection between right and remedy is often tenuous, as somewhat philosophical values are hard to translate into a practical idiom.²⁶ But with separation of powers cases, the philosophical values are often hard to discern and the disjuncture between right and remedy particularly tangible.

The hollow remedies, even more than the rare findings of constitutional violations, are the most interesting aspects of separation of powers jurisprudence. They raise one of the enduring mysteries of the federal judiciary: why hold a government program to be unconstitutional if you aren’t going to do anything about it?

The answer tells us something about the interplay between constitutional and administrative law, an interplay in which constitutional law is increasingly taking a back seat. The Constitution, to today’s small-government judges, is a remedy of last resort to be used when other legal options fail. So far, the courts seem to be implying that those other options have not failed. Administrative Procedure Act (APA) relief is broadly available to those aggrieved by particular actions of the administrative state, and it is also targeted and cabined.²⁷ APA remedies create a back and forth between courts and agencies. Businesses and individuals are used to planning for those remedies. Congress always has an opportunity to check judicial

23. *Buckley v. Valeo*, 424 U.S. 1, 142 (1976), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-55, 116 Stat. 81, *as recognized in* *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, (2003), *overruled by* *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

24. *Id.*

25. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

26. Constitutional law “assumes a process of constitutional adjudication that begins with judicial identification of a pure constitutional value. The pure value is then corrupted by being forced into a remedial apparatus that translates the right into an operational rule applied to the facts of the real world.” Daryl Levinson, *Rights Essentialism and the Remedial Equilibrium*, 99 COLUM. L. REV. 857, 858 (1999).

27. See 5 U.S.C. §§ 701-707 (2018). For a similar sort of argument, see Daniel Walters, *The Judicial Role in Constraining Presidential Nonenforcement Discretion: The Virtues of an APA Approach*, 164 PA. L. REV. 1911 (2016).

oversight or goad agency action if it wants progress in a particular area and believes that progress has been frustrated by reluctant rule-makers or APA review.²⁸

Constitutional remedies, on the other hand, cannot be overruled by Congress, and, unless carefully constrained, “salt the earth,” killing adjacent innovations in public administration as well as the complained-of practice.²⁹ While APA review stalls rules, constitutional remedies risk eliminating whole agencies or longstanding mechanisms on which many different agencies rely to make policy.³⁰

Such constitutional remedies are accordingly unpredictable, and, for that reason, not small-c conservative. Even if judges may consider rethinking the extreme desuetude into which separation of powers merits claims have fallen, they are also confronted by precedents that ensure separation of powers doctrines *never* do any damage. These include a vigorous severability practice and a recommitment to the de facto officer doctrine.³¹

In what follows, I discuss the doctrines and the stakes of separation of powers disputes, and then review every case in the past twenty years taken up by the Supreme Court and the D.C. Circuit, the nation’s premier administrative court, with an eye to revealing just how modest the relief offered in these cases has been. As we will see in Part II of this Article, the number of modern cases awarding serious relief to separation of powers plaintiffs can be counted on one hand and are outstripped by those cases where successful plaintiffs have won, essentially, nothing. By the same token, the doctrines underlying separation of powers claims have, in most cases, made a finding of liability quite rare, as I show in Part I.

Part III applies these insights to all the separation of powers cases decided by the Supreme Court and D.C. Circuit in an effort to convince the reader that my claims are not based on cherry-picked examples. Part IV concludes the paper with an elaboration of the argument that the separation of powers doctrines are such weak tea because there are better alternatives out there. Although the main contribution of the paper is to make clear just how weak the doctrines and remedies of the separation of powers have become, Part IV also suggests a modest doctrinal prescription. Courts should make clear that they will apply separation of powers law only to *formal* violations—putting sitting members of Congress in the

28. For example, Congress held hearings in an effort to get the Federal Trade Commission to investigate gasoline prices, an effort that led to the decision in *FTC v. Standard Oil Co. of California*, 449 U.S. 232 (1980); see also *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) (holding, in a non-APA contest, after a Supreme Court decision time-barring a gender-discrimination claims, that Congress eliminated the time bar in the Lilly Ledbetter Act).

29. As Justice White observed, sweeping separation of powers remedies have real consequences. “Courts should always be wary of striking statutes as unconstitutional; to strike an entire class of statutes based on consideration of a somewhat atypical and more-readily indictable exemplar of the class is irresponsible.” *INS v. Chadha*, 462 U.S. 919, 974 (1983) (White, J., dissenting).

30. For example, although the decision was extremely narrow, the Supreme Court’s intervention on ALJs could have dissuaded agencies from making policy through formal adjudications, a currently unpopular but classic mechanism on which agencies like the National Labor Relations Board almost exclusively rely.

31. See *infra* Section I.D for a discussion of these doctrines.

leadership of federal agencies, for example, or on Article III courts—rather than *functional* efforts to police how the executive’s take-care powers are to be distinguished from the legislature’s role as the maker of rules.³²

I. Modern Problems and the Separation of Powers on the Merits

The intuition behind separation of powers lawsuits is that by creating institutions that are not responsive to either the President or Congress, lawmakers have failed to honor the formal allocation of responsibilities set forth in the Constitution to the various parts of the government. Moreover, to formalists, defending that allocation makes good sense.³³ Muddying who can exercise which powers is likely to reduce the accountability, and perhaps also the expertise, of the government as a whole.³⁴

However, the doctrines of separation of powers relevant to the administrative state have struggled to deal with the complexities of modern governance. This Part of the Article reviews the relevant separation of powers doctrines, the challenges posed by modernity to them, and how the courts have sought to devise tests that maintain separation of powers principles while accepting the realities of the modern bureaucratic state. For the most part, courts have decided to defang the doctrines, rather than to dismantle the bureaucracy. This review will be familiar to those well versed in the separation of powers doctrines, who may wish to turn to the novel claims made in Parts II and III.

A. Presidential Autonomy’s Few Protectors

Some of the ways that the Constitution separates executive power from the other branches of government are specific, like the Appointments Clause. Other presidential protections have been mined from the more amorphous Take Care and Vesting Clauses. Although all of these components of Article II could be interpreted to place portions of the administrative state under the sole control of the President, they have instead been interpreted to make clear that the President’s executive authority can be substantially limited by Congress.

The Appointments Clause, for example, has been interpreted to require that government officials with real clout be placed in office through a process

32. I read some other scholars as also proposing that we give up the ghost on functional separation of powers remedies. See Kent Barnett, *Standing for (and up to) Separation of Powers*, 91 *IND. L.J.* 665, 711-13 (2016); John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 *HARV. L. REV.* 1939, 1943-45 (2011).

33. To the extent that formalists care about good or bad sense in the law, of course.

34. As the Supreme Court has put it, “By diffusing federal powers among three different branches, and by protecting each branch against incursions from the others, the Framers devised a structure of government that promotes both liberty and accountability.” *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015).

that involves politically accountable oversight. The mechanism for oversight differs among officials. Appointment of “Officers of the United States”—who wield “significant authority”—requires “presidential selection and confirmation by the Senate.”³⁵ “[I]nferior officers,” must be appointed by the President, the head of a department, or court.³⁶ The idea, as the Office of Legal Counsel has put it, is that limiting the ways that powerful officials can be appointed makes the appointment process more transparent and the appointers and appointees more accountable.³⁷ Cabinet officials and other important officers (and not so important officers, for example, the ambassador to Slovenia) must be confirmed by the Senate. Other officers who supervise others yet are also supervised by Officers of the United States might count as inferior officers, and so cannot be appointed through the ordinary civil service process.³⁸

The clause may have been easy enough to apply for a government with hundreds of employees and only four departments.³⁹ But the size of the modern administrative state has posed challenges for the application of the clause. Inferior officers in particular are hard to define, given that many government officials can point to a supervisor and also to decisions, often momentous ones, that are almost always left to their discretion.

Jennifer Mascott has argued, on originalist grounds, that under the Appointments Clause, a panoply of government officials should be deemed to exercise substantial authority: “(i) officials overseeing federal disaster relief preparations; (ii) tax collectors; (iii) officials authorizing federal benefits payments; (iv) contract specialists, (v) federal law enforcement officers; (vi) officials responsible for government investigations, audits, or cleanup; and (vii)

35. Under Article II of the Constitution, “The President . . . shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States.” U.S. CONST. art. II, § 2; *see also* Buckley v. Valeo, 424 U.S. 1, 125-26 (1976), (“any appointee exercising significant authority pursuant to the laws of the United States is an “Officer of the United States,” and must, therefore, be appointed in the manner prescribed”).

36. The power to appoint “inferior” officers must be vested “in the President alone, in the Courts of Law, or in the Heads of Departments.” *Id.* The Supreme Court has never precisely explained what exactly makes a government official a principal officer of the United States needing Senate confirmation, or an inferior officer, or mere employee (who does not need confirmation). *See, e.g.*, Landry v. FDIC, 204 F.3d 1125, 1132 (D.C. Cir. 2000) (“The line between ‘mere’ employees and inferior officers is anything but bright.”); Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62, 72 n.26 (1990) (“The reach of the Appointments Clause, however, is unclear.”).

37. *See* Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 75 (2007), <https://www.justice.gov/file/451191/download> [<https://perma.cc/4JN8-3695>].

38. *Edmond v. United States*, 520 U.S. 651 (1997) (“‘Inferior Officers’ are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.”). Perhaps the ordinary civil-service process can be used to identify a potential office holder, whose appointment would then be made by the President, a court, or the head of a department.

39. As Richard Fallon has observed, “George Washington had no White House staff. His four-member Cabinet oversaw no bureaucracy.” Richard H. Fallon, Jr., *Constitution Day Lecture: American Constitutionalism, Almost (but Not Quite) Version 2.0*, 65 ME. L. REV. 77, 83 (2012).

ALJs.”⁴⁰ Most of these officials have obtained their positions via the ordinary civil-service path, rather than through appointment and confirmation by politicians or judges. If such officials did have to go through the process stipulated by the Appointments Clause, appointments would quickly exhaust congressional, presidential, and department head time and energy.

Along the same lines, the Office of Personnel Management (OPM) has explained, officials in the Senior Executive Service (SES), “operate and oversee nearly every government activity in approximately 75 Federal agencies.”⁴¹ One third of these bureaucrats manage \$100 million programs, or oversee more than 200 employees.⁴² The 5 division directors of the SEC, for example, are SES officials.⁴³ The vast majority of these officials obtained their positions through a competitive process administered by OPM and their own agency, rather than being appointed by the President with or without Senate confirmation, the head of a department, or a court, or some other process designed to ensure that officials politically aligned with the President occupy important positions at the agencies subject to his control.⁴⁴

Judges have responded to this reality by asking whether powerful government bureaucrats are supervised by politically appointed officials.⁴⁵ This supervision is meant to vindicate the principle of democratic accountability by placing at the top of the administrative state’s various tentacles those whom the people have chosen, or at least officials chosen by the officials chosen by the people.⁴⁶ But, of course, this has left the vast majority of the administrative state outside the purview of the Appointments Clause.

40. Jennifer L. Mascott, *Who Are “Officers of the United States”?*, 70 STAN. L. REV. 443, 454 (2018).

41. *Senior Executive Service*, OFF. PERSONNEL MGMT. (2020), <https://www.opm.gov/policy-data-oversight/senior-executive-service> [<https://perma.cc/P4P9-REJC>]. For a somewhat dated critique of the function of the SES, see *Developments in the Law: The Civil Service and the Statutory Law of Public Employment*, 97 HARV. L. REV. 1619, 1647 (1984).

42. Nora Kelly, *Can the Government Fix Its Corps of Managers?*, ATLANTIC (Jan. 11, 2016), <https://www.theatlantic.com/politics/archive/2016/01/senior-executive-service/423435> [<https://perma.cc/LQQ4-LZHX>].

43. See John H. Walsh, *SEC Regulation of Foreign-Domiciled Investment Advisers: A Study of the Policy Vision Inspiring the Unibanco Letter*, 7 AM. U. BUS. L. REV. 233, 236 n.23 (2018). And of course, countless other important SES officials may be identified. For example the Vice-Chair of the Board of Veterans Appeals is also a member of the SES. See Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1238 (2000) (describing the arrangement).

44. *Senior Executive Service*, *supra* note 41.

45. As the Court explained, “in the context of a Clause designed to preserve political accountability relative to important Government assignments, we think it evident that ‘inferior officers’ are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.” *Edmond v. United States*, 520 U.S. 651, 663 (1997).

46. *Id.*

The Take Care Clause, another workhorse in separation of powers jurisprudence, works in a similar, if more amorphous, way.⁴⁷ By assigning the faithful execution of laws to the President, the Constitution provides that Congress cannot give executive powers to someone else, ensuring that, as the Court has put it, the “buck stops” with the President.⁴⁸ One implication of the Clause concerns removal: as Chief Justice Roberts has said, the “President cannot ‘take Care that the Laws be faithfully executed’ if he cannot oversee the faithfulness of the officers who execute them.”⁴⁹ Ensuring that the President has the power to remove and replace recalcitrant bureaucrats with employees who support her program is one way to guarantee faithful execution.

The Vesting Clause also has been invoked to protect presidential privileges, including the privilege to replace officers in the executive branch with officers more to his liking. It provides that the “executive power shall be vested in a President of the United States,” and while lawyers have long debated the Clause’s exact meaning, it does, at a minimum, assign responsibility for the execution of the laws to the President.⁵⁰ As with the Take Care Clause, the Vesting Clause could be thwarted if civil-service protections and the structure of agencies mean that officials who do not respond to presidential direction are the ones executing the laws in their particular issue-area.⁵¹ The Vesting Clause was cited as the basis for the President’s removal power in *Myers v. United States*,⁵² a high-water mark of separation of powers jurisprudence.

But the modern application of the removal power covers a tiny number of politically appointed officials.⁵³ The heads of independent agencies can only be removed for cause, meaning that the President has no functional ability to take action against these officials.⁵⁴ Senior Executive Service officials also enjoy

47. U.S. CONST. art. II, § 3 (providing that the President “shall take Care that the Laws be faithfully executed”).

48. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 484 (2010).

49. *Id.*

50. U.S. CONST. art. II, § 1, cl. 1.

51. For an excellent analysis of what the Vesting Clause would have meant to the Framers, see Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1172 (2019).

52. 272 U.S. 52, 115 (1926).

53. For-cause removal protections were approved by the Supreme Court in *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935). The Supreme Court now infers those protections for all independent agencies, regardless of the statutory language. *Free Enterprise Fund*, 561 U.S. at 487 (“The parties agree that the Commissioners cannot themselves be removed by the President except [for] inefficiency, neglect of duty, or malfeasance in office . . . and we decide the case with that understanding.”).

54. The vast majority of the civil service enjoys “for cause” job removal protections. M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1198 (2000) (“There exists an elaborate web of laws and regulations associated with the civil service system; those laws limit patronage and require for-cause removal of some employees.”). So do the heads of independent agencies. *Humphrey’s Executor*, 295 U.S. at 620.

protections against removal for reasons other than cause, and may challenge efforts to remove them by resorting to their very own protective agency, the Merit Services Protection Board.⁵⁵

The courts have thus adapted the removal power by permitting Congress to restrict it in many ways, but they also insist on some formal limits at the outer bounds.⁵⁶ The legislature can go too far, by, for example, offering too many layers of for-cause protection between the President and important officials that he might want to replace⁵⁷ or by placing its own members in the leadership of federal agencies.⁵⁸

These protections of presidential autonomy are exceedingly modest, but it is not clear that the modern President needs much protecting. We live in the era of the “imperial presidency,”⁵⁹ a time of “presidential administration,” as Justice Elena Kagan has put it.⁶⁰ The President may not have much control over who is appointed to, or removed from, the executive branch based on the way courts have interpreted the Appointments, Vesting, and Take Care Clauses. But that may not mean there is a reason to worry about it.

B. Congress’s Legislative Role Has Been Formally but Not Functionally Protected

In theory, the legislature should be the only organ of government able to make rules of general applicability and future effect. That is, after all, a definition of legislation, and legislative power has been allocated to Congress by Article I of the Constitution.⁶¹ But because our society is far too complicated for the 538 members of Congress to make all the rules, separation of powers jurisprudence has become a matter of policing some formal constitutional requirements without attempting to prevent the legislature from substantively giving plenty of its legislative powers away to agencies both inside and outside

55. See Peter L. Strauss, *On the Difficulties of Generalization—PCAOB in the Footsteps of Myers, Humphrey’s Executor, Morrison, and Freytag*, 32 *CARDOZO L. REV.* 2255, 2282 (2011) (discussing some of the limitations on removal of SES officials). For a discussion of the procedures required for taking adverse action against SES employees, see *Senior Executive Service: Adverse Actions*, U.S. OFFICE PERSONNEL MGMT. (2020), <https://www.opm.gov/policy-data-oversight/senior-executive-service/adverse-actions> [<https://perma.cc/G26L-CFNZ>].

56. As Justice Elena Kagan has observed, “the courts sometimes have allowed Congress to insulate the administrative state from the President through limitations on his power to remove officeholders.” Elena Kagan, *Presidential Administration*, 114 *HARV. L. REV.* 2245, 2271 (2001).

57. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010).

58. *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991).

59. The term comes from Arthur Schlesinger. See ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (1973).

60. Kagan, *supra* note 56, at 2246.

61. “Unlike other state action, legislation consists of rules having continuing force and intended to be observed and applied in the future.” *John P. King Mfg. Co. v. City Council of Augusta*, 277 U.S. 100, 104 (1928); see also U.S. CONST. art. I, § 1.

of the executive branch. Perhaps the judiciary has the power to use its Article I weapons to strike down truly transformative exercises of lawmaking power by government bodies other than Congress. But it has not done so yet.

The most famous of the separation of powers principles, the nondelegation doctrine, in theory prevents anyone else from usurping the legislature's role as the creator of laws. It is derived from Article I, section 1 of the Constitution, which provides that "all legislative power" is vested in Congress.⁶²

But, as every law student learns in the first week of their administrative-law class, the nondelegation doctrine allows Congress to delegate almost any legislative power it likes to almost any government institution.⁶³ Under the doctrine, Congress must provide the delegate with an "intelligible principle" that cabins its discretion, ensuring that the legislature has done its job establishing the basics of a regulatory scheme.⁶⁴

But Congress can offer the vaguest guidance and still pass the intelligible principle test—it can direct agencies to regulate in the "public interest"⁶⁵ or in a way "requisite to protect the public health."⁶⁶ The Supreme Court has turned away at least six nondelegation challenges away in the past two decades, and the votes were not close until 2019.⁶⁷

The only run of opinions related to the nondelegation doctrine with any bite have invoked the so-called "major questions" doctrine. That doctrine, though quite nebulous, would police agency decisionmaking on the basis of the importance of the matter to be decided. As the D.C. Circuit has put it, "an agency can issue a *major* rule—i.e., one of great economic and political significance—only if it has clear congressional authorization to do so."⁶⁸ Ambiguous authorizations by implication would not do.

Although it is not clear, the Supreme Court might have undone an agency regulation on major-questions grounds when it rejected the FDA's initial bid to

62. U.S. CONST. art. I, § 1.

63. "Courts should finally shake off the cobwebs of the old jurisprudence and acknowledge that the nondelegation doctrine, and its corollaries for statutory interpretation, are dead." Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1762 (2002). Some argue that the nondelegation doctrine has been dead for centuries. *See, e.g.*, Jason Iuliano & Keith E. Whittington, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 431 (2017) (noting that by the New Deal era, "the nondelegation doctrine—the meaningful and judicially enforced constitutional constraint on legislatures—was already dead"). *But see* Ilan Wurman, *As-Applied Nondelegation*, 96 TEX. L. REV. 975, 977 (2018) (attempting to fashion a workable revision to nondelegation).

64. "Applying this 'intelligible principle' test to congressional delegations, our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

65. *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 225-26 (1943).

66. *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 465 (2001).

67. GARY LAWSON, *FEDERAL ADMINISTRATIVE LAW* 114 (6th ed. 2013).

68. *U.S. Telecomm. Ass'n v. Fed. Commc'ns Comm'n*, 855 F.3d 381, 383 (D.C. Cir. 2017).

regulate cigarettes on the basis that nicotine was a drug and cigarettes a drug-delivery device.⁶⁹ The Court's opinion suggested that, although nicotine surely is a drug, and cigarettes delivered those drugs to people, Congress would have to explicitly authorize an expansion of the agency's jurisdiction to the tobacco industry because the FDA had never regulated the industry before and had in the past disclaimed any intention of doing so.⁷⁰ The case could be understood, as the D.C. Circuit apparently understood it, as a nondelegation doctrine constraint requiring explicit delegations when the question is a really important one.⁷¹

But if some day the major-questions doctrine, such that it is, is invoked on the basis of the separation of powers, there is an equally plausible way to read the doctrine as a "no funny business" rule rooted less in the separation of powers and more in judicial caution. When agencies regulate incrementally, courts generally defer; when they seek to dramatically expand their jurisdiction, courts grow less likely to do so.

The nondelegation story, apart from the possible major-questions codicil, looks like the story of other clauses of the Constitution that might divide the legislative role from other governmental roles. The Bicameralism and Presentment Clauses, for example, limit congressional interference in the administrative state by requiring a particular set of actions for legislation.⁷² But one look at our current regulatory state establishes that these clauses have been interpreted formally, rather than functionally.⁷³ If the President directs the Environmental Protection Agency (EPA) to promulgate emissions rules that transform the economy and the environment, has there essentially been legislation that failed to go through both houses of Congress and be presented to the president? Under such a regime, EPA rules furthering the presidential order would presumably be of "general applicability" and have "forward effect."⁷⁴

So far, the answer has been no. Instead, the courts have limited the Bicameralism and Presentment Clauses to other sorts of violations; for

69. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) ("Contrary to its representations to Congress since 1914, the FDA has now asserted jurisdiction to regulate an industry constituting a significant portion of the American economy.").

70. *See id.*

71. *See id.*

72. William N. Eskridge Jr., *The New Textualism*, 37 *UCLA L. REV.* 621, 642 (1990) (noting "the special conventions of the legislative process, such as the requirements that a bill must be passed in the same form by both chambers (bicameralism) and that it must then be presented to the President (presentment)").

73. There are scholars who think that the boundaries between formalism and functionalism are unstable, though in this piece I treat them as such. "The Court's separation-of-powers case law can be understood as a form of cycling between rules and standards." Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 *YALE L.J.* 346, 351 (2016).

74. *See* 5 U.S.C. § 551 (2018) (defining agency rulemaking in a way that makes it look like legislation).

example, they have required statutory amendments to go through the constitutional procedure involving both houses of Congress and signature by the President.⁷⁵ As we will see, these separation of powers doctrines have notched some actual victories for separation of powers enthusiasts, although if anything, results have reduced legislative and executive control over the administrative state, rather than enhancing it.

C. Protecting the Judicial Power in a Government of Adjudicators

Although Article III vests the judicial power in the courts, it has not been interpreted to prevent agencies from making adjudications and has often been used to make it difficult for those aggrieved by adjudications (or rulemaking for that matter) to obtain judicial review or get nationwide relief through that review. It has, to be sure, pared back the powers of administrative courts that look too much like actual courts, but that is the limit of the way this doctrine has checked administrators.

The administrative state makes backward-looking determinations of liability paired with some sort of penalty all the time, just as courts do.⁷⁶ Is that consistent with the separation of powers? The Supreme Court has said it was since *Crowell v. Benson*, a dispute between two private parties over the compensation due to an injured harbor worker under the Longshoremen and Harbor Worker Compensation Act, and one presided over by the deputy commissioner of the U.S. Employees' Compensation Commission.⁷⁷ The Court permitted administrative adjudications of publicly created, as opposed to common-law, rights.⁷⁸ As the Court later put it in *Stern v. Marshall*, if a "right is integrally related to particular federal government action," then it generally may be allocated to agency adjudication.⁷⁹ The Court reaffirmed this principle by a 7-2 vote in 2018 in *Oil States Energy Services v. Greene's Energy Group, LLC*.⁸⁰

As John Harrison has put it, *Crowell* meant that "administrative adjudication of issues arising under federal statutes was approved."⁸¹ Since statutes cover vast areas of our modern economy, agency adjudicators have a free hand to make decisions in all sorts of economic areas, ranging from the assessment of copyright royalties, to the right to unionize, to the materiality of the disclosures in corporate earnings statements. To be sure, these decisions are

75. See, e.g., *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983).

76. See Edward L. Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044, 1118 (1984).

77. *Crowell v. Benson*, 285 U.S. 22, 54-63 (1932).

78. See *id.*

79. 546 U.S. 462, 490-91 (2011).

80. 138 S. Ct. 1365 (2018).

81. John Harrison, *The Relation Between Limitations on and Requirements of Article III Adjudication*, 95 CALIF. L. REV. 1367, 1379 (2007).

subject to judicial review, and in that very important sense, the judiciary does check the administrative state. However it does not do so by placing all cases and controversies as matters for federal judges alone to decide—a separation of powers remedy—but rather by letting courts review adjudications conducted at the agency level.

If anything, when a court cites Article III, the opinion is likely to be good news for the agency. For example, when the D.C. Circuit invokes the separation of powers in relation to Article III, it often is dismissing a claim against a regulator for a lack of standing by the plaintiff. It did so in four of its standing cases in the last two decades.⁸² A vigorous standing doctrine protects the administrative state by dismissing lawsuits seeking to constrain it on the grounds that the plaintiffs who brought the suit have not been injured by agency action in a concrete and particularized way. The canonical standing suit, the one that created the modern standing test, *Lujan v. Defenders of Wildlife*, threw out efforts by environmental groups to obligate the Secretaries of the Interior and Commerce to apply a part of the Endangered Species Act to projects located overseas but funded by the United States on this basis.⁸³

It is nonetheless worth noting for the sake of completeness that there is one part of the semi-administrative adjudicatory state that has been curtailed by Article III: bankruptcy courts.⁸⁴ And one important modern issue on which, if anything, the separation of powers component of Article III is likely to be interpreted in an agency-friendly way very soon: nationwide injunctions.

Bankruptcy courts look and work more like courts than they do agencies, but they are staffed with Article I appointees, rather than Article III judges. The Supreme Court has a long tradition of resisting the allocation of common-law claims to bankruptcy proceedings, and more generally, of resisting the allocation of all of the powers of Article III to Article I judges.⁸⁵ In 2011, the Supreme Court invoked the separation of powers to prevent bankruptcy courts from hearing state counterclaims.⁸⁶ In 2015, it qualified this holding to permit bankruptcy courts to hear such claims with the parties' consent.⁸⁷ This all began in 1982, when the Court threw out a bankruptcy-process-reform statute on the grounds that it gave bankruptcy judges too much judicial power, a rare

82. See *infra* Table 2.

83. As the Court explained, “causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992).

84. For a discussion and a critique, see Anthony J. Casey & Aziz Z. Huq, *The Article III Problem in Bankruptcy*, 82 U. CHI. L. REV. 1155, 1162 (2015).

85. See, e.g., *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 55 (1982) (striking down a statute seeking to give bankruptcy courts “all of the ‘powers of a court of equity, law, and admiralty’”).

86. *Stern v. Marshall*, 564 U.S. 462 (2011).

87. *Wellness Int’l Network, Ltd. v. Sharif*, 135 S Ct. 1932, 1954 (2015).

case in which the separation of powers seriously impacted a legislative scheme.⁸⁸

New and pressing Article III separation of powers claims are likely to concern the propriety of the nationwide injunction, but, like standing, limiting nationwide injunctions on separation of powers grounds preserves, rather than limits, bureaucratic discretion.⁸⁹

A nationwide injunction works exactly how it sounds—it affords relief not only to the particular plaintiff who brought the suit (that would mean that she would get the injunction against a government policy being applied to her) but to everyone in the country.⁹⁰ Nationwide injunctions have recently been deployed against signature administrative initiatives, regardless of the political party that supports the initiative. A nationwide injunction was adopted when a judge in Seattle barred enforcement of the one of the Trump administration’s travel bans,⁹¹ and another when a judge in Texas threw out a plan to defer deportations of illegal immigrant families whose children had grown up in the United States—a signature immigration achievement of the Obama administration.⁹²

These injunctions have not just restricted regulators, they have also posed problems for the Supreme Court, which has been forced to weigh in on various nationwide injunctions soon after they have been implemented.⁹³ As Nicolas Bagley and Samuel Bray recently put it, “Instead of allowing many judges to reach independent judgments,” nationwide injunctions “resolve the question for all courts. The government has little choice but to appeal, sometimes all the way up to the Supreme Court.”⁹⁴

88. *Northern Pipeline*, 458 U.S. at 55.

