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The Cycles of Separation-of-Powers Jurisprudence

ABSTRACT. The Supreme Court's approach to the Constitution's separation of powers is a puzzle. Although the Justices appear to agree on the doctrine's goals, in almost every important line of cases the Court oscillates between hard-edged rules and open-textured standards. The Court's seemingly erratic doctrinal shifts cannot be wholly explained by changes in the bench's personnel or methodological fads. This Article isolates and analyzes pervasive doctrinal cycling between rules and standards as a distinctive element of separation-of-powers jurisprudence. We break from previous scholarship critical of the Court's zigzagging, and instead consider whether purposeful cycling between rules and standards might be justified as a judicial strategy for implementing the separation of powers. We further develop a new theoretical account of the separation of powers where doctrinal cycling might be justified on two key assumptions: First, the separation of powers promotes a plurality of normative ends, and second, it does so in the context of a more heterogeneous institutional environment than a singular focus on the interplay of the three great branches would suggest. Doctrinal cycling between rules and standards could be used, at least in theory, to manage normative pluralism and police this "thick political surround" when simpler, more straightforward regulatory strategies would fail. This rational reconstruction of the feasible judicial role in the separation-of-powers context provides a benchmark for evaluating observed doctrinal oscillations, and, more generally, for determining whether courts possess the necessary institutional resources to promote separation-of-powers values.

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INTRODUCTION

The Supreme Court's separation-of-powers jurisprudence is a puzzle. The Court endorses James Madison's conviction that institutional separation is a "sacred" element of the Constitution's grand design.[1] It also accepts the conventional understanding that separation of powers "make[s] Government accountable" and "secure[s] individual liberty."[2] Yet beyond those broad strokes, the Court seems unmoored and unprincipled when it translates the separation of powers into legal doctrine. In several lines of cases, the Court oscillates between using rules and using standards, pivoting with a surprising alacrity that cannot be explained by changes in the bench's personnel, macro-level shifts in the relative power of the political branches, or the ebb and flow of jurisprudential fads.

Consider three recent illustrations:

- **Presidential removal power:** In *Morrison v. Olson*, the Court employed an open-textured standard to uphold a congressional limitation on the President's Article II authority to fire an executive official.[3] But in the next major challenge to such congressional limits on the President's removal power, *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, the Court refused to apply *Morrison* and instead imposed a hard-edged rule.[4]

- **Limits on Article I tribunals:** In *Stern v. Marshall*, the Court adopted a rule to reject the authority of a non-Article III bankruptcy court to issue a final judgment on a particular state-law counterclaim.[5] Only four years later, though, the Court in *Well-*

1. Myers v. United States, 272 U.S. 52, 116 (1926) (quoting James Madison, 1 ANNALS OF CONG. 581 (1789) (Joseph Gales ed., 1834)).

2. Boumediene v. Bush, 553 U.S. 723, 742 (2008); *see also* Wellness Int'l Network v. Sharif, 135 S. Ct. 1932, 1954 (2015) (Roberts, C.J., dissenting) (noting that the separation of powers "promotes both liberty and accountability"); Bond v. United States, 131 S. Ct. 2355, 2365 (2011) (stating that "individuals . . . are protected by the operations of separation of powers"); Bowsher v. Synar, 478 U.S. 714, 722 (1986) (observing that the separation of powers was designed to produce both "liberty" and "full, vigorous, and open debate on the great issues affecting the people").

3. 487 U.S. 654, 696 (1988) (finding that "to some degree" an executive official can be free of presidential control).

4. 561 U.S. 477, 497 (2010); *see id.* at 498 (rejecting the proposition that two layers of removal could be justified as a "practical accommodation" (citation omitted)).

5. 131 S. Ct. 2594, 2608-09 (2011).

ness International Network, Ltd. v. Sharif rejected "formalistic and unbending rules" of the kind applied in *Stern* in favor of a "practical effect" standard.[6]

- **Congressional regulation of presidential foreign relations powers**: When analyzing the constitutionality of legislative constraints on the President's wartime actions, courts have relied heavily on Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*.[7] Yet such almost reflexive reliance obscures considerable oscillation in the application. Specifically, in applying Justice Jackson's framework, the Court alternatively reads statutes as narrow rules (thereby authorizing only limited presidential engagements) or as open-textured standards (effectuating delegations of broad authority to the President).[8] The result is a jurisprudence that cycles between pro-presidential and pro-congressional positions.

Seeming inconsistencies within and between the separation-of-powers doctrines taunt and frustrate commentators. Many simply wash their hands of what they see as an "incoherent muddle."[9]

This Article is the first to consider the Court's mixed approach as a potential solution to the particularly thorny problems posed by the separation of powers.[10] It makes both a positive and a normative contribution. As a positive

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6. 135 S. Ct. at 1944 (2015) (quoting Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986)).

7. 343 U.S. 579, 635–38 (1952). For examples of invocations of the Jackson framework, see *Hamdan v. Rumsfeld*, 548 U.S. 557, 638 (2006) (Kennedy, J., concurring); *Dames & Moore v. Regan*, 453 U.S. 654, 661 (1981); *Nixon v. Admistrator of General Services*, 433 U.S. 425, 443 (1977); and *Old Dominion Branch No. 496, National Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 273 n.5 (1974).

8. *See infra* text accompanying notes 115-140.

9. Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1517 (1991). For similar statements, see M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 608-09 (2001); M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1132-38, 1148-49 (2000) [hereinafter Magill, *The Real Separation*]; and Jonathan Turley, *Recess Appointments in the Age of Regulation*, 93 B.U. L. REV. 1523, 1526 n.6 (2013). The complaint is at least twenty-five years old. *See, e.g.*, Martin H. Redish & Elizabeth J. Cisar, *"If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 450 (1991) ("In the separation of powers area . . . the modern Court has evinced something of a split personality . . . .").

10. There has been no effort to defend as principled or sensible the Court's habit of tacking between different norms in these cases. In a recent article, Eric Posner and Cass Sunstein explore the general phenomenon of "institutional flip-flops," including by members of the

matter, we show that the Court's separation-of-powers case law can be understood as a form of cycling between rules and standards.[11] Normatively, we develop a potentially justificatory account for such rules-standards cycling. This account starts with two structural premises of the separation of powers. Reasoning from those foundational principles, we argue that a court might sensibly resort to rules-standards cycling as a way to promote institutional contestation over conflicting normative values, encouraging salutary forms of confrontation, compromise, and cooperation within judicially imposed boundaries. This theoretical result, we emphasize, is a "proof of concept": it provides a benchmark to evaluate existing precedent and then to analyze the viability of judicial enforcement of the separation of powers.

Central to our normative account are two key, if often overlooked, assumptions of the Constitution's separation of powers: *normative pluralism* and *institutional heterogeneity*. *Normative pluralism*, our first assumption, recognizes and endorses a multiplicity of constitutional values infusing our federal government's structure. These values include, but are not limited to, liberty, effective administration, democratic accountability, the rule of law, and the prevention of tyranny. These constitutional values, moreover, cannot be easily aggregated, ordered, or reconciled. Consider, for example, the way in which the separation of powers promotes efficiency by eliciting institutional specialization among the branches[12] *and* prevents tyranny by diffusing power between different branches;[13] such aims are not necessarily or inevitably commensurable. Indeed, they regularly conflict. Given normative pluralism, the separation of powers does not (and, in truth, cannot) require the maximization of a single value. It

Court. *See* Eric A. Posner & Cass R. Sunstein, *Institutional Flip-Flops*, 94 TEX. L. REV. 485, 500-04, 515-23 (2016). Posner and Sunstein, however, do not address separation-of-powers questions expressly.

11. We use Louis Kaplow's now-canonical definition of rules and standards: A rule is a legal norm given content before regulated subjects act, whereas a standard is a legal norm that is given content after regulated subjects act. Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559-63 (1992).

12. For a defense of efficiency as the pivotal separation-of-powers value, see N.W. Barber, *Prelude to the Separation of Powers*, 60 CAMBRIDGE L.J. 59, 65 (2001) ("[I]t is efficiency, not liberty, which is at the heart of the separation of powers."). *But see* Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 639 (2000) (attacking efficiency as a goal in separation-of-powers case law).

13. *Cf.* Mistretta v. United States, 488 U.S. 361, 381 (1989) (describing the separation of powers as a "security against tyranny—the accumulation of excessive authority in a single Branch").

calls instead for the harmonization—or, at the very least, the cycling through—of competing, conflicting values.[14]

As for *institutional heterogeneity*, the separation of powers is properly conceived as something more complex than the standard "three-branch problem."[15] The three branches of the federal government do not stand in splendid isolation. Nor do they operate as monoliths. Rather, they are enveloped and infused by a teeming ecosystem of institutional, organizational, and individual actors within as well as outside of government. Within the federal government, congressional committees, a cadre of civil servants, and an assortment of independent agencies and other species of bureaucratic faction represent just a fraction of the denizens of this fertile ecosystem. Outside government are a jostling array of lobbyists, political party structures, media actors, and domestic and foreign interest groups. All told, these internal and external actors create a *thick political surround* that shapes and channels action by the three branches, sometimes facilitating and sometimes frustrating the realization of the multiple separation-of-powers values.[16]

A well-grounded separation-of-powers jurisprudence must account for both normative pluralism and the thick political surround. On our reckoning, such a jurisprudence—sensitive to the multiplicity of normative values and mindful of the various, thick patterns of institutional contestation inside and around the three branches—might well take the seemingly incoherent form of oscillating rules and standards. Such oscillations pose no shortage of difficulties when observed in judicial doctrine. Generally speaking, we celebrate doctrinal stability and consistency. We make sense of various lines of constitutional jurisprudence in terms of either rules or standards—*but not both*. First-year law

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14. For discussions of such cycling, see GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES 41-44, 195-96 (1978); and Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1174 (2005), which explains that cycling "signals a reluctance to indulge in absolutes, a recognition of the variety of normative commitments that undergird any democratic system, and an acknowledgement that our identities are multiple and complex."

15. *See* William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 834 (2001).

16. In previous scholarship, we have each separately drawn attention to the significance of some elements of that thick political surround to the operation of the separation of powers. *See, e.g.*, Aziz Z. Huq, *Structural Constitutionalism as Counterterrorism*, 100 CALIF. L. REV. 887, 904-44 (2012) (analyzing the role of bureaucratic and external interest groups in the national security context); Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 538-51 (2015) (discussing the role of agency leadership, the civil service, and civil society). This paper builds on and connects our separate work by exploring systematically and comprehensively the implications of a thick political surround for judicial intervention under a separation-of-powers flag.

students have been taught certain rules (such as the First Amendment ban on prior restraints and the federalism-inspired prohibition on commandeering) and certain standards (such as those used for the Eighth Amendment and the dormant Commerce Clause doctrine) for generations. Not so with interbranch relations.

Neither standards nor rules alone are likely to vindicate the separation of powers. In important part, this is because, depending on the context, an oscillation between rules and standards has the potential to promote the sort of pluralistic political dynamics that the separation of powers is intended to foster. Standards invite flexibility, experimentation, negotiation, and contestation.[17] They tend to enable a wider array of actors, championing a broad range of normative values, to enter the political arena and make their presence known. A jurisprudential turn to rules may, and frequently does, become necessary, to discipline some domineering actors, put a decisive end to unhealthy or abusive forms of engagement, and to clear paths for even greater democratic contestation down the road. Rules and standards are thus both needed to open and close the floodgates as institutional and political dynamics and demographics change. The willingness to toggle between the two could encourage an organic, dynamic form of normative pluralism in a thick political surround and could deter (and, if necessary, correct) forms of contestation that become corrupted or decayed. The resulting doctrinal movements echo patterns observed in other areas of the law, but rarely identified or analyzed in constitutional law.[18]

To be clear, we do not assert that the Court consciously styles itself as a regulator of the thick political surround in the fashion we describe. Our theoretical account of the separation of powers has not been articulated by any Justice, nor do we have reason to think that it has in fact animated any member of the Court on a conscious level. Our claim and thus our ambition is a more

17. *See* Seana Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214, 1222 (2010) (describing how vague standards can "require[] that the citizen who aims to be compliant, whether from motives of justice or motives of prudence, grapple with the relevant moral concepts directly.").

18. *See* Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 598-99 (1988) (making this observation about rules in the property-law context); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 428-29 (1985) (noting the "tendency of rules to evolve or degenerate . . . into standards, and standards to evolve or degenerate into rules"); *see also* Adrian Vermeule, *The Cycles of Statutory Interpretation*, 68 U. CHI. L. REV. 149, 150 (2001) (arguing that cycling in statutory interpretation is a consequence of "self-defeating expectations" (emphasis omitted)). A different form of rules-standards convergence has also been documented in other contexts. *See* Frederick Schauer, *The Convergence of Rules and Standards*, 2003 N.Z. L. REV. 303, 312 (proffering a "convergence hypothesis" to explain the tendency for standards to harden and rules to soften). Our claim is one of cycling, not convergence.

modest one. What we offer is a "rational reconstruction."[19] We take bodies of precedent that "may seem confused and disorderly, partly or potentially conflicting, gappy in places," and then "put them back together, to reconstruct them in a way that makes them comprehensible because they are now shown as parts of a well ordered though complex whole."[20]

Our rational reconstruction provides a much-needed normative baseline against which the Court's actual interventions can be judged. As a result, our main contribution is to clarify *what counts* as jurisprudential success (although we also offer tentative thoughts on several lines of separation-of-powers cases). We emphasize that even with our criteria in mind, reasonable people can still disagree about whether courts are institutionally competent to play the role we describe, or whether particular strands of precedent make sense. Courts, like the other branches, are buffeted by an external ecosystem of interest groups, and have only limited epistemic and political resources. We do not here aim to settle the hard and contested question whether separation-of-powers challenges ought to be justiciable given these constraints. But we hope that the terrain upon which that disagreement arises will be henceforth perceived with greater perspicuity.

Because we recognize the central, albeit neglected, role of normative pluralism and the thick political surround, we are compelled to part ways from settled practice in another respect. Leading scholars have critiqued oscillations in separation-of-powers jurisprudence as incoherent in large part because they divide the doctrinal world between formalism and functionalism.[21] John Manning distills what has long been conventional wisdom. "[L]egal academics have . . . discerned two basic approaches to separation of powers doctrine": a "functionalist approach" and a "formalist approach."[22] Manning describes this conventional wisdom as "accurate[]," a view shared by most leading commentators on the separation of powers.[23] Even recent efforts to transcend the di-

19. Neil MacCormick, *Reconstruction After Deconstruction: A Response to CLS*, 10 OXFORD J. LEGAL STUD. 539, 556 (1990).

20. *Id.* (emphasis omitted). Judicial doctrine from a multimember tribunal is the product of contestation and compromise among judges. A purposive account of doctrine must account for the immanent effects of judicial numerosity. Because we offer a reconstructive account, we bracket that complication.

21. For a summary of that scholarship, see John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1950-61 (2011).

22. *Id.* at 1942-43.

23. *Id.* at 1942; *accord* Harold H. Bruff, *The Incompatibility Principle*, 59 ADMIN. L. REV. 225, 225-26 (2007); Magill, *The Real Separation*, *supra* note 9, at 1136.

chotomy are framed largely as variations of that debate.[24] Although functionalism and formalism dominate discussions of the separation of powers, we understand standards and rules as part of a more helpful, flexible, and forgiving vocabulary to use when describing and making sense of abrupt, oscillating interventions.

We think that a rules-versus-standards framing is more useful for two reasons. First, as a practical matter the formalism-versus-functionalism characterization tends to imply an overarching jurisprudential worldview. Generally speaking, judges are either formalists or functionalists, but not both—and must, among other things, vindicate the separation of powers in a manner consistent with their chosen worldview. As a result, any observed cycling is reflexively criticized as apostate. Such exclusivity arises in part because formalism tends to be associated with both textualist and originalist theories of constitutional interpretation, whereas functionalism is more often associated with pragmatic, dynamic, and hermeneutical approaches.[25] This association remains generally true despite recent moves by some originalists to criticize exclusive adherence to rule-based structures.[26] Still, we worry that shoehorning the vindication of separation of powers into a judge's chosen worldview gets things backward, a case of the tail wagging the dog as it were. This would never happen so long as we thought in terms of rules and standards, tools which are equally useful but are far less freighted. No judge would insist she be called a "standards" judge, come hell or high water.

Second, the formalism-versus-functionalism framing tends to characterize the central challenge of separation-of-powers jurisprudence as a dichotomous choice between two distinct, extreme positions. Not only is there no toggling between the two, there is also no occupying (or seeking to occupy) a middle ground. While functionalists tend to endorse loose standards that promote a flexible balancing of powers,[27] formalists derive "readily ascertainable and en-

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24. *See, e.g.*, Ronald J. Krotoszynski, Jr., *Transcending Formalism and Functionalism in Separation-of-Powers Analysis: Reframing the Appointments Power After* Noel Canning, 64 DUKE L.J. 1513, 1527 (2015); *see also* Josh Chafetz, *A Fourth Way? Bringing Politics Back into Recess Appointments (and the Rest of the Separation of Powers, Too)*, 64 DUKE L.J. ONLINE 161, 161-66 (2015) (offering a parallel critique of the formalism-functionalism dichotomy).

25. On the link between formalism and textualism, see, for example, MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 6-10 (1995), which advances a text-based defense of formalism; and Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CALIF. L. REV. 853, 859-60 (1990), which links formalism to textualism and originalism.

26. *See, e.g.*, Steven G. Calabresi & Gary Lawson, *The Rule of Law as a Law of Law*, 90 NOTRE DAME L. REV. 483, 488 (2014).

27. *See, e.g.*, Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 496 (1989) (describing the functionalist premise that

forceable rules" from the textual accounts of separation.[28] But neither polar position allows for proper recognition of a key function of the separation of powers: the presence of multiple normative values within a thick political surround. Classically conceived formalism dictates a needlessly rigid focus on the three constitutional branches to the exclusion of the intrabranch and external actors that influence their interplay. True functionalism, by contrast, is too permissive. It seemingly permits any actor within the thick political surround to promote any and all conceivable values. Equally damning, classical formalists and functionalists inhabit a Manichean world, allowing few, if any, opportunities to oscillate between the two poles (or gravitate to a median position) as circumstances warrant. Rules and standards have at least the theoretical potential to enable a happier equilibrium, more capacious than a narrow focus on the three branches permits and yet still capable of imposing order and discipline upon an otherwise chaotic thick political surround.

At the same time, we recognize and credit contemporary efforts to conflate rules with formalism and standards with functionalism as important contributions to legal and scholarly conversations and debates, including on the separation of powers.[29] Still, we think there is good reason to keep the two sets of terms distinct. For at certain moments, preservation of a stringently polarized formalism-functionalism divide undoubtedly remains conceptually and lexicographically useful.

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Our analysis proceeds in three Parts. In Part I, we explain how several lines of existing separation-of-powers jurisprudence can fairly be characterized in terms of judicial cycling between rules and standards. In Part II, we introduce the foundational concepts of normative pluralism and institutional heterogeneity, and further show that both can be discerned, albeit imperfectly and partially, as animating and inflecting the trajectory of those several lines of case law. In Part III, we explore how cycling between rules and standards might, at least

"through the carefully orchestrated disposition and sharing of authority, restraint would be found in power counterbalancing power"); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 609 (1984) (advocating a "checks-and-balances approach").

28. Manning, *supra* note 21, at 1958; *see also* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 29 (2006); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1183-84 (1989).

29. *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).

as a theoretical matter, be ranked as a sensible response to the ever-changing demands of normative pluralism and institutional heterogeneity. Here we link our theoretical predicates of the separation of powers to the concrete challenges of creating workable doctrines and jurisprudential principles. In concluding, we show how our analysis can be used to explore whether courts are appropriately positioned to advance separation-of-powers values given the nature of that task.

I. THE UBIQUITY OF RULES-STANDARDS CYCLING IN SEPARATION-OF-POWERS JURISPRUDENCE

We set the foundation for our argument by demonstrating in this Part that the Supreme Court's jurisprudence on the separation of powers routinely cycles between rules and standards. To that end, we employ now-canonical definitions of rules as legal norms given content before regulated subjects act, and standards as legal norms given content after regulated subjects act.[30] Rules (both in general and in the separation-of-powers context) tend to be more restrictive than standards; standards, by contrast, leave the law more open to novel and unanticipated considerations. The correlation between rules and inflexibility, however, is not inevitable. As we will show, in some instances rules can leave regulated actors with great flexibility, while standards can impose heavy burdens of compliance.

To show the pervasiveness of rules-standards cycling, we analyze five discrete lines of authority. In Section I.A, we discuss the legislative delegation of regulatory authority. In Sections I.B and I.C, we consider the design of administrative agencies, including, particularly, the removal of agency officials and the level of judicial deference afforded to agency interpretations of statutes. In Section I.D, we discuss the adjudication of disputes by non-Article III actors. And, in Section I.E, we address the management of foreign affairs. By considering multiple, distinct lines of precedent, we broaden and strengthen our descriptive claim that cycling cannot simply be chalked up to personnel changes on the Court or to the waxing or waning of jurisprudential philosophies or fads. Previous analyses that zeroed in on only one or two of these lines, to the exclusion of the others, understandably failed to appreciate the frequency and transsubstantive reach of rules-standards cycling.

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30. Kaplow, *supra* note 11, at 559-63. For example, the norm "do not exceed 40 miles per hour" is a rule because its content (i.e., the universe of potentially relevant facts) has been fully specified before its applications. The norm "drive reasonably" is a standard because its content depends on the factors that an enforcer or adjudicator determines to be salient.

Before proceeding, two cautions should be sounded. First, we concede that our account of cycling is limited rather than universal. Not every line of separation-of-powers jurisprudence exhibits patterns of cycling. We consider those non-cycling lines at the very end of this Part. Second, we appreciate that not every instance of cycling examined in this Part is necessarily reasonable or principled. Given our immediate task of simply mapping the doctrinal landscape, we do not grapple here with the logic or prudence of cycling. We defer that exercise to Parts II and III.

A. Legislative Delegations

The nondelegation doctrine seeks to restrict Congress from delegating legislative power in a manner inconsistent with its Article I duties.[31] The doctrine is difficult to apply because it is not a simple task to determine what constitutes legislative power. In the modern era, the Court has required Congress to provide an "intelligible principle" when delegating lawmaking authority to administrative agencies. This requirement, first articulated in the 1928 case *J.W. Hampton, Jr., & Co. v. United States*,[32] is meant to ensure that Congress guides, even if it does not entirely specify, the terms of agency action. *J.W. Hampton* remains good law today.[33] But its practical effect has fluctuated. Periods of dutiful adherence to *J.W. Hampton*'s standard-like formulation have been punctuated by carve-outs of categorical, rule-like exceptions to the standard's applicability.

On only two occasions has the Court struck down legislative delegations on constitutional grounds. Both cases involved provisions of the National Industrial Recovery Act (NIRA). In *Panama Refining Co. v. Ryan*,[34] the Court rejected section 9(c) of the NIRA, underscoring Congress's failure to furnish an intelligible principle directing the President's prohibition of the interstate transportation of excess petroleum and petroleum products. Simply stated, the Court found that "the Congress has declared no policy" to guide the President.[35]

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31. Field v. Clark, 143 U.S. 649, 692 (1892) ("That Congress cannot delegate legislative power . . . is vital to the integrity and maintenance of the system of government ordained by the Constitution."). *See generally* U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress . . . .").

32. 276 U.S. 394, 409 (1928).

33. *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) (invoking *J.W. Hampton*'s "intelligible principle" standard).

34. 293 U.S. 388 (1935).

35. *Id.* at 430.

Then, in *A.L.A. Schechter Poultry Corp. v. United States*,[36] the Court held that section 3 of the NIRA, authorizing the President to approve of privately arrived-at codes of fair competition for various industries, also lacked an intelligible principle. The provision therefore left recipients of lawmaking power free to "roam at will."[37]

Panama Refining and *Schechter* are outliers. Before 1935, the intelligible-principle requirement was glossed as an open-textured standard. *Panama Refining* and *Schechter* read it as a rule demanding a high degree of legislative specificity. But this rule-like understanding did not last. After 1935, the Court returned to treating the intelligible-principle imperative as a standard, giving Congress considerable flexibility in its delegations.[38] Explaining this return to a standard-like formulation, the Court underscored its "practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."[39]

Schechter did more than just construe the intelligible-principle imperative as a rule. It also layered on an additional, equally categorical rule barring delegations of state authority to private parties. This "private delegation" carve-out barred *all* delegations of rulemaking authority to private parties. It has never morphed into a standard and remains hard-edged today, foreclosing such delegations irrespective of how carefully and thoroughly Congress specifies an intelligible principle.[40]

Over time, two further categorical rules—more carve-outs from the "intelligible principle" standard—surfaced. Like *Schechter*'s private-delegation prong, both turn on the *recipient* of the delegation, not the scope or specificity of the power delegated. First, *INS v. Chadha*[41] involved a challenge to Congress's one-

36. 295 U.S. 495 (1935).

37. *Id.* at 538; *see also id.* at 551 (Cardozo, J., concurring) (condemning section 3 as failing to provide any direction to those entrusted with lawmaking authority).

38. *See, e.g.*, Yakus v. United States, 321 U.S. 414, 425-27 (1944) (upholding the delegation of broad sweeping price-setting powers to an executive agency).

39. Mistretta v. United States, 488 U.S. 361, 372 (1989) (citing Opp Cotton Mills, Inc. v. Adm'r of the Wage & Hour Div. of the Dep't of Labor, 312 U.S. 126, 145 (1941) ("In an increasingly complex society Congress obviously could not perform its functions if it were obliged to find all the facts subsidiary to the basic conclusions which support the defined legislative policy . . . .").

40. *See Schechter*, 295 U.S. at 537; *see also* Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1237 (2015) (Alito, J., concurring) ("Congress 'cannot delegate regulatory authority to a private entity.'" (quoting Ass'n of Am. R.Rs. v. Dep't of Transp., 721 F.3d 666, 670 (D.C. Cir. 2013))).

41. 462 U.S. 919 (1983).

house veto over administrative decisions that the legislature delegated to the Attorney General. In effect, the veto empowered either the House or Senate to unilaterally reverse the Attorney General's decision to suspend deportation proceedings against an undocumented person. The Court held this legislative veto unconstitutional: Congress may not delegate to itself a decision-making role outside of the one prescribed in Article I, Section 7 of the Constitution, regardless whether the single house of Congress exercising the veto is constrained by an intelligible principle furnished in the authorizing legislation. In dissent, Justice White expressed frustration at the abrupt imposition of a rule-like limitation on congressional delegations. All congressional delegations, Justice White insisted, should be evaluated pursuant to the Court's general "intelligible principle" standard. Justice White posited the legislative veto as simply a reflection of a limited delegation of lawmaking power and a concession to practical administrative needs: "If the effective functioning of a complex modern government requires the delegation of vast authority which, by virtue of its breadth, is legislative or 'quasi-legislative' in character, I cannot accept that Art[icle] I . . . should forbid Congress from qualifying that grant with a legislative veto."[42]

Second, in the Line Item Veto Act of 1996 (LIVA),[43] Congress delegated to the President authority to cancel or nullify certain provisions of appropriations bills within five days of his signing those bills into law. Wielding that authority, President Clinton canceled a provision of the Balanced Budget Act of 1997 and a provision of the Taxpayers Relief Act of 1997. In *Clinton v. City of New York*, the Court invalidated LIVA, holding that Congress lacked authority to delegate cancellation power to the President.[44] As in *Chadha*, the *Clinton* ruling did not turn on whether the delegation contained an intelligible principle, which the Act indeed seemed to provide.[45] Instead, the Court imposed a bright-line rule: delegations to the executive, however precise, may not involve formal revisions to acts of Congress.[46]

The *Clinton* Court's imposition of a bright-line rule invoked a sharp dissent from Justice Scalia. From Justice Scalia's perspective, LIVA's delegation was indistinguishable from an ordinary delegation of lawmaking authority. He conceded that it was possible to read the Constitution to admit no delegations of

42. *Id.* at 989 (White, J., dissenting).

43. Pub. L. No. 104-130, 110 Stat. 1200 (1996).

44. 524 U.S. 417, 448 (1998).

45. *Id.* at 436 (describing narrow statutory conditions under which cancellations were permissible).

46. *Id.* at 438-40.

lawmaking power but cautioned that the Court had never hewed to such a reading of the Constitution. Instead, Justice Scalia homed in on the bright-line distinction, implicit in the *Clinton* majority's ruling, between "cancelling" legislative provisions and furthering legislative provisions through rulemaking. He insisted that the Constitution "no more categorically prohibits the Executive reduction of congressional dispositions in the course of implementing statutes that authorize such reduction, than it categorically prohibits the Executive augmentation of congressional dispositions in the course of implementing statutes that authorize such augmentation—generally known as substantive rulemaking."[47]

We appreciate that the Court in neither *Clinton* nor *Chadha* would classify its holding as a modification of the nondelegation doctrine. Only the dissenting Justices, who emphasized the doctrine's openness to unforeseen pragmatic considerations, would. But that is precisely our point. The nondelegation doctrine is more dynamic than generally appreciated. *Clinton* and *Chadha* alike conjured new and unexpected limitations. They drew bright-line rules carving out narrow exceptions limiting the application of the still-capacious intelligible principle standard that applies liberally when the delegation is to a bona fide administrative agency.[48] Whether *Clinton* and *Chadha*'s results are justified or not, our core point here is that they, like *Schechter*'s private delegation doctrine, illustrate how a broad standard that seems to cover the waterfront of delegation jurisprudence can prove amenable over time to rule-based limitations.

B. The Removal Power

Our second example concerns the separation-of-powers controversy over who controls top-ranking agency officials. The key question in these cases is whether the President must have complete and unfettered authority to remove agency officials, consistent with her duty to take care that the laws are faithfully executed.[49] Evidence from the Founding period is mixed. The Constitution vests in the President the power to appoint principal officers of the United States,[50] but is silent on the question of subsequent forms of control. Madison suggested that the power to unilaterally remove officers was an inherent element of Article II's grant of executive power and the President's corresponding

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47. *Id.* at 464-65 (Scalia, J., dissenting) (emphasis omitted).

48. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) (citing J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)).

49. U.S. CONST. art. II, § 3, cl. 5.

50. *See id.* § 2, cl. 2.

duty to take care that the laws be faithfully executed.[51] The Court in *Marbury v. Madison* seemingly acknowledged as much, at the same time conceding that Congress may at times restrict that unilateral presidential power.[52]

In the twentieth century, with the rise of the administrative state, questions of control over executive personnel took on greater importance. The modern jurisprudence on agency control is complex, characterized by oscillations akin to those observed in the nondelegation domain. We start with the bright-line rule announced in *Myers v. United States*.[53] In *Myers*, the Court rejected congressionally imposed limitations on the removal of postal officials and announced what seemed like a comprehensive and categorical rule. Explaining that the power to remove officials "is an incident of the power to appoint them,"[54] the Court insisted that complete presidential control was necessary for the Chief Executive to "properly supervise and guide [officials'] construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone."[55]

The seeming absolutism of *Myers* yielded in short order to a softer-edged standard. Just a decade after deciding the postal removal case, the Court in *Humphrey's Executor v. United States*[56] rejected *Myers*'s rule as overbroad. In its place, the Court substituted an open-textured standard for identifying classes of officials Congress could insulate from summary presidential removal. Humphrey had been one of the Federal Trade Commission's (FTC) Commissioners, a carryover from the Coolidge and Hoover administrations that President Franklin D. Roosevelt was eager to dismiss.[57] After Humphrey's death, his executor challenged the termination as inconsistent with the statutory protections Congress afforded commissioners, which limited the grounds for removal to "inefficiency, neglect of duty, or malfeasance in office."[58] The Court held that some agency officials need not fall under the President's unfettered control. If those officials' responsibilities are "quasi-legislative" or "quasi-judicial," the Court opined, Congress may restrict the President's removal powers by requir-

51. *See, e.g.*, EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS 102-04 (3d ed. 1948).

52. 5 U.S. (1 Cranch) 137, 162 (1803).

53. 272 U.S. 52 (1926).

54. *Id.* at 161.

55. *Id.* at 135.

56. 295 U.S. 602 (1935).

57. *Id.* at 618-19; *see also* THOMAS K. MCCRAW, PROPHETS OF REGULATION 151 (1984).

58. *Humphrey's Ex'r*, 295 U.S. at 620 (quoting 15 U.S.C. § 41 (1934)).

ing a showing of good cause.[59] Hence, a presidential power framed in *Myers* as categorical and rule-like was transformed into a standard that would require a searching and fact-sensitive *ex post* inquiry. Demonstrating the difficulty of applying this standard, later courts questioned whether the *Humphrey's Executor* Court was even right on its facts given the FTC's extensive executive responsibilities.[60]

Cases challenging the constitutionality of removal provisions occur infrequently. A subsequent pair in 1958 and 1986 followed *Humphrey's Executor* and involved the Court investigating whether a terminated official's responsibilities were primarily executive, judicial, or legislative.[61] In 1988, however, the Court again changed tack. Rather than sliding back to a rule, it instead pushed even further in the direction of an open-ended standard. In *Morrison v. Olson*,[62] a case concerning whether Congress could insulate a special prosecutor from removal by the Attorney General absent good cause, the Court disavowed *Humphrey's Executor*. *Morrison* insisted that the *Humphrey's Executor* standard was too unreliable and, perhaps, too rigid.[63] Instead the Court fashioned a new, arguably muddier standard that obligated courts to determine "whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty."[64]

Dissenting in *Morrison*, Justice Scalia lamented the long-abandoned bright-line rule of *Myers*.[65] "The Court," Justice Scalia bemoaned, "has . . . replaced the clear constitutional prescription that the executive power belongs to the President with a 'balancing test.' What are the standards to determine how the bal-

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59. *Id.* at 625-26.

60. *See* Morrison v. Olson, 487 U.S. 654, 689 n.28 (1988) (citing Bowsher v. Synar, 478 U.S. 714, 761 n.3 (1986) (White, J., dissenting)).

61. *See Bowsher*, 478 U.S. at 732-34 (determining that the Comptroller General has executive duties and thus he or she could not be an official who serves at the pleasure of Congress); Wiener v. United States, 357 U.S. 349, 355-56 (1958) (imposing a for-cause restriction on presidential control of War Claims Commissioners after determining that the Commission was an "adjudicating body").

62. 487 U.S. 654.

63. *See id.* at 689-90 ("We undoubtedly did rely on the terms 'quasi-legislative' and 'quasi-judicial' to distinguish the officials involved in *Humphrey's Executor* . . . from those in *Myers,* but our present considered view is that the determination of whether the Constitution allows Congress to impose a 'good cause'-type restriction on the President's power to remove an official cannot be made to turn on whether or not that official is classified as 'purely executive.' The analysis contained in our removal cases is designed not to define rigid categories of those officials who may or may not be removed at will by the President . . . .").

64. *Id.* at 691.

65. *Id.* at 705 (Scalia, J., dissenting).

ance is to be struck, that is, how much removal of presidential power is too much?"[66]

The Court would effectively repudiate one element of *Morrison* concerning appointments in 1997,[67] but Justice Scalia would have to wait twenty-odd years for the return of a bright-line rule to the Court's removal jurisprudence. In *Free Enterprise Fund v. Public Co. Accounting Oversight Board*[68] (PCAOB), the Court confronted an administrative regime where a double layer of political insulation immunized the titular Board from direct presidential control. Commissioners of the Securities and Exchange Commission (SEC) were understood to be subject to presidential removal only for cause. Similarly, PCAOB members could be removed by the SEC Commissioners only by a showing even greater than the typical cause.[69] The Court could have applied the *Morrison* standard and assessed whether this dual limitation on full presidential control impeded the President's ability to perform his constitutional duties, finding that this particular set of limitations represented too great a restriction. Instead, the Court without warning pivoted to a new bright-line rule. Repeatedly insisting that two layers of for-cause insulation from presidential control present concerns qualitatively different from one layer of insulation, the Court held that two layers were per se unconstitutional[70]—adopting what seems for the moment to be a rule-like carve-out from the *Morrison* standard, at least in special cases of double insulation. Whether *Free Enterprise Fund*'s new rule will be extended remains to be seen.

C. Deference to Agency Legal Interpretations

A third line of cases implicating separation-of-powers questions concerns the deference afforded to administrative agencies' statutory interpretations. Lest there be any doubt, the degree to which courts cede interpretative authority is very much a matter of interbranch relations. The Court has construed deference in terms of Congress delegating interpretive legal authority to agencies

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66. *Id.* at 711.

67. *See* Edmond v. United States, 520 U.S. 651, 662-66 (1997).

68. 561 U.S. 477 (2010).

69. The Commissioners would have to find that a "Board member (a) ha[d] willfully violated any provision of the [Sarbanes-Oxley] Act, the rules of the Board, or the securities laws, (b) ha[d] willfully abused the authority of that member; or (c) . . . ha[d] failed to enforce compliance with any such provision or rule, or any professional standard" without a reasonable justification for not acting. *Id.* at 486 (quoting 15 U.S.C. § 7217 (d)(3)).

70. *See id.* at 484.

as opposed to judges.[71] Because the scope of such interpretive authority helps determine agencies' policymaking power, it has become a heavily litigated battleground for separation-of-powers disputes.

We start with *Skidmore v. Swift & Co.*,[72] a 1944 dispute about whether private firefighters at a meatpacking plant qualified for overtime pay while on call to battle potential fires. *Skidmore* turned partially on how much deference the Court would give to the Labor Department officials' interpretation of the relevant overtime provisions of the Fair Labor Standards Act. The Court held that the Department's interpretation was "entitled to respect."[73] The Court explained that the weight given to an agency's judgment "in a particular case will depend upon the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade."[74] In other words, the Court used a standard encompassing a heterogeneous array of pragmatic considerations to measure the deference owed to agency interpretations.

Forty years later, the Court expressly reoriented its deference jurisprudence in a more rule-like direction. In its landmark decision in *Chevron v. National Resources Defense Council*, the Court held that whenever statutes authorizing agency action are vague, agency interpretations of those statutes are valid provided they constitute a permissible construction of the statutory text.[75] The permissibility of *Chevron*'s formulation might suggest a continued devotion to standards. But *Chevron* abandoned the plethora of factors used by a generation of lawyers, judges, and policymakers working under *Skidmore*. Under *Chevron*, the interpretive deference given to agencies no longer depended on a searching, case-specific analysis. Instead, only one fact mattered: whether the relevant statute is ambiguous. If so, agencies are automatically *entitled* to deference.

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71. *See, e.g.*, Michaels, *supra* note 16, at 565-66 (explaining why *Skidmore* and *Chevron* are separation-of-powers cases); *see also* Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 495 (2010) ("The Court [in *Chevron*] appears to have been influenced both by separation of powers and institutional competency concerns about the appropriate judicial role . . . ."). Some jurists have recently expressed discomfort with the existing deference regime. *See, e.g.*, Michigan v. EPA, 135 S. Ct. 2699, 2712-14 (2015) (Thomas, J., concurring) (questioning *Chevron* deference on separation-of-powers grounds); Gutierrez-Brizuela v. Lynch, No. 14-9585, slip op. at 12 (10th Cir. Aug. 23, 2016) (Gorsuch, J., concurring), http://www.ca10.uscourts.gov/opinions/14/14-9585.pdf [http://perma.cc/C9LE-KCYB] (similar). Whether this is a passing or durable phenomenon is not possible to determine at the time of this writing.

72. 323 U.S. 134 (1944).

73. *Id.* at 140.

74. *Id.*

75. 467 U.S. 837, 843 (1984).

Chevron is thus fairly characterized as a rule in our terminology. Nevertheless, it enlarged the space (in a categorical fashion) for discretionary action by regulated actors. At the same time, *Chevron* also implicitly assigned to the courts considerable discretion in deciding how to interpret whether a statute is indeed ambiguous.[76] The Court did not impose any stable "ranking" of canons or other interpretive presumptions, leaving later benches to select between diverse approaches to statutory interpretation.[77] As a result of this diversity of interpretive approaches at what is often called Step One, *Chevron*'s one-type-of-deference rule (which, again, applies only once courts find a statute to be ambiguous) may "not necessarily yield greater predictability and law-like behavior among judges than context-saturated standards."[78] Hence, notwithstanding its rule-like formulation, *Chevron* still enables a measure of cycling between different approaches to statutory interpretation.

Despite this elasticity, the sharper, one-type-of-deference rule installed in *Chevron* soon morphed into a compound, rule-standard analysis. The leading case here is the 2001 decision *United States v. Mead Corp.*[79] *Mead* held that when agencies acted with the "force of law," the Court would accord them *Chevron* deference.[80] Otherwise, agencies likely merit only *Skidmore* deference.[81] *Mead* thus contains a complex intermingling of rule-like and standard-like features. After *Mead*, agencies engaging in notice-and-comment rulemaking or in formal adjudications would be presumed to have acted with the force of law and would continue to receive *Chevron* deference.[82] Those that employed more in-

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76. *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 131-61 (2000) (using a broad set of interpretive tools to determine whether a statute is ambiguous); INS v. Cardoza-Fonseca, 480 U.S. 421, 453-54 (1987) (Scalia, J., dissenting) (objecting to the Court's decision to go beyond the "plain meaning and . . . the structure of the Act" and to additionally draw upon the "traditional tools of statutory construction" when assessing the ambiguity of said act (internal quotation marks omitted)).

77. *See* Abbe R. Gluck, *What 30 Years of* Chevron *Teach Us About the Rest of Statutory Interpretation*, 83 FORDHAM L. REV. 607, 614 (2014).

78. Connor N. Raso & William N. Eskridge, Jr., Chevron *as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1727 (2010); *see also* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1090 (2008) ("[T]he Court [has] employed a continuum of deference regimes . . . [that are] more complicated than the literature or even the Court's own opinions suggest . . . .").

79. 533 U.S. 218 (2001).

80. *Id.* at 226-27.

81. *See id.* at 227.

82. *See id.* at 229-30.

formal decisional processes are now apt to receive only the lesser, more open-ended *Skidmore* deference, wherein the measure of such deference turns on some gestalt-like computation of the plural *Skidmore* factors.[83] Adding complexity and uncertainty to the deference regime, those factors have since multiplied, as later cases, notably *Barnhart v. Walton*,[84] have added to the list of considerations relevant to the application of the *Mead/Skidmore* standard. In effect, the oscillation from *Skidmore* to *Chevron* to the *Mead* mid-point suggests that we now find ourselves in a hybrid rule-standard world—with courts employing rules or standards based on the types of procedures agencies use.

D. Adjudication by Non-Article III Judges: The Bankruptcy Example

Notwithstanding Congress's wide power to create federal courts, the national legislature has created any number of alternative adjudicative offices lacking the lifetime tenure and salary protections of traditional Article III appointments.[85] These alternative tribunals include territorial courts, military courts, bankruptcy courts, tax courts, and a bewildering array of different agency adjudicators, including immigration and Social Security courts.[86] Among this varied contingent of non-Article III adjudicators are more than 1,500 administrative law judges (ALJs) working across more than twenty-five agencies.[87] ALJs outnumber Article III judges almost two-to-one,[88] and decide

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83. *Id.* at 235 (enumerating "[t]he merit of [the rule's] writer's thoroughness, logic, and expertness, [the rule's] fit with prior interpretations, and any other sources of weight" as possible determinants for how much respect an agency interpretation obtains under *Skidmore*).

84. 535 U.S. 212, 222 (2002) (announcing a list of factors for calibrating deference that partly overlap with those announced in *Mead* and partly go beyond the *Mead/Skidmore* factors).

85. *See* U.S. CONST. art. III, § 1 (vesting Congress with the power to create federal courts and establishing both tenure and salary protections for Article III judges).

86. For a partial listing of non-Article III tribunals, see Jaime Dodge, *Reconceptualizing Non-Article III Tribunals*, 99 MINN. L. REV. 905, 913-14 (2015). For historical scholarship that explores their constitutional credentials and development, see Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559 (2007); and Gordon G. Young, *Public Rights and the Federal Judicial Power: From* Murray's Lessee *Through* Crowell *to* Schor, 35 BUFF. L. REV. 765 (1986).

87. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 542-43 (2010) (Breyer, J., dissenting).

88. *Compare id.* ("[T]he Federal Government relies on 1,584 ALJs to adjudicate administrative matters in over 25 agencies."), *with U.S. Federal Courts–Total Judicial Officers in the U.S. Courts of Appeals, District Courts, and Bankruptcy Courts–as of June 30, 1990 and September 30, 1995, 2000, 2005, and 2011 Through 2015*, U.S. COURTS (2015), http://www.uscourts.gov/statistics/table/11/judicial-facts-and-figures/2015/09/30 [http://perma.cc/NUV5-C9C4]

more than 250,000 cases a year.[89] The 372 bankruptcy judges[90] are another important group to whom Congress grants front-line adjudicative responsibilities, albeit under the supervision of federal district court judges.[91] ALJs and bankruptcy judges alike decide matters of large financial and personal significance.

Non-Article III adjudication has generated two related, but not wholly consistent, lines of precedent. One is characterized by cycling between rules and standards, while the other evinces marked stability. In brief, the Article III treatment of *administrative agency* adjudication has remained remarkably stable and conciliatory for more than 125 years. By contrast, the Court's treatment of *bankruptcy courts* has oscillated wildly between restrictive rules and enabling standards. Scholars have puzzled over the divergent treatment of agency and bankruptcy adjudication.[92] But that concern is secondary to our point here: that cycling is an important feature of bankruptcy jurisprudence. We focus on the latter here, holding off on the jurisprudence of agency adjudication until Section I.F, the Section devoted to doctrinal lines that do not exhibit rules-standards cycling.

Bankruptcy courts might seem to be a minor separation-of-powers problem. They operate under the supervision of Article III judges, not within executive departments. And they have a long historical pedigree: English bankruptcy practice, with which the Framers were well acquainted, allocated front-line adjudicative responsibilities to non-judicial commissioners.[93] Nevertheless, the Court's treatment of bankruptcy judges has cycled twice during the twentieth century, with a majority of Justices seemingly pivoting erratically from loose standard to rigid rule, reinstalling the rule after a period of inattention by the Supreme Court, and then finally relaxing somewhat, settling on another standard to assess constitutionality. The ensuing pattern, such as it is, does not lend itself to easy explanation, such as judicial turnover at One First Street.

(reporting 179 authorized courts of appeal seats and 677 authorized district court seats in 2015).

89. *See* Kent Barnett, *Resolving the ALJ Quandary*, 66 VAND. L. REV. 797, 799 (2013).

90. *See* Ralph R. Mabey, *The Evolving Bankruptcy Bench: How Are the "Units" Faring?*, 47 B.C. L. REV. 105, 106 (2005).

91. *See* 28 U.S.C. §§ 152(a)(1), 157(a)-(b)(1) (2012) (authorizing bankruptcy judges, on reference by a federal district court judge, to "hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11").

92. *See* Anthony J. Casey & Aziz Z. Huq, *The Article III Problem in Bankruptcy*, 82 U. CHI. L. REV. 1155, 1187 (2015); Rafael I. Pardo & Kathryn A. Watts, *The Structural Exceptionalism of Bankruptcy Administration*, 60 UCLA L. REV. 384, 417-18 (2012).

93. *See* Casey & Huq, *supra* note 92, at 1167-71.

The first separation-of-powers challenge to non-Article III bankruptcy judges arose under an 1898 Act of Congress.[94] This statutory scheme drew a fuzzy distinction between "summary" jurisdiction over matters related to the estate (which bankruptcy judges actually or constructively possessed) and "plenary" jurisdiction over other matters (which they lacked).[95] The distinction's fuzziness meant that it fell to the federal courts to define bankruptcy courts' powers.[96] The Court initially applied a flexible standard that accommodated a range of policy interests, including ones seemingly unforeseen by the enacting Congress. For example, in the 1966 case of *Katchen v. Landy*, the Court considered bankruptcy judges' authority to designate creditors' claims against an estate as voidable preferences, payments made in anticipation of bankruptcy to avoid its distribution rule.[97] Voidable preferences might be understood to be unrelated to the state given that they by definition involve a pre-filing transfer to a third party. At least at first blush, they thus seem to fall outside a bankruptcy judge's summary jurisdiction. Moreover, while the *Katchen* petitioners did not argue that Article III had been violated, they did press a Seventh Amendment right to a jury trial, in effect claiming that Congress would have assigned the matter to the wrong branch if voidable preferences could be resolved by a non-Article III official.[98] Resisting that inflexible and rule-like logic, the Court emphasized cost and administrability considerations in concluding that bankruptcy judges could decide preference claims even though the petitioners lacked actual or constructive possession of the property in question.[99] The Court thus treated the 1898 statute's apparent limit on bankruptcy judges' authority as a standard rather than a rule, invoking consequentialist considerations to stretch that authority as circumstances warranted.

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94. An Act to Establish a Uniform System of Bankruptcy Throughout the United States, ch. 541, 30 Stat. 544 (1898), *amended by* Chandler Act (Bankruptcy Act, Amendments of 1938), ch. 575, 52 Stat. 840, *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549.

95. Weidhorn v. Levy, 253 U.S. 268, 273-74 (1920) (discussing this statutory distinction); *see also* Casey & Huq, *supra* note 92, at 1171-72 (same).

96. For examples of the sort of knotty jurisprudence this yielded because of uncertainty as to the scope of the estate, see, for example, *Taubel-Scott-Kitzmiller Co. v. Fox*, 264 U.S. 426, 430-34 (1924); and *Mueller v. Nugent*, 184 U.S. 1, 13-14 (1902).

97. 382 U.S. 323, 329-30 (1966). For a definition of voidable preferences, see *Stern v. Marshall*, 131 S. Ct. 2594, 2616 (2011).

98. *Katchen*, 382 U.S. at 339.

99. *Id.* (citing concerns about "delay and expense" as a justification for denying the Seventh Amendment challenge).

Yet when later reconsidering the constitutional bounds of bankruptcy courts' power in light of new legislation, the Court applied a rigid rule with no allowance for the forward-looking, practical concerns *Katchen* endorsed. In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, a plurality of the Court invalidated provisions of the 1978 Bankruptcy Reform Act allocating bankruptcy judges power to decide all matters "related to" a bankruptcy case.[100] Writing for four Justices, Justice Brennan insisted that Article III adjudication could be ousted in only three "historically and constitutionally . . . exceptional" pockets: territorial courts, military courts, and the adjudication of "public rights" cases (i.e., suits between the government and its citizens).[101] Justice Brennan distinguished "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power," from the "adjudication of state-created private rights," which fall outside that power.[102] The Court used this rule-like distinction to invalidate the 1978 jurisdictional provisions in toto.[103]

Thirty years later, the Court once again revisited the separation-of-powers question in the bankruptcy court context. The Justices were confronted with Congress's answer to *Northern Pipeline*. This answer, part of the Bankruptcy Amendments and Federal Judgeship Act of 1984, was structured around a list of sixteen "core" matters within bankruptcy judges' reach.[104] In the interim, the relevant Article III regime for bankruptcy remained rule-like, even as the Court continued to issue standard-based decisions regarding agency adjudication.[105] One might have read these latter agency adjudication cases to presage an impending shift from rules to standards in the bankruptcy context too. After all, as noted above, both sets of cases involve the extension of adjudicatory responsibilities to non-Article III tribunals. Alternatively, we might characterize this era as one where the *Northern Pipeline* rule was, in practice, ignored, as bankruptcy judges went unmolested as they continued creatively interpreting the sixteen expansive new statutory fonts of power in light of practical considerations and policy imperatives.[106]

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100. 458 U.S. 50, 76 (1982) (plurality opinion).

101. *Id.* at 64-68.

102. *Id.* at 71.

103. *Id.* at 88 (staying the judgment for three months to give Congress time to react).

104. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 157(b)(1), (c)(1), 98 Stat. 333, 340-41; *id.* § 157(b)(2) (listing sixteen "core" matters).

105. *See, e.g.*, Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 854-56 (1986); Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 583-93 (1985).

106. Indeed, the sixteen categories enumerated in the 1984 Act were so broad and diffuse that they could "easily" have reached the action in *Northern Pipeline*. Ralph Brubaker, *A "Sum-*

When the Court did return to the separation-of-powers question raised by bankruptcy courts, it reaffirmed its commitment to rigid rules foreclosing experimentation or new considerations. Thus, in *Stern v. Marshall*,[107] the Court held that the statutory category assigned to bankruptcy judges of "counterclaims by the estate against persons filing claims against the estate"[108] violated Article III.[109] Reaching back to the category of "public rights" employed in *Northern Pipeline*, the *Stern* Court defined the permissible scope of bankruptcy judges' power as reaching only issues "integral to the restructuring of the debtor-creditor relationship."[110] On its face, this test might be read as a standard, inviting consideration of new factors, but the *Stern* Court seemingly rejected any such reading as it deployed the test as a rule to narrow bankruptcy judges' power. *Stern* hence retained, and even doubled down on, the *Northern Pipeline* approach.

Perhaps more surprisingly, *Stern*'s rule did not endure. Just three years later, and in the absence of any change in the Court's personnel, the same nine Justices who decided *Stern* cycled back to a more standard-like articulation. In *Executive Benefits Insurance Agency v. Arkison*, a unanimous Court held that any constitutional troubles regarding the assignment of adjudicatory responsibilities over bankruptcy could be "cured" if the bankruptcy judge's ruling was treated as proposed findings of facts and legal conclusions, to be evaluated de novo by a district court.[111] A year later, a six-Justice majority in *Wellness International Network, Ltd. v. Sharif* found litigant consent sufficient to vest the bankruptcy courts with power to enter a final judgment.[112] Without abjuring *Stern*, the Court in *Wellness International* reached across domains, citing and centrally relying on precedent from the agency adjudication context that, as noted above, employed a much more flexible standard.[113] Rather than applying

mary" Statutory and Constitutional Theory of Bankruptcy Judges' Core Jurisdiction After Stern v. Marshall, 86 AM. BANKR. L.J. 121, 136-37 (2012).

107. 131 S. Ct. 2594 (2011).

108. 28 U.S.C. § 157(b)(2)(C) (2012).

109. *Stern*, 131 S. Ct. at 2609 ("Article III protects liberty not only through its role in implementing the separation of powers, but also by specifying the defining characteristics of Article III judges.").

110. *Id.* at 2628 (quoting Langenkamp v. Culp, 498 U.S. 42, 44 (1990) (per curiam)). Somewhat confusingly, the *Stern* Court also employs a different terminology, speaking of "whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process." *Id*. at 2618.

111. 134 S. Ct. 2165, 2175 (2014).

112. 135 S. Ct. 1932, 1942 & n.7 (2015).

113. *Id.* at 1942-43.

an unbending rule, the *Wellness International* Court engaged in open-ended consideration of the "practical" consequences of its decision.[114] The separation-of-powers regime in bankruptcy, in short, is well on its way back to the standard that produced *Katchen* in 1966.

As suggested above, the shifts documented above do not obviously correlate with ideological changes in the Court nor with clear shifts in jurisprudential methodologies. To the contrary, it is striking that Justice Brennan, a jurist rarely seen as an arch-formalist, penned the leading rule-like decision in *Northern Pipeline*. At this moment, moreover, Article III jurisprudence seems to be transitioning from rules to standards and drawing connections between agency adjudicators and bankruptcy judges despite the stability of the Court's personnel and the historically separate treatment of those two doctrinal lines.

E. Foreign Affairs and National Security

The final separation-of-powers domain that cycles between rules and standards concerns foreign affairs. In the four contexts canvassed so far, it is the Court's *rule of decision* that is the cycling pivot. In the foreign affairs domain, by contrast, the crucial rule of decision has remained largely stable. Echoing dynamics observed in the *Chevron* context, cycling instead occurs in the *application* of that rule. In these cases, the modal question—defined most famously by Justice Robert Jackson's path-making opinion in *Youngstown Sheet & Tube Co. v. Sawyer*[115]—is whether Congress prohibits or allows the presidential actions in question. The balance of interbranch powers, therefore, largely depends on how the Court measures the scope of congressional permission.

Patterns of rules-standards cycling surface here in the context of statutory interpretation, rather than in the crafting of constitutional rules. Specifically, the Court sometimes reads an act of Congress as a sharp-edged rule, marking a clear delineation of what forms of executive initiative the legislature does and does not support. At other times, the Court glosses relevant statutory text as a malleable standard capable of accommodating novel and capacious considerations of congressional intent. When the Court treats the relevant statute as a standard, the executive is more likely to find supportive legal authority. The re-

114. *Id.* at 1944 (quoting Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986)).

115. 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring). Justice Black's less influential plurality opinion also viewed the presence of statutory authority as dispositive. *Id.* at 585 (plurality opinion) ("The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself.").

sult, as in the lines of cases canvassed above, is a series of wide fluctuations in the stringency of separation-of-powers limitations.

Under Justice Jackson's influential three-part typology, Presidents have "maximum" authority when acting "pursuant to an express or implied authorization of Congress";[116] uncertain authority when "ac[ting] in absence of either a congressional grant or denial of authority";[117] and their "lowest ebb" of authority when "tak[ing] measures incompatible with the expressed or implied will of Congress."[118] This framework might be understood as susceptible to a range of more or less pro-legislative readings. Subsequent courts, however, have not explicitly read *Youngstown* to invite context-specific judgments about interbranch balance, but have rather treated the Jackson approach as a general framework for the analysis of separation-of-powers questions.[119] More conventionally, what is perhaps the Court's most famous concurrence represents a theory of constitutionalism channeled through interpretative construction of congressional enactments. But like the *Chevron* opinion discussed above, it is silent on how courts interpret statutes.[120] For its part, Congress has proved (perhaps unsurprisingly) incapable of consistently writing statutes that are resistant to diverse, even inconsistent, readings.

Applying the *Youngstown* framework to a range of ambiguous statutes, the Court has alternated between rule-like and standard-like readings of the relevant statutes. Evaluating President Truman's seizure of the steel mills in the *Youngstown* case itself, a plurality of the Court read legislation concerning the resolution of labor disputes narrowly as a set of specific, rule-like permissions for presidential intervention that did not include the mass seizure of facilities at

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116. *Id.* at 635.

117. *Id.* at 637.

118. *Id.*

119. For examples of the invocation of the Jackson *Youngstown* opinion as a general rule of decision for a diverse array of separation-of-powers disputes, see *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2095 (2015), which employs Justice Jackson's framework to analyze presidential power to recognize foreign states; and *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977), which applies Justice Jackson's view that the separation of powers "were not intended to operate with absolute independence" to a mandatory statutory framework for the preservation of presidential records. *See* United States v. Nixon, 418 U.S. 683, 707 (1974).

120. Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539, 558 (2005) ("Justice Jackson's opinion is silent on the question of how to judge whether a presidential act fits within the scope of an express or implied statutory authorization."); *see also* Neil Kinkopf, *The Statutory Commander in Chief*, 81 IND. L.J. 1169, 1175 (2006) (discussing the difficulty raised by Justice Jackson's silence given that "[i]t will be the rare circumstance indeed where Congress has actually been silent," although its statements will often be "ambiguous").

issue in that case. Indeed, Justice Black's plurality opinion emphasized a negative inference drawn from the Congress's failure to enact authorization of the sort that could justify such a seizure.[121]

The Court's willingness to read enabling statutes as rules, however, did not endure. Three decades later, when the Court next confronted an arguably unilateral presidential intervention in the wake of the Iran hostage crisis, the Court read the relevant statutes loosely. Then-Justice Rehnquist's opinion in *Dames & Moore v. Regan* acknowledged the absence of precise statutory authority for such executive conduct,[122] which had damned President Truman some thirty years before. In a novel interpretive move, however, the Court then eschewed attention to any single statute and refused to draw any negative inference from the absence of express statutory authority. It instead directed attention to "the general tenor of Congress' legislation in this area."[123] That is, the Court adopted an interpretive strategy that a majority of Justices in *Youngstown* had rejected. The more general body of relevant statutes passed by Congress granting the President emergency economic powers, coupled with Congress's inability to "anticipate and legislate with regard to every possible action" the President might take, resulted in the executive having "broad discretion" to determine what steps were necessary to address novel international situations.[124] More prosaically stated, the Court read the relevant statutes as a standard.[125] More than twenty years later, a plurality of the Court in *Hamdi v. Rumsfeld* would use the latitudinarian approach of *Dames & Moore* to find detention authority in a tersely worded authorization of military force that made no mention of anything approximating detention.[126]

Yet the pivot to standards was neither stable nor consistent. In a pair of cases decided soon after *Hamdi*, the Court read enabling legislation narrowly as rule-like authorizations. These cases are instructive because of the ideologically divergent coalitions of Justices in the majorities of each. In the first of the two cases, *Hamdan v. Rumsfeld*, the Court invalidated the military commissions established by President George W. Bush at Guantanamo Bay because they failed

121. *Youngstown*, 343 U.S. at 586 (plurality opinion) (drawing a negative inference from proposed amendments to the Taft-Hartley Act that were rejected in 1947).

122. 453 U.S. 654, 675-77 (1981) (finding express statutory authority for the nullification of attachments and the transfer of Iranian agreements pursuant to the President's emergency economic powers, but finding no express authority to suspend claims pending in U.S. courts).

123. *Id.* at 678.

124. *Id.*

125. *See supra* text accompanying note 30 (discussing Kaplow's definition of standards).

126. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 517-19 (2004) (plurality opinion).

to comply with, among other things, Article 36(b) of the congressionally enacted Uniform Code of Military Justice (UCMJ).[127] Article 36(b) demanded that military commission and court-martial procedures "be uniform insofar as practicable."[128] The *Hamdan* judgment rested on the fact that the President had determined that Article III trials were not practical, but had not officially made the same determination about courts-martial.[129] Under the circumstances of the case, it was tolerably clear that such a judgment was at least implicit in the President's order. The Court's demand for specific compliance instead reflected its view of the UCMJ as a precise rule, setting forth ex ante particularized forms of compliance rather than inviting ex post application of a general standard.

Two years later in *Medellín v. Texas*, a different coalition of Justices similarly read the United States' agreement to treaties establishing the International Court of Justice as precise and exhaustive of presidential authority.[130] Chief Justice Roberts's opinion for the Court in *Medellín*, to be sure, rested on a general rule that treaties are presumptively non-self-executing.[131] This presumption, however, treats treaty text in a precise, rule-like fashion, rather than as a more open-ended standard. The majority framed the question presented in *Medellín* in terms of whether "explicit" textual authority existed.[132] The dissent, in contrast, would have allowed a more latitudinarian approach to the text.[133] *Hamdan* and *Medellín* are typically viewed as cases at ideological poles.[134] But

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127. 548 U.S. 557, 567 (2006) (invalidating Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001)).

128. *Id.* at 620 (quoting Uniform Code of Military Justice art. 36(b), 10 U.S.C. § 836(b) (2000)).

129. *Id.* at 623.

130. 552 U.S. 491, 513 (2008) (holding that "[t]he pertinent international agreements, therefore, do not provide for implementation of ICJ judgments through direct enforcement in domestic courts").

131. *Id.* at 505-06 (discussing precedent on treaty self-execution).

132. *Id.* at 514 ("The interpretive approach employed by the Court today—resorting to the text—is hardly novel.").

133. *Id.* at 549 (Breyer, J., dissenting) ("The provision's text matters very much . . . . But that is not because it contains language that explicitly refers to self-execution. For reasons I have already explained . . . one should not expect *that* kind of textual statement.").

134. For an example of scholarship in these pages that is highly critical of *Hamdan* while endorsing *Medellín*, see Michael Stokes Paulsen, *The Constitutional Power To Interpret International Law*, 118 YALE L.J. 1762, 1777 n.41, 1835 (2009). Anticipating our analysis, Harlan Cohen fairly describes both opinions as exercises in "formalism." Harlan Grant Cohen, *Formalism and Distrust: Foreign Affairs Law in the Roberts Court*, 83 GEO. WASH. L. REV. 380, 384-85 (2015).

they share methodological common ground in their reliance on rules over standards vis-à-vis statutory construction.

These contexts are not the only ones where we see cycling in foreign affairs law. In cases concerning the preemptive effects of federal immigration law on state regulation, for example, the Court has also switched between standard-like field preemption[135] and narrower, rule-like conflict preemption.[136] More generally, along a longer timeline the Court has alternated between exclusive, rule-like and broad, standard-like readings of the President's foreign affairs powers. In a pair of cases challenging President Roosevelt's 1933 agreement with the Soviet Union, the Court thus relied on a "powerful presumption in favor of federal executive action" even absent either statutory authority or clear justification in the constitutional text.[137] A decade later, in *Youngstown* itself, a plurality of the Court declined to infer additional presidential authority beyond Article II's enumeration.[138] Subsequently, the Court proved more willing to infer nonstatutory presidential authority to oust state law that impinged on the President's foreign policy efforts.[139] Most recently, the Court in *Zivotofsky ex rel. Zivotofsky v. Kerry*, determined that it is the "exclusive prerogative of the Execu-

135. *See* Hines v. Davidowitz, 312 U.S. 52, 72-74 (1941) (finding a Pennsylvania alien registration law preempted because Congress intended to occupy the field via a "single integrated and all-embracing system" for regulating naturalization).

136. *See* De Canas v. Bica, 424 U.S. 351, 357 (1976) (declining to find a California law that regulated noncitizen employment preempted in the absence of a "clear and manifest purpose of Congress" (quoting Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146 (1963))). This cycle of standards to rules within preemption has also repeated itself. *Compare* Chamber of Commerce v. Whiting, 563 U.S. 582, 608 (2011) (employing rule-like conflict preemption), *with* Arizona v. United States, 132 S. Ct. 2492, 2502 (2012) (employing standard-like field preemption); *see also* Daniel Abebe & Aziz Z. Huq, *Foreign Affairs Federalism: A Revisionist Approach*, 66 VAND. L. REV. 723, 734-36 (2013) (describing the Court's "oscillating positions" in immigration federalism cases).

137. Abebe & Huq, *supra* note 136, at 736-37 (discussing United States v. Pink, 315 U.S. 203 (1942); and United States v. Belmont, 301 U.S. 324 (1937)).

138. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952) (plurality opinion) ("The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself.").

139. Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 413-17 (2003) (invalidating California insurance statute based on the President's "independent authority"). An earlier case, *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 368, 375 (2000), invalidated a Massachusetts law imposing sanctions on Burma on the ground that it interfered with statutorily created presidential discretion. The *Crosby* Court, however, also invoked the Jackson framework in *Youngstown* in a way that makes plain that the Massachusetts law is problematic also because it infringes on a domain of presidential authority. *Id.* at 381-85.

tive" to "recognize a foreign state and its territorial bounds," a prerogative that "resides in the President alone."[140]

Again, ideology provides no organizing principle for the observed movement between standards and rules in foreign affairs cases. So-called liberal Justices rely on both rules (*Hamdan*, *Youngstown*) and standards (*Zivotofsky*). Similarly, holdings labeled conservative are just as likely to be grounded on standards (*Dames & Moore*) as rules (*Medellín*). What is consistent is not the alignment between one ideological side of the Court with one sort of legal norm, but rather the fluid movement back and forth between the two kinds of norms.

F. The Cycles of Separation-of-Powers Law: A Summary

Rules-standards cycling occurs across a varied separation-of-powers terrain. The doctrinal changes identified here are diverse. Some involve a sudden, conscious shift from rules to standards (or vice versa) that expressly rejects a prior methodological approach. Such about-faces are surprisingly rare, but include *Northern Pipeline*.[141] More commonly the Court creates a carve-out by nesting a rule within a standard or layering a standard on top of a rule. Nondelegation cases, including *Schechter*, *Chadha*, and *Clinton*, thus impose rules that limit the relevance of the broad "intelligible principle" standard,[142] while *Free Enterprise Fund*, a removal case, carves out a rule limiting the applicability of the broad standard announced in *Morrison*.[143] Alternatively, the Court recalibrates by replacing one standard with another, or one rule for another. The move from *Humphrey's Executor* to *Morrison*[144] or from *Northern Pipeline* to *Stern*[145] arguably falls into this category.

We hasten to add two caveats to our descriptive account. First, not all lines of separation-of-powers doctrine oscillate between rules and standards. In contrast to the cycling described above, the Court's pronouncements in Appointments Clause cases have been quite stable.[146] As Justice Kennedy suggested in

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140. 135 S. Ct. 2076, 2089, 2094 (2015).

141. N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982); *see supra* notes 100-103 and accompanying text.

142. *See supra* notes 40-46 and accompanying text.

143. *See supra* notes 68-70 and accompanying text.

144. *See supra* notes 62-64 and accompanying text.

145. *See supra* notes 105-110 and accompanying text.

146. U.S. CONST. art. II, § 2, cl. 2; *see also* Buckley v. Valeo, 424 U.S. 1, 132 (1976) (holding that "[u]nless their selection is elsewhere provided for," all officers must be appointed in accord-

his concurrence in *Public Citizen v. United States Department of Justice*,[147] this may be in part because the Constitution's text on appointments provides more guidance than its language does on removal authority. In *Public Citizen*, Justice Kennedy distinguished cases in which "the power at issue was not explicitly assigned by the text of the Constitution to be within the sole province of the President" from those "where the Constitution by explicit text commits the power at issue to the exclusive control of the President . . . ."[148] He emphasized that there was no need to engage in any balancing "[w]here a power has been [textually] committed to a particular [b]ranch"—that "balance already has been struck by the Constitution itself."[149] We recognize this is only a partial answer, in part because the interpretive question of textual commitment itself is also vulnerable to cycling between rules and standards. Still, we do not think that textual specificity is without relevance.

Another domain in which stability prevails without textual specificity is one previewed above: Article III's application to agency adjudication, which again stands in sharp contrast to the intense cycling found in jurisprudence exploring the Article III question in bankruptcy cases. We suspect that this phenomenon is best explained not by textual specificity but rather by judicial aversion to certain kinds of litigation. Since the first inklings of the modern administrative state, the federal judiciary has resisted efforts to assign itself a large ministerial role over the day-to-day conduct of administrative agency adjudication.[150] As Thomas Merrill has explained, the early twentieth-century judiciary's "fear of contamination" by involving itself in agency administration was conducive to a constrained judicial role in the retail operation of the administrative state.[151]

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ance with the Appointments Clause); Shoemaker v. United States, 147 U.S. 282, 300 (1893) ("[W]hile Congress may create an office, it cannot appoint the officer.").

147. 491 U.S. 440, 484 (1989) (Kennedy, J., concurring).

148. *Id.* at 484-85.

149. *Id.* at 486.

150. *See* Interstate Commerce Comm'n v. Brimson, 154 U.S. 447, 468-70 (1893) (invalidating jurisdiction that required courts to engage in "administrative" rather than judicial functions). By contrast, courts have repeatedly intervened to restrict the structure of agencies (via nondelegation and removal jurisprudence), and maintain discretion to intervene on major regulatory efforts on questions of law and policy.

151. Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 944, 980, 990 (2011) ("During the earlier era, the primary concern was that Article III courts would be drawn into matters of 'administration' that were not properly judicial. In other words, the concern was not dilution of the judicial power but contamination of that power."); *accord* JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 24-25 (2012) (offering a similar reading of the historical record).

Although Merrill documents hesitation on judges' part throughout the Progressive Era, his story ends with the judiciary ultimately accepting the validity of congressional delegations of adjudicatory power to agencies.[152] By 1932, the year of the landmark *Crowell v. Benson* decision,[153] the Court had permitted agency adjudication with Article III review of fact-finding based solely upon the administrative record.[154] The Court has not since wavered from this basic position. Recent constitutional challenges to agency adjudication have been rejected under a loose standard that permits the Court to account for a wide variety of variables related to the operation of different kinds of adjudicative mechanisms within the regulatory state.[155] A recent warning shot from Justice Thomas, calling for a reconsideration of agency adjudication's status,[156] thus signals a potentially destabilizing willingness, at least on the part of some, to reconsider an unusually fixed element of our separation-of-powers doctrine.

Our second caveat is that the lines of cases analyzed here even when combined with the few that do not exhibit much cycling do not exhaust the institutional landscape. Notwithstanding reports of its demise,[157] the political question doctrine—and the paucity of justiciable controversies—mean that many constitutional questions about the design and operation of the federal govern-

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152. *See* Merrill, *supra* note 151, at 987-92.

153. 285 U.S. 22 (1932).

154. *Id.* at 63-65. *Crowell* enunciated an exception for "jurisdictional facts," *id.* at 62-63, but with one exception that language has not proved generative, *cf.* Agosto v. INS, 436 U.S. 748, 753 (1978) (noting that "the Constitution requires that there be some provision for *de novo* judicial determination of claims to American citizenship in deportation proceedings"); Ng Fung Ho v. White, 259 U.S. 276, 283-85 (1922) (acknowledging the same). On the importance of *Crowell*, see Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 18 (1983), which stated that "*Crowell* . . . sanctioned a wide area for the operation of public administration, removing article III as a meaningful barrier to the use of administrative agencies to establish and enforce, at least initially, all the rights created by the administrative state." *Accord* Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 923-24 (1988) ("The fountainhead for the stream of cases legitimating the role of the modern administrative agency is *Crowell v. Benson* . . . .").

155. *See, e.g.*, Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 854-56 (1986); Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 583-93 (1985).

156. B & B Hardware, Inc. v. Hargis Indus., Inc., 135 S. Ct. 1293, 1316 (2015) (Thomas, J., dissenting) ("Because federal administrative agencies are part of the Executive Branch, it is not clear that they have power to adjudicate claims involving core private rights.").

157. Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 240 (2002) (reporting "the demise of the political question doctrine").

ment remain beyond judicial purview.[158] Litigation about the separation of powers thus occurs against a backdrop of institutional change and development that proceeds largely (albeit not entirely) independently of what the courts do.[159] Secular trends such as the twentieth-century rise of bureaucratic power do not evince the same cycling dynamic as the case law.[160] This Part, in other words, has mapped *the law's* trajectory—a path that should not be mistaken for the larger *institutional* dynamics of the federal government.

Yet the doctrinal cycling between standards and rules—and back again—still poses a puzzle. Why would rational judges engage in such jurisprudential oscillation? Our aim in what follows is not to explain it as a historical matter, but rather to determine whether cycling might be justified by the foundational dynamics of the separation of powers.

II. THE SEPARATION OF POWERS' FOUNDATIONS: NORMATIVE PLURALISM IN THE THICK POLITICAL SURROUND

This Part returns to first principles to understand better how normative values and institutional forces shape interbranch dynamics, and thus create the background conditions for judicial intervention. The central normative claim we introduce here and develop further in Part III is that given the two background constraints—normative pluralism and institutional heterogeneity—rules-standards cycling may serve as a sensible mechanism for judicial vindication of the separation of powers. This Part introduces these two predicate assumptions.

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158. Nonjusticiable separation-of-powers questions include, for example, many war powers questions, bicameralism and presentment rules, intercameral relations within Congress, and disputes about the selection and removal of both legislators and Presidents. *See* Aziz Z. Huq, *Enforcing (but Not Defending) 'Unconstitutional' Laws*, 98 VA. L. REV. 1001, 1037-41 (2012) (explaining why "weak departmentalism" is functionally inevitable).

159. *See, e.g.*, Michaels, *supra* note 16, at 530-67 (understanding the constitutional legitimation of the administrative state as largely a function of congressional disaggregation of administrative power).

160. *See, e.g.*, City of Arlington v. FCC, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting) ("The administrative state wields vast power and touches almost every aspect of daily life. The Framers could hardly have envisioned today's vast and varied federal bureaucracy and the authority administrative agencies now hold over our economic, social, and political activities . . . . And the federal bureaucracy continues to grow . . . ." (citations omitted)). For a cautionary note identifying threats to that twentieth-century bureaucratic consensus, see Jon D. Michaels, Separation of Powers All the Way Forward: The Theory and Practice of Constitutional, Administrative, and Privatized Government 13-16 (Sept. 12, 2016) (unpublished manuscript) (on file with authors), which describes contemporary challenges and threats aimed at limiting or reconfiguring administrative power.

The first assumption is that the separation of powers promotes a plurality of values, not just a single one. In recent cases, the Court has rooted the separation of powers in ideals of liberty, efficiency, democratic accountability, and the often-elusive rule of law. But the Court (and commentators) generally fails to note that these ideals cannot all be realized simultaneously. They are in irreconcilable tension. Consequently, the separation of powers must enable the dynamic contestation of those values. This basic fact of *normative pluralism* resonates with the longstanding resistance, starting with Madison, to absolutist solutions in American constitutional law.[161] Power, on this view, is never to be wholly concentrated in one government institution nor given over to one type of authority, be it republican, populist, or mandarin. This familiar Madisonian resistance to tyranny (as reflected in the *separation* of powers) and the corresponding commitment to pluralism (as reflected in the *diversification* of powers) should be reconceived to reflect not just concern about literal, corporeal tyranny, but also about the tyranny of a single norm.

Whereas normative pluralism can be traced back to the separation of powers' intellectual origins, the second predicate assumption of our argument is less clearly marked or celebrated.[162] Yet as a factual and normative matter, it is of vital importance. We contend that diverse separation-of-powers values are in practice contested and ultimately realized in a multitude of venues populated by a broad array of actors acting within and around the three branches identified in the Constitution. These venues and the actors populating them—including political parties, activists, congressional committee staffers, state and local government officials, civil servants, foreign agents, and members of the general public (including special-interest groups and lobbyists)—constitute the *thick political surround*.

Though most of these actors go unmentioned in the Constitution (and those few who do are acknowledged only peripherally), they play pivotal roles in advancing or undermining the sundry separation-of-powers values. For this reason, institutional heterogeneity, reflected in the thick political surround, must therefore be accounted for in any serious analysis of the separation of powers. In what follows, we take up the normative pluralism and institutional heterogeneity predicates in turn and then briefly revisit the jurisprudence introduced in Part I to gauge whether and how it reflects judicial sensitivity to these two predicates.

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161. *See infra* Section II.A.5.

162. We do, however, find evidence in the writing of Madison for our argument. *See infra* text accompanying notes 200-204.

A. Normative Pluralism

The Constitution's separation of powers is not merely a heuristic for assigning responsibilities and resolving disputes among the competing branches. Nor is it just a reflection of the intrinsic value of the three-branch structure.[163] The Constitution's chief institutions have instrumental justifications. The three branches serve as devices through which a larger, pluralistic normative vision can be channeled and, ultimately, vindicated. The key term here is *pluralistic*: the federal government's basic design is intended to simultaneously advance and harmonize diverse and conflicting normative ends. As a correlative, American separation-of-powers thinking since Madison has long registered antipathy to arrangements that concentrate power in one branch or, worse, a single element of a branch.[164] It follows a fortiori that the tradition evinces resistance to prioritizing one separation-of-powers value over all others. Instead, Americans have been historically committed to maintaining institutional arrangements that enable normative pluralism to flourish.

This commitment is one that the Court seemingly embraces: the Court's separation-of-powers opinions are shot through with normative pluralism. Here we emphasize four prominent norms—liberty, efficiency, democratic accountability, and the rule of law—and discuss their centrality to modern separation-of-powers jurisprudence.

1. Liberty

In recent cases, the Court has placed perhaps the greatest weight on the most libertarian of the separation of powers' aspirations. In 2011, for example, a unanimous Court stated that the separation of powers "protect[s] each branch of government from incursion by the others," but as importantly "protect[s] the individual as well" from an overreaching, possibly tyrannous State.[165] The liberty principle is hammered home in cases where the threat to individual lib-

163. *See* Bruce Ackerman, *Good-bye, Montesquieu*, *in* COMPARATIVE ADMINISTRATIVE LAW 128, 128-33 (Susan Rose-Ackerman & Peter L. Lindseth eds., 2010) (advocating for reconsidering the three-branch structure and developing a new conceptual separation-of-powers framework "containing five or six boxes—or maybe more").

164. One strand of constitutional theory, however, takes the Vesting Clause of Article II and from it weaves an elaborate justification for the concentration of power in the presidency. *See* Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165-68 (1992). Those who subscribe to this account will find our more fluid, multicriterial analysis uncongenial.

165. Bond v. United States, 131 S. Ct. 2355, 2365 (2011).

erty is abundantly clear.[166] But even where the connection to individual rights is not immediately obvious, the Justices are quick to remind us they are working to promote our liberty. They do so, for instance, in cases concerning recess appointments,[167] administrative agency design,[168] line-item vetoes,[169] removal,[170] and non-Article III bankruptcy court adjudication.[171]

2. Effective Administration

Beyond liberty, the separation of powers is thought to promote effective government by matching tasks to the comparative advantage of specific government institutions. The Court has credited this goal at some moments, but elsewhere resisted it. To see efficiency's persisting allure, consider an unlikely parallelism between two leading cases, one involving agency adjudication and the other foreign affairs.[172]

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166. *See, e.g.*, Boumediene v. Bush, 553 U.S. 723, 742 (2008) ("The Framers' inherent distrust of governmental power was the driving force behind the constitutional plan that allocated powers among three independent branches. This design serves not only to make Government accountable but also to secure individual liberty."). Liberty was particularly salient in *Boumediene*, where the Court recognized the broad reach of the "great writ" of habeas corpus, extending to non-U.S. persons detained at Guantanamo. *Id.* at 732. For a larger exploration of the connection between the separation of powers and libertarian values, see Aziz Z. Huq, *Libertarian Separation of Powers,* 8 N.Y.U. J.L. & LIBERTY 1006 (2014).

167. *See* NLRB v. Noel Canning, 134 S. Ct. 2550, 2592-93 (2014) (Scalia, J., concurring in the judgment) (linking the separation of powers to the vindication of individual liberty); *see also id.* at 2559 (majority opinion) ("We recognize, of course, that the separation of powers can serve to safeguard individual liberty . . . .").

168. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 497-501 (2010) (remarking that "[t]he Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty" (quoting Bowsher v. Synar, 478 U.S. 714, 730 (1986))).

169. *See* Clinton v. City of New York, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) ("Liberty is always at stake when one or more of the branches seek to transgress the separation of powers.").

170. *See* Morrison v. Olson, 487 U.S. 654, 710-11 (1988) (Scalia, J., dissenting) (characterizing the liberty-preserving implications of plenary presidential control over the removal of executive officers).

171. *See* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1954-55 (2015) (Roberts, C.J., dissenting) (linking the separation of powers to the vindication of individual liberty).

172. The concern with comparative institutional advantage can also be discerned across a wide range of statutory interpretation contexts in which the Court seemingly evaluates decisions based on whether the relevant government actor possesses the necessary competence and expertise. *See generally* Aziz Z. Huq, *The Institution Matching Canon*, 106 NW. U. L. REV. 417

First, in *Commodity Futures Trading Commission v. Schor*, the Court permitted agency adjudication of federal regulatory violations and state-law counterclaims on the ground that Congress's "primary focus was on making effective a specific and limited federal regulatory scheme, not on allocating jurisdiction among federal tribunals."[173] The *Schor* Court rested its ruling centrally on efficiency concerns such as the value of "prompt, continuous, expert and inexpensive" dispute resolution by the specialized Commission.[174] Second, efficiency concerns also emerge in the foreign affairs and national security contexts. Dissenting in *Hamdan v. Rumsfeld*, Justice Thomas, joined by Justice Scalia, identified "structural advantages attendant to the Executive Branch—namely, the decisiveness, activity, secrecy, and dispatch that flow from the Executive's unity" as dispositive reasons for assigning power to that branch.[175]

The majority in *Schor* and Justice Thomas's dissent in *Hamdan* might seem poles apart in subject matter and ideological orientation. Yet both rest upon the logic of administrative efficiency. And both prefer the same institutional settlement: reallocation of adjudicative authority traditionally possessed by Article III courts to bodies lacking federal judges' accouterments of independence.

It would be misleading, of course, to imply that the Court's treatment of comparative efficiencies is uniformly positive. After all, Justices Thomas and Scalia were dissenting in *Hamdan*. Another powerful jurisprudential strand is decidedly wary of efficiency arguments. In *Myers v. United States*, Justice Brandeis famously inveighed against efficiency justifications in the separation of powers. Although he wrote in dissent, his warning that the purpose of the separation of powers was "not to promote efficiency but to preclude the exercise of arbitrary power"[176] has gained approving citation by majorities in a range of other contexts.[177] For instance in *Chadha*, Chief Justice Burger channeled Justice Brandeis, insisting that "[c]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government."[178] In *Clinton*, Justice Stevens assumes the Brandeis-Burger mantle, railing as he does

(2012) (identifying an interpretive canon through which the Court promotes comparative institutional advantage).

173. 478 U.S. 833, 855 (1986).

174. *Id.* at 856 (quoting Crowell v. Benson, 285 U.S. 22, 46 (1932)).

175. 548 U.S. 557, 679 (2006) (Thomas, J., dissenting) (citation and internal quotation marks omitted).

176. Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

177. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 629 (1952) (Douglas, J., concurring) (quoting *Myers*, 272 U.S. at 293 (Brandeis, J., dissenting)); Am. Fed'n of Labor v. Am. Sash & Door Co., 335 U.S. 538, 545 (1949) (Frankfurter, J., concurring) (same).

178. INS v. Chadha, 462 U.S. 919, 944 (1983).

against the line-item veto. Undoubtedly efficient, the line-item veto unacceptably short-circuits the "single, finely wrought and exhaustively considered, procedure" for enacting or revising federal laws.[179]

This wavering prioritization of efficiency reflects a basic fact about the relation between the values of liberty and efficiency in the separation of powers. As Justice Brandeis's *Myers* dissent suggested, those goals need not—and generally do not—align.[180] Whether a decision that permits efficient governmental action will be conducive to greater individual liberties depends on the uses to which governmental powers are placed. At times, efficiency and liberty go hand-in-hand. But quite often, they are at odds with one another: efficient government may be less inclusive and deliberative, admitting few opportunities for dissent and contestation. And liberty-prioritizing government may well be slow and cumbersome, if for no other reason than the democratic and juridical safeguards of liberty are time intensive and susceptible to manipulation and foot-dragging.

3. Democratic Accountability

A third normative value routinely ascribed to the separation of powers is democratic accountability. The relation between voters and elected representatives is a complex and contested one.[181] The separation of powers is thought to promote one quite specific form of ex post democratic accountability by preserving clear lines of responsibility for distinct policy decisions.[182] The clarity of responsibility enabled by crisp institutional separation facilitates voters' retrospective assignment of liability at the ballot box.[183]

The Court's *Free Enterprise Fund* decision invalidating so-called dual for-cause removal regimes incorporated such ex post democratic accountability di-

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179. Clinton v. City of New York, 524 U.S. 417, 439-40 (1998) (quoting *Chadha*, 462 U.S. at 951).

180. *See* Barber, *supra* note 12, at 63 ("Writers on separation of powers have frequently contrasted the claims of efficiency and liberty."); *see also* M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 63-74 (2d ed. 1998) (discussing this tension in John Locke's work).

181. The best general account is HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION (1967).

182. *See* Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1740 (1996).

183. This is not the only type of accountability that might be promoted by the separation of powers. For example, the separation of powers was originally conceived as a necessary predicate to the effective regulation of the state's coercive powers. *See* Aziz Z. Huq, *How the Fourth Amendment and Separation of Powers Rise (and Fall) Together*, 83 U. CHI. L. REV. 139, 144-54 (2016). On this view, the separation of powers enables legal, rather than democratic, accountability.

rectly into the jurisprudence. Chief Justice Roberts's opinion in that case started from the premise that "[o]ur Constitution was adopted to enable the people to govern themselves, through their elected leaders."[184] The Chief Justice then drew upon Madison's language in *Federalist No. 51* to identify "dependence on the people" as the "primary controul on the government," and asserted that such dependence is uniquely enabled (and preserved) by presidential control of the bureaucracy.[185] Even in this case, democratic accountability did not prove wholly dispositive. The Court recognized the nonabsolutism of the separation of powers and tacitly let stand one layer of for-cause insulation from the President.[186] It also declined to opine on the status of civil servants within independent agencies or on the status of ALJs.[187] As a result, these effectively tenured civil servants and politically insulated adjudicators retain their independence, at considerable cost to democratic accountability as otherwise preserved through firm presidential direction and discipline.

Judicial invocations of democratic accountability do not have as long a pedigree as the liberty and efficiency strands of the separation of powers. There is also considerable empirical dispute over whether the public will in fact treat a given policy success or failure as a referendum on the policy architect herself.[188] And democratic accountability is not costless, so much so that it sometimes seems to butt up against constitutional liberties and what we may call the rule of law.[189]

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184. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 499 (2010).

185. *Id.* at 501 (quoting THE FEDERALIST NO. 51, at 349 (James Madison) (Clinton Rossiter ed., 1961)).

186. *Id.* at 495 (noting earlier precedent authorizing one layer of insulation from the President).

187. *Id.* at 506-07 & n.10.

188. For a discussion of this problem in the national security domain, where it is particularly acute, see Huq, *supra* note 16, at 930-34.

189. *See, e.g.*, Borough of Duryea v. Guarnieri, 131 S. Ct. 2488, 2496 (2011) (limiting constitutional tort remedies on the ground that excessive "judicial superintendence" of government would raise separation-of-powers concerns and would "consume the time and attention of public officials, burden the exercise of legitimate authority, and blur the lines of accountability between officials and the public"); *see also* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1954-55 (2015) (Roberts, C.J., dissenting) (linking the separation of powers to democratic accountability). The idea of accountability as a touchstone in the separation of powers has been championed by scholars such as Rebecca Brown. *See* Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531, 564–65 (1998).

4. The Rule of Law

The rule of law is a complex and contested concept. It has both a "thin" formal and a "thick" substantive version.[190] In its thinner, formal version, the rule of law requires (among other things) that rules be clear and relatively stable, and particularized determinations should be guided by the general rules.[191] Separation-of-powers jurisprudence is alive to this kind of formal rule-of-law concern to the extent that judges limit the power of elected officials, and empower bureaucratic staff who are more likely to maintain stable and predictable policies. Similarly, some of the Court's moves from standards to rules might be understood as efforts to promote rule-of-law values within a given domain. In the bankruptcy court context, for example, the *Northern Pipeline* Court's attempt to regularize the kinds of issues a bankruptcy judge could decide might be understood as an effort to promote stability and predictability within a given doctrinal domain.[192]

This rule-of-law strand within the separation of powers has recently been recapitulated by Jeremy Waldron with characteristic eloquence. At the heart of the separation of powers, as Waldron conceives it, is a commitment to "articulated governance," in which the process of democratic rule is "divide[d] conceptually into three main functions . . . ."[193] By requiring the State to "slow[] down" its decisional process into "an orderly succession of phases" when making important decisions, Waldron suggests, the separation of powers promotes regularity and stability and enables broad participation in lawmaking.[194] Further, he suggests, the distinct functions parsed out into separate institutions by the separation of powers correspond to "concerns about liberty, dignity, and respect that the [thick] rule of law represents."[195] When the Court enforces more rules that seem to turn on functional categories—as when it disallows the legislative veto or line-item veto in favor of "a sort of assembly-line fidelity"[196]—it

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190. *See* JOSEPH A. RAZ, *The Rule of Law and Its Virtue*, *in* THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 211, 214 (1979) (critiquing the conflation of the rule of law with "the rule of the good law" and instead advancing a formal ideal of the rule of law that has no relation to equality or justice).

191. *Id.* at 214-16.

192. *See supra* text accompanying notes 100-103.

193. JEREMY WALDRON, POLITICAL POLITICAL THEORY: ESSAYS ON INSTITUTIONS 62 (2016).

194. *Id.* at 63.

195. *Id.* at 64.

196. *Id.* at 111. The cases concerning the legislative veto and the line item veto are *INS v. Chadha*, 462 U.S. 919 (1983), and *Clinton v. City of New York*, 524 U.S. 417 (1999), respectively. The concern about articulated governance might have greatest resonance in the administrative

might be understood as trying to promote the rule of law as defined by Waldron. But when the Court muddies branch boundaries, as in nondelegation cases or removