SEPARATING THE POWERS IN THE ADMINISTRATIVE STATE: ARTICLE I

All legislative Powers herein granted shall be vested in a Congress of the United States . . . .

— U.S. CONST. art. I, § 1

Typically, when Congress and the President delegate to an executive agency, they delegate everything: the power to issue binding rules, adjudicate violations of those rules, and send agents knocking on doors to enforce those rules.[1] Many find this perfectly well and good.[2] But others consider the vast swath of powers now housed in the executive a violation of the constitutional separation of powers (the "frustrated formalists"[3]).[4] Others don't see a constitutional problem and like the efficiency of today's delegations (the "functionalists"[5]) but have practical concerns, such as the consolidation of power in the executive branch[6] and the neutering of Congress.[7] Many of these issues are bipartisan.[8] And yet, the frustrated formalists bang on a door that closed long ago,[9]

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[1] *See* City of Arlington v. FCC, 569 U.S. 290, 312–13 (2013) (Roberts, C.J., dissenting).

[2] *See, e.g.*, Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1742 (2002) (noting and endorsing widespread acceptance of delegations).

[3] Formalism and functionalism are "terms of art." Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CALIF. L. REV. 853, 857 (1990). I use "frustrated" to distinguish from the nonfrustrated formalists who view delegated rulemaking as executive power. *See infra* note 44 and accompanying text.

[4] *See, e.g.*, Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994); PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 8 (2014); Lindsey Martin, Comment, *The Administrative State: Congress's Role in Perpetuating It*, 41 CAMPBELL L. REV. 559, 562 (2019); Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 CORN. L. REV. 1, 1–2 (1994); Gundy v. United States, 139 S. Ct. 2116, 2131–33 (2019) (Gorsuch, J., dissenting); *cf.* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 701–02 (1997) (noting that "law elaboration by agencies," *id.* at 701, does not satisfy bicameralism and presentment).

[5] This Note doesn't differentiate "frustrated" functionalists because, by virtue of their more open-textured analyses, intra-functionalist battle lines are less clearly drawn. *See, e.g.*, William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL'Y 21, 21 (1998).

[6] *See, e.g.*, Kathryn E. Kovacs, *Avoiding Authoritarianism in the Administrative Procedure Act*, 28 GEO. MASON L. REV. 573, 573 (2021).

[7] *See Make Congress Great Again*, MIKE LEE: US SENATOR FOR UTAH (Feb. 5, 2016), https://www.lee.senate.gov/2016/2/make-congress-great-again [https://perma.cc/N8CW-QGFK].

[8] *Compare id.*, *and* William Yeatman, *It's Time to Make Congress Great Again*, CATO INST.: COMMENT. (Jan. 15, 2020), https://www.cato.org/commentary/its-time-make-congress-great-again [https://perma.cc/28UE-PJZT] (conservative), *with* DEMAND PROGRESS EDUC. FUND & PUB. CITIZEN, ARTICLE ONE: REBUILDING OUR CONGRESS 1 (2020), https://s3.amazonaws.com/demandprogress/reports/ArticleOne-_Rebuilding_Our_Congress.pdf [https://perma.cc/U3W4-VUFQ] (liberal).

[9] *See, e.g.*, *The History of the Doctrine of Nondelegability*, CORN. UNIV.: LEGAL INFO. INST., https://www.law.cornell.edu/constitution-conan/article-1/section-1/the-history-of-the-doctrine-of-nondelegability [https://perma.cc/NAQ3-4EVR] (cataloging many failed nondelegation challenges).

and the functionalists don't see any way to address their concerns while preserving what they find practically useful about today's delegations.[10]

This Note proposes something new.[11] Next time Congress and the President pass a law, they should delegate powers to the branches in line with their constitutional role: formal and notice-and-comment rulemaking power (think, legislating) to congressional agencies and enforcement power (think, executing the law) to executive agencies, with each branch retaining control over its own agencies. This Note would apply the same logic to administrative adjudications and judicial agencies, but that argument is left for another day.[12] In short, the argument is to separate the powers in the administrative state.

All of today's constitutional guardrails could continue to apply, albeit modified. The "intelligible principle" standard[13] could continue, in this new context, to constrain the rulemaking authority that Congress and the President delegate to congressional agencies (as opposed to presidential agencies). Removal doctrine could limit the ability of Congress and the President to insulate congressional officers from removal (as it does today for executive officers).[14]

This proposal might seem radical, but it is a constitutional and normative upgrade. To the frustrated formalists, this would be unconstitutional if the administrative state had never been born,[15] but by returning

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[10] *See* sources cited *infra* notes 39–40.

[11] Authors have addressed ways Congress could reassert itself. *See, e.g.*, JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 2–4 (2017) (identifying various tools). But they never seem to consider this Note's proposal. One author sketches "a theory of an administrative separation of powers" composed of the public, the civil service, and agency heads. Jon D. Michaels, Opinion, *A Constitutional Defense of the Administrative State*, REGUL. REV. (Dec. 17, 2019) (emphasis omitted), https://www.theregreview.org/2019/12/17/michaels-constitutional-defense-administrative-state [https://perma.cc/M68W-Z7NH]. That author never addresses whether the original branches might do the job. This might be because such a proposal is flagrantly unconstitutional or patently unworkable. This Note hopes to show otherwise.

[12] The Article III argument is like the Article I argument. "[A]t least some modern administrative adjudication undoubtedly falls squarely on the judicial side." Lawson, *supra* note 4, at 1247. Ideally these matters would be sent to Article III judges, but until then it would be a constitutional second-best to vest the appointment and removal of existing non–Article III judges in the judiciary. It might also be a normative upgrade. *See* HIAS Staff, *Trump's Attacks on the Immigration Court System — What You Need to Know*, HIAS (July 25, 2025), https://hias.org/news/trumps-attacks-immigration-court-system-what-you-need-know [https://perma.cc/67QG-W86V] (criticizing the President's removal of non-Article III judges). The judiciary already has a sprawling bureaucracy. James E. Pfander, *The Chief Justice, the Appointment of Inferior Officers, and the "Court of Law" Requirement*, 107 NW. U. L. REV. 1125, 1126–27 (2013). The constitutional text gives Congress the power to vest inferior officer appointments in the "Courts of Law." *Id.* at 1128 (quoting U.S. CONST. art. II, § 2, cl. 2). And existing guardrails could continue to apply. For example, the public rights doctrine could limit which cases could be adjudicated before non-Article III judges appointed by the judiciary (as opposed to by the President). *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1856).

[13] *See, e.g.*, FCC v. Consumers' Rsch., 145 S. Ct. 2482, 2497 (2025) (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)).

[14] *See* Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2197–98 (2020).

[15] *See* Manning, *supra* note 4, at 706–07.

rulemaking authority (which in their view is legislative power[16]) to the legislative branch, this would present a constitutional "second best"[17] that should be sanctioned as a workable alternative to repeatedly failing to put the rulemaking genie back in the bicameralism and presentment bottle.[18] And, to the functionalists who don't see a constitutional problem, this proposal keeps constant much of what they appreciate, like efficiency, while improving what they find disquieting, like the concentration of power and neutering of Congress. The proposal is thus more faithful both to the Constitution and to ideals of democracy.

Part I details the proposal. Part II addresses its second-best constitutionality, taking as a given the frustrated formalist premise that rulemaking is legislative in nature. Part III addresses its functional desirability and effects on consolidation of power, efficiency, stability, and accountability. The final Part concludes.

I. THE PROPOSAL

A. Background and Motivation

A little over a century ago, the modern administrative state was born.[19] The growth in federal responsibilities from the Civil War and New Deal eras meant that Congress was unable to legislate with as much particularity as it often had in the preceding century.[20] Congress then increasingly delegated broad administrative powers to agencies.[21] The Constitution "failed utterly to . . . make any direct provision for the exercise of administrative powers."[22] But the job had to get done.

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[16] *See* Cass R. Sunstein, *Administrative Law's Grand Narrative*, 77 ADMIN. L. REV. 291, 293 (2025) (describing this view). Which forms of rulemaking are legislative is discussed later. *See infra* notes 62–64 and accompanying text.