89. The argument is one of standing, but also one of judicial modesty. Compare Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 420 (2017) (“No matter how important the question and no matter how important the value of uniformity, a federal court should not award a national injunction.”), with Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1069 (2018) (“[I]n some cases, nationwide injunctions are also the only means to provide plaintiffs with complete relief and avoid harm to thousands of individuals similarly situated to the plaintiffs.”).

90. For a discussion, see Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095, 2098 (2017).

91. *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040, at *2 (W.D. Wash. Feb. 3, 2017), *appeal dismissed*, No. 17-35105, 2017 WL 3774041 (9th Cir. Mar. 8, 2017) (“This TRO is granted on a nationwide basis and prohibits enforcement of Sections 3(c), 5(a), 5(b), 5(c), and 5(e) of the Executive Order (as described in the above paragraph) at all United States borders and ports of entry pending further orders from this court.”).

92. For a discussion of the immigration litigation, see *Texas v. United States*, 809 F.3d 134, 188 (5th Cir. 2015), *aff’d per curiam mem. by an equally divided Court*, 136 S. Ct. 2271 (2016).

93. See, e.g., *Trump v. Sierra Club*, 140 S. Ct. 1 (2019) (reversing an injunction against border-wall funding); *Trump v. Hawaii*, 138 S. Ct. 2392, 2403 (2018) (reversing an injunction against another version of the travel ban).

94. Nicolas Bagley & Samuel Bray, *Judges Shouldn’t Have the Power to Halt Laws Nationwide*, ATLANTIC (Oct. 31, 2018), <https://www.theatlantic.com/ideas/archive/2018/10/end-nationwide-injunctions/574471> [<https://perma.cc/B3PE-MKYK>].

It is certainly the case that injunctions have posed separation of powers problems before, but these concerns have been different from those posed by a nationwide injunction. In the past, academics worried that structural injunctions issued against state-run institutions for violations of federal constitutional law put judges in a quasi-legislative and quasi-executive role.⁹⁵ These concerns arise where, for instance, an injunction gives courts control over school districts and prisons to remedy equal-protection and due-process violations. In such instances, judges are involved in the promulgation of new standards, in funding, and in the oversight of state-level public institutions. Is this consistent with separation of powers limitations on the judicial role? Abram Chayes thought it was.⁹⁶ Others thought otherwise.⁹⁷

Institutional-reform litigation is still important, but vastly diminished from the school- and prison-reform era.⁹⁸ The nationwide injunction is more about thwarting broad federal regulatory initiatives at the trial-court level, rather than about judicial takeover of a local institution.

Still, like institutional-reform litigation, if the nationwide injunction becomes viewed as a threat to good administration because it grants relief to persons who are not parties to a case, its threat to the administrative state is not likely to last long.⁹⁹ Attorney General William Barr has opined that “nationwide injunctions violate the Separation of Powers” because of this standing concern and because they “allow district courts to wield unprecedented power.”¹⁰⁰ In 2018, the House Judiciary Committee voted on a bipartisan basis to advance a bill that would ban nationwide injunctions.¹⁰¹ If such a law passed, it would be extremely surprising if the courts struck it down as an impermissible interference with the judicial power.

95. For an overview and elegy of this era, see David Zaring, *National Rulemaking Through Trial Courts: The Big Case and Institutional Reform*, 51 UCLA L. REV. 1015, 1018 (2004) (“Institutional reform cases are paradigmatic exercises of judicial power in the public sphere and have been for the last half-century.”).

96. Abram Chayes, *The Role of the Judge in Public Law Adjudication*, 89 HARV. L. REV. 1281, 1289 (1976).

97. See, e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE* (1991).

98. See, e.g., Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN L. REV. 661, 664 (1978) (positing that the separation of powers required federal courts to act cautiously when it came to institutional reform remedies against state actors); John C. Yoo, *Who Measures the Chancellor’s Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CALIF. L. REV. 1121, 1122-24 (1996) (claiming that elaborate judicial remedies threatened the structure of the separation of powers).

99. *Lewis v. Casey*, 518 U.S. 343, 357 (1996).

100. William P. Barr, U.S. Att’y Gen., Remarks to the American Law Institute on Nationwide Injunctions (May 21, 2019), <https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-american-law-institute-nationwide> [<https://perma.cc/X45Y-NP2H>].

101. *House Panel Advances Bill to Bar Nationwide Injunctions*, LAW360 (Sept. 18, 2018), <https://www.law360.com/articles/1082785/house-panel-advances-bill-to-bar-nationwide-injunctions> [<https://perma.cc/2R4Y-LM7X>].

D. The Doctrinal Limits of Separation of Powers Remedies

The separation of powers doctrines discussed in this Part are raised in the context of the coordination of the several branches of government, and the place of the modern administrative state within and outside of those branches. Why, doctrinally, aren't meritorious claims vindicated with serious remedies?

The answers lie in the development of two mostly practical constraints on the remedies that courts can order for violations of the separation of powers—the de facto officer doctrine and the preference for severability. The doctrines are not just rules of judicial efficiency; in theory, they arise out of vague separation of powers concerns about overweening courts.

Of the two, the de facto officer doctrine is the stranger. When deployed, it serves to nullify, at the remedy stage, those rare cases where separation of powers claims succeed on the merits.¹⁰² As the Supreme Court has explained, the “de facto officer doctrine confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person’s appointment or election to office is deficient.”¹⁰³

The doctrine is deployed against plaintiffs who successfully argued for the unconstitutionality of a government action.¹⁰⁴ The concern is that without it, there would be chaotic, multiple, and repetitious suits challenging every action taken by every official whose claim to office could be open to question.¹⁰⁵ It is a doctrine rooted almost purely in efficiency, stability and settled expectations, and some concern that the alternatives would give judges too much power over the process of unwinding (un)official acts.

In *Ryder v. United States*, the Supreme Court appeared to limit the doctrine, at least in criminal contexts.¹⁰⁶ In ordering a new trial for a defendant whose conviction had been affirmed by an unconstitutionally appointed

102. The Supreme Court seemed to find that the doctrine should not apply to constitutional challenges, though it is hard to square that decision with the decision to uphold a sanction issued by an unconstitutionally appointed agency in *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010). For a discussion of the de facto officer doctrine, see *SW General, Inc. v. NLRB*, 796 F.3d 67, 81 (D.C. Cir. 2015), *aff'd on other grounds*, 137 S. Ct. 929 (2017) (holding that an act by an invalidly appointed official is accorded de facto validity unless plaintiff raises challenge “at or around the time that the challenged government action [was] taken” (citing *Andrade v. Lauer*, 729 F.2d 1475, 1499 (D.C. Cir. 1984))).

103. *Norton v. Shelby Cty.*, 118 U.S. 425, 440 (1886).

104. See, e.g., *Connor v. Williams*, 404 U.S. 549, 550-51 (1972) (holding that legislative acts performed by legislators elected under an unconstitutional apportionment scheme were not void). For a more controversial example, see *Free Enterprise Fund*, 561 U.S. at 484 (affirming sanctions handed down by an unconstitutionally appointed board after the Court remedied the board’s unconstitutionality by severing the problematic removal protections).

105. *Ryder v. United States*, 515 U.S. 177, 180-81 (1995).

106. See *id.* For more on this distinction, see Deepak Gupta, *The Consumer Protection Bureau and the De Facto Officer Doctrine*, 65 ADMIN. L. REV. 945 (2013) (“There is a significant difference between situations in which the government is engaged in an ongoing action against a particular person . . . and situations in which the government is establishing laws and regulations of general applicability, carrying out investigation, or engaging in general supervision of an industry.”).

military appeals board, the Court decided that a defendant who “makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question and whatever relief may be appropriate if a violation indeed occurred.”¹⁰⁷ But, as we will see, *Ryder* has been ignored by lower courts in civil contexts.

Severability rules are easier to understand. They are designed to minimize the fallout from a separation of powers problem. The test for severability is, “unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.”¹⁰⁸ Rather than throw out an entire statute, a court is supposed to examine whether: first, the rest of the statute can stand on its own if an unconstitutional part of it is voided, and second, whether the legislature would have wanted it to remain standing. Moreover, courts have placed the thumb on the scale in favor of severability. As the D.C. Circuit has explained, “in separation of powers cases, severance of the unconstitutional provision is the chosen remedy.”¹⁰⁹

Severability is based on judicial modesty, and its practice reflects a judicial duty to “try to limit the solution to the problem.”¹¹⁰ In practice, however, severability is used more expansively than this. Courts will modestly rewrite statutes under its guise. For example, if an agency has an Appointments Clause problem, a court may choose not to eliminate the offending appointment but instead to rewrite the statute to provide for an appropriate substitute process.¹¹¹

The critiques of these remedial limitations are easy to imagine. As Kirstin Hickman has observed, plaintiffs unlikely to obtain a remedy are less like to sue, even if they have meritorious claims.¹¹² On these grounds, Kent Barnett has encouraged Congress to provide fallback remedies and to incentivize litigants to pursue separation of powers cases with the potential award of scheduled damages and attorneys’ fees.¹¹³

107. *See id.*

108. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987). For a discussion of severability, see Brian Charles Lea, *Situational Severability*, 103 VA. L. REV. 735, 737 (2017).

109. *John Doe Co. v. Consumer Fin. Prot. Bureau*, 849 F.3d 1129, 1133 (D.C. Cir. 2017).

110. *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 328 (2006). In other words, “a court should refrain from invalidating more of the statute than is necessary.” *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984).

111. *See, e.g., Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 115 (D.C. Cir. 2015) (adding a removal-at-will clause to a statute governing an administrative tribunal organized to set royalty rates).

112. Kristin E. Hickman, *Symbolism and Separation of Powers in Agency Design*, 93 NOTRE DAME L. REV. 1475, 1476 (2018).

113. Kent Barnett, *To the Victor Goes the Toil - Remedies for Regulated Parties in Separation of Powers Litigation*, 92 N.C. L. REV. 481, 483 (2014) (“[P]revailing regulated parties often obtain not only an unsatisfactory judicial remedy, but one that may place them in an even worse position than the one they occupied before bringing suit.”).

II. The Denial of Remedies When Separation of Powers Rights Are Found

In almost every separation of powers case in the past two decades, when the Supreme Court or D.C. Circuit have recognized a right, they have not afforded the plaintiff a remedy, or at least not much of one. A tour through the remedies ordered by the courts in separation of powers cases suggests why. Eliminating entire agencies or channels for policymaking because of a technical structural problem looks like overreaction; the plaintiff's complaint about an organizational-chart problem in the agency that is persecuting her often loses luster when compared to the substance of her conduct.

It is still surprising when the remedies are crafted so narrowly that absolutely nothing changes, as was the case when the Federal Election Commission was found to be unconstitutionally structured but allowed to continue to operate in 1976.¹¹⁴ Sometimes, the plaintiffs themselves do not obtain any relief even when they win the case on the merits, as was the case when the Public Company Accounting Oversight Board was found to be unconstitutionally structured in 2010.¹¹⁵

The lack of remedies calls for some realism about the separation of powers. This part of the paper will review those remedies in detail; Part IV will offer that realism.

A. *The Long List of Modest Remedies*

In those rare cases where courts decide to reward a separation of powers claimant with a decision on the merits, they award no relief to the plaintiff. This Section proves the claim by reviewing the remedies ordered in separation of powers cases.

1. Appointments Clause Sidesteps

Consider the recent semisuccessful campaign to take on the hoary APA policymaking procedure known as formal adjudication, under which agencies enforce their regulations through trial type proceedings overseen by an Administrative Law Judge (ALJ).¹¹⁶ The Supreme Court in *Lucia v. SEC* agreed that the ALJ's role in formal adjudication did not pass constitutional muster because the ALJs were "inferior officers" who had been appointed not by a head of a department, as required by the Appointments Clause, but

114. *Buckley v. Valeo*, 424 U.S. 1 (1976).

115. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010).

116. The process is set forth in 5 U.S.C. §§ 556-557 (2018).

through a competitive process administered by the Office of Personnel Management.¹¹⁷

However, the Court observed, “the appropriate remedy for an adjudication tainted with an appointments violation is a new hearing,” which looks like the sort of remand to the agency that might be offered in a nonconstitutional case.¹¹⁸ Once the SEC issued an order ratifying the appointment of ALJs, it concluded that “[t]o cure the constitutional error, another [ALJ] (or the Commission itself) must hold [a] new hearing” over the defendant, now that the appointment process—where the SEC Commissioners, operating as a head of a department, signed off on the appointment—passed constitutional muster.¹¹⁹

In other words, even though the plaintiff established that the agency process finding that he had committed securities fraud was unconstitutional, the plaintiff did not win dismissal of the charges against him. If that does not exactly elevate constitutional litigation over the ordinary practice in ordinary administrative law, it is worth noting that *Lucia*’s remand would be made in the context of judicial review that did not quibble at all with the substance or procedures of the agency’s decision—the only problem lay in the place of the decisionmaker on the agency’s organizational chart. It is, if anything, particularly likely that agency decisionmakers will reach the same decision they reached last time, because the courts identified no error in the decision itself, just error in the way the decider was picked for the job.

In other cases about ALJ appointments, the courts have fallen over themselves to affirm that, despite the constitutional problem of competitive selection through an OPM administered civil-service process, nothing had to change. One judge emphasized that even if formal adjudication violated the Appointments Clause, an easy fix “portends no change to any” ALJ’s “robust protections” and independence.¹²⁰

The ALJ-case remedies exemplify how the Appointments Clause never seems to count in cases where it is not honored. In *Buckley v. Valeo*, the Supreme Court concluded that the Federal Election Commission was unconstitutionally structured—its Commissioners were appointed in part by members of Congress, in ways that did not track the language of the Appointments Clause at all.¹²¹ Nonetheless, the Court allowed the Commission to continue to regulate elections and to bring enforcement actions, even after finding it to be illegally constructed.¹²² Nor did it disturb the validity of the past actions of the FEC.¹²³ The reason was the *de facto* officer doctrine. As the

117. 138 S. Ct. 2044, 2055 (2018).

118. *Id.*

119. *Id.*

120. *Bandimere v. SEC*, 844 F.3d 1168, 1190 (10th Cir. 2016).

