THE SEPARATION OF POWERS IS A THEY, NOT AN IT

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"The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. Were the federal Constitution, therefore, really chargeable with this accumulation of power, or with a mixture of powers, having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system."

—James Madison[1]

INTRODUCTION

Judges and lawyers refer to "the" separation of powers, but the term is an umbrella concept, referring to six different propositions, or six separations of powers. (1) The legislature may not exercise the executive power. (2) The legislature may not exercise the judicial power. (3) The executive may not exercise the legislative power. (4) The executive may not exercise the judicial power. (5) The courts may not exercise the legislative power. (6) The courts may not exercise the executive power. None of these propositions is without

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1. THE FEDERALIST NO. 47, at 298 (James Madison) (Clinton Rossiter ed., 2003).

ambiguity and all of them must be qualified, but each can be understood to have a core of both meaning and truth. If the goal is to protect liberty or self-government, every one of the six propositions can be strongly defended. Still, they raise different considerations, and they must be analyzed separately. None of them is a logical truth; all of them rest on empirical judgments, involving the likely capacities and performance of various institutions, that are more than plausible but that may or may not be correct.

I. LIBERTY AND DELIBERATIVE DEMOCRACY

It is March 27, 1933. Here is a headline in the *New York Times*: "Hitler Is Supreme Under Enabling Act."[2] Under that headline: "Chancellor, Pre-eminent Over Cabinet, Is Now Practically the German Government."[3] Under that: "All Legislative Powers Have Been Transferred to Regime, Free to Refashion National Life."[4]

How might that transfer of powers be justified? Is there a theory? To say the least, that is a complicated question, but for a glimpse, turn to the justification by the legal theorist Carl Schmitt[5] of what happened in Germany on June 30, 1934. That was the Night of the Long Knives,[6] in which Hitler ordered his elite guards to murder hundreds of people, including the leaders of the paramilitary Sturmabteilung (SA). Liberalism was Schmitt's central target. He announced, "The real Führer is always a judge. Out of Führerdom flows judgeship."[7] Schmitt added, "One who wants to separate the two from each other or puts them in opposition to each other would have the judge be either the leader of the opposition or the tool of

2. Guido Enderis, *Hitler Is Supreme Under Enabling Act*, N.Y. TIMES (Mar. 27, 1933), https://www.nytimes.com/1933/03/27/archives/hitler-is-supreme-under-enabling-act-chancellor-preeminent-over.html [https://www.nytimes.com/1933/03/27/archives/hitler-is-supreme-under-enabling-act-chancellor-preeminent-over.html?smid=url-share].

3. *Id.*

4. *Id.*

5. Detlev Vagts, *Carl Schmitt's Ultimate Emergency: The Night of the Long Knives*, 87 GERMANIC REV. 203, 206 (2012).

6. *See generally* PHIL CARRADICE, NIGHT OF THE LONG KNIVES: HITLER'S EXCISION OF ROHM'S SA BROWNSHIRTS, 30 JUNE–2 JULY 1934 (2018).

7. Vagts, *supra* note 5, at 206.

the opposition and is trying to unhinge the state with the help of the judiciary."[8]

It is worth pausing over these claims. "Out of Führerdom flows judgeship." Separation between leadership and judgeship creates a "leader of the opposition," and it unhinges the State. Thus Schmitt insisted that it "was characteristic of the blindness about justice of the liberal way of thinking about law that it sought to make out of criminal law a great liberating charter, the 'Magna Carta of the criminal.'"[9] So much for "the liberal way of thinking about law." In Schmitt's view, "the Führer's action was true judging. It is not subject to law but is in itself the highest justice."[10] This is a horror movie, but it is also real, and what was being said in the 1930s can be found, in various forms, today.

The U.S. Constitution, an emphatically liberal document, is meant to prevent tyranny. It is designed to "secure the Blessings of Liberty to ourselves and our Posterity."[11] But what are those blessings? Consistent with a prominent strand in liberal thought, we should take them to include a private realm of immunity from the power of the government—a realm in which people need not worry about public coercion.[12] On one view, the separation of powers essentially *is* a Bill of Rights. The private realm of immunity certainly includes freedom of speech, freedom of religion, and protection of private property against takings without just compensation. It might extend far more broadly. It might include a private sphere of protection against official incursion.[13] It might include the rule of law,[14] which is easily taken to include an independent judiciary and

8. *Id.*

9. *Id.*

10. *Id.*

11. U.S. CONST. pmbl.

12. For versions of this view, see F.A. HAYEK, THE CONSTITUTION OF LIBERTY (1960); RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD (1995).

13. *See id.*

14. *See* LON L. FULLER, THE MORALITY OF LAW (rev. ed. 1969); JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY (1979); John Tasioulas, *The Rule of Law*, *in* THE CAMBRIDGE COMPANION TO THE PHILOSOPHY OF LAW 117 (2020).

thus to unhinge the State, on principle. Whatever its precise content, the blessings of liberty allow people to be something like sovereigns over their own lives. The separation of powers might be taken to be a way to secure those blessings.

But as the Constitution was designed, the blessings of liberty were broader than that. They included the right to republican self-government.[15] Rejecting the monarchical heritage, the founding generation abolished titles of nobility and insisted on a principle of equality, which entailed at least a kind of popular sovereignty.[16] Adverting to the founding, Abraham Lincoln said this in 1854:

> [I]f the negro *is* a man, is it not to that extent, a total destruction of self-government, to say that he too shall not govern *himself*? When the white man governs himself that is self-government; but when he governs himself, and also governs *another* man, that is *more* than self-government—that is despotism . . . [N]o man is good enough to govern another man, *without that other's consent*. I say this is the leading principle—the sheet anchor of American republicanism.[17]

In a few daring sentences, Lincoln connected the antislavery movement, calling for a right to self-government in individual lives, with the right to self-government in politics. Lincoln was keenly aware that, consistent with the founding conception of republicanism, the Constitution aimed to create a deliberative democracy—one that combined accountability with reason-giving in the public domain.[18] In a deliberative democracy, the people certainly rule, in the sense that they control the operations of the government.[19] But in a deliberative democracy, institutions are designed to increase the likelihood that decisions would be based on

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15. *See generally* JOSEPH M. BESSETTE, THE MILD VOICE OF REASON: DELIBERATIVE DEMOCRACY AND AMERICAN NATIONAL GOVERNMENT (1994).