[17] *See* McCutchen, *supra* note 4, at 2–3 ("[Given] unconstitutional institutions . . . the Court should allow (or even require) the creation of compensating institutions that . . . move governmental structures closer to the constitutional equilibrium[,] . . . even where they would have been unconstitutional if considered standing alone." *Id.* at 3.).

[18] *See The History of the Doctrine of Nondelegability*, *supra* note 9.

[19] Some believe the administrative state began with the creation of the Interstate Commerce Commission in 1887, while others see its roots stretching back to the Founding. *See* Mark Tushnet, *Introduction: The Pasts & Futures of the Administrative State*, DAEDALUS, Summer 2021, at 5, 6–8 (discussing the two views); Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1295–96 (2006) (discussing Founding-era delegations). But there is broad agreement it exploded in scope at the end of the nineteenth and into the twentieth century. *See* Gillian E. Metzger, *The Supreme Court,* 2016 *Term — Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 51–52 (2017).

[20] *See* Mashaw, *supra* note 19, at 1292 ("[In Founding-era] legislation one would hardly be surprised to find an instruction . . . that while engaged in official duties the collectors should keep breathing.").

[21] *See* Tushnet, *supra* note 19, at 6–7.

[22] W.F. WILLOUGHBY, AN INTRODUCTION TO THE STUDY OF THE GOVERNMENT OF MODERN STATES 242 (1919); *see also* CHARLES C. THACH, JR., THE CREATION OF THE PRESIDENCY, 1775–1789: A STUDY IN CONSTITUTIONAL HISTORY 140 (Johns Hopkins Paperbacks ed. 1969).

Although there were, and are to this day, congressionally controlled Article I agencies with narrow responsibilities,[23] the most powerful agencies were the Article II agencies, and it was to those agencies and their experts that more and more responsibilities were delegated.[24] To impose regularity on these delegations, the Administrative Procedure Act[25] (APA), characterized as a "subconstitution,"[26] was enacted in 1946.[27]

Today, the Article II administrative state is immense, and its powers are vast. The 2016 Code of Federal Regulations was over "175,000 pages and included . . . more than . . . one million regulatory restrictions."[28] "[T]he executive enjoys binding . . . power . . . [to] dictat[e] what Americans can grow, manufacture, transport, smoke, eat, and drink."[29] When grade school civics students wonder why[30] the President can unilaterally order executive agencies to exempt hundreds of thousands of immigrants from deportation,[31] regulate carbon emissions requirements,[32] or fire and replace immigration judges[33] without Congress, these vast powers are largely why.[34]

Ever since the rise of the modern regulatory state, there have been people deeply uncomfortable with what they view as legislative activity happening within the executive branch (the frustrated formalists). From

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[23] Both the Library of Congress, established in 1800, and the Government Printing Office, established in 1860, have been considered Article I agencies, although historically control was often mixed, making such characterizations less clear. *See History of the Library of Congress*, LIBR. OF CONG., https://www.loc.gov/about/history-of-the-library [https://perma.cc/W278-2NBY]; *About the Library*, LIBR. OF CONG., https://www.loc.gov/about [https://perma.cc/RPS3-PRF2]; *Government Publishing Office*, FED. REG., https://www.federalregister.gov/agencies/government-publishing-office [https://perma.cc/E49S-YKWN]. Clearer and more recent examples include the Congressional Research Service, the Government Accountability Office, and the Congressional Budget Office. *See* JONATHAN D. SHAFFER & DANIEL H. RAMISH, FEDERAL GRANT PRACTICE § 5:16, at n.1 (2024) (noting that "th[o]se organizations . . . work for . . . Congress").

[24] *See* ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 6–7 (2011).

[25] 5 U.S.C. §§ 551–559, 701–706 (2012).

[26] Antonin Scalia, Vermont Yankee*: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 363 (1979).

[27] *See* ch. 324, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551–559, 701–706).

[28] Christopher J. Walker, *Restoring Congress's Role in the Modern Administrative State*, 116 MICH. L. REV. 1101, 1101 (2018) (reviewing CHAFETZ, *supra* note 11).

[29] HAMBURGER, *supra* note 4, at 4.

[30] *See, e.g.*, SATURDAY NIGHT LIVE, *How a Bill Does Not Become a Law — SNL* (Youtube, Nov. 23, 2014), https://www.youtube.com/watch?v=JUDSeb2zHQo [https://perma.cc/YL3H-9KVN].

[31] *See* Michael Tan, *DACA Is and Will Always Be Constitutional*, ACLU (Aug. 15, 2017) https://www.aclu.org/news/immigrants-rights/daca-and-will-always-be-constitutional [https://perma.cc/WBB8-9AE9].

[32] *See, e.g.*, 40 C.F.R. §§ 1036.104, 1036.108 (2024).

[33] *See* HIAS Staff, *supra* note 12.

[34] This, and the President's increasing power over agencies. *See* Jack M. Beermann, Seila Law*: Is There a There There?*, U. CHI. L. REV. ONLINE (Aug. 27, 2020), https://lawreview.uchicago.edu/online-archive/seila-law-there-there-there [https://perma.cc/XR84-PUTT]; POSNER & VERMEULE, *supra* note 24, at 6.

academics,[35] to Supreme Court justices,[36] to senators,[37] these people decry what they see as a violation of the separation of powers. The standard fix proposed is to limit delegation via a stronger nondelegation doctrine and reemphasize the traditional legislative process.[38]

These arguments have failed to gain traction in the face of widespread pragmatism by functionalists across the judiciary[39] and academy,[40] who might have some practical concerns, like the risk of authoritarianism,[41] but who, for the most part, accept the administrative state and reject formalist arguments about delegation as too disruptive.[42] The functionalists have largely trounced the formalists, producing failure after failure of nondelegation challenges.[43]

The functionalists find allies in the *non*frustrated formalists who provide a theoretical grounding for delegations. On their view, an exercise of validly delegated rulemaking authority is an exercise of executive

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[35] *See* Lawson, *supra* note 4, at 1231, 1233 (referring to the "bloodless constitutional revolution," *id.* at 1231, of "Congress . . . delegat[ing its] . . . legislative authority to administrative agencies," *id.* at 1233); HAMBURGER, *supra* note 4, at 1 ("[T]o constrain liberty, the executive ordinarily had to rely on the other branches of government . . . . Nowadays, . . . the executive acts against Americans through its own legislation . . . ."); Martin, *supra* note 4, at 559 ("Gone are the days where the Legislative Branch primarily enacted laws . . . . [Today] [a]gencies possess legislative . . . powers and wield those powers to administer critical government programs . . . ."); McCutchen, *supra* note 4, at 2 ("In exercising executive, legislative, and judicial power, administrative agencies combine powers that the Constitution separates . . . .").

[36] *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116, 2138–40 (2019) (Gorsuch, J., dissenting).

[37] *Make Congress Great Again*, *supra* note 7; Matt Kelley, *Grassley: Congress "Violated the Constitution" by Delegating More Power to the President*, RADIO IOWA (Nov. 13, 2024) (quoting Sen. Chuck Grassley), https://www.radioiowa.com/2024/11/13/grassley-congress-violated-the-constitution-by-delegating-more-power-to-the-president [https://perma.cc/J84E-NRNV].

[38] *See, e.g.*, *Gundy*, 139 S. Ct. at 2135–37, 2145 (Gorsuch, J., dissenting).

[39] *See, e.g.*, Lawson, *supra* note 4, at 1241 ("[T]he Court believes . . . the modern administrative state could not function . . . [without delegation] . . . . [The Court has] declared that 'our jurisprudence has been driven by a practical understanding that in our increasingly complex society, . . . Congress simply cannot do its job absent an ability to delegate power under broad general directives.'" (quoting Mistretta v. United States, 488 U.S. 361, 372 (1989))); Darren A. Wheeler, *Actor Preference and the Implementation of* INS v. Chadha, 23 BYU J. PUB. L. 83, 99 (2008) ("Without the [legislative] veto, [Justice] White argued, Congress was left with a Hobson's Choice to either refrain from providing executive branch agencies with needed discretion and flexibility, or to engage in a 'hopeless' task of writing laws with excruciating specificity . . . . Neither was desirable nor . . . feasible." (footnotes omitted) (quoting INS v. Chadha, 462 U.S. 919, 968 (1983) (White, J., dissenting))); *Gundy*, 139 S. Ct. at 2120 ("Indeed, if [this] delegation is unconstitutional, then most of Government is unconstitutional — dependent as Congress is on the need to give discretion to executive officials to implement its programs.").