121. *Buckley v. Valeo*, 424 U.S. 1, 142 (1976).

122. *Id.*

123. *Id.*

Court said, “the Commission’s inability to exercise certain powers because of the method by which its members have been selected should not affect the validity of the Commission’s administrative actions and determinations to this date.”¹²⁴

Buckley, though it kept an unconstitutionally organized agency in place for months, is not a remedial outlier. When the D.C. Circuit held that members of Congress could not serve on an agency designed to regulate the capital’s airports, it reached a similar remedial conclusion. The court decided to “direct . . . that actions taken by the Board to this date not be invalidated automatically on the basis of our decision” because of the *de facto* officer doctrine.¹²⁵

The courts have done this sort of thing before in other separation of powers contexts. The Supreme Court in *NLRB v. Noel Canning, Inc.*, concluded that the National Labor Relations Board had relied on some illegal appointments to do its business but let the agency quickly reach almost the same conclusions when redeciding the cases originally before the illegal appointees.¹²⁶ Peter Shane concluded that the separation of powers triumph would almost certainly not “change the outcome of the [regulated party’s] case”¹²⁷—even though the D.C. Circuit thought that the issues raised in the case went “to the very power of the Board to act and implicate fundamental separation of powers concerns.”¹²⁸

Other successful Appointments Clause cases have worked in the same way. In *Intercollegiate Broadcasting System v. Copyright Royalty Board*, the D.C. Circuit concluded that the three judges on the Copyright Royalty Board, who made determinations of reasonable rates for royalty payments where the parties were unable to agree to such terms, enjoyed unconstitutional protections against removal.¹²⁹ Under the statute that created the board, the judges on it could be removed by the Librarian of Congress, a presidential appointee confirmed by the Senate only for misconduct or neglect of duty.¹³⁰ Given the authority they wielded, the D.C. Circuit concluded that the copyright-royalty judges were “principal officers”; thus, as the court explained, the structure of the Board violates the Appointments Clause.¹³¹

124. *Id.*

125. *Citizens for Abatement of Aircraft Noise, Inc. v. Metropolitan Wash. Airports Auth.*, 917 F.2d 48, 57 (D.C. Cir. 1990), *aff’d*, 501 U.S. 252 (1991).

126. *N.L.R.B. v. Noel Canning*, 573 U.S. 513 (2014).

127. Peter Shane, *Two Cheers for Recess Appointments*, REG. REV. (June 26, 2014), <https://www.theregreview.org/2014/06/26/26-shane-two-cheers-recess-appointments> [<https://perma.cc/JN6F-PYW4>].

128. *Noel Canning v. N.L.R.B.*, 705 F.3d 490, 497 (D.C. Cir. 2013), *aff’d*, 573 U.S. 513, 134 S. Ct. 2550, 189 L. Ed. 2d 538 (2014).

129. *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 115 (2015).

130. 17 U.S.C. § 802(i) (2018).

131. *Intercollegiate Broadcasting System*, 796 F.3d at 115.

But rather than invalidate the Board, the court concluded that “invalidating and severing the restrictions on the librarian’s ability to remove the CRJs eliminates the Appointments Clause violation and minimizes any collateral damage.”¹³² This time the plaintiff was afforded some, albeit limited, relief. The D.C. Circuit vacated the Board’s decision and remanded to the board for reconsideration, after which the Board conducted a paper proceeding and reaffirmed the royalty rate it had originally charged the plaintiffs.¹³³

The Federal Circuit offered the same sort of remedial gruel to plaintiffs who argued that adjudicators on the Patent Trial and Appeal Board were unconstitutionally appointed. The court agreed but easily resolved the constitutional problem by “severing the restriction on removal of [Administrative Patent Judges] renders them inferior rather than principal officers”¹³⁴ As with *Lucia*, the remedy for the originally unconstitutional trial was a new trial before a different panel of administrative judges, now made removable in theory—though likely not in practice—by their supervisors.¹³⁵ Once again, the constitutional victory by the plaintiff resulted in their being little better off as a matter of regulation, and only worse off as a matter of legal fees.

2. Removal Workarounds

“Successful” removal-powers claims have fared as poorly, as exemplified by the way that the Supreme Court has addressed restrictions on removal. *Free Enterprise Fund v. PCAOB* arose out of disciplinary proceedings brought against an accounting firm by the Public Control Accounting Oversight Board (PCAOB).¹³⁶ The Board was an institution overseen by SEC Commissioners; it was created by the Sarbanes-Oxley Act to police standards in the accounting profession.¹³⁷ It was meant to ensure that accounting firms were subject to high professional and ethical standards; its budget came largely from fees paid by the accounting industry, and Board members, critically, enjoyed for-cause protection, as did the SEC Commissioners who appointed them.¹³⁸

The Supreme Court held that “multilevel protection from removal is contrary to Article II’s vesting of the executive power in the President,” and that, because the PCAOB had this sort of multilevel protection, it was

132. *Id.*

133. *Id.*

134. *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320, 1338 (Fed. Cir. 2019).

135. Nor would the plaintiffs even necessarily receive a new hearing for their troubles: “We see no error in the new panel proceeding on the existing written record but leave to the Board’s sound discretion whether it should allow additional briefing or reopen the record in any individual case.” *Id.* at 1340.

136. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 493 (2010).

137. *See* 15 U.S.C. §§ 7211-7220 (2018).

138. *Id.*

unconstitutionally structured when it disciplined the plaintiff, an accounting firm.¹³⁹

The problem was rooted in the President's removal powers.¹⁴⁰ "The President . . . must have some power of removing those for whom he cannot continue to be responsible," the Court explained, and the PCAOB structure did not give him enough of it.¹⁴¹

But even if the case was a win for plaintiffs on the merits, the Court's severability analysis resulted in little remedial vindication. The Court reasoned that it was not "the existence of the Board" that "violate[s] the separation of powers," but the particular removal restrictions in the statute.¹⁴² "When confronting a constitutional flaw in a statute, [courts] try to limit the solution to the problem"; therefore, the appropriate remedy was to remove the problematic provisions so that they would not constrain the President's powers going forward.¹⁴³ The SEC issued a statement after the decision expressing its pleasure that the Court did "not call into question any action taken by the PCAOB since its inception."¹⁴⁴ The accounting firm, despite winning the case, remained disciplined by the PCAOB.

The Court is not alone—those lower-court Appointments Clause cases that essentially affirmed the adjudications of administrative agencies while making their adjudicators putatively easier to remove by the President also suggest that the President's removal power is no awesome thing.¹⁴⁵ They suggest that the theoretical creation of such a power just about blesses decisions already made by the adjudicators before that removal power existed—cold comfort for the plaintiffs who brought the cases.

3. Bicameralism and Presentment

Bicameralism and Presentment cases have, on occasion, also been much ado about nothing. In *Bowsher v. Synar*,¹⁴⁶ a case about one variant of a balanced-budget act passed by Congress, the Court's decision to throw out balanced-budget mandates has been ignored by the legislature eager to govern itself by them.

139. 561 U.S. at 484.

140. *Id.*

141. *Id.* at 493.

142. *Id.* at 508-09.

143. *Id.* at 508; *see also* *John Doe Co. v. Consumer Fin. Prot. Bureau*, 849 F.3d 1129, 1133 (D.C. Cir. 2017) (stating that "traditional constraints on separation of powers remedies" refuted the plaintiffs' position that a removal-restrictions claim could invalidate a CFPB action against them).

144. Press Release, SEC, Statement on the Supreme Court's Decision in *FEF v. PCAOB* (June 28, 2010), <https://www.sec.gov/news/press/2010/2010-111.htm> [<https://perma.cc/P7RP-FKXH>].

145. *See supra* Section II.A.1.

146. 478 U.S. 714 (1986).

In *Bowsher*, the Supreme Court held that a method devised by Congress to constrain spending was unconstitutional because it gave executive power to a congressionally controlled official, the Comptroller General. The Comptroller was appointed by the President but removable only by a joint resolution by Congress, which raised, for the Court, the “dangers of congressional usurpation of Executive Branch functions.”¹⁴⁷

Under the Gramm Redman Hollings Act, “If in any fiscal year the federal budget deficit exceeds the maximum deficit amount by more than a specified sum, the Act requires across-the-board cuts in federal spending to reach the targeted deficit level, with half of the cuts made to defense programs and the other half made to nondefense programs.”¹⁴⁸

The problem with the statute was the role the Comptroller General played in applying this formula, “through a rather complicated procedure.”¹⁴⁹ The Comptroller had the power to make across-the-board cuts to the proposed budget if certain targets were not met.¹⁵⁰ Once made, the revised budget would be presented to the President who was then obligated to issue an order implementing the budgetary changes unless Congress acted to undo them.¹⁵¹

The Supreme Court concluded that this mechanism essentially gave the Comptroller executive power that the President alone could wield. As the Court held, “To permit an officer controlled by Congress to execute the laws would be, in essence, to permit a congressional veto. . . . This kind of congressional control over the execution of the laws. . . is constitutionally impermissible.”¹⁵²

Bowsher did not take the possibility of a balanced-budget statute off the constitutional table for all time—indeed, less effective balanced-budget legislation has been passed two times since.¹⁵³ However, *Bowsher* limited Congress’s role in implementing the cuts that would be required by a future budget-balancing regime, which has in turn limited congressional enthusiasm for automatic legislation. The Court recognized congressional incentives when it chose to strike the budget-balancing mechanism in the statute, rather than severing the provision of the Act providing that the Comptroller General could be removed only by a joint resolution of Congress. “Striking the removal provisions would lead to a statute that Congress would probably have refused to adopt,” the Court reasoned, because it would give executive-branch officials

147. *Id.* at 727.

148. *Id.* The overruled Act can be found at Pub. L. No. 99-177, 99 Stat. 1037 (1985).

149. *Bowsher*, 478 U.S. at 727.

150. *See id.*

151. *See id.*

152. *Id.* at 726-27.

153. Congress passed the Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987, Pub. L. No. 100-119, 101 Stat. 754 (1987), shortly after *Bowsher* was decided, and, in 1990, passed the Budget Enforcement Act of 1990, Pub. L. 101-508, 104 Stat. 1388 (1990), which expired in 2002.

(including the now-immunized-from-congressional-control Comptroller) too much power to specify the cuts required to bring the budget into balance.¹⁵⁴

While *Bowsher* eliminated one mechanism to reach balanced budgeting, it is possible to read too much into the relief the Supreme Court ordered in the case. Congress, concerned about the risks of judicial review, created a fallback mechanism to try to get to a balanced budget that essentially required fast-track approval of a balanced budget by the legislature.¹⁵⁵ The Court's decision "simply permit[ted] the fallback provisions to come into play."¹⁵⁶

4. Functional Separation of Powers Claims

In addition to the above, there are some more amorphous separation of powers claims. These claims might be understood as a "this is just a bit too much" rule of constitutional law. But these claims, even if they worked in 1935 in *A.L.A. Schechter Poultry Corp. v. United States*,¹⁵⁷ are unlikely to result in a useful remedy today. For example, efforts to take on the CFPB are not likely to result in the demise of the agency, but rather, at best, in a ruling making its head removable by the President. The claims made against the CFPB point to a novel separation of powers theory: the agency, run by a single head, with a guaranteed budget that Congress cannot reduce, is simply too insulated from control by executive- or legislative-branch elected officials to exist.¹⁵⁸ But rather than being an existential threat, proponents of this theory of the case suggest that nothing really need change. Then-Judge Kavanaugh posited that the CFPB's illegal independence could be fixed with a "targeted remedy [that] will not affect the ongoing operations" of the agency.¹⁵⁹ The outcome was that "the CFPB as remedied will continue operating" as it had in the past.¹⁶⁰

154. *Bowsher*, 478 U.S. at 735.

155. *See* 2 U.S.C. § 274(f) (2018).

156. *Bowsher*, 478 U.S. at 736.

157. 295 U.S. 495 (1935).

158. As the D.C. Circuit explained, "The CFPB's concentration of enormous executive power in a single, unaccountable, unchecked Director not only departs from settled historical practice, but also poses a far greater risk of arbitrary decisionmaking and abuse of power, and a far greater threat to individual liberty, than does a multi-member independent agency." *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 8 (2016).

159. *Id.* (Kavanaugh, J., dissenting). A district court who agreed that the CFPB was unconstitutionally structured also let the case against the defendant proceed because state regulators were involved. *See Consumer Fin. Prot. Bureau v. RD Legal Funding, LLC*, 332 F. Supp. 3d 729, 785 (S.D.N.Y. 2018).

160. *PHH Corp.*, 839 F.3d at 9. To be sure, Judge Henderson in that case crafted a dissent that would have struck the entire part of Dodd-Frank that created the CFPB, so some judges will at least entertain sweeping relief (even if only in relatively inconsequential dissenting opinions). *See id.* at 56-60.

5. What Is a Plaintiff to Do?

None of these outcomes come close to giving plaintiffs the relief that they sought. After the SEC reopened its case against him, Raymond Lucia sued in district court, seeking an order “[e]njoining the SEC from carrying out an administrative proceeding against Mr. Lucia . . . or any other administrative proceedings.”¹⁶¹ One of his lawyers protested, “There is a human toll that is rarely considered in cases like this. . . . Haling a citizen before an unlawful [administrative process] is a grave breach of his constitutional rights.”¹⁶² The administrative case against Lucia remains ongoing as of this writing.

Other separation of powers plaintiffs have sought the same thing—dismissal, ideally with prejudice, of the enforcement action against them. The mortgage lender PHH, when faced with a nine-figure civil monetary penalty from the CFPB, asked that the order be vacated, or set aside, given “unprecedented agency action that ignores fundamental constitutional principles.”¹⁶³ But even if PHH had won the case, then-Judge Kavanaugh, who was sympathetic to its predicament, wrote that the appropriate remedy would allow the CFPB to “continue to operate and to perform its many duties.”¹⁶⁴ The accounting firm sanctioned by the PCAOB sought “an order and judgment enjoining the Board and its Members from taking any further action against Plaintiff Beckstead and Watts and nullifying and voiding any prior adverse action against Beckstead and Watts.”¹⁶⁵ It instead received precisely the same sanction it faced before it “won.” In *Ryder*, the Court spoke about the importance of separation of powers claims and the need to incentivize litigants, yet it still only remanded the case, which the plaintiff won, back to the military tribunals for a redo—the best that plaintiffs can hope for, apparently, and a remedy that they often do not get.¹⁶⁶

An Appointments Clause case pending before the Supreme Court is replete with the same sort of hopeful prayers for relief. Aurelius, a hedge fund that purchased Puerto Rican sovereign debt at a discount, has filed suit against the board created by Congress to take the island through a bankruptcy process. It asks “that the debt adjustment case filed for the Commonwealth of Puerto . . . be dismissed as unauthorized,” and that further bankruptcy efforts “be

161. Complaint at 23, *Raymond J. Lucia Companies, Inc. v. SEC*, 2019 WL 3997332 (S.D. Cal. 2019) (No. 18-cv-2692).

162. Press Release, New Civil Liberties Alliance, *Lucia v. SEC*: NCLA Files Suit Over Unconstitutional SEC Appointees (Nov. 29, 2018), <https://nclalegal.org/2018/11/ncla-files-suit-over-unconstitutional-sec-appointees> [https://perma.cc/66BD-JAPB].