16. *See generally* GORDON WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION (1992).

17. Abraham Lincoln, *Speech on the Kansas-Nebraska Act at Peoria, Illinois*, *in* Abraham Lincoln: Speeches and Writings 1832–1858, at 307, 328 (1989) (emphasis added).

18. *See generally* Bessette, *supra* note 15; Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985); DELIBERATIVE DEMOCRACY (Jon Elster ed., 1998).

19. *See generally* BESSETTE, *supra* note 15.

the force of the better argument.[20] Public power is not supposed to be exercised only on the ground that those in a position of authority think that it should be so exercised. They must justify themselves.[21] This too is a prominent part of the liberal tradition.

Self-government is opposed to tyranny. Now consider Madison's remarkable sentence, drawing on and helping to build the relevant tradition: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[22] On its face, the Constitution aims to forbid the accumulation of all powers in the same hands. Article I, section 1 of the Constitution says this: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."[23] Article II, section 1 of the Constitution says this: "The executive Power shall be vested in a President of the United States of America."[24] Article III, section 1 of the Constitution says this: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[25]

These provisions establish the separation of powers. We might want to emphasize the word "all" in Article I and the word "the" in Articles II and III. The Constitution seems to contemplate that there is something called "*the* executive power" and "*the* judicial power," and that they are vested in particular institutions. And if "*all*" legislative powers are vested in Congress, then they would seem to be vested nowhere else.

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20. *See generally* AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? (2004).

21. *See generally* JERRY L. MASHAW, REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY: HOW ADMINISTRATIVE LAW SUPPORTS DEMOCRATIC GOVERNMENT (2018).

22. THE FEDERALIST NO. 47 (James Madison), *supra* note 1, at 269.

23. U.S. CONST. art. I, § 1.

24. U.S. CONST. art. II, § 1.

25. U.S. CONST. art. III, § 1.

II. SIX, NOT ONE

The separation of powers, it is called, but we should immediately be able to see that the term is too undifferentiated. It is a misnomer. The separation of powers is a *they*, not an *it*. It is an umbrella concept, and it seems to include six separations of powers.

(1) The legislature may not exercise the executive power.
(2) The legislature may not exercise the judicial power.
(3) The executive may not exercise the legislative power.
(4) The executive may not exercise the judicial power.
(5) The judiciary may not exercise the legislative power.
(6) The judiciary may not exercise the executive power.

The six separations can be taken to include three sets of prohibitions. There are two things that the legislature cannot do; two things that the executive branch cannot do; and two things that the judiciary cannot do.

To be sure, and importantly, the six propositions are mere inferences. They are not semantically mandated by the constitutional text. The vesting of some power in some institution does not *necessarily* mean that some other institution may not exercise that power. But the relevant inferences are certainly plausible, and perhaps more than that. From the vesting of "all legislative powers" (herein granted) in Congress, we might well be inclined to infer that the executive and the judiciary do not have, and may not exercise, legislative powers. From the vesting of "the executive power" in the President, we might infer that Congress and the judiciary do not have, and may not exercise, executive power. From the vesting of "the judicial power" in federal courts, we might infer that Congress and the executive do not have, and may not exercise, judicial power.

Some of these inferences may not be entirely secure. It would be possible, for example, to agree that Article III vests the judicial power in courts, but also to insist that the executive may sometimes

exercise judicial power.[26] The text is not without ambiguity. Still, the inferences seem reasonable. If *all* legislative powers are vested in Congress, it would be puzzling to say that the executive may exercise some such powers. At least as a textual matter, then, we might be inclined to endorse the six propositions. Still, it is true that public meaning originalists would want to investigate the original public meaning,[27] and a careful historical investigation might yield plenty of surprises.[28] Perhaps one or more of the six propositions is inconsistent with the original public meaning. Some people would also insist on asking about historical traditions and longstanding practices, which may or may not support the six propositions.[29] If they do not, one or another of the propositions might be rejected. These various possibilities raise fundamental questions about constitutional interpretation.[30]

At times, I will be putting some pressures on every one of the six propositions. But for purposes of discussion, let us start with the assumption that they are generally or broadly right, and that they capture the separation of powers as the Constitution understands it.

Understood in terms of these six propositions, the separation of powers has nothing to do with checks and balances.[31] It is genuinely about *separation as such*. So understood, it is under-descriptive of the U.S. Constitution, which mixes separation of powers with

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26. For a possible example, see Crowell v. Benson, 285 U.S. 22 (1932). The law has taken many twists and turns here. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986); Thomas v. Union Carbide Agric. Prod. Co., 473 U.S. 568 (1985); SEC v. Jarkesy, 144 S. Ct. 2117 (2024).

27. *See e.g.*, Lawrence Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV. 1953 (2021).

28. *See, e.g.*, Jed H. Shugerman, *The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity*, 171 U. PA. L. REV. 753 (2023); JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW (2012). On some big surprises, *see generally* JONATHAN GIENAPP, AGAINST ORIGINALISM: A HISTORICAL CRITIQUE (2024) (arguing, among other things, that "the Constitution" was not understood, at the founding period, to be limited to the text).

29. *See, e.g.*, NLRB v. Noel Canning, 573 U.S. 513 (2014).

30. For various views, see United States v. Rahimi, 144 S. Ct. 1889 (2024).

31. For a defining treatment, see M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS (2d ed. 1998).

checks and balances.[32] It follows that, even if each of the six propositions remains a plausible reading of that Constitution, the constitutional text and current doctrine require important qualifications. For example, Congress exercises the judicial power insofar as the Senate conducts trials in the aftermath of impeachment in the House of Representatives. In addition, the executive branch does, in fact, exercise judicial power—a great deal of it.[33] And in some respects, the judicial branch might be thought to exercise legislative power.[34] I will have a few things to say about these points.

I will be covering a great deal of ground in a relatively short space, and it will be useful to keep two general propositions in mind. First, each of the six propositions rests on reasonable judgments about various institutions and their likely performance, capacities, and incentives. Above all, protection of liberty is an overriding goal, and protection of deliberative democracy is equally central. Second, those reasonable judgments are based on empirical projections, involving the capacities and likely performance of various institutions; though reasonable, the projections may not be right. We can readily imagine one or another time and place in which one or another of the six propositions might be rejected. I do not believe that the time is now or that the place is here; but still. Here as elsewhere, Schmitt's rejection of the separation of powers, and the experience of fascism under Hitler, offer the right warnings. The six separations of powers lie at the core of liberalism, rightly conceived.