[40] *See, e.g.*, Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 317 (2000) (describing weaker alternatives to the nondelegation doctrine as "not threaten[ing] to unsettle so much of modern government," *id.* at 315); Carl McGowan, *Congress, Court, and Control of Delegated Power*, 77 COLUM. L. REV. 1119, 1127 (1977) (arguing that a stronger nondelegation doctrine would "invalidat[e] 'approximately one hundred percent of federal legislation conferring rulemaking authority on federal agencies'" (quoting KENNETH CULP DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 2.04, at 33 (1976)).

[41] *See* sources cited *infra* notes 161–63.

[42] *See* sources cited *supra* notes 2–3.

[43] *See The History of the Doctrine of Nondelegability*, *supra* note 9 (listing failures).

power.[44] On this view, whenever Congress and the President grant rulemaking power to the Executive, the exercise of that power *is* executive.

Legal concepts aside, there is something obviously right about the functionalist position. A government that fits the perfect strictures of the Constitution but lets its people starve,[45] its borders go unwatched,[46] its rivers burn,[47] or that fails to address whichever ends one wishes their government to pursue, is not much of a government.[48] Even people deeply uncomfortable with executive rulemaking seem to acknowledge the strength of this view by distancing themselves from the strictest formalists.[49] And, all that aside, as a political matter, almost a century of

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[44] *See, e.g.*, Posner & Vermeule, *supra* note 2, at 1723 ("A statutory grant of authority to the executive isn't a *transfer* of legislative power . . . . [A]gents acting within the terms of such a statutory grant are exercising executive power, not legislative power."); Loving v. United States, 517 U.S. 748, 777 (1996) (Scalia, J., concurring in part and concurring in the judgment) (arguing that when Congress "assign[s] responsibilities to the Executive . . . and . . . the Executive undertakes those assigned responsibilities," there has been "no delegation at all" (emphasis omitted)).

[45] *See* Gary Richardson, *The Great Depression*, FED. RSRV. HIST. (Nov. 22, 2013), https://www.federalreservehistory.org/essays/great-depression [https://perma.cc/U2BN-GFPS].

[46] *Cf.* Jeffrey S. Passel & Jens Manuel Krogstad, *U.S. Unauthorized Immigrant Population Reached a Record 14 Million in 2023*, PEW RSCH. CTR. (Aug. 21, 2025), https://www.pewresearch.org/race-and-ethnicity/2025/08/21/u-s-unauthorized-immigrant-population-reached-a-record-14-million-in-2023 [https://perma.cc/VJU2-77TZ] (describing a rise in border encounters).

[47] *See* Ally Hirschlag, "*If We Can Come Back from that, We Can Come Back from Anything": The Burning River that Fuelled a US Green Movement*, BBC (May 1, 2025), https://www.bbc.com/future/article/20250429-how-the-cuyahoga-river-fires-fuelled-the-us-green-movement [https://perma.cc/394C-BJ8F].

[48] *See* Gillian Metzger, *Of Presidents, Democracy, and Congress*, YALE J. ON REGUL.: NOTICE & COMMENT (Nov. 4, 2022), https://www.yalejreg.com/nc/symposium-shane-democracy-chief-executive-09 [https://perma.cc/9NND-NSGY] ("As FDR's Brownlow Commission famously stated . . . : 'By democracy we mean getting things done . . . . Without results we know that democracy means nothing and ceases to be alive in the minds and hearts of men.'" (quoting PRESIDENT'S COMM. ON ADMIN. MGMT., ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES 1 (1937), https://babel.hathitrust.org/cgi/pt?id=mdp.39015030482726 [https://perma.cc/B5B2-T5ZD])); JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 10–12 (1938) (arguing that functionalism is better suited to an industrialized nation); Saikrishna Bangalore Prakash, Note, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers*, 102 YALE L.J. 991, 994 (1993) ("[At the Founding,] some wondered 'whether a government without [sufficient] power . . . was a government at all.'" (quoting CLINTON ROSSITER, 1787: THE GRAND CONVENTION 48 (W.W. Norton & Co. 1987) (1966))).

[49] *See, e.g.*, Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490, 1502 (2021) ("Mortenson and Bagley . . . argu[e] that if the proponents of nondelegation are right, then no act of rulemaking would be constitutional. To be sure, some formalists give fuel for such claims. . . . [But] none of that need be the case." (footnote omitted) (citing Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 288 (2021)); *cf.* J. Skelly Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575, 582 (1972) (reviewing KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969)) ("[W]e can all join in rejecting broad formulations of the [nondelegation] doctrine, such as the famous statement in *Field v. Clark*[, 143 U.S. 649 (1892)]: 'That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity . . . of the system of government ordained by the Constitution.'" (quoting *Field*, 143 U.S. at 692)).

precedent makes clear that there is insufficient appetite for demolishing the administrative state.[50]

But there is also something obviously right about the frustrated formalist position: The legal concept that rulemaking becomes executive when delegated is more fiction than reality.[51] Many rules promulgated by executive agencies are literally called "legislative rules."[52] Justices occasionally call out this fiction, saying things like "legislative authority is routinely delegated to the executive branch."[53] And the average person — in grander terms, "We the People,"[54] the ultimate sovereign[55] — upon hearing that "[l]egislative power . . . is the authority to make laws,"[56] and learning how agencies, after years of public debate and scrutiny[57] and subject to judicial review,[58] pass binding rules — like the EPA's regulation of tailpipe emissions,[59] the FDA's prohibition of synthetic food dyes,[60] or the FCC's elimination of net neutrality[61] — likely understands those activities as lawmaking. It is probably only due to decades of brilliant, motivated reasoning that many lawyers have rejected that simple truth.

It is typically assumed that one must choose between preserving the administrative state and accepting the premise that rulemaking is an exercise of legislative power.[62] This Note suggests a way to accept what both get right. The functionalists are right that gone are the days when all rulemaking can happen through bicameralism and presentment. But the frustrated formalists are also right that rulemaking is legislative in nature and that giving legislative power to the President is in deep

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[50] *See The History of the Doctrine of Nondelegability*, *supra* note 9; FCC v. Consumers' Rsch., 145 S. Ct. 2482, 2492 (2025).

[51] *See, e.g.*, Kathryn A. Watts, *Rulemaking as Legislating*, 103 GEO. L.J. 1003, 1052 (2015).

[52] ADMIN. CONF. OF THE U.S., DISTINGUISHING BETWEEN LEGISLATIVE RULES AND NON-LEGISLATIVE RULES (2024), https://www.acus.gov/sites/default/files/documents/34%20Distinguishing%20Between%20Legislative%20Rules%20and%20Non-Legislative%20Rules.pdf [https://perma.cc/NDF7-QL22].

[53] INS v. Chadha, 462 U.S. 919, 984 (1983) (White, J., dissenting); *see also* City of Arlington v. FCC, 569 U.S. 290, 312–13 (2013) (Roberts, C.J., dissenting).

[54] U.S. CONST. pmbl.

[55] *See, e.g.*, LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 8 (2004).

[56] Springer v. Philippine Islands, 277 U.S. 189, 202 (1928).

[57] *See* ADMIN. CONF. OF THE U.S., NOTICE-AND-COMMENT RULEMAKING (2021), https://www.acus.gov/sites/default/files/documents/IIB014-Rulemaking.pdf [https://perma.cc/2T7X-LRX3]; *About the Rulemaking Process*, U.S. CTS., https://www.uscourts.gov/forms-rules/about-rulemaking-process [https://perma.cc/S4PC-A2SY].

[58] *See* 5 U.S.C. § 706.

[59] *See, e.g.*, 40 C.F.R. § 1036.104, 1036.108 (2025).

[60] *See* Press Release, U.S. FDA, HHS, FDA to Phase Out Petroleum-Based Synthetic Dyes in Nation's Food Supply (Apr. 22, 2025), https://www.fda.gov/news-events/press-announcements/hhs-fda-phase-out-petroleum-based-synthetic-dyes-nations-food-supply [https://perma.cc/9F42-737D].