163. *PHH Corp.*, 881 F.3d at app. 61.

164. *Id.* at 8.

165. Complaint, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 2007 WL 891675 (D.D.C. 2007) (No. 06-0217).

166. *Ryder v. United States*, 515 U.S. 177, 180-81 (1995).

enjoined.”¹⁶⁷ Based on past practice, if it wins the case, it should assume that it is unlikely to obtain the relief it seeks.

6. The Spread of No-Remedy Constitutional Rights from the Separation of Powers

Many worry that the First Amendment is being weaponized against the administrative state, and in some ways they are right to worry.¹⁶⁸ I reviewed the Supreme Court database first assembled by Melvin Spaeth and currently updated at Washington University for all the recent cases where the Court had found an act of Congress to be unconstitutional, though, of course, not all of these cases were challenges to legislatively created administrative bodies.¹⁶⁹ By far the most successful recent doctrinal area were First Amendment cases, which accounted for 16 of the 36, or 44% of the cases in which the Court found a statute to be unconstitutional.¹⁷⁰

But courts have been cautious in providing remedies in First Amendment cases as well—at least, when it comes to nonelection regulators. An example will suffice. The D.C. Circuit found that a program requiring companies to certify that they were not using certain conflict minerals to make their goods violated the First Amendment, but only if the government insisted that the firms use the words “DRC [for Democratic Republic of Congo] conflict free” in their disclosures.¹⁷¹ The remedy meant that the program in all other

167. *In re Fin. Oversight & Mgmt. Bd. for P.R.*, 318 F. Supp. 3d 537, 541 (2018), *aff'd in part sub nom Aurelius Investment, LLC v. Puerto Rico*, 915 F.3d 838 (2019), *cert. granted*, 139 S. Ct. 2736 (2019).

168. See, e.g., John C. Coates IV, *Corporate Speech and the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223 (2015) (arguing that businesses are becoming the chief beneficiaries of the First Amendment protections for the freedom of speech).

169. Harold J. Spaeth et al., *The Supreme Court Database*, WASH. U.L. (Sept. 13, 2019), <http://supremecourtdatabase.org> [https://perma.cc/W5U7-4TQS].

170. The First Amendment cases were *Matal v. Tam*, 137 S. Ct. 1744 (2017) (bar on registering obscene trademarks); *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014) (aggregate campaign-contribution limits); *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321 (2013) (endorsing antiprostitution campaign as a condition for receiving aid); *United States v. Alvarez*, 132 S. Ct. 2537 (2012) (punishing false claims of veterans status); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012) (exempting religious bodies from Americans with Disability Act compliance); *United States v. Stevens*, 559 U.S. 460 (2010) (criminalizing animal-cruelty depictions); *Citizens United v. FEC*, 558 U.S. 310 (2010) (campaign-contribution limits for corporations); *Davis v. FEC*, 554 U.S. 724 (2008) (campaign-expenditure thresholds); *FEC v. Wis. Right To Life, Inc.*, 551 U.S. 449 (2006) (corporate political speech); *McConnell v. FEC*, 540 U.S. 93 (2004) (campaign contributions by minors); *Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2003) (pharmacy advertising restrictions); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002) (virtual child-pornography prohibition); *USDA v. United Foods*, 533 U.S. 405 (2001) (compelled advertising in agricultural marketing scheme); *Legal Servs. Corp. v. Velasquez*, 531 U.S. 533 (2001) (advocacy prohibition as a funding condition); *United States v. Playboy Entm't Grp.*, 529 U.S. 803 (2000) (“signal bleed” prohibition for cable channels showing adult content); *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173 (1999) (prohibition on casino advertising).

171. *Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 530 (D.C. Cir. 2015) (“[T]he Commission’s final rule, violate[s] the First Amendment to the extent the statute and rule require regulated entities to

respects—certification, annual disclosures, and so on—could continue in the way that Congress had wished when it insisted that the SEC set it up in the Dodd-Frank Wall Street Reform Act.¹⁷² It was only the requirement that particular words be used that constituted compelled speech; that label, the D.C. Circuit worried, “requires an issuer to tell consumers that its products are ethically tainted, even if they only indirectly finance armed groups.”¹⁷³

It is hard to seriously discipline the administrative state through any constitutional remedy, as we have seen. It could be that separation of powers remedial weakness will spread from separation of powers cases to other doctrinal areas theoretically revived by new appointees to the Supreme Court.

B. The Exceptions That Support the Rule

The courts occasionally do impose real remedies on government institutions on the basis of novel separation of powers claims. There are some cases where the remedies have been breathtaking—but very few. The one-house-legislative-veto mechanism was included in dozens of statutes before *Chadha* struck it down as inconsistent with the Bicameralism and Presentment Clauses.¹⁷⁴ The Supreme Court struck down the National Industrial Recovery Act of 1933 in *United States v. Schechter Poultry* in 1935,¹⁷⁵ the nondelegation doctrine’s “one good year.”¹⁷⁶ In *United States v. Booker*, the Court held that the Sentencing Guidelines promulgated by the U.S. Sentencing Commission were advisory, rather than mandatory, partly out of a sense that congressional delegation of sentencing parameters to an agency would interfere with the judicial role.¹⁷⁷

But the sentencing guidelines and the legislative veto had relatively short tenures, and were the subject of active opposition by duly appointed officers of the United States, such as Article III judges, in the case of the former,¹⁷⁸ and

report to the Commission and to state on their website that any of their products have ‘not been found to be ‘DRC conflict free.’”).

172. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1502, 124 Stat. 1376, 2218 (2010).

173. *National Association of Manufacturers*, 800 F.3d at 530.

174. *INS v. Chadha*, 462 U.S. 919 (1983).

175. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

176. Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 330 (1999).

177. *United States v. Booker*, 543 U.S. 220 (2005); *see also* *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (holding that the Sixth Amendment right to a jury trial prevents judges from imposing criminal sentences above statutorily fixed maximums if the sentence is based on factors other than those determined by a jury beyond a reasonable doubt).

178. *See* David Margolick, *Chorus of Judicial Critics Assail Sentencing Guides*, N.Y. TIMES (Apr. 12, 1992), <https://www.nytimes.com/1992/04/12/us/justice-numbers-special-report-full-spectrum-judicial-critics-assail-prison.html> [<https://perma.cc/N64K-9675>]. Justice Kennedy told Congress that he agreed “with most judges in the Federal system that mandatory minimums are an imprudent, unwise and often unjust mechanism for sentencing.” *Mandatory Sentencing Is Criticized by Justice*, N.Y. TIMES,

the Department of Justice in the case of the latter.¹⁷⁹ Congress has famously ignored the decision in *Chadha*, passing multiple legislative vetoes since then, suggesting that when the Court goes big, it risks being ignored.¹⁸⁰ And *Schechter* has proved to be a *sui generis* case in which Congress delegated a truly breathtaking amount of authority to regulate the national economy to the President and industry groups. No other comparable delegation has been attempted in peacetime.¹⁸¹

For more sweeping modern-era separation of powers relief, one must turn to *Clinton v. City of New York*, which ended the possibility that Congress could give the President a “line item veto,” over any spending provision in the budget, a power that many state governors enjoy.¹⁸² The Line Item Veto Act gave the President the power to “cancel in whole” three types of provisions in a passed budget: “(1) any dollar amount of discretionary budget authority; (2) any item of new direct spending; or (3) any limited tax benefit.”¹⁸³ In *Clinton*, the Supreme Court rejected the statute for formalist reasons: the affected constitutional clauses were the Bicameralism and Presentment Clauses. As the Court explained, “If the Line Item Veto Act were valid, it would authorize the President to create a different law—one whose text was not voted on by either House of Congress or presented to the President for signature,”¹⁸⁴ which the Court viewed as “surely not a document that may ‘become a law’ pursuant to the procedures designed by the Framers of Article I, §7, of the Constitution.”¹⁸⁵

The line-item veto is certainly a case where the Court actually provided the plaintiffs with a separation of powers remedy. But it is worth reflecting on the effect of the remedy. It rejected creative new mechanisms that the

(Mar. 10, 1994) <https://www.nytimes.com/1994/03/10/us/mandatory-sentencing-is-criticized-by-justice.html> [<https://perma.cc/4TX4-2CE4>] (quoting testimony of Justice Kennedy). Judge Jack B. Weinstein, for example, announced he would not hear narcotics cases as a result of his frustration with the severity of the guideline sentences. See Dalia Lithwick, *Jack Weinstein*, ATLANTIC (Nov. 2010), <https://www.theatlantic.com/magazine/archive/2010/11/jack-weinstein/308273> [<https://perma.cc/4JMP-FMMY>]. For a discussion, see David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1322 (1995).

179. See *Chadha*, 462 U.S. 919 (holding unconstitutional a section of the Immigration and Nationality Act permitting one House of Congress to veto an executive-branch decision to allow a deportable alien to remain in the United States because such action was legislative in nature).

180. See Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 LAW & CONTEMP. PROBS. 273, 288 (1993).

181. For an example of a comparable delegation in wartime, see *Yakus v. United States*, 321 U.S. 414 (1944), which found constitutional the delegation of power to set prices to an executive-branch “Price Administrator” under the Emergency Price Control Act of 1942; under the Act, the Administrator reviewed prices to ensure that they were “fair and equitable.”

182. *Clinton v. City of New York*, 524 U.S. 417 (1998). As Miriam Seifter has explained, “most states—to the envy of Presidents—have retained the item veto, allowing governors to revise certain statutes before they become law.” Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. 483, 508 (2017).

183. 2 U.S.C. § 691(a) (2010).

184. *Clinton*, 524 U.S. at 448.

185. *Id.* at 449.

legislature and executive had hoped to use to oversee agency action and discipline the size of the bureaucracy. The Court's rejection of the one-house vote had a similar effect. Both tools were eliminated, but once again, even successful separation of powers claims did not cut back the administrative state. If anything, they have empowered it.

At any rate, the point is not that constitutional doctrine never vindicates separation of powers concerns, but rather that vindications are surpassingly rare.

III. The Actual Practice of Separation of Powers Merits Matters

There is still more that can be said about the relationship between the separation of powers and the administrative state. I obtained every case in the Supreme Court and the D.C. Circuit that raised separation of powers concerns in the past two decades to see where the doctrines fit today. I reviewed this data to reduce the risk of cherry-picking the risk that the cases that I and others deem "important" might obscure the true weight of actual practice.

Political scientists have built two data sets on the Supreme Court; one includes every case decided by the Court, and the other includes every challenge by a litigant to the constitutionality of a congressional enactment heard by the Supreme Court.¹⁸⁶ I extracted all challenges to the constitutionality of federal statutes on separation of powers grounds.¹⁸⁷

Because there is no similar database for courts of appeal cases, I collected every case where Westlaw coded the D.C. Circuit as having engaged in a separation of powers analysis through its keynote system in the past twenty years.¹⁸⁸ There are some limitations to this approach, but it is unlikely to miss any separation of powers case purporting to overrule a congressional statute.¹⁸⁹

As for the Supreme Court, it is easy to overstate how invested the modern Court is in separation of powers claims. Consider every case in which the Supreme Court entertained separation of powers claims since 1900. There have

186. See Spaeth, *supra* note 169; Whittington, *supra* note 19.

187. I used the Whittington database to build the database and checked it against the Spaeth database to ensure that there were not cases missed. To be sure, relying on political scientists to interpret legal doctrine correctly is a risk. Cases like *Ortiz v. United States*, 138 S. Ct. 2165 (2018), which allowed military officers to serve in two adjudicatory roles and briefly discussed the Appointments Clause implications, could be included but are not.

188. The search was 92xx! in the CTADC databased with a date restriction after 1/1/1998.

189. The problem with relying on Westlaw's classification system is that the system can be overinclusive and underinclusive. For example, the D.C. Circuit will often throw out appeals for a lack of standing. In resolving the standing question, the D.C. Circuit will sometimes cite a failure to meet the requirements of the standing test in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992). But in other cases the court will go further and remind the parties that the standing doctrine, limiting the courts from hearing anything that is not a case or controversy, is a way of cabining the judiciary, and thus vindicates separation of powers values. Although the issue in both sets of cases is the same, Westlaw will only generate a headnote referencing the separation of powers in the second set of cases.

been 2 high-water marks, both periods with conservative ascendance at the Court. In the 1920s and 1930s, the Supreme Court considered 21 separation and powers claims, and—5 times in the 1920s, and 3 times in the 1930s—vindicated those claims. In the 1980s and 1990s, the Supreme Court entertained separation of powers claims 18 times per decade. In 10 of the cases in the 1980s, it struck down a statute. But the bloom of separation of powers was coming off the rose quickly: in the 1990s the Court only granted relief to separation of powers plaintiffs 5 times. In the 2 decades since, the Court has heard fewer cases—13 since 2000—and taken action against a statute 7 times, as Figure 1 shows, although the remedy in these cases was limited in all but two cases, one involving the foreign affairs power, and one—the line-item veto case—plausibly involving the administrative state. In one case, the Court affirmed the sanction administered by an agency that it concluded was unconstitutionally appointed, bolsters the administrative state as much as it sanctions it.

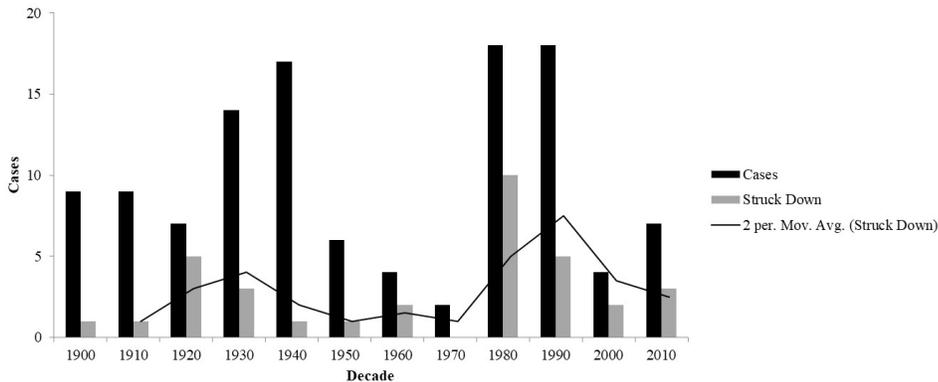


Figure 1. Separation of Powers Cases at the Supreme Court, 1900-Present

The record is consistent with the narrative that the separation of powers is a set of doctrines beloved by those opposed to the growth of the regulatory state. The 1930s Court before the “switch in time that saved nine” was famously hostile to regulatory initiatives.¹⁹⁰ In the 1980s and 1990s, the Burger and Rehnquist Courts retrenched from a liberal era that lasted from the 1950s to the 1970s.¹⁹¹ During this liberal period—the Warren Court era—separation of powers claims were almost never made, and only in three cases ever vindicated.

190. As Maxwell Stearns has put it, “In addition to the ‘Four Horsemen,’ as the four conservative justices were sometimes called, Justice Owen Roberts rather consistently sided with the conservatives against FDR’s New Deal initiatives.” Maxwell L. Stearns, *Standing and Social Choice: Historical Evidence*, 144 U. PA. L. REV. 309, 462 (1995).

191. Erwin Chemerinsky, *The Vanishing Constitution*, 103 HARV. L. REV. 43, 104 n.11 (1989) (“Perhaps the Burger Court, though conservative in many of its rulings, will be regarded in history as a transitional Court from the liberal Warren Court to the even more conservative Rehnquist Court.”);

The curious thing about this judicial history is that the Court has retained its Rehnquist-era conservative majority in the past two decades and yet has heard far fewer separation and powers cases—and has struck down far fewer of them—than its predecessors. Separation of powers cases have fallen out of fashion. Moreover, *Chevron* deference, which blunts the courts’ power to review agency interpretations of ambiguous statutes, has become well-established.¹⁹²

In the past 20 years, the Supreme Court has considered 13 separation of powers challenges. Only 1 of these cases affected the administrative state, the line-item veto case (it also undid a bankruptcy court’s power to decide a state law counterclaim and a congressional effort to constrain the executive’s power to set passport eligibility standards). In 7 of those 13 cases, it outright rejected a separation of powers argument, as Table 1 shows. Nor does it appear that the decision not to hear separation of powers cases is based on a lack of opportunity: more briefs raising the issue at the certiorari stage were filed in the last decade than in the first decade of the twenty-first century, and more briefs were filed in that decade than in either the 1990s or the 1980s.¹⁹³

In three of the cases, the Court struck down the statute as applied, in which case its ordinary remedy was to remand the matter to the agency involved for reconsideration in light of the Court’s opinion. The importance of remand can vary. *United States v. Hatter* involved a question about whether obligating Article III judges to pay into Social Security and Medicare violated the Compensation Clause, which provides that federal judicial compensation may not be reduced while judges are in office. The Court allowed the Medicare taxes but struck down the Social Security taxes.¹⁹⁴ In that case, the remand essentially directed the agency to refund the money wrongly taken from the

Michael C. Dorf, *Does Federal Executive Branch Experience Explain Why Some Republican Supreme Court Justices “Evolve” and Others Don’t?*, 1 HARV. L. & POL’Y REV. 457, 462 (2007) (positing that both conventional wisdom and voting patterns made the Burger Court relatively conservative, and the Rehnquist Court more conservative).

192. See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). As Joshua Matz has said, *Chevron* deference is “[o]ne of the most important doctrines in administrative law—indeed, arguably in all of law.” Joshua Matz, *The Imminent Demise of Chevron Deference?*, TAKE CARE (June 21, 2018), <https://takecareblog.com/blog/the-imminent-demise-of-chevron-deference> [<https://perma.cc/MV2B-4QAL>].

193. Or so a search of Westlaw’s Supreme Court Petitions for Certiorari database suggests. 1651 briefs raising the “separation of powers” at the certiorari stage were filed between January 1, 2010 and July 15, 2019. 1085 such briefs were filed between January 1, 2000, and December 31, 2009. 623 were filed in the 1990s and 140 in the 1980s. The implications of the briefing are limited—presumably Westlaw catalogued fewer certiorari briefs in the decades before the turn of the century. Nonetheless, it is not as if, in recent years, separation of powers questions were not raised in the certiorari docket.

194. *United States v. Hatter*, 532 U.S. 557, 561 (2001) (“The special retroactivity-related Social Security rules that Congress enacted in 1984, however, effectively singled out then-sitting federal judges for unfavorable treatment.”).

Article III judges, who won the case. The result constrained Congress's taxing power, though not in a way that particularly threatened tax administration.¹⁹⁵

In *Nguyen v. United States*, the matter concerned a criminal appeal in which a territorial judge, appointed pursuant to Article IV of the Constitution, participated in the three-judge panel that affirmed a criminal conviction. The Court decided this was an encroachment on Article III. Getting a remand after being convicted of a crime is better than getting the conviction affirmed, one supposes, but Nguyen's relief was hardly the stuff of exoneration. On remand, his criminal appeal was considered by a panel composed of three Article III judges, which again held that Nguyen should be convicted.¹⁹⁶

Only in *Stern v. Marshall*, discussed above in Section I.C, did the Supreme Court exercise its power to affect a more dramatic change in an administrative program.¹⁹⁷ In that case, a bankruptcy court "exercised the judicial power of the United States by entering final judgment on a common law tort claim, even though the judges of such courts enjoy neither tenure during good behavior nor salary protection."¹⁹⁸ Remand in this matter presumably meant a remand to the bankruptcy court with an instruction not to decide the state-law counterclaim. This meant that one claimant to an estate with a bankruptcy-court judgment lost, and another claimant with a state-court judgment won—a rare example in which a separation of powers judgment really mattered to the parties in the case. *Stern* also cut back on a power claimed by an administrative program—the bankruptcy process could not, it appeared, decide state-law counterclaims over the objection of one of the parties as part of its efforts to resolve all of the claims of all of the creditors of a bankrupt estate.

However, only a few years later, the Court walked back much of the implications of *Stern* by allowing the parties to consent to have bankruptcy courts resolve state-law counterclaims, giving the courts the power to decide the sort of matters found to be beyond their power only a few years before.¹⁹⁹

Three other cases struck down congressionally approved statutes on their face. Here too, however, a "successful" facial challenge means different things in different contexts. One, *Clinton v. City of New York*, took the line-item veto away from Congress and the President forever, as we saw above. The other two

195. See, e.g., Alice G. Abreu & Richard K. Greenstein, *Tax: Different, Not Exceptional*, 71 ADMIN. L. REV. 663, 665 (2019); Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 466 (2013); Lawrence Zelenak, *Maybe Just a Little Bit Special, After All?*, 63 DUKE L.J. 1897, 1901 (2014).

196. *Nguyen v. United States*, 539 U.S. 69, 71 (2003). For the opinion on remand, which did vacate some, but not all, of the charges for which Nguyen had been originally convicted, see *United States v. Nguyen*, 113 F. App'x 252, 255 (9th Cir. 2004).

197. *Stern v. Marshall*, 564 U.S. 462, 469 (2011).

198. *Id.*

199. *Wellness Int'l Network, Ltd. v. Sharif*, 135 S.Ct. 1932, 1954 (2015).

cases had almost no impact on the administrative state.²⁰⁰ *Free Enterprise Fund* resolved a technical Appointments Clause question in a technical way that left unaffected the unconstitutional decision-maker and left in place the sanction against the plaintiffs.²⁰¹ *Zivotofsky v. Kerry* affirmed presidential control over foreign relations by voiding a statute that obligated the executive branch to issue passports to American citizens born in Israel in a particular way.²⁰²

The Supreme Court, in sum, has been willing to entertain separation of powers claims but has rarely authorized a remedy that has constrained regulators in the past two decades. The D.C. Circuit is no different.

I collected all D.C. Circuit cases with separation of powers headnotes in the past two decades. Of the forty-two cases, eight vindicated separation of powers arguments. But the federal courts only offered defendants much relief in a select few of these cases; in half of them, the panel that entertained the structural argument was reversed en banc or by the Supreme Court, as Table 2 in the Appendix shows.

The remaining cases hardly suggest a separation of powers revolution in the nation's most important administrative-law court. In *QUALCOMM, Inc. v. FCC*, the court held that an agency could not modify a prior order that was currently under consideration by the court of appeals. To do so would encroach upon the court's jurisdiction over the dispute—a matter of federal court jurisdiction more than one of administrative law.²⁰³ In *Rawls Corp. v. CFIUS*, the court considered the due-process implications of the designation of a foreign-owned firm as hostile to national-security interests by the Committee on Foreign Investment in the United States (CFIUS). The separation of powers was implicated because the government argued that a CFIUS designation was a political question charged to the other branches and nonjusticiable by the courts.²⁰⁴ When *Zivotofsky* was before the D.C. Circuit, the court defended the President's power to issue passports in the manner of his choosing despite a statute attempting to force his hand with regard to American citizens born in Israel.²⁰⁵ Every other case in which a panel of the DC Circuit invoked the separation of powers to overrule a statute was reversed either by the court sitting en banc or by the Supreme Court.

200. *Clinton v. City of New York*, 524 U.S. 417, 421 (1998) (holding that “the cancellation procedures set forth in the Act violate the Presentment Clause”).

201. *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 484 (2010) (holding that “multilevel protection from removal is contrary to Article II’s vesting of the executive power in the President”).

202. *See Zivotofsky v. Kerry*, 576 U.S. 1059 (2015).

203. *QUALCOMM Inc. v. FCC.*, 181 F.3d 1370, 1371 (D.C. Cir. 1999).

204. *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 758 F.3d 296, 312 (D.C. Cir. 2014) (positing that the political-question doctrine, which the court decided did not matter for the resolution of the dispute, was rooted in separation of powers concerns).

205. *Zivotofsky ex rel. Zivotofsky v. Sec’y of State*, 725 F.3d 197 (D.C. Cir. 2013), *aff’d sub nom. Zivotofsky*, 135 S. Ct. at 192.

Lower courts are not always the place to see novel or idiosyncratic constitutional claims vindicated, but the record is still striking. The most important administrative-law court is almost entirely uninterested in separation of powers claims on the merits. When it does embrace such a claim, it never does so when an administrative program is at risk. And when an administrative program is at risk—for example, as in *PHH Corp. v. CFPB*—the remedy is modest to the point of nonexistence.²⁰⁶ Figure 2 shows how rare successful separation of powers claims are in both courts.

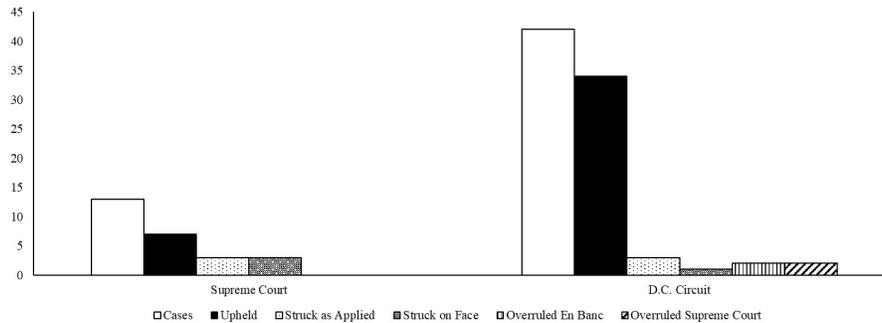


Figure 2. Separation of Powers Cases, 1998-2018

To be sure, a comprehensive approach—reviewing every decision—is a useful check, but not a definitive one. Sometimes the outlier decisions really are the important ones, and sometimes a doctrinal advancement may be made in a case in which the merits go the other way. *Marbury v. Madison*, after all, was a case in which the executive branch won the dispute, but thereafter was subjected to judicial review.²⁰⁷ Win-rates are not everything.²⁰⁸ Moreover, relying on headnotes to build a set of cases from the D.C. Circuit could be both over- and underinclusive, given that judges sometimes discuss doctrines without really applying them to the case at hand, and sometimes apply doctrines without discussing them in the opinion. Standing cases exemplify this issue: sometimes a court will remind readers that the Article III standing doctrine is rooted in the separation of powers, so that courts are not making decisions that belong to other parts of the government, and sometimes it will apply a standing analysis without citing the separation of powers at all.²⁰⁹ The same problems apply to relying on political scientists to analyze legal doctrines,

206. *PHH Corp. v. CFPB*, 839 F.3d 1 (2016) (challenging the independence of the CFPB on separation of powers grounds).

207. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

208. “Litigation loss may, counterintuitively, produce winners.” Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 945 (2011).

209. *See supra* note 189.

although legal scholars have generally made their peace with the Spaeth database (the Whittington database has not, to my knowledge, been used by legal scholars before this Article).²¹⁰

IV. Separation of Powers Realism

Why, if the government has violated the separation of powers, is the relief such weak tea?

The problem with constitutional remedies is twofold. First, they are too big to succeed. Taken literally, they would require dismantling vast government apparatuses. Second, relatedly, they are intensely counter-majoritarian. They are strong medicine, and the courts have reasonably concluded that there is little need to take it when there are adequate, even better ways to put the administrative state through its paces. The claim here is that the increasingly settled and predictable world of *Chevron* deference has led the judiciary to turn away from separation of powers cases on the merits, and to strangle the few successful ones when it comes to providing a remedy. It would be better for the courts to make this clear: the separation of powers is about policing technical violations of clear constitutional rules, not about entertaining sweeping functional challenges to the administrative state.

A. *The Bull in the China Shop*

Even though four Justices of the Supreme Court pined for the reinvigoration of the nondelegation doctrine in *Gundy v. United States*, they must face up to the uncertainties that this reinvigoration could wreak upon the system.²¹¹ Nicolas Bagley worried that a reinvigoration of the doctrine could “call . . . into question the whole project of modern American governance.” And he is one to something.²¹²

Separation of powers claims so often fail because of what Laurence Tribe has characterized as the “settled expectations” check on the logic of constitutional law and that I call the part-of-the-furniture doctrine.²¹³ Where an institution has been accepted in almost all corners of the Washington establishment and has been making policy for many years, few benefit from its sudden disappearance. Businesses find it difficult to plan against the prospect

210. *See id.*

211. *Gundy v. United States*, 139 S. Ct. 2116 (2019).

212. Nicolas Bagley, *Most of the American Government Is Unconstitutional*, N.Y. TIMES (June 21, 2019), <https://www.nytimes.com/2019/06/21/opinion/sunday/gundy-united-states.html> [<https://perma.cc/BXZ8-BXVQ>].

213. This “doctrine” is entirely my invention. It might be considered a precautionary principle for Supreme Court Justices, and it helps to explain why the Court might find, for example, that prayer to open legislative sessions is not inconsistent with the First Amendment prohibition against the establishment of religion. *See Serpentfoot v. Rome City Comm’n*, 426 Fed. App’x 884 (11th Cir. 2011).

of dramatic changes to their regulatory environment. Further, judicial decisions that remove regulatory protections that the public has come to rely upon puts the popular legitimacy of the judiciary to the test.

Along these lines, courts also might resist implementing elaborate separation of powers remedies because of the burdens of enforcing them. If in some cases, an agency could theoretically be struck out of existence with the stroke of a pen, in other cases—undoing a complex bankruptcy restricting in Puerto Rico, for example, or invalidating every decision made by ALJs who were not appointed by the heads of the agencies for which they work.

The point is a realist one—the opposite of arguing that if the doctrine requires something, then that is what judges must do, regardless of the consequences. Instead, in separation of powers cases, judges have proven time and again that they attend to the consequences very carefully and are increasingly unwilling to do much to vindicate the functional implications of the doctrines. This sort of realism is consistent with Orin Kerr’s account of the Supreme Court’s approach to the Fourth Amendment and Jack Balkin’s view of how change happens in constitutional law.²¹⁴ Moreover, this Article is not alone in making a realist analysis in this field. As Adrian Vermeule recently observed of the nondelegation doctrine, “One suspects that as the stakes increase in future cases, as the consequences of casting the fifth vote to destabilize the administrative state focus the judicial mind . . . the likelihood of invalidation will fall correspondingly.”²¹⁵

We can see the importance of settled expectations in the blowback to a recent decision by a district-court judge to hold the entire Affordable Care Act (ACA) to be unconstitutional.²¹⁶ The decision prompted the Washington Post to conclude that the ruling “could create major disruptions across the U.S. health-care system—affecting which drugs patients can buy, preventive services for older Americans, the expansion of Medicaid in most states and the structure of the Indian Health Service.”²¹⁷

214. Jack M. Balkin, *Why Liberals and Conservatives Flipped on Judicial Restraint: Judicial Review in the Cycles of Constitutional Time*, 98 TEX. L. REV. 215 (2019); Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 480 (2011) (noting that “[w]hen new tools and new practices threaten to expand or contract police power in a significant way, courts adjust the level of Fourth Amendment protection to try to restore the prior equilibrium,” and “[g]enerational shifts in views about judicial activism and judicial restraint mirror the rise and fall of political regimes”). On the other hand, there are those who think that the separation of powers also evolves, in usually useful ways. As Jon Michaels has put it, “fashioning yet another—a tertiary—system of rivalrous checks and balances seems to be a normatively and constitutionally necessary precondition to legitimizing these currently concentrated and unencumbered exercises of political-commercial power.” Jon D. Michaels, *An Enduring—Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 523 (2015) (emphasis omitted).

215. Adrian Vermeule, *Never Jam Today*, YALE J. ON REG.: NOTICE & COMMENT (June 20, 2019), <https://yalejreg.com/nc/never-jam-today-by-adrian-vermeule> [<https://perma.cc/LT4L-QZF6>].

216. *Texas v. United States*, 340 F. Supp. 3d 579 (N.D. Tex. 2018).

217. *Legal Experts Rip Judge’s Rationale for Declaring Obamacare Unconstitutional*, WASH. POST (Dec. 15, 2018), <https://www.washingtonpost.com/world/national-security/legal-experts-rip->

The decision was based on a view that Congress had exceeded its constitutional powers. A prior Supreme Court opinion concluded that the ACA requirement that all Americans purchase health insurance—the “individual mandate”—would be unconstitutional under the Interstate Commerce Clause but constitutional under the Tax Power because it triggered a tax for noncompliers.²¹⁸ In 2017, Congress eliminated the tax in its Tax Cuts and Jobs Act.²¹⁹ This led the judge to conclude that the tax power could no longer justify the mandate. “Because the Individual Mandate continues to mandate the purchase of health insurance, it remains unsustainable under the Interstate Commerce Clause.”²²⁰ Moreover, because the individual mandate was “essential” to the act, the rest of the act was unconstitutional as well. “The individual mandate is so interwoven with the ACA’s regulations that they cannot be separated. None of them can stand,” the judge concluded.²²¹

This dramatic remedy provoked a dramatic response. “Millions of people now rely on Obamacare’s subsidies and rules, which argues against judges repealing the law by fiat,” the conservative *Wall Street Journal*’s editorial board complained.²²² Robert Verbruggen, a similarly conservative writer on the *National Review* bemoaned “destroying a huge piece of legislation on such reasoning.”²²³ The *Washington Post*’s and *New York Times*’s editorial boards also decried the decision.²²⁴ The Fifth Circuit has reversed the district court’s severability analysis in the wake of this criticism, offering yet another example of the reticence of courts to permit sweeping separation of powers relief.²²⁵

judges-rationale-for-declaring-obamacare-law-invalid/2018/12/15/9cab3bb8-0088-11e9-83c0-b06139e540e5_story.html [https://perma.cc/7YTU-366L].

218. Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

219. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054 (2017).

220. *Texas*, 340 F. Supp. 3d at 585.

221. *Id.* at 615. There are some pedestrian problems with the opinion. The decision to throw out the entire statute for problems with the individual mandate makes little sense, given that the statute makes a large number of interventions into the health insurance industry, many of which are unrelated to the individual mandate. The statute—among many other things—expanded Medicaid eligibility and provided for testing programs for cost-saving measures, neither of which has much to do the requirement to purchase health insurance.

222. Editorial, *An Obamacare Blunder*, WALL ST. J. (Dec. 16, 2018), <https://www.wsj.com/articles/texas-obamacare-blunder-11544996418> [https://perma.cc/T7GB-8S69].

223. Robert Verbruggen, *Don’t Cheer (or Panic) Over That Obamacare Ruling*, NAT’L REV. (Dec. 15, 2018), <https://www.nationalreview.com/corner/dont-cheer-or-panic-over-that-obamacare-ruling> [https://perma.cc/7B4E-NUHA].

224. *See, e.g.*, Jonathan H. Adler & Abbe R. Gluck, *What the Lawless Obamacare Ruling Means*, N.Y. TIMES (Dec. 15, 2018), <https://www.nytimes.com/2018/12/15/opinion/obamacare-ruling-unconstitutional-affordable-care-act.html> [https://perma.cc/3UR8-U3WM] (noting that the case is “not based on a solid legal argument” and characterizing the decision as “an exercise in raw judicial power”).

225. As the Fifth Circuit explained, “All together, these observations highlight the need for a careful, granular approach to carrying out the inherently difficult task of severability analysis in the specific context of this case. We are not persuaded that the approach to the severability question set out in the district court opinion satisfies that need.” *Texas v. United States*, 945 F.3d 355, 397 (5th Cir. 2019).

B. The Counter-Majoritarian Difficulty

Though some judges can, sometimes, invoke the separation of powers to lay waste to portions of the administrative state, many others—including the current Chief Justice—have been unwilling to strike down signature legislative accomplishments on facially plausible legal grounds that might even accord with their policy preferences. For the Affordable Care Act, the Court made this explicit in *King v. Burwell*. It reasoned:

In a democracy, the power to make the law rests with those chosen by the people. . . . [I]n every case we must respect the role of the Legislature, and take care not to undo what it has done. . . . If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter.²²⁶

Congress, in other words, should get the benefit of the doubt in constitutional litigation. Courts do not accord agencies the same charity. Although agencies are entitled to deference, signature administration priorities at the EPA or SEC get struck down regularly. Some took the Court's decision in *King v. Burwell* as a realist commitment not to eviscerate a signature achievement of the Obama-era Congress and administration.

Courts must always wrestle with their countermajoritarian difficulties. Promulgating statutes is hard work, particularly these days. It takes agreement from the majority of 435 elected members of the House of Representatives, the concurrence of a majority of 100 senators, and the assent of the President. The window for the passage of legislation, given the difficulties involved in building legislative coalitions these days, is narrow—during the Obama and Trump administrations, the first 2 years of the presidencies presented both presidents with their only possible opportunities for legislative success.²²⁷

When unelected judges undo that work, the democratic-deficit concerns become acute, and the reasons for the intervention have to be better than merely plausible. Theoretical concerns about constraints on the ability of Congress to delegate powers, or to limit the President's or Congress's ability to interfere with the agencies to which those powers have been delegated, are hard to square with the overwhelming numerical and process advantages that go the other way.

Finally, courts must think about their own powers. If this Article has shown the difficulties courts have in providing remedies to separation of

226. *King v. Burwell*, 576 U.S. 988 (2015).

227. See generally Niall McCarthy, *Historically, The President's Party Performs Poorly In The Midterms*, FORBES (Oct. 9, 2018), <https://www.forbes.com/sites/niallmccarthy/2018/10/09/historically-the-presidents-party-performs-poorly-in-the-midterms-infographic/#31679c066732> [<https://perma.cc/A4LX-UQ8H>] (discussing the historical trend of the president's party losing power in the midterm elections).

powers victims, others have shown how the executive branch can evade doctrinal efforts to invigorate the separation of powers in non-administrative state contexts.²²⁸ And more generally, as Andrew Coan has observed, the Supreme Court in particular is constrained by its capacity—it must not bring on more litigation than it can handle.²²⁹

C. The Administrative-Law Alternative

Courts have turned away from separation of powers remedies because the remedies, if taken seriously, would be overpowered and undemocratic, but also because they know that there is a less intrusive alternative out there. It is review through the APA, a review that scrutinizes at the retail, rather than wholesale, level.

Consider *Chevron*—the most written about case in administrative law—which provides the rules of the road for APA review.²³⁰ *Chevron* sets forth the standard courts should apply to an agency’s interpretations of the statute it has been charged with administering, when those interpretations are made in an order imbued with the force of law.²³¹ The standard of review under *Chevron* consists of two steps. For the first step, the reviewing court must ask whether, after “employing traditional tools of statutory construction,” it is evident that “Congress has directly spoken to the precise question at issue.”²³² If so, the statute is “unambiguous” and the agency must not differ from Congress’s clearly expressed command.²³³

If, however, the court decides that the statute is ambiguous, it then moves to step two of the inquiry. That step requires the court to uphold the agency’s interpretation so long as it is “based on a permissible construction of the statute.”²³⁴ Appellate courts have interpreted this to require deference to any reasonable interpretation of the statute offered by the agency.²³⁵

228. Non administrative, but closely related to it. As Aziz Huq has argued, even after some lauded decisions holding the national security presidency to account for its extra-territorial detentions, “federal courts played a minor role aiding the President—and arguably did more to entrench rather than to dissolve the prison doors at Guantánamo.” Aziz Z. Huq, *The President and the Detainees*, 165 U. PA. L. REV. 499, 507 (2017).

229. ANDREW COAN, *RATIONING THE CONSTITUTION* (2019).

230. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

231. *Id.* at 843. The contours of when, precisely, to apply *Chevron* are complex, and beyond the scope of this Article. But roughly, we know that it does apply when the agency is acting with force of law, and the more formal the action the better. The when-*Chevron*-applies inquiry has been most definitively explored by the Supreme Court in *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

232. *Chevron*, 467 U.S. at 843 & n.9.

233. *Id.* at 844.

234. *Id.* at 843.

235. Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984 (describing how *Chevron* had been applied in circuit courts).

All of this is familiar enough, but one advantage of *Chevron* is that it makes the APA review process more tractable. After seeing enough applications of *Chevron*, one learns, for example, that technical environmental rules are likely to get deference,²³⁶ and politically sensitive issues related to controversial statutes are not.²³⁷ One would learn that *Chevron* is no paper tiger; courts reverse agencies approximately one third of the time—Congress, it turns out, does sometimes speak directly and agencies do impermissibly construe their governing statutes.²³⁸ And one would learn that it is easy to overthink just how different the *Chevron* inquiry is from most of the other standards of review used in administrative law.²³⁹ All of these legally critical questions become much easier to answer once the words of the law are put in the context of experience.

As it turns out, *Chevron*'s test for reasonableness subjects agency to a type of scrutiny they can plan around. Under *Chevron*, agencies are not to be watched like hawks and courts are supposed to assume that agency policy decisions are entitled to deference when administering statutes that do not offer clear guidance, even if the agency's decision differs from the policy the court would otherwise think best.²⁴⁰ Finally, the ordinary remedy under the APA is remand, meaning that the agency can try again.

All of this is reassuringly minimalist, which may well be good for refereeing the balance between administrative agencies and the industries they

236. Although this might be changing. *See, e.g., Michigan v. EPA.*, 135 S. Ct. 2699 (2015) (finding EPA updates to its National Emissions Standards for Hazardous Air Pollutants Program to be unentitled to deference based on a failure of the agency to consider costs of implementing the updated standards).

237. For example, see *King v. Burwell*, 576 U.S. 988 (2015), in which the Supreme Court interpreted the portion of the controversial ACA related to insurance subsidies on the exchanges created by the statute. The case turned on an IRS interpretation of the Act, but the Court elected not to provide *Chevron* deference to the agency interpretation. *Id.* at 2488-89 (explaining that *Chevron* deference "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. . . . In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation"); *see also Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) ("An arbitrary and capricious regulation of this sort is itself unlawful and receives no *Chevron* deference.").

238. *See* David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135 (2010) (arguing that the various standards of review in administrative law can best be understood as inquiries into the reasonableness of the agency's action; observing that under most of them the agency wins 2/3s of the cases brought for judicial review).

239. *See id.* *But see* Kent Barnett & Christopher Walker, *Chevron in the Circuit Courts* 116 MICH. L. REV. 1 (2017) (finding that "there was nearly a twenty-five-percentage-point difference in agency-win rates when the circuit courts applied *Chevron* deference than when they did not").

240. *See* *Holder v. Martinez Gutierrez*, 566 U.S. 583, 591 (2012) (the agency's "position prevails if it is a reasonable construction of the statute, whether or not it is the only possible interpretation or even the one a court might think best"). Some would classify these cases as related to the separation of powers, as they delineate between agency and judicial powers. *See, e.g., Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 696-97 (1991)

regulate.²⁴¹ But judicial review can go further than *Chevron*, even controversially so, while avoiding the thicket of constitutional provocation. Obtaining rulings, as industries occasionally have done, requiring agencies to conduct extensive cost-benefit analyses before passing rules really does limit regulatory power—even if the Office of Information and Regulatory Affairs (OIRA) already requires some cost-benefit analysis.²⁴² For example, challenges to cost-benefit analyses have substantially slowed SEC rulemaking, taking advantage of statutory requirements for the SEC to consider the effects of its rules on efficiency, competition, and capital formation.²⁴³ One court has interpreted the Dodd-Frank Wall Street Reform Act to disrupt the government’s strategy for overseeing too-big-to-fail insurance companies and asset managers on similar grounds.²⁴⁴ Regulated industry, in other words, can win big without throwing the basis of some of the fundamentals of the constitutional state into question.

There is a second minimalist implication from the paucity of separation of powers remedies. Rational-basis review of legislation is much less rigorous than rational-basis review of regulation.²⁴⁵

The better luck plaintiffs have under the APA is, perhaps, unsurprising. While many jurists believe that legislative history is unimportant when interpreting statutes, any agency’s proffered reasons for new regulations are parsed much more carefully.²⁴⁶ Under the APA, agencies must engage in reasoned decision-making; Congress must meet the barest shadow of such requirement.²⁴⁷

241. Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 8 (1996) (considering whether “minimalism . . . is self-consciously connected with the liberal principle of legitimacy”).

242. See Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 369 (2019) (pronouncing caution over the overuse of cost-benefit analysis). *But see* Cass R. Sunstein, *Cost-Benefit Analysis and Arbitrariness Review*, 41 HARV. ENVTL. L. REV. 1, 6 (2017) (“[A]ny decision not to quantify costs and benefits, or to show that the latter justify the former, does require some kind of explanation.”).

243. For a discussion of this litigation, see Bruce Kraus & Connor Raso, *Rational Boundaries for SEC Cost-Benefit Analysis*, 30 YALE J. ON REG. 289, 290 (2013).

244. *Metlife, Inc. v. Fin. Stability Oversight Council*, 177 F. Supp. 3d 219, 224 (D.D.C. 2016).

245. As for rational review, as the Ninth Circuit has put it, “the legislature’s decision to remove certain . . . requirements that it no longer deems essential . . . is a rational and quintessentially legislative decision.” *Merrifield v. Lockyer*, 547 F.3d 978, 990 (9th Cir. 2008); *see also* Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV L. REV. 505, 532 (1985) (discussing judicial review of agency decisionmaking, which, as with congressional legislation, evaluates an agency decision under the rational-basis test and accords it “great deference”). For a discussion, see David Zaring, *The Federal Deregulation of Insurance*, 97 TEX. L. REV. 125, 161 (2018).

246. As the Supreme Court has put it, an agency must be able to show that its policy is “the product of reasoned decision-making.” *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983).

247. “Rational basis review is the default level of scrutiny that gives immense deference to Congress and is very easy for the government to satisfy.” Rick Zou, *Stateless in the United States: The United Nations’ Efforts to End Statelessness and American Gender Discrimination in Lynch v. Morales-Santana*, 90 S. CAL. L. REV. 85, 103 (2016).

D. A Better Approach to Separation of Powers

Separation of powers challenges are being raised and entertained more now than they have been in the past. But those plaintiffs are wasting their money and the time of the judiciary. The courts would be better served by announcing a new approach. Formal technical violations of the separation of powers doctrines that do appear in the Constitution—appointments, bicameralism and presentment, and the like—could be policed: these clauses should not be read out of the document. But functional claims—that a regulator is acting too much like the legislature, or that the legislature is trammeling too much on the powers of the presidency, or that a regulator looks too much like a court—should probably be dismissed as nonjusticiable. Let the separation of powers become a technical doctrine of agency construction, not an existential threat to the modern state, which does not need such a threat from its judicial branch.

Functional separation of powers doctrines include the nondelegation doctrine and the “this is just too much” doctrine, which prevents insulation of independent agencies from executive control. No longer would courts have to decide whether midlevel agency officials are “inferior officers” or “mere employees.” Under this regime, layers of for-cause removal protections would be permitted—who is harmed if an accounting board that reports to the SEC is not removable for any reason by the President? But the placement of congressional officials on agency boards, or violations of the Bicameralism Clause could be rejected.

Conclusion

It is a good thing that the courts are disinclined to undo the administrative state through separation of powers jurisprudence. Separation of powers litigation does, however, waste time and attention that could be directed to more useful tasks. If there is no right without a remedy, perhaps courts should spend less time vindicating rights only to traduce them when it comes to finding a cure. One way to do this would be to explicitly abandon efforts to reinvigorate functional separation of powers inquiries.

For the foregoing reasons, we should assume that the new vogue for separation of powers claims is—appropriately—a false dawn. The administrative state needs a judicial check, but it has that check in ordinary administrative law, which explains why the judiciary has been so consistently unwilling to swing the separation of powers wrecking ball.

Table 1. Separation of Powers Cases in the Supreme Court: 1998-2019²⁴⁸

Case	Subject	Effect	Limit on Remedy
FEC v. Akins, 524 U.S. 11 (1998)	Standing	Upheld	-
Clinton v. City of New York, 524 U.S. 417 (1998)	Line-Item Veto	Struck Down on Face	-
Miller v. French, 530 U.S. 327 (2000)	Automatic Stay of Injunction	Upheld	-
Whitman v. Am. Trucking Ass'n, 531 U.S. 457 (2001)	Nondelegation	Upheld	-
United States v. Hatter, 532 U.S. 557 (2001)	Compensation Clause	Struck Down as Applied	Remand
Khanh Phoung Nguyen v. United States, 539 U.S. 69 (2003)	Non-Article III Judge	Struck Down as Applied	Remand
Free Enterprise Fund v. PCAOB, 561 U.S. 477 (2010)	Removal	Struck Down on Face	Sever
Stern v. Marshall, 564 U.S. 462 (2011)	Article I Court/State Law Counterclaim	Struck Down as Applied	-
Wellness Int'l Network v. Sharif, 575 U.S. _ (2015)	Article I Court/Consented Counterclaim	Upheld	-
Zivotofsky v. Kerry, 576 U.S. _ (2015)	Foreign Relations	Struck Down on Face	-

248. Whittington, *supra* note 19.

Case	Subject	Effect	Limit on Remedy
Bank Markazi v. Peterson, 578 U.S. __ (2016)	Foreign Sovereign Immunity	Upheld	-
Oil States Servs. v. Greene's Energy Grp., 584 U.S. __ (2018)	Patent-Board Adjudications	Upheld	-
Patchak v. Zinke, 583 U.S. __ (2018)	Law Change While Lawsuit Pending	Upheld	-

Table 2. Separation of Powers Cases in the D.C. Circuit: 1998-2019²⁴⁹

Case	Institution	Subject	Liability	Limits on Remedy
Saco River Cellular, Inc. v. FCC, 133 F.3d 25 (D.C. Cir. 1998)	FCC	FCC Order Revision	Upheld	-
<i>In re</i> Papandreou, 139 F.3d 247 (D.C. Cir. 1998)	District Court	Foreign Sovereign Immunity	Upheld	-
LaShawn A. by Moore v. Barry, 144 F.3d 847 (D.C. Cir. 1998)	District Court	Institutional Reform Litigation	Struck Down as Applied	Remand
Flamingo Hilton-Laughlin v. NLRB, 148 F.3d 1166 (D.C. Cir. 1998)	NLRB	Agency Bias	Upheld	-
Bellsouth Corp. v. FCC, 17 F.3d 1487 (D.C. Cir. 1998)	FCC	Legislation Modifying Consent Decree	Upheld	-

249. Source: Data collected from Westlaw headnotes 92xx.

Toward Separation of Powers Realism

Case	Institution	Subject	Liability	Limits on Remedy
QUALCOMM Inc. v. FCC, 181 F.3d 1370 (D.C. Cir. 1999)	FCC	Legislation Modifying Final Judgment	Struck Down as Applied	Remand
McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders of Judicial Conf. of U.S., 264 F.3d 52 (D.C. Cir. 2001)	JCUS	Judicial Discipline	Upheld	-
United States v. Wilson, 290 F.3d 347 (D.C. Cir. 2002)	USCRC	Commission Terms	Upheld	-
<i>In re</i> Cheney, 334 F.3d 1096 (D.C. Cir. 2003)	White House	Discovery Order Breadth	Upheld	-
Cobell v. Norton, 392 F.3d 461 (D.C. Cir. 2004)	Interior	Legislation Modifying Final Judgment	Upheld	-
Schneider v. Kissinger, 412 F.3d 190 (D.C. Cir. 2005)	White House	Foreign Policy	Upheld	-
Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005)	Defense	Military Commission	Upheld	-
United States v. Pollard, 416 F.3d 48 (D.C. Cir. 2005)	Justice	Postconviction Relief	Upheld	-
Zivotofsky <i>ex rel.</i> Ari Z. v. Sec'y of State, 444 F.3d 614 (D.C. Cir. 2006)	State	Foreign Relations	Upheld	-
Bancoult v. McNamara, 445 F.3d 427 (D.C. Cir. 2006)	White House	Political Question	Upheld	-

Case	Institution	Subject	Liability	Limits on Remedy
Whatley v. District of Columbia, 447 F.3d 814 (D.C. Cir. 2006)	District Court	Attorneys' Fees Award Constraints	Upheld	-
Jung v. Ass'n of Am. Med. Colleges, 184 F. App'x 9 (D.C. Cir. 2006)	Congress	Legislation Limiting Judicial Jurisdiction	Upheld	-
Nat. Res. Def. Council v. EPA, 464 F.3d 1 (D.C. Cir. 2006)	EPA	Litigation, Implementation of a Treaty	Upheld	-
Am. Fed'n of Gov't Employees, AFL-CIO, Local 446 v. Nicholson, 475 F.3d 341 (D.C. Cir. 2007)	Veterans	Labor Bargaining Exclusion	Upheld	-
Kaufman v. Mukasey, 524 F.3d 1334 (D.C. Cir. 2008)	Justice	Renunciation of Citizenship	Upheld	-
Free Enter. Fund v. PCAOB, 537 F.3d 667 (D.C. Cir. 2008)	PCAOB	Removal Powers	Upheld	-
El-Shifa Pharm. Indus. Co. v. United States, 559 F.3d 578 (D.C. Cir. 2009)	Defense	Political Question	Upheld	-
El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836 (D.C. Cir. 2010)	Defense	Political Question	Upheld	-
Am. Bus. Ass'n v. Rogoff, 649 F.3d 734 (D.C. Cir. 2011)	Transit	Legislative Limits on Agency Enforcement	Upheld	-

Toward Separation of Powers Realism

Case	Institution	Subject	Liability	Limits on Remedy
Altman v. SEC, 666 F.3d 1322 (D.C. Cir. 2011)	Securities	Federalism	Upheld	-
Dominguez v. UAL Corp., 666 F.3d 1359 (D.C. Cir. 2012)	Antitrust	Standing	Upheld	-
Grocery Mfrs. Ass'n v. EPA, 93 F.3d 169 (D.C. Cir. 2012)	EPA	Standing	Upheld	-
Zivotofsky <i>ex rel.</i> Zivotofsky v. Sec'y of State, 725 F.3d 197 (D.C. Cir. 2013)	State	Foreign Relations	Struck Down on Face	-
United States v. Taylor, 743 F.3d 876 (D.C. Cir. 2014)	Sentencing Commission	Sentencing Limits	Upheld	-
Kuretski v. C.I.R., 755 F.3d 929 (D.C. Cir. 2014)	IRS	Removal Powers	Upheld	-
Sierra Club v. EPA, 755 F.3d 968 (D.C. Cir. 2014)	EPA	Standing	Upheld	-
Ralls Corp. v. Comm. on Foreign Inv. in U.S., 758 F.3d 296 (D.C. Cir. 2014)	CFIUS	Political Question	Struck Down as Applied	Remand
Al Bahlul v. United States, 792 F.3d 1 (D.C. Cir. 2015)	Defense	Military Commission	Over-ruled En Banc	-
Ass'n of Am. R.R.s v. U.S. Dep't of Transp., 821 F.3d 19 (D.C. Cir. 2016)	Transportation	Appointments Clause	Over-ruled by Supreme Court	Remand

Case	Institution	Subject	Liability	Limits on Remedy
Friends of Animals v. Jewell, 824 F.3d 1033 (D.C. Cir. 2016)	Interior	Statute Reinstating Rule	Upheld	-
Patchak v. Jewell, 828 F.3d 995 (D.C. Cir. 2016)	Interior	Law Change While Lawsuit Pending	Upheld	-
Scenic Am., Inc. v. U.S. Dep't of Transp.	Transportation	Standing	Upheld	-
PHH Corp. v. CFPB, 839 F.3d 1 (D.C. Cir. 2016)	CFPB	Removal Powers	Overruled En Banc	Sever
Senate Permanent Subcomm. on Investigations v. Ferrer, 856 F.3d 1080 (D.C. Cir. 2017)	Congress	Judicial Review of Legislative Committee	Upheld	-
Ass'n of Am. R.R.s v. U.S. Dep't of Transp., 896 F.3d 539 (D.C. Cir. 2018)	Transportation	Appointments Clause	Overruled by Supreme Court	Sever
Judicial Watch, Inc. v. U.S. Dep't of Def., 913 F.3d 1106 (D.C. Cir. 2019)	Defense	Executive Privilege	Upheld	-
United States v. Vasquez-Benitez, 919 F.3d 546 (D.C. Cir. 2019)	ICE	Detention of Criminal Defendant	Upheld	-