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32. *See* THE FEDERALIST NO. 47 (James Madison), *supra* note 1, at 299 ("From these facts, by which Montesquieu was guided, it may clearly be inferred that in saying 'There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates,' or, 'if the power of judging be not separated from the legislative and executive powers,' he did not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other.").

33. *See supra* note 26 (collecting examples).

34. *See generally* Jack M. Beermann, *Common Law and Statute Law in Administrative Law*, 63 ADMIN. L. REV. 1 (2011).

III. THE LEGISLATURE MAY NOT EXERCISE THE EXECUTIVE POWER

A. Two Layers, and Liberty

Suppose that Congress enacts a law making something a crime. After enactment of that law, the decision whether to prosecute people for that crime is made by another branch of government, not by Congress itself. That is an important safeguard of liberty. The executive branch, with its own incentives and traditions, is required to make a separate decision about enforcement. It might decline to proceed at all. In this way, citizens have the protection that comes from the need for concurrence from two layers of government, not just one.[35] Prosecutorial discretion, prominently including the discretion not to act, is a crucial safeguard of freedom.[36] Imagine a system in which each and every crime was prosecuted, or in which the national legislature were put in a position to decide which crimes to prosecute. Liberty would be in grave danger.

Something similar can be said about regulations. Congress might authorize the Department of Health and Human Services to issue regulations governing some sector of the economy. But the Department has discretion to set priorities, and it might well have discretion not to issue those regulations at all.[37] The Department might say, "not now." It might even say, "not ever." Here too, there is a potential safeguard of liberty. The regulatory enterprise might be an unjustified burden on the relevant sector; it might squelch freedom. And Congress itself might be aware of that. It might be counting on the second layer to ensure against excessive intrusiveness.

B. Complications

This argument is fundamentally right. Note, however, that it buries some contestable premises, and on certain assumptions, the two layers are a cure that is worse than the disease. Let us assume that the executive branch is lazy, corrupt, or otherwise ill-motivated. Let

35. *See* INS v. Chadha, 462 U.S. 919 (1983); Bowsher v. Synar, 478 U.S. 714 (1986).

36. *See* Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUD. SOC'Y 18 (1940).

37. Cass R. Sunstein & Adrian Vermeule, *The Law of "Not Now": When Agencies Defer Decisions*, 103 GEO. L.J. 157 (2014).

us assume that it does not want to enforce the law when the law really should be enforced, or that it has a bad or perverse agenda. Perhaps it is in thrall to well-organized private groups. Perhaps it does not much care about occupational safety and health. Perhaps it does not care about clean air. If so, we might well be better off if the legislature could exercise executive power. Whether two layers are a salutary protection of liberty, or instead a form of overkill, depends on judgments about how executive power is likely to be exercised. If the legislature would exercise executive power well, or if the executive is wrongheaded or arbitrary, the two layers would be nothing to celebrate.[38]

There are underlying disputes here about the right conception of liberty.[39] You might believe that liberty requires immunity from government intrusion ("private liberty"), or you might also or instead believe that liberty requires government help or protection. Suppose that we agree that while private liberty is exceedingly important, liberty is also compromised if people are subject to unsafe working conditions, dirty air, dirty water, and discrimination. If we believe that the New Deal had something like the right conception of liberty,[40] or at least had something to add, we might think that the executive branch's discretion, and its ability to say "not now" or "never," is a threat to liberty, properly conceived. That thought helps explain some of the shifts in the understandings of the separation of powers that occurred during the New Deal, with an increase in the discretionary policymaking authority of the executive branch and with the rise in the policymaking authority of independent regulatory commissions.[41]

Consider in this light continuing debates about judicial review of agency inaction.[42] On one view, agency inaction is in an altogether different category from agency action, because it does not involve

38. *See* Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973).

39. *See generally* ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY (1990).

40. *See* CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION (2004).

41. *See* Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987).

42. *Id.*

the exercise of coercive authority over citizens.[43] That view is controversial. On a competing view, agency inaction is not different, in principle, from agency action; if an agency fails to act, it fails to protect people from harm (and threatens their liberty, properly conceived).[44]

These are important debates. But let us not lose sight of the central point. The requirement of concurrence from the executive, before the weight of government might be brought to bear, is a crucial safeguard of at least one form of liberty.

IV. THE LEGISLATURE MAY NOT EXERCISE THE JUDICIAL POWER

A. The Central Idea

What does it mean to say that the legislature may not exercise the judicial power? What is "the judicial power"?

On one view, the answer is simple: *The judicial power is the power to adjudicate disputes, and Congress may not adjudicate disputes*.[45] That is also an important safeguard of liberty. If there is a dispute between Jones and Smith, it should be resolved by a real court, with the traditional characteristics, practices, traditions, and norms of the judiciary, not by a political body. So too if there is a dispute between Jones and the Environmental Protection Agency. If Congress is resolving that dispute, the electoral connection might well distort the process of adjudication. The central point holds even if judges are themselves elected. Judges have their own traditions and constraints, and those traditions and constraints are well-suited to the process of adjudication (real rather than Potemkin).[46]

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43. *See* Heckler v. Chaney, 470 U.S. 821 (1985); Dunlop v. Bachowski, 421 U.S. 560 (1975).

44. *See Heckler*, 470 U.S. at 840 (Marshall, J., concurring in the judgment); Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657 (2004). For a vivid example, see Massachusetts v. EPA, 549 U.S. 497 (2007).

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

46. An exception of course is impeachment (in the House) and trial and possibly conviction (in the Senate). *See* U.S. CONST. art. I, §§ 2–3.

On another view, the judicial power centrally involves the (authoritative) interpretation of what the law is,[47] and here things get a bit more complicated. Suppose that Congress enacts a law of uncertain constitutionality. If Congress is entitled to resolve the constitutional issue, we cannot exactly expect an impartial judgment. Congress is most unlikely to think that (a) a statute for which it has voted is an excellent idea and (b) that very statute is unconstitutional. An independent tribunal, assessing the constitutional objection, seems far better. Hamilton put it this way:

> If it be said that the legislative body are themselves the constitutional judges of their own powers and that the construction they put upon them is conclusive upon the other departments it may be answered that this cannot be the natural presumption where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed that the Constitution could intend to enable the representatives of the people to substitute their *will* to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority.[48]

Hamilton does not quite spell out the logic here. Why, exactly, is that "more rational to suppose"? The answer must be that with respect to the meaning of the Constitution, courts are relatively impartial, and that "an intermediate body" is better situated to keep the legislature within the bounds of its authority. For reasons just sketched, that is an eminently plausible answer.[49]

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47. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (noting in particular these well-known words: "It is emphatically the province and duty of the judicial department to say what the law is.").

48. THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

49. There are counterarguments. *See* Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020, 2095 (2022) ("A constitutional discourse based on legal entitlements risks crowding out . . . nonlegal considerations, even in contexts where the legal claim itself is deeply contested, and the moral or policy considerations are especially weighty. It provides a 'limited menu of argument types . . . expected to provide definitive answers' precisely where the goal should be more multifaceted contestation and a more provisional understanding of settlement.").

B. Complications

Here as well, the various judgments are empirical speculations, not logical truths. Of course it is true that Congress has an obligation to follow the Constitution, which means that it must assess the relevant legal issues, even if its assessment is not authoritative.[50] It has an independent obligation to interpret the law so as to ensure that it remains faithful to it, which means that it exercises some kind of judicial power, even if its exercise of that power is not binding or authoritative.[51]

More fundamentally, we could imagine institutional judgments that would cut hard the other way.[52] Suppose, for example, that legislatures took their constitutional responsibilities exceedingly seriously, and would be most unlikely to act in ways that violated the founding document. Suppose too that courts had agendas of their own, and that they would interpret the Constitution in a way that reflected their own judgments of policy and principle.[53] Under such assumptions, a prohibition on the exercise of judicial authority[54] by legislatures would produce less, rather than more, in the way of fidelity to the Constitution. Fair enough.[55] Still, we might reasonably think that the contrary assumptions are more reasonable, simply because of the likely motivations of the two institutions.[56]

There is another complication. To assess Hamilton's argument, *we need a theory of constitutional interpretation*. His argument might

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50. James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

51. Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975).

52. *See* Thayer, *supra* note 50.

53. This is not, of course, an especially adventurous assumption.

54. The term is admittedly ambiguous in this context. I am taking it to mean authoritative or presumptively authoritative interpretations of the Constitution.

55. Indeed, some people have thought, in some periods, that judicial fidelity to the Constitution is (let us say) merely occasional. *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

56. *See* Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981). I realize that my conclusion here is, well, conclusory.

seem to work best if we are public meaning originalists.[57] In ascertaining the original public meaning, we might suppose that courts are likely to be more impartial than legislatures, though for reasons just stated, that is not inevitable. But imagine that judges embrace a different theory. Suppose that they are moral readers,[58] seeking to give the founding document the best imaginable moral reading. If so, the case for forbidding legislators to exercise judicial power might seem to be greatly strengthened—or greatly weakened. Things get complicated here, and in a hurry. Suppose we think that moral readings are illegitimate,[59] and that legislators will follow the original public meaning and are competent public meaning originalists. If so, we might well want legislators to exercise judicial authority. And if *both* legislators and courts are moral readers, the question is which will produce the better moral readings. There is no abstract answer to that question.[60] Political accountability might be a virtue; it might be a vice.

Or suppose that judges believe in representation-reinforcing judicial review, seeking to improve the operation of the democratic process.[61] If they are very good indeed at that, and if we think that representation-reinforcing judicial review is a very good idea, we might want to forbid legislators from exercising judicial power, at least in the sense that we will want to insist that they do not get the final say on the meaning of constitutional provisions. But there are two big *ifs* there.

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57. *See* Lawrence B. Solum, *The Unity of Interpretation*, 90 B.U. L. REV. 551, 572 (2010).

58. *See* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996).

59. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854 (1989).

60. An argument in favor of judicial superiority can be found in ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962); *see also* Ronald Dworkin, *supra* note 56.

61. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

C. Beyond Constitutional Interpretation

Let us bracket the complexities here and assume that Hamilton is broadly right. If so, the principle does not apply only to judicial review for constitutionality. Consider (authoritative) interpretation of statutes. If we are committed to the rule of law,[62] we will be wary of a situation in which those who enact the law are also charged with its interpretation. To be sure, the legislature may be in a privileged (epistemic) position with respect to intended meaning.[63] But if the question is *what a statute means to ordinary readers*,[64] courts might well be in a better position.[65] And from the standpoint of the rule of law, that is indeed the question. Focused on the natural or ordinary meaning of texts, judges might be in a superior position to those who voted for legislation. Of course, there is no obvious conclusion here on who is likely to perform best. We could easily imagine a judiciary that would be highly reliable; we could easily imagine a judiciary, armed with its own convictions and willing to deploy them, that would not be reliable at all.

Apart from judicial review for constitutionality, courts might use canons of interpretation that have deep roots in traditions or constitutional principles, but that legislatures might not endorse or apply in particular cases. These canons might be important. Consider the rule of lenity; the avoidance canon[66]; the canon against retroactivity[67]; the canon against extraterritorial application of national

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62. *See generally* LON L. FULLER, THE MORALITY OF LAW (Yale Univ. Press, rev. ed. 1969) (1964); JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY (1979); John Tasioulas, *The Rule of Law*, *in* THE CAMBRIDGE COMPANION TO THE PHILOSOPHY OF LAW 117 (John Tasioulas ed., 2020).

63. Time might matter. The legislature of 2024 might know the intended meaning in 2023. The legislature of 2024 might not know the intended meaning in 1964.

64. Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 351–57 (2013).

65. Again, this is not clear in the abstract. Everything depends on the competence and good faith of the relevant institutions. If judges are not competent in assessing the original public meaning, or if their own judgments of principle and policy are playing a large role, we might not be so enthusiastic about the idea that judges alone exercise the judicial power.

66. Kent v. Dulles, 357 U.S. 116, 128–29 (1958).

67. *See, e.g.*, Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules

law.[68] Judges might wield these canons, very much for the better; legislators might be indifferent or hostile to them.

Here is Hamilton again, and what he says is full of implications for the separation of powers:

> But it is not with a view to infractions of the Constitution only that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled, by the very motives of the injustice they meditate, to qualify their attempts.[69]

This is a striking passage insofar as it emphasizes "mitigating the severity and confining the operation of" law. (It is instructive to compare Hamilton to Schmitt; let us stand with Hamilton.) Here again, liberty is a defining value. On plausible (if optimistic) assumptions about how courts work, it is right to endorse the idea that legislators cannot exercise judicial authority, because they would act in a way that would undermine the rule of law, properly understood. Of course it is true that some of the concerns raised about judicial review of statutes for constitutionality apply here as well.

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will not be construed to have retroactive effect unless their language requires this result.").

68. *See, e.g.*, EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) ("We assume that Congress legislates against the backdrop of the presumption against extraterritoriality. Therefore, unless there is 'the affirmative intention of the Congress clearly expressed,' we must presume it 'is primarily concerned with domestic conditions.'") (citations omitted).

69. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 48, at 469.

V. THE EXECUTIVE MAY NOT EXERCISE THE JUDICIAL POWER

The initial question, once more, is the meaning of the term "the judicial power." Let us begin by assuming that the term refers to authoritative interpretation of the meaning of federal law. And in this context, we confront Schmitt directly: "The real Führer is always a judge. Out of Führerdom flows judgeship."[70] Not so. In a system of separation of powers, both of these statements are anathema.

A. Interpretation

Suppose that the Environmental Protection Agency (EPA) is issuing some regulation under the Clean Air Act (CAA). The regulation might involve particulate matter, ozone, or greenhouse gases. In a standard case, the regulation might be challenged on the ground that it is inconsistent with the CAA and is also arbitrary and capricious. If the executive could exercise judicial power, the rule of law would be at serious risk.[71] The executive has every incentive to resolve difficult issues (and perhaps not-so-difficult issues) in its own favor. Liberty might well be in jeopardy.[72]

We do have to be careful here. A well-functioning executive will be keenly alert to its obligations under the Take Care Clause, and it will investigate the legal issues with care and conscientiousness.[73] We could imagine a continuum of possibilities here, from an executive that is highly scrupulous with respect to the legal issues to one that is careless or excruciatingly self-serving. There is another point. If the question is the meaning of a term like "diagnosis," or "source," or "calendar," one view or another is not necessarily, or perhaps in any sense, in the executive's favor, which means that it is often implausible to say that one or another view is self-serving. Still, it is true that an executive branch that exercises judicial power

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70. Vagts, *supra* note 5, at 206.

71. For what seems to me an excessively strong statement of this view, see Philip Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. 1187 (2016).

72. *See id.*

73. *See supra* note 44.

is often acting as judge in its own cause, at least insofar as it is deciding on the legality of its own regulation. That is a reason to separate execution of the law from interpretation of the law.

Similar things might be said about constitutional issues. The executive branch should be expected to give careful consideration to the question of whether its regulations, or its actions more broadly, violate the founding document.[74] But there is an inevitable risk that its judgments will ultimately be self-serving. As they say, foxes should not guard henhouses—a point about both liberty and the rule of law.[75]

The analysis must be different if the executive is seeking to decide whether acts of Congress are inconsistent with the Constitution. We might think that in such circumstances, the risk of bias is reduced, because the executive is not assessing itself. But again, the executive does not have the traditions and constraints of courts. Its members are not protected by tenure and salary guarantees. It is reasonable to think that its constitutional judgments will be imperfectly reliable. The same is true for courts, of course, and there are no logical proofs here. But if we are to choose which institution will exercise the judicial power, it makes sense to say, with Hamilton: courts.

Consider in this light the longstanding debate over *Chevron v. NRDC*,[76] which held that courts should defer to reasonable agency interpretations of ambiguous statutes.[77] In *Loper Bright Enterprises v. Raimondo*,[78] the Court overruled *Chevron* on the ground that it was inconsistent with the Administrative Procedure Act (APA). But there are fundamental questions, constitutional in nature, in both the background and the foreground. Thus the *Loper Bright* Court began this way, with a separation-of-powers principle:

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74. That is one of the jobs of the Office of Legal Counsel within the Department of Justice, and general counsels within agencies, and those who work for them, explore constitutional questions essentially every day.

75. As they also say, or at least should say: Who is the fox? I will return to that question.

76. 467 U.S. 837 (1984).

77. For discussion, see Cass R. Sunstein, Chevron *as Law*, 107 GEO. L.J. 1613 (2019).

78. 144 S. Ct. 2244 (2024).

> Article III of the Constitution assigns to the Federal Judiciary the responsibility and power to adjudicate "Cases" and "Controversies"—concrete disputes with consequences for the parties involved . . . . The Framers also envisioned that the final "interpretation of the laws" would be "the proper and peculiar province of the courts." [The Federalist] No. 78, at 525 (A. Hamilton). Unlike the political branches, the courts would by design exercise "neither Force nor Will, but merely judgment." To ensure the "steady, upright and impartial administration of the laws," the Framers structured the Constitution to allow judges to exercise that judgment independent of influence from the political branches.[79]

On one view, *Chevron* grants judicial authority to the executive branch, and thus violates a core principle of the separation of powers.[80] Whether this objection is convincing depends on what, exactly, *Chevron* is understood to entail. In *Loper Bright*, the Court understood *Chevron* to call for much more than "due respect to Executive Branch interpretations of federal statutes."[81] That call was, in the Court's view, illegitimate, for historical practice suggested that "[t]he views of the Executive Branch could inform the judgment of the Judiciary, but did not supersede it."[82] Thus the Court embraced the "traditional understanding that questions of law were for courts to decide, exercising independent judgment."[83]

As the *Loper Bright* Court had it, the APA "codifies for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to Marbury: that courts decide legal questions by applying their own judgment."[84] The Court emphasized that the APA "incorporates the traditional understanding of the judicial function, under which courts must exercise independ-

79. *Id.* at 2254–57 (citations omitted).
80. Hamburger, *supra* note 71.
81. *Loper Bright*, 144 S. Ct. at 2247.
82. *Id.* at 2258.
83. *Id.*
84. *Id.* at 2244, 2261.

ent judgment in determining the meaning of statutory provisions."[85] The Court put that understanding in the context of foundational matters: "Indeed, the Framers crafted the Constitution to ensure that federal judges could exercise judgment free from the influence of the political branches."[86]

The Court insisted on independent judicial review of legal questions under the APA; that is the central theme of *Loper Bright*. At the same time, the Court noted "that the informed judgment of the Executive Branch—especially in the form of an interpretation issued contemporaneously with the enactment of the statute—could be entitled to 'great weight.'"[87] It warmly embraced *Skidmore v. Swift & Co.*,[88] which calls not for deference, but for respectful attention to the views of the relevant agency. There the question was what counted as "waiting time" and what counted as "working time."[89] The *Skidmore* Court said this:

> We consider that the rulings, interpretations, and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with

85. *Id.* at 2262.

86. *Id.* at 2268. Note that Justice Thomas offered a detailed explanation of his view that *Chevron* is inconsistent with the separation of powers. *See id.* at 2273–75 (Thomas, J., concurring). As he put it, *Chevron* "curbs the judicial power afforded to courts, and simultaneously expands agencies' executive power beyond constitutional limits." *Id.* at 2274. Justice Gorsuch spoke in similar terms. *See id.* at 2275–94 (Gorsuch, J., concurring), and in particular this statement: "*Chevron* deference runs against mainstream currents in our law regarding the separation of powers, due process, and centuries-old interpretive rules that fortify those constitutional commitments." *Id.* at 2281. As noted in the text, the Court rejected this view; it made it clear that Congress can delegate interpretive authority to agencies.

87. *Id.* at 2259 (citation omitted).

88. 323 U.S. 134 (1944).

89. *Id.*

> earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.[90]

The Court ended up accepting the interpretation of the Administrator, not because it was binding or should be given deference, but because it deserved to be given weight. After *Loper Bright*, it is safe to predict that this passage will be increasingly important (and often quoted). Consider in this light *Chevron* itself, where the EPA defined "source" to include a plantwide "bubble."[91] Under *Loper Bright*, the court is in the driver's seat, but it might give "great weight" to the agency's view, and so uphold it.[92] Is that the likely course for the future? Will *Chevron* cases be *Skidmore* cases, and come out favorably to the agency much of the time? The answer might well be "yes," at least where technical issues are involved. But even if that is so, interpretation is ultimately for courts, nor for the executive – and hence the separation of powers is preserved.

Even more fundamentally, the *Loper Bright* Court also made clear that Congress may have explicitly or implicitly granted interpretive authority to the agency—and that courts should respect that

90. *Id.* at 140.

91. Chevron v. NRDC, 467 U.S. 837, 861 (1984).

92. There is a question about consistency over time. *Chevron* allowed departures. *See id.*; Nat'l Cable & Telecomm. Ass'n v. Brand X, 545 U.S. 967 (2005). It is much less clear that *Loper Bright* will allow departures, except perhaps in cases in which Congress has explicitly or implicitly given agencies discretion, as with terms like "appropriate" or "reasonable" (or "source"?).

grant.[93] In so saying, the Court firmly rejected the view that Congress lacks the constitutional authority to grant interpretive[94] authority to agencies.[95] The Court said this:

> In a case involving an agency, of course, the statute's meaning may well be that the agency is authorized to exercise a degree of discretion. Congress has often enacted such statutes. For example, some statutes "expressly delegate[]" to an agency the authority to give meaning to a particular statutory term. Others empower an agency to prescribe rules to "fill up the details" of a statutory scheme, or to regulate subject to the limits imposed by a term or phrase that "leaves agencies with flexibility," such as "appropriate" or "reasonable." When the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits. The court fulfills that role by recognizing constitutional delegations . . . .[96]

There is a lot there. The Court should not be taken to be restoring *Chevron* through another route. But it *is* saying that certain terms, such as "reasonable," can be taken to be a delegation of authority to the agency.

A great deal might be said about whether the Court rightly interpreted the APA.[97] And it would be possible to argue that *Chevron*

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93. See the brilliant discussion in Adrian Vermeule, Chevron *By Any Other Name: From "*Chevron *Deference" to "*Loper Bright *Delegation,"* THE NEW DIGEST (June 28, 2024), https://thenewdigest.substack.com/p/chevron-by-any-other-name?r=18b35&utm_medium=ios&triedRedirect=true [https://perma.cc/T6UR-3C4S].

94. We can quibble over the word. Perhaps the Court is best understood to say that in deciding the meaning of a term like "reasonable" or "appropriate," the agency is given the authority to make policy. Fine. That is good enough. Note also that the Court recognized that there are constitutional constraints on Congress's power of delegation. Those constraints should be understood to be those of Article I (the nondelegation doctrine), not Article III; if they were the latter, the whole discussion would make no sense.

95. That view is expressed in *Loper Bright* by Justice Thomas, *see* 144 S. Ct. at 2274 (Thomas, J., concurring), and also Justice Gorsuch, *see* 144 S. Ct. at 2277–79 (Gorsuch, J., concurring), and is elaborated by Hamburger, *supra* note 71.

96. *Loper Bright*, 144 S. Ct. at 2263 (citations omitted).

97. And the present author has said a great deal. *See* Sunstein, *supra* note 77.

itself was consistent with the separation of powers insofar as it ensured judicial primacy at Step 1 and rested on an understanding that Congress had delegated a degree of interpretive authority to agencies.[98] But let us not lose the forest for the trees. (There are a ton of trees here.) No one should doubt that a world of independent judicial interpretation of law, of the sort set out in *Loper Bright*, is entirely consistent with the principle that the executive may not exercise judicial power. Similar things might be said about executive interpretations of regulations issued by the executive; there as well, courts should be in charge, even if agencies get to resolve genuine ambiguities.[99]

B. Don't Think of an Elephant

There is an elephant in the room. It will be noticed that every day, the executive does exercise judicial power, *in the sense that it engages in adjudication*.[100] This area of law is unusually complex, and there do not appear to be clear rules. But after *Crowell v. Benson*,[101] it is clear that some adjudicatory action by executive agencies does not offend Article III. Does this mean that the executive may, in fact, exercise judicial authority?

The short answer is yes! The longer answer is that the executive may exercise judicial authority, but only if it is sufficiently constrained and supervised by Article III courts.[102] The relevant set of constraints and supervisions is meant to protect liberty.[103] The many twists and turns, and the instability of current law, need not detain us here. Some people are skeptical of *Crowell v. Benson* and think that it gravely undermines the separation of powers. Other people think that the decision, and the exercise of some adjudicatory power by executive agencies, is consistent with longstanding separation-of-powers traditions and maintains fidelity with Article

98. *See Loper Bright*, 144 S. Ct. at 2294–2311 (Kagan, J., dissenting).