[61] Alina Selyukh, *FCC Repeals "Net Neutrality" Rules for Internet Providers*, NPR (Dec. 14, 2017, at 05:30 ET), https://www.npr.org/sections/thetwo-way/2017/12/14/570526390/fcc-repeals-net-neutrality-rules-for-internet-providers [https://perma.cc/5FSM-8V5Y].

[62] *See, e.g.*, McCutchen, *supra* note 4, at 2.

tension with the Constitution. The proposal that follows is designed to satisfy both camps, giving the frustrated formalists a constitutional second-best outcome that improves upon today's status quo, and giving the functionalists a fix for some of their concerns, like the consolidation of power in the executive branch, while keeping constant what they appreciate, like efficiency.

Before detailing the proposal, a word about assumptions. Anyone who views the legal concept of delegated-rulemaking-as-executive as a truth rather than a legal fiction will remain unpersuaded by the legal arguments in this Note. As for those open to the frustrated formalist premise, it is tempting to refrain from defining exactly how much rulemaking today is legislative and instead suggest that if one suspects that *some* is, then this proposal should have appeal. But for clarity's sake, this Note will focus on the "essentialist"[63] position that some powers, like the power to issue binding rules that govern conduct, particularly when accompanied by formal procedures, are inherently legislative regardless of who wields them.[64] In other words, this Note assumes that anything that looks like formal or notice-and-comment rulemaking is legislative.

Finally, consider the size of this Note's constituency. Many people care to some degree about functional arguments, so if Part III is persuasive, that alone may carry weight. It is less obvious that there are many people who accept legal arguments based on frustrated formalist premises (as in Part II). However, these premises are growing in popularity on the bench[65] and in the academy[66] (though likely not enough for the Court to endorse a strong nondelegation doctrine[67]). And it is possible that many who reject the frustrated formalist premise sympathize but stay silent for want of a practical solution.[68] This Note provides one and might encourage more timid formalists to come out of the woodwork. Concededly, the inverse might also be true: There may be frustrated formalists with a distaste for regulation per se[69] who might not be as committed to rulemaking-as-legislative if presented with a proposal that leaves rulemaking in place — as this one does. Altogether, if

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63 Posner & Vermeule, *supra* note 2, at 1730.

64 *See id.*; Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1297–98 (2003).

65 *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting); Wurman, *supra* note 49, at 1498.

66 *See* Sunstein, *supra* note 16, at 298. *See generally* Gary Lawson, *The Rise and [?] of Anti-Administrativism*, 51 BYU L. REV. 163 (2025) (describing the rise of challenges to the administrative state).

67 *See, e.g.*, FCC v. Consumers' Rsch., 145 S. Ct. 2482, 2492 (2025) (rejecting a recent nondelegation challenge).

68 *See* sources cited *supra* notes 2–3.

69 *See, e.g.*, NEIL GORSUCH & JANIE NITZE, OVER RULED: THE HUMAN TOLL OF TOO MUCH LAW 6 (2024); *Gundy*, 139 S. Ct. at 2134 (2019) (Gorsuch, J., dissenting) (quoting THE FEDERALIST NO. 62, at 376 (James Madison) (Clinton Rossiter ed., 2003)).

this Note can appeal to some frustrated formalists and appease the functionalists, it may have a substantial constituency.

B. Separating the Powers

This Note proposes taking the vast rulemaking authority currently delegated to Article II agencies and delegating that power to Article I agencies. To illustrate: Today there is one SEC. In this Note's world, there would be an executive agency, SEC-E, to enforce the law and a legislative agency, SEC-L, to promulgate regulations. Article I agencies like SEC-L would pass rules pursuant to statutory delegations without bicameralism and presentment, subject to notice-and-comment and publication requirements, just as agencies do today. The only change would be control. The President would control executive agencies and Congress legislative agencies.

Existing constitutional guardrails could continue in full force. Today, the nondelegation doctrine constrains the delegation of rulemaking power to Article II agencies by requiring that it come with an "intelligible principle."[70] That doctrine purports to delineate "impermissible" legislative delegations from "permissible" delegations of rulemaking power[71] — contrary to the frustrated formalist premise that *all* rulemaking is legislative.[72] Instead, in this context, the intelligible principle test could be seen as a limitation on the scale of bicameralism and presentment violations. From that angle, the same constraint could apply equally to Article I delegations.

Removal doctrine could also remain in force, albeit modified. Today, that doctrine constrains the ability of Congress and the President to insulate Article II officials from removal.[73] The President, in whom the Constitution vests the executive power,[74] should not be "impede[d]" from "perform[ing] his constitutional duty."[75] Analogously, Congress and the President should be constrained in their ability to impose statutory removal restrictions on Article I officials because Congress, in whom the Constitution vests the legislative power,[76] should not be impeded from performing its constitutional duty to exercise the legislative power. A congressional removal power doctrine has not yet been articulated, and it might differ slightly from the Article II context depending on the

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[70] *See, e.g.*, *Consumers' Rsch.*, 145 S. Ct. at 2496–97.
[71] *Id.* at 2497.
[72] *See supra* notes 35–37, 51–61 and accompanying text.
[73] *See* Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2197–98 (2020).
[74] U.S. CONST. art. II, § 1, cl. 1.
[75] Morrison v. Olson, 487 U.S. 654, 691 (1988).
[76] U.S. CONST. art. I, § 1, cl. 1.

staffing model, but such a doctrine could and should be developed by analogy.[77]

The concept of Congress staffing agencies leaves some people scratching their heads, but it is simple and common. Two models currently exist. The first is where a chamber of Congress chooses its own officers through an internal vote. For example, the Clerk of the House and the Speaker of the House are each chosen by majority vote of the House.[78] Some of these positions were once extremely powerful.[79] These same procedures could govern the selection of congressional rulemakers. For example, when Congress creates a new SEC-L director position by statute, it could vest the power to appoint that officer in the Senate.[80]

The second model is where Congress vests the power of appointment in individual officers. This method is less well-known, but there are hundreds of existing congressional commissions staffed like this.[81] Power over a single appointee can be given to some number of officers who must agree. For example, the Congressional Budget Office Director is appointed jointly by the President pro tempore of the Senate and the House Speaker.[82] Or appointment power can be given to individual officers in the House or Senate. For example, the Adams Memorial Commission statute allocates four appointments each to different legislative leaders.[83] Which one of these configurations best serves the American public would be up to the President and Congress (or a veto-proof Congress). It would, in short, be subject to the political process.

Such a separation of powers in the administrative state would be more faithful to the Constitution and to democratic ideals. The following Parts explain why.

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[77] Consider a statute vesting the appointment of an SEC-L director in the Senate for life. While the Senate could impose removal limits like the filibuster on itself by majority vote, statutory removal restrictions should not be constitutionally permitted.

[78] *See About the Clerk*, U.S. HOUSE OF REPRESENTATIVES, https://clerk.house.gov/About#OverviewContact [https://perma.cc/9MJM-HWG9].

[79] *See* CHAFETZ, *supra* note 11, at 288–89 (recounting how in 1908 the *New York Times* called the House Speaker "the greatest absolute monarch on earth," *id.* at 288 (quoting *A Glimpse into Speaker Cannon's Famous Red Room*, N.Y. TIMES, Dec. 13, 1908 (§ 6), at 8)); Seth Barrett Tillman & Josh Blackman, *Offices and Officers of the Constitution Part II: The Four Approaches*, 61 S. TEX. L. REV. 321, 334 (2021) (discussing the historical prominence of the Clerk in England and colonial America).

[80] *See infra* section II.D, pp. 1155–57.

[81] *See* JACOB R. STRAUS & KAREN L. SHANTON, CONG. RSCH. SERV., RL33313, CONGRESSIONAL MEMBERSHIP AND APPOINTMENT AUTHORITY TO ADVISORY COMMISSIONS, BOARDS, AND GROUPS 1 (2025).

[82] *See* IDA A. BRUDNICK, CONG. RSCH. SERV., R42072, LEGISLATIVE BRANCH AGENCY APPOINTMENTS: HISTORY, PROCESSES, AND RECENT ACTIONS 2 (2024).