99. *See* Kisor v. Wilkie, 588 U.S. 558 (2019).

100. See, for example, the Social Security Administration.

101. 285 U.S. 22 (1932); *see also* CFTC v. Schor, 478 U.S. 833 (1986).

102. *See id.* For the best discussion, see Richard H. Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915 (1988).

103. *See id.* at 963.

III *so long as Article III judges are available to maintain fidelity to law, and also to ensure that agency factfinding has a sufficient basis in law*. For what it is worth, I tend to agree with the latter view. For present purposes, the key point is that however heated, these are ultimately disputes among most-of-the-time friends, both committed to maintaining separation between executive and adjudicatory authority.

C. Concerns and Qualms

Suppose that judicial interpretation of law turned out to be highly unreliable. Perhaps judicial interpretation of statutes is uninformed; perhaps it is driven by policy considerations; perhaps judges have the wrong theory of interpretation. In the context of statutes, perhaps judges are wooden textualists (and let us suppose they are wrong to be that). Or perhaps they are purposivists (and let us suppose they are wrong to be that). Suppose too that by contrast, the executive branch follows the right theory of interpretation, and that it is both honest and excellent in following that theory. If so, we might not be so enthusiastic about forbidding the executive from exercising the judicial power.

Here as elsewhere, the best response relies on the most likely assumptions about incentives and capacities. By virtue of its distinctive role, the executive is not likely to be the most reliable interpreter of the law. Because they are judges, judges are likely to be better. Of course there are no guarantees here. But Schmitt's view offers a cautionary note, one that strongly supports the view that the executive may not exercise the judicial power. Unhinging the State, to adopt Schmitt's view, can be a terrific idea.

VI. THE EXECUTIVE MAY NOT EXERCISE THE LEGISLATIVE POWER

What are "all legislative powers"? What is "legislative power"? Let us start very simply, by understanding the term to refer to lawmaking as Article I understands and specifies it. The executive cannot "make law." To be sure, it can issue binding rules, at least under

current law—but if and only if Congress authorizes it to do so.[104] When we say that the executive cannot exercise the legislative power, then, what are we forbidding?

A. Necessary Permission Slip

Here is the central answer. To act, the executive generally needs a permission slip, in the form of authorizing legislation. So the Court ruled in 1952 in *Youngstown Sheet & Steel Tube Co.*,[105] which might be the most important separation-of-powers decision in U.S. history. It follows that the executive cannot address climate change, immigration, or highway safety on its own. The basic idea here is that the national legislature, with its distinctive form of accountability,[106] must authorize the executive branch to act. We can (and should) associate that idea with the goal of ensuring a deliberative democracy,[107] specified in the composition of the House and Senate, the requirement of bicameralism, and the opportunity for presidential signature or veto. The requirement of legislative authorization should also be seen as a check on group polarization, the process by which like-minded people, engaged in discussion with one another, sometimes go to extremes.[108]

The prohibition on exercise of legislative authority by the executive branch should also be associated with the protection of liberty: Needing legislative permission, the executive cannot go after citizens, or their liberty, on its own.[109] Insofar as we are seeking to understand the ban on the exercise of legislative power by the executive branch, that might be the most important justification of all. If

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104. *See* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 482–83 (2002).

105. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

106. Gundy v. United States, 588 U.S. 128, 149 (2019) (Gorsuch, J., dissenting).

107. *See* Joseph M. Bessette, *Deliberative Democracy: The Majority Principle in Republican Government*, *in* HOW DEMOCRATIC IS THE CONSTITUTION? 102 (Robert A. Goldwin & William A. Schambra eds., 1980); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985); DELIBERATIVE DEMOCRACY (Jon Elster ed., 1983).

108. *See* CASS R. SUNSTEIN, GOING TO EXTREMES: HOW LIKE MINDS UNITE AND DIVIDE (2009).

109. Enderis, *supra* note 2.

we had to choose just one separation-of-powers principle, as the first among equals, this one would be a strong candidate.

B. Complications

Still, there is a counterargument. Suppose that national problems are serious and numerous. Suppose that by virtue of its composition and processes, the national legislature is simply unable to handle those problems.[110] The problem might be gridlock. The problem might be sheer complexity. In that light, we could imagine situations in which exercise of legislative power by the executive branch is absolutely essential; if the executive branch is unable to exercise legislative power, serious and perhaps catastrophic problems will go unsolved.[111]

This might be, and I think should be, dismissed as an unacceptably Schmittian point. But under American law, it is a fair cautionary note, and it has implications for several sets of current controversies. The first involves the nondelegation doctrine.[112] What kinds of constraints does Article I, section 1 impose on a grant of discretionary authority to the executive branch?[113] If the executive branch is exercising broad discretion, is it exercising legislative authority? Some people think so; in their view, very broad discretionary authority just *is* legislative authority.[114] Other people think not; in their view, even very broad discretionary authority counts as executive authority *if it is exercised under and pursuant to a legislative grant of discretion*.[115]

There is an intense debate about the historical pedigree, or not, of the nondelegation doctrine, understood as a restriction on the grant

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110. *See* Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1 (2014).

111. For relevant discussion, see Cass R. Sunstein, *The Most Knowledgeable Branch*, 164 U. PA. L. REV. 1607 (2016).

112. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 539 (1935).

113. *See* Keith E. Whittington & Jason Iuliano, *The Myth of The Nondelegation Doctrine*, 165 U. PA. L. REV. 379 (2017).

114. Gundy v. United States, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting).

115. *See* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002).

of discretionary authority to the executive.[116] It now appears that historical support for that doctrine, so understood, is quite weak.[117] There is an equally intense debate about whether and to what extent aggressive judicial enforcement of the nondelegation doctrine would well serve the American people.[118] On one view, such enforcement would protect, at once, liberty and deliberative democracy (or self-government).[119] On another view, such enforcement would disable Congress from acting in such a way as to allow real problems to be solved.[120] In my view, aggressive enforcement of the nondelegation doctrine would be a terrible idea.[121] But one might accept that view while also insisting that the executive may not exercise legislative power, in the sense that it may not make law (and perhaps also in the sense that the most open-ended exercises of discretion are a violation of Article I, section 1).

There is also an intense debate about whether the executive has "emergency power."[122] In the area of foreign affairs, it is generally agreed that the President may act unilaterally to repel a sudden attack.[123] Suppose, however, that there is some kind of domestic crisis, involving (say) a pandemic, an internal rebellion, or potentially

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116. For a sampling, see, e.g., Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding: A Response to Critics*, 122 COLUM. L. REV. 2323 (2022); Kevin Arlyck, *Delegation, Administration, and Improvisation*, 97 NOTRE DAME L. REV. 243, 248 (2021); Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 GA. L. REV. 81, 87–88 (2021); Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence From the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288, 1302 (2021); Whittington & Iuliano, *supra* note 113.

117. *See* Cass R. Sunstein, *Epistemic Communities in American Public Law*, 1 POL. PHIL. 181 (2024).

118. *See* DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS (1999).

119. *See, e.g.*, *Gundy*, 588 U.S. at 149 (Gorsuch, J., dissenting).

120. *See* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000).

121. *See id.*

122. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

123. *See* H. Jefferson Powell, *The President's Duty to Defend Against Cyber-Attacks*, HARV. L. REV. BLOG (Feb. 22, 2018), https://harvardlawreview.org/blog/2018/02/the-presidents-duty-to-defend-against-cyber-attacks/ [https://perma.cc/8LX6-TP37].

catastrophic environmental harm. May the President act on his own?[124] The general view is that he may not,[125] but the door is not quite shut. There are unresolved questions of history and principle here.[126] (I say, keep that door shut.)

VII. THE JUDICIARY MAY NOT EXERCISE THE LEGISLATIVE POWER

A. Easy

This principle might be the most intuitive of all. Courts are not legislatures, and they are not entitled to legislate. One reason for this principle is that judges lack the right kind of accountability. Consider the kinds of judgments that are involved in questions about (say) clean air, road safety, and immigration. Those judgments require democratic accountability, which judges lack. A system of deliberative democracy cannot tolerate lawmaking by judges. Another reason, and an important one, is that judges do not have the requisite information: Lawmaking calls for acquisition of a lot of knowledge, and the adversarial process, well-suited to the resolution of disputes, is not well-suited to the development of legislation.[127] Call this the epistemic argument for the ban on the exercise of legislative authority by judges.

B. Complications

Judges have long had common law authority, and even in the aftermath of *Erie*,[128] something like the common law tradition is alive and well in American law.[129] Is the common law a form of legisla-

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124. *See* Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385 (1989).

125. *Youngstown*, 343 U.S. at 579.

126. *See* Saikrishna Bangalore Prakash, *The Imbecilic Executive*, 99 VA. L. REV. 1361, 1363–65 (2013) (articulating various positions over the scope of the executive's emergency powers).

127. This is one way of reading Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915). *See* Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402–03 (1942).

128. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1937).

129. *See* DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010).

tion? Not technically and not formally in the sense of Article I, section 1—but it does involve what might well be described as the making of law. To take an important contemporary example, administrative law is, in significant part, common law; *Vermont Yankee*[130] is in this respect administrative law's *Erie*.[131] We can have learned discussions of the similarity between legislation, as such, and lawmaking through the common law. Still, the differences are real. In creating common law, courts may not always act incrementally, but they cannot produce a Clean Air Act, an Affordable Care Act, or an Inflation Reduction Act. The fact that they cannot exercise the legislative power is exceedingly important.

VIII. THE JUDICIARY MAY NOT EXERCISE THE EXECUTIVE POWER

Judges may not bring enforcement proceedings; they may not make regulations. As in the case of the immediately preceding principle, one reason is of course accountability. The executive is subject to We the People, which is an important safeguard. Another is epistemic, particularly in the context of regulations. Development and issuance of regulations involving (say) carcinogens calls for a great deal of knowledge, which judges lack.

We could introduce some complications, but they do not have much force, so let's not.

IX. THEY, NOT IT

Is the accumulation of all powers—legislative, executive, and judiciary—in the same hands rightly described as the very definition of tyranny? The arc of human history so suggests. We should unhinge the State, with the aid of the judiciary. We should do that in the name of liberty. We should also do so in the name of deliberative democracy.

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130. Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519 (1978).

131. This sentence is cryptic, I know. In short: *Vermont Yankee* tried and kind of failed to stop judge-made common law in the domain of administrative law; *Erie* kind of failed to stop judge-made common law more broadly.

The six separation-of-powers principles are critically important, but as the American constitutional order lives and breathes them, they have different degrees of firmness. We can raise a series of empirical and conceptual challenges to each of the principles. For example, the executive branch exercises broad discretion and creates binding rules.[132] Still, it cannot produce actual legislation. The legislature may not exercise judicial power, and courts may not prosecute anyone.[133] But the executive branch does adjudicate (a lot), and in that sense it exercises judicial power. It would be possible to explore, in far more detail than I have managed to do here, the precise content of each of the six principles and how they might be qualified.

I have attempted to sketch the underlying justifications for each of the six principles. All of them have a great deal to do with liberty. If the legislature cannot exercise executive authority, citizens have two levels of protection, not one. (And the courts make for three.) If the executive cannot exercise legislative authority, citizens are protected against a kind of absolutism.[134] Even if Congress is allowed to grant the executive broad discretionary authority, it much matters that executive authority *must always be granted, not asserted*. If the executive cannot exercise judicial authority in the sense of issuing binding interpretations of the Constitution, federal statutes, and federal regulations, we can secure important features of the rule of law. All of the separation-of-powers principles also have a great deal to do with self-government and in particular with the idea of deliberative democracy.

At the same time, I have identified some complications. If legislators were perfectly reliable in their understanding of the meaning of legal texts, and if judges were likely to go off on larks of their own, we might be a lot more enthusiastic about legislative exercise of judicial authority. If the legislature were blocked and unable to address serious social problems, we might be prepared to welcome

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132. *See* Merrill & Watts, *supra* note 104.

133. Note, however, that judges may hold people in contempt of court.

134. Roscoe Pound, *The Place of the Judiciary in a Democratic Polity*, 27 A.B.A. J. 133, 133 (1941).

a little, or perhaps a lot, in the way of executive exercise of legislative authority. Institutional judgments are not a matter of logic or arithmetic.

In some times and places, one or more of the six propositions discussed here might be rejected.[135] But suppose that we care, as we should, about liberty and deliberative democracy. In most times and places, each and every one of the six propositions is a terrific bet.[136]

135. For example, it will have been noticed that I have not discussed parliamentary systems.

136. For vivid evidence, see Enderis, *supra* note 2.