[83] STRAUS & SHANTON, *supra* note 81, at 7.

II. CONSTITUTIONAL CONSIDERATIONS

This Part demonstrates why this proposal is a constitutional "second best"[84] that should be constitutionally sanctioned, even if unconstitutional as an original matter. It takes as a given the frustrated formalist view that some actions, like notice-and-comment rulemaking, are inherently legislative.

The constitutional second best theory is that, where a "practice . . . is both unconstitutional under formalism and [practically] irreversible . . . [t]he Court is *required* to seek a second best solution because its duty is to the balance of power embodied in the constitutional text."[85] Per frustrated formalists, much of the administrative state is unconstitutional.[86] But it has become "irreversible" as a practical matter,[87] as evidenced by almost a century of failed nondelegation challenges.[88] It is thus the duty of a frustrated formalist to seek a workable constitutional second best.[89]

One famous formalist applied this logic to another congressional tool. "[T]he legislative veto helps compensate for widespread, unconstitutional delegations to agencies. A first-best world would have neither delegations nor legislative vetoes, but a world with both delegations and legislative vetoes is closer to the correct constitutional 'baseline' than is a world with only delegations."[90]

Constitutional second best arguments can be tricky because there is no objective metric for what counts as an upgrade.[91] But there is at least one frame that most frustrated formalists could likely agree on: a proposal reducing existing constitutional violations while creating no new violations. Today, according to a frustrated formalist, the administrative state violates the Article I Vesting Clause[92] *and* flouts bicameralism and presentment.[93] In this Note's world, the former problem would be solved — legislative power would be returned to the legislature.[94] The bicameralism and presentment problem would continue to the same degree — no worse.[95] And there would be no new violations of otherwise-undisturbed clauses (like the Appointments Clause).[96] Altogether, that makes this a constitutional upgrade that, under the theory

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84 McCutchen, *supra* note 4, at 2.
85 *Id.* at 21.
86 *See* sources cited *supra* note 4.
87 McCutchen, *supra* note 4, at 20.
88 *See The History of the Doctrine of Nondelegability*, *supra* note 9.
89 *See* McCutchen, *supra* note 4, at 20–21.
90 *See* Lawson, *supra* note 4, at 1252–53.
91 *Cf.* R.G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11, 12 (1956).
92 U.S. CONST. art. I, § 1.
93 *See* McCutchen, *supra* note 4, at 31; U.S. CONST. art. I, § 7, cl. 2.
94 *See infra* section II.A, pp. 1150–51.
95 *See infra* section II.B, pp. 1151–55.
96 *See infra* section II.D, pp. 1155–57.

of constitutional second best, a court sympathetic to frustrated formalist premises should sanction.[97]

A. The Vesting Clauses, Structure, and History

The Vesting Clauses and their structural separation of powers implications straightforwardly support this proposal once the frustrated formalist position is assumed. The Constitution "vest[s]" "legislative Powers" "in a Congress."[98] Taken together with the other Vesting Clauses (executive[99] and judicial[100]), formalists find it clear that vesting the legislative power in Congress means that it cannot be vested elsewhere, like in the President.[101] Taking as a given the view that rulemaking is legislative, today's administrative state violates the Vesting Clauses and their separation-of-powers implications. Separating the powers in the administrative state and giving Congress control over rulemaking would balm these constitutional violations.[102]

This argument is further supported by history. No one can know the Founders' views on an administrative state that has more employees than 1780 America had people,[103] but they clearly abhorred consolidations of power.[104]

Some may argue against this proposal by pointing to Founding-era fears of the legislature. Those fears were real.[105] But Founding-era

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97 *See* McCutchen, *supra* note 4, at 21.

98 U.S. CONST. art. I, § 1.

99 *Id.* art. II, § 1, cl. 1.

100 *Id.* art. III, § 1.

101 *See, e.g.*, Posner & Vermeule, *supra* note 2, at 1723.

102 The Vesting Clauses likely do not independently prevent congressional self-delegation. For example, imagine a constitutional amendment eliminating the bicameralism and presentment requirements. Congress would then clearly have immense flexibility to exercise its legislative powers.

103 *See* Travis Shoemaker, *The Fourth of July: The Nation's Population Then and Now*, U.S. CENSUS BUREAU (July 2, 2025), https://www.census.gov/library/stories/2025/07/fourth-of-july.html [https://perma.cc/QV5N-A3YY]; *How Many Civilian Jobs Are in the US Federal Government?*, USAFACTS (July 2025), https://usafacts.org/answers/how-many-civilian-jobs-are-in-the-us-federal-government/country/united-states [https://perma.cc/LDJ7-WWZ7].

104 *See* sources cited *infra* notes 108–09.

105 *See* THE FEDERALIST NO. 48, *supra* note 69, at 343–44 (admonishing the "[t]he founders of our republics" for focusing too much on "the danger to liberty from [an] overgrown and all-grasping" executive power, and not enough on "legislative usurpations, which, by assembling all power in the same hands, must lead to the same tyranny . . ."); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 640 (1996) (citing, inter alia, GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 403–13 (1998)).

fears of the executive were pervasive.[106] And the Constitution often evinces a textual favoritism for legislatures.[107]

However, more than any one branch, the Founders feared consolidation of power in *any* set of hands.[108] Specifically, they feared different *types* of powers in the same hands. In the words of Montesquieu: "When the legislative and executive powers are united in the same person, . . . there can be no liberty . . . ."[109] That is why the Constitution separates the powers via the Vesting Clauses.[110] Separating the powers in the administrative state would thus remedy today's Vesting Clause violations and bring the government more in line with constitutional text, structure, and history.

B. Bicameralism and Presentment

For this proposal to qualify as a constitutional second best, it must constitutionally improve (as shown above) without making existing arrangements worse. This proposal does not violate bicameralism and presentment any more than today's administrative state does. Furthermore, a Court persuaded by the constitutional second best argument need not overrule key precedents to uphold this proposal. Those cases could have their outcomes preserved because they presented meaningfully different scenarios. And, if not, they had logical errors and should be overruled.

One argument for why this proposal poses a greater threat to bicameralism and presentment than today's arrangement is that this proposal

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[106] JACK P. GREENE, NEGOTIATED AUTHORITIES: ESSAYS IN COLONIAL POLITICAL AND CONSTITUTIONAL HISTORY 199 (1994) ("[C]olonial legislators . . . look[ed] at each governor as a potential Charles I or James II, . . . assume[d] a hostile posture toward the executive, and . . . define[d] with the broadest possible latitude the role of the lower house . . . ."). The Declaration of Independence complained of executive abuses of legislatures. CHAFETZ, *supra* note 11, at 277 (quoting THE DECLARATION OF INDEPENDENCE paras. 6–8 (U.S. 1776)). And James Madison's oft-used quotation implies that the *typical* disposition of the time was to be more suspicious of the executive than the legislature. *See* sources cited *supra* note 105.

[107] For instance, Congress is created in the first Article. *See* U.S. CONST. art. I. Major powers like taxation, war, and spending reside in Congress. *See id.* art. I, § 8. State legislatures, not governors, appoint presidential electors, *id.* art. II, § 1, cl. 2. *But cf.* Moore v. Harper, 143 S. Ct. 2065, 2084–86 (2023) (suggesting governors might play a role), and historically selected senators, U.S. CONST. art. I, § 3, cl. 1, *amended by*, U.S. CONST. amend. XVII.

[108] *See, e.g.*, George Washington, *Farewell Address* (Sep. 17, 1796), *in* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1907, at 213, 219 (James D. Richardson ed., 1908) ("The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create . . . a real despotism."); THE FEDERALIST NO. 48, *supra* note 69, at 343–44 (expressing concern over one branch "assembling all power in the same hands," *id.* at 344); *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES *146 ("[W]here the legislative and executive authority are in distinct hands . . . the liberty of the subject [is safeguarded]."); JOHN LOCKE, TWO TREATISES ON CIVIL GOVERNMENT 267 (George Routledge & Sons 1903) (1690) ("[I]t may be too great temptation to human frailty . . . for the same persons who have the power of making laws to have also in their hands the power to execute them . . . .").

[109] 1 BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 151 (Thomas Nugent trans., Colonial Press rev. ed. 1900) (1748).

[110] U.S. CONST. art. I, § 1 (legislative); *id.* art. II, § 1, cl. 1 (executive); *id.* art. III, § 1 (judicial).

could *decrease* uses of bicameralism and presentment.[111] When Congress delegates discretion to the Executive, it has a "structural incentive"[112] to avoid ambiguity because it knows it will lose control over interpretation. If Congress could delegate to *its* agencies, it might intentionally pass ambiguous laws to give its agencies more leeway to interpret and avoid the high-friction requirements of bicameralism and presentment.[113]

This argument, however, falls into a familiar trap of eliding a piece of legislative reality: the President's role.[114] "Typically, the President is as essential to the passage of legislation as Congress."[115] Their vote is required for almost all legislation,[116] and they often recommend new legislation.[117] Only with a veto-proof Congress does the structural incentive critique flow in one direction. But out of tens of thousands of bills passed, very few have ever survived a veto.[118] So today, the President has similar structural incentives to embrace ambiguity as Congress would have in a world of legislative self-delegation. Presidents are incentivized to approve ambiguous statutes so that executive agencies have broad interpretive leeway.[119] Structural incentives thus do not suggest that congressional delegations tomorrow would create more bicameralism and presentment violations than presidential delegations today.

Even if the Court were sympathetic to the constitutional second best argument, it might feel bound by contrary precedent. But it might not be. Just as with Article II removal cases, the reasoning of past cases could be glossed while keeping their results.[120] Taken at face value, the relevant precedents seem to bar this proposal, but their outcomes can be preserved by reading them as turning on a critical difference between separated and unseparated powers — a concern that this proposal does not implicate.

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111 *Cf.* Manning, *supra* note 4, at 706–07 (making a similar argument regarding interpretive reliance on legislative history).

112 *Id.* at 706.

113 *See id.* at 706–07.

114 Rajiv Mohan, Chevron *and the President's Role in the Legislative Process*, 64 ADMIN. L. REV. 793, 794 (2012).

115 *Id.*

116 *See* U.S. CONST. art. I, § 7, cl. 3.

117 Mohan, *supra* note 114, at 798–801.

118 *See Statistics and Historical Comparison*, GOVTRACK.US, https://www.govtrack.us/congress/bills/statistics [https://perma.cc/66TL-NP9C]; MITCHEL A. SOLLENBERGER, CONG. RSCH. SERV., RS21750, THE PRESIDENTIAL VETO AND CONGRESSIONAL PROCEDURE 2 (2004).

119 *See* Mohan, *supra* note 114, at 827; *see also* Thomas W. Merrill, *The Supreme Court, 2023 Term — Comment: The Demise of Deference — And the Rise of Delegation to Interpret?*, 138 HARV. L. REV. 227, 256–57 (2024) (discussing the continuing interpretive power of executive agencies after *Chevron*).

120 *See, e.g.*, Beermann, *supra* note 34.

In *INS v. Chadha*,[121] Congress tried to retain residual control, via a legislative veto, over power it delegated to the Attorney General to suspend deportations.[122] *Chadha* held the legislative veto unconstitutional because a single chamber of Congress was exercising legislative power.[123] That reasoning would bar this proposal. But *Chadha*'s outcome could be preserved via different reasoning. Specifically, any time the Attorney General made a deportation decision, one house of Congress could override that *same* decision.[124] Thus, the branches of government could step on each other's toes, exercising the same administrative power at the same time. This could be a meaningful issue. If both branches can make the same decision in a similar manner, however one characterizes that power (legislative or executive), to an essentialist, one branch necessarily exercises a power that it should not. The present proposal would not have that problem because it would not have two branches sharing the same power (for example, rulemaking over immigration) at the same time.

Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.[125] (*MWAA*) is another case in the *Chadha* family tree.[126] In that case, Congress delegated primary responsibility for developing policy over the Washington D.C.–area airports to a body controlled by Virginia, Maryland, and the District of Columbia, subject to the veto of an Article I agency.[127] *MWAA* held that the governing body was unconstitutional because it was an impermissible legislative subdelegation.[128] But *MWAA* could similarly be preserved by relying on different reasoning — specifically, vertical, as opposed to horizontal, separation of powers principles. Congress granted the state-run entity (as opposed to the executive in *Chadha*) rulemaking authority with a reversionary veto power in a congressional agent.[129] Although the case explicitly disavowed federalism concerns,[130] making this a harder gloss, Congress and the states were at risk of stepping on each other's toes, presenting a similar problem as in *Chadha*.[131]

Emerging from these two analyses could be the proposition that if rulemaking power is delegated, it must be without residual control to prevent a separation of powers violation by having two branches (or sovereigns) exercise the same kind of power. These concerns, while not endorsed in the cases, were floating in the background. *Chadha* cast

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121 462 U.S. 919 (1983).
122 *See id.* at 923–25.
123 *Id.* at 959.
124 *Id.* at 925.
125 501 U.S. 252 (1991).
126 *See id.* at 255 (citing, inter alia, *Chadha*, 462 U.S. 919).
127 *See id.* at 255–61, 269.
128 *Id.* at 255, 269–70.
129 *Id.* at 255, 266–67.
130 *Id.* at 271.
131 *See id.*

aspersions on the "'sharing' with the Executive by Congress of its authority,"[132] and the *MWAA* certiorari petition described the arrangement there as a "delicately-balanced and innovative institution of federalism."[133] And similar separation of powers concerns have been raised in myriad other contexts. For example, there is a long line of cases barring Congress from sharing the power to decide cases with the judiciary.[134] Viewed in this proposed light, the cases above present no barrier to this Note's proposal, which would have Congress give rulemaking power over some topic to its own Article I agencies, without sharing that same power with the executive or with the states.

In the alternative, if these proposed reinterpretations are unpersuasive, grappling with those cases on their own terms reveals flawed reasoning, and the cases should be overruled. Those cases determined that Congress's attempts to subdelegate legislative functions were impermissible because Congress could generally exercise legislative power only via bicameralism and presentment.[135] However, given the essentialist position that legislative actions continue to be legislative when delegated, this reasoning fails to make sense on its own terms. "The *Chadha* Court's deceptively simple reasoning cannot be taken at face value."[136] In the same breath that the *Chadha* Court denounced giving a subbranch of Congress the power to suspend deportations, it sanctioned giving that same power to an agent of the executive branch despite the similar lack of bicameralism and presentment.[137] This incongruity may be part of why the reaction to *Chadha* was a "deafening" "uproar."[138] *MWAA* was more ambivalent about the nature of the power at issue,[139] but if that power were legislative, it presented similar problems as in *Chadha*, and if executive, it would be inapplicable to this proposal, as discussed below. The question the Court never grappled with, but with which any formalist hoping to rely upon these precedents must, is why the same delegation to the executive branch is more constitutional than to the legislative branch. Despite *Chadha* being "among . . . the fifty most important cases in [Supreme Court] history,"[140] it never explained the discrepancy.

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132 INS v. Chadha, 462 U.S. 919, 958 (1983).

133 Petition for a Writ of Certiorari, *MWAA*, 501 U.S. 252 (No. 90-906) (quoting Citizens for the Abatement of Aircraft Noise, Inc. v. Metro. Wash. Airports Auth., 917 F.2d 48, 61 (D.C. Cir. 1990) (Mikva, J., dissenting)).

134 *See, e.g.*, Patchak v. Zinke, 138 S. Ct. 897, 905 (2018); United States v. Klein, 80 U.S. (13 Wall.) 128, 147 (1871).

135 *See Chadha*, 462 U.S. at 945, 958; *MWAA*, 501 U.S. at 276.

136 Manning, *supra* note 4, at 716.

137 *See Chadha*, 462 U.S. at 954.

138 Wheeler, *supra* note 39, at 83.

139 *MWAA*, 501 U.S. at 276.

140 Wheeler, *supra* note 39, at 84 (quoting BARBARA HINKSON CRAIG, *CHADHA*: THE STORY OF AN EPIC CONSTITUTIONAL STRUGGLE 232 n.27 (1988)).

One other line of precedent can be dispensed with relatively quickly. *Bowsher v. Synar*[141] and *Springer v. Philippine Islands*[142] held that Congress may not exercise executive power.[143] But under the frustrated formalist view, this Note's proposal does no such thing. It returns *legislative* power to Congress.

Thus, this proposal does not violate bicameralism and presentment any more than today's administrative state does, paving the way for its constitutional second best stature. Precedent that might stand in the way can be glossed as resting on the problem of unseparated powers and, to the extent that is unpersuasive, can be overruled based on logical formalist flaws.

C. Independent Agencies

Seila Law LLC v. CFPB[144] and the various precedents[145] restricting Congress's power to impose removal protections on executive officials might also appear to prohibit this proposal. However, this proposal deals with congressional officials, not executive officials. Those cases rested on the premise that "[i]f any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws."[146] Thus, Congress's power to impose removal restrictions on Article II officers is limited.[147] This Note's proposal, by contrast, would not involve Congress's stepping on the President's domain. Instead, Congress would have separate agencies and would leave executive officers alone.

D. Appointment Power

Even if one accepts the foregoing arguments, one might want a textual basis for Congress's power to appoint agents and imbue them with rulemaking powers.

At the outset, one possibility is that Congress concedes the appointment power, and retains just removal power. As explained in the preceding subsections, this arrangement would be permissible because, as posited, these appointed officers exercise legislative power. They would

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141 478 U.S. 714 (1986).

142 277 U.S. 189 (1928).

143 *Bowsher*, 478 U.S. at 736; *Springer*, 277 U.S. at 201. In *Bowsher*, Justice Stevens viewed the delegated power as legislative. 478 U.S. at 737 (Stevens, J., concurring in the judgment). He might be right, but he doesn't address whether, if such an unconstitutional delegation must happen, it would be more constitutional under Congress than under the President.

144 140 S. Ct. 2183 (2020).

145 *See, e.g.*, Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 514 (2010).

146 *Seila L.*, 140 S. Ct. at 2197 (quoting 1 ANNALS OF CONG. 481 (1789) (Joseph Gales ed., 1834) (statement of James Madison)).

147 *Id.*

thus be analogous to the Comptroller General — appointed by the President and removable by Congress.[148]

Turning to appointment power, *Buckley v. Valeo*[149] presents a potential barrier to Congress's appointing officers with significant authority — if it does, it contains flaws and should be overruled; but it may not present a real conflict at all. In *Buckley*, the Court held that officers exercising significant authority are principal officers that must generally be appointed by the President pursuant to Article II, Section 2.[150] It declined to decide whether congressional officers like the Speaker or Clerk of the House are principal officers.[151] As to inferior officers, the Court noted that there was no such thing as congressional Heads of Departments in whom the appointment of inferior officers could be vested.[152]

The text of the Constitution grants the House and the Senate the power to "chuse their [own] Officers."[153] And the Appointments Clause contains an explicit carveout for all officers "whose Appointments are not herein otherwise provided for"[154] — which might include all congressional officers chosen via these "Choosing" Clauses. This is the argument that *Buckley* declined to address — which leaves open the possibility of Congress's appointing its own rulemaking Officers of the United States. And, crucially, the Choosing Clauses are not limited to members of Congress: "[L]egislative officers may be members of the legislature . . . or else outsiders."[155]

If Congress wishes to also vest the appointment of inferior officers in its principal officers, *Buckley* presents a clearer barrier. But there is an argument it was incorrect and should be overruled. "[T]he Congress may by Law vest the Appointment of . . . inferior Officers . . . in the Heads of Departments."[156] "Departments" are thought of as executive, but they could also be legislative. "[B]oth the Constitution and its framers seem to conceive of at least two types of 'departments' — executive and not . . . . [Nonexecutive departments were] created by Congress and if Congress cho[se], entitled to a degree of protection from ongoing presidential control."[157] These arguments were raised in defense of mixed-control independent agencies and rejected by the Supreme

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148 *See* BRUDNICK, *supra* note 82, at 6.

149 424 U.S. 1 (1976) (per curiam).

150 *See id.* at 126.

151 *See id.* at 128.

152 *See id.* at 127.

153 U.S. CONST. art. I, § 2, cl. 5; *id.* art. I, § 3, cl. 5.

154 *Id.* art. II, § 2, cl. 2.

155 Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 397 (2004).

156 *Id.*

157 Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 71–72 (1994).

Court,[158] but could have a new life in this separated-powers context, in which they might suggest that the appointment of inferior officers may be vested in the heads of congressional departments — for example, officers chosen via the Choosing Clauses.

Finally, assuming the power to appoint its own officers, the Necessary and Proper Clause[159] gives Congress the power to imbue those officers with rulemaking authority as a matter of constitutional second best. That clause is the current basis for Congress's power to delegate rulemaking power (when connected to an enumerated power and in line with the nondelegation doctrine).[160] However persuasive that is, this Note's separated-powers administrative state seems at least as necessary and likely more proper. Practically, the administrative state has come to be viewed as "necessary" to the administration of government.[161] And, as much of this Note attempts to show, Congress is a more "proper" home for the administrative machinery of rulemaking than the executive branch. In a world without today's administrative state, the Necessary and Proper Clause might not give Congress the power to delegate either to the President or to itself. However, as long as the administrative state remains necessary in its modern form, the constitutional rationale of second best suggests Congress can imbue its own officers with rulemaking power.

III. NORMATIVE AND PRACTICAL CONSIDERATIONS

There are plenty of practical concerns, like consolidation of power, efficiency, accountability, and stability, raised by this proposal. For the functionalists, who care more about these questions than about formalist niceties,[162] this proposal keeps constant the aspects of the administrative state that they appreciate, like efficiency, while ameliorating many of their concerns, like the consolidation of power in the executive branch and the neutering of Congress.

A. Consolidation of Power

Across the political spectrum, Americans have become concerned with the consolidation of power in the executive branch. Fears of

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158 *See* Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2192 (2020).

159 U.S. CONST. art. I, § 8, cl. 18.

160 *See* Lawson, *supra* note 4, at 1234, 1239.

161 *See supra* notes 42–43 and accompanying text.

162 *See* Chad Squitieri, *Administrative Virtues*, 76 ADMIN. L. REV. 599, 604 (2024) ("[F]unctionalists . . . are more likely to relax the Constitution's separation-of-powers principles to make room for a 'more workable and efficient government . . . .'" (quoting Ilan Wurman, *Nonexclusive Functions and Separation of Powers Law*, 107 MINN. L. REV. 735, 737 (2022))).

presidential authoritarianism today are acute on the political left.[163] But, not long ago, the political right was the primary fount of concern.[164] And history supports these concerns. Executives arrogating power from legislatures has been a precipitating cause of dictatorship, from Nazi Germany to President Vladimir Putin's Russia.[165] It rarely happens the other way around.[166]

This proposal would greatly ameliorate this problem by reestablishing Congress as a coequal branch of government. The drift of power from Congress to the President was tightly linked to the development of the Article II administrative state[167] — a situation this proposal would address.

Further, the problem of consolidation of power in the executive branch would not simply get recreated under a new branch. Congress would be regaining control over only legislative power, while leaving the power to execute the laws — like sending FBI agents to knock on doors — with the President. So, unless Congress started arrogating executive power, sending rulemaking back to Congress would not recreate the problem.

B. Accountability

To some, Congress is a more accountable branch than the Executive, and it has been repeatedly neutered[168] — a problem this proposal would fix. Reasonable minds differ as to the relative democratic accountability of the President and Congress, with some noting that the President is elected nationwide,[169] and others focusing on Congress's two-year election cycles, its smaller ratio between representative and represented,

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163 *See, e.g.*, Erica L. Green, Zolan Kanno-Youngs & Maggie Haberman, *How Trump Is Trying to Consolidate Power over Courts, Congress and More*, N.Y. TIMES (Mar. 20, 2025), https://www.nytimes.com/2025/03/20/us/politics/trump-power-courts-crisis.html [https://perma.cc/696E-UWS9] ("We've never seen a president so comprehensively attempt to arrogate and consolidate so much of the other branches' power . . . ." (quoting Professor Stephen Vladeck)).

164 *See, e.g.*, Yeatman, *supra* note 8; *Obama Administration's Abuse of Power: Hearing Before the H. Comm. on the Judiciary*, 112th Cong. 1, 1 (2012) (statement of Rep. Lamar Smith, Chairman, H. Comm. on the Judiciary), https://www.congress.gov/event/112th-congress/house-event/LC2239/text [https://perma.cc/H3KH-LV4Y].

165 *See* WILLIAM L. SHIRER, THE RISE AND FALL OF THE THIRD REICH: A HISTORY OF NAZI GERMANY 196–200 (1960); HUM. RTS. WATCH, MANAGING CIVIL SOCIETY: ARE NGOS NEXT? 11–13 (2005), https://www.hrw.org/legacy/backgrounder/eca/russia1105/russia1105.pdf [https://perma.cc/93EH-WVRG].

166 The 1793 Committee of Public Safety and its Reign of Terror is one of the few, short-lived examples. *See* WILLIAM DOYLE, THE FRENCH REVOLUTION 58–60 (2d ed. 2019).

167 *See* Walker, *supra* note 28, at 1108; *cf.* POSNER & VERMEULE, *supra* note 24, at 4–5 (arguing this was inevitable).

168 *See, e.g.*, Lincoln Chafee, *The Tax Cut that Neutered Congress*, BROWN ALUMNI MAG. (Mar. 26, 2008), https://www.brownalumnimagazine.com/articles/2008-03-26/the-tax-cut-that-neutered-congress [https://perma.cc/97KB-A4C9].

169 *E.g.*, Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2203 (2020) ("Only the President . . . is elected by the entire Nation.").

and the fact that Congress is the only directly elected institution in the Constitution.[170]

Those who view Congress as the more accountable branch should find this proposal attractive. If Congress picked rulemakers, it would become reinvigorated. Congressional elections might once again become independently important rather than mere referenda on the President.[171] Thus, to the extent one's democratic sympathies lie with Congress, sending power back to Congress in this way would be a functional upgrade.

C. Efficiency

The greatest functional concern with separating the powers in the administrative state is efficiency.[172] As then-Professor Woodrow Wilson explained in 1887, the point of the administrative state is to centralize expertise and circumvent the high-friction system of checks and balances.[173] A modern government requires "the utmost possible efficiency," which necessitates "large powers and unhampered discretion."[174] To Wilson and his supporters, the present proposal might be a downgrade if it diminishes efficiency.

But the separated-powers administrative state would retain many of the efficiencies of the current system, for better or worse. Congressional rulemaking agencies would not go through bicameralism and presentment any more than executive rulemaking agencies do.

This proposal might produce other inefficiencies.[175] For example, no longer housing all experts (executive, adjudicative, and legislative) under the same roof may eliminate some workplace efficiencies of the modern administrative state.[176] Further, depending on the staffing model, a multimember appointing body might be more internally conflicted than an individual supervisor like the President, which might lead to slower

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[170] *See* Deborah N. Pearlstein, *Form and Function in the National Security Constitution*, 41 CONN. L. REV. 1549, 1576 n.99 (2009) ("[I]t is not the President but Congress that is most commonly thought of as the most politically accountable branch."); *If It Can Get Its Act Together: A Case for Strengthening Congress*, CONG. INST. (Apr. 17, 2020), https://www.congressionalinstitute.org/2020/04/17/if-it-can-get-its-act-together-a-case-for-strengthening-congress [https://perma.cc/T8TX-YZ9L] ("Congress is in a far better position to provide accountability to the public than the executive branch."); *History of the House*, U.S. HOUSE OF REPS., https://www.house.gov/the-house-explained/history-of-the-house [https://perma.cc/8SJE-PG4Z].

[171] *See, e.g.*, Gary C. Jacobson, *Extreme Referendum: Donald Trump and the 2018 Midterm Elections*, 134 POL. SCI. Q. 9, 9–10 (2019).

[172] *See* sources cited *supra* notes 39, 48.

[173] *See* Charles J. Cooper, *Confronting the Administrative State*, 25 NAT'L AFFS., Fall 2015, at 96, 99 (quoting Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 213 (1887)), https://www.nationalaffairs.com/publications/detail/confronting-the-administrative-state [https://perma.cc/3M3R-Y7KC].

[174] Wilson, *supra* note 173, at 197, 213.

[175] *See* Cooper, *supra* note 173, at 100.

[176] *See* Kate Vitasek, *5 Reasons You Should Work with People Who Think Differently*, FORBES (Oct. 17, 2024, at 08:50 ET), https://www.forbes.com/sites/katevitasek/2024/10/17/5-reasons-you-should-seek-to-work-with-people-who-think-differently [https://perma.cc/HE2W-7DAU].

filling of vacancies and more conflicting instructions to officers. And finally, there might be an opportunity cost to Congress in deciding whom to appoint — in other words, congresspeople might spend less time on other issues if they become managers of a sprawling bureaucracy. All these points are uncertain and contestable, but on the whole, these efficiency impacts are likely minor compared to avoiding bicameralism and presentment.[177]

Note as well that, as the frustrated formalists might say, a little less efficiency can be a virtue that increases deliberation and decreases the risk of authoritarianism.[178] In sum, this Note's proposal keeps efficiency largely constant, and to the extent it decreases efficiency at all, a little more deliberation (and thus a smaller risk of authoritarianism) might be worth it.

D. Stability

Another concern is that the separated-powers model might produce more instability in federal policy. Members of the House have two-year terms,[179] compared to the President's four.[180] It is entirely possible that the power to control agencies could occasionally be given directly to the House. In such a world, the party in charge of certain rules could change every two years, as opposed to every four. That would lead to less stability in rulemaking.

That, however, might not happen. Congress and the President, in their next delegation, might decide that some rules have a greater need for stability and long-term planning and therefore leave those under the control of the Senate (with its staggered six-year terms[181]). They might likewise decide that other rules require more responsiveness and leave those with the House. This flexibility might allow government to be *both* more stable and more responsive.

But even if rulemaking agencies were placed under the control of the House, that might not be so bad. Elections are supposed to have consequences. Less regulatory stability might produce more democratic accountability and more engagement from voters.[182] To the extent one likes that tradeoff, one should be sympathetic to Congress and the President being able to delegate rulemaking power to bodies like the House that have more frequent turnover.

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177 *See* Manning, *supra* note 4, at 708–09 (describing difficulties of legislating).

178 *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting).

179 U.S. CONST. art. I, § 2, cl. 1.

180 *Id.* art. II, § 1, cl. 1.

181 *Id.* art. I, § 3, cl. 1.

182 *See* Antoine Loeper & Wioletta Dziuda, *Voters and the Trade-Off Between Policy Stability and Responsiveness*, 232 J. PUB. ECON., art. 105093, Apr. 2024, at 1, 1–2.

CONCLUSION

Congress may very well enjoy its subordinate role and never assert itself. It is hard to have responsibility — it comes with more attention and accountability.[183] But it is possible that the legislature will be interested in experimenting with this proposal. In that case, the point of this Note has been to encourage Congress to do so and to provide a sketch of the constitutional arguments in support when a legislative subdelegation is challenged.

These arguments might also serve as constitutional fodder. The next time a judge feels uncomfortable with the amount of delegation to the Executive but sees no practical way out, this Note suggests the possibility of striking down a challenged delegation to the President and, in an aside, opening the door to the same delegation to Congress.

Anyone who sees rulemaking in the executive branch as a perfect fit and who has no practical concerns with the consolidation of power in that branch will likely be unpersuaded. But hopefully, to all others, this Note has proposed a sketch of why separating the powers in the administrative state would be both normatively desirable and more constitutional. Continuing down the current path would be a missed opportunity to reinvest American democracy with representative strength and would betray the Founders, who risked charges of treason to break the yoke of the King and establish a government of separated powers by the people and for the people.[184]

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[183] *Cf.*, *e.g.*, Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1501, 1504–06 (2015) (describing advantages to individual congresspeople of delegation); Christopher J. Walker, *Legislating in the Shadows*, 165 U. PA. L. REV. 1377, 1415–16 (2017) (same).

[184] *See* KING GEORGE III, A PROCLAMATION FOR SUPPRESSING REBELLION AND SEDITION (London, Charles Eyre & William Straban 1775); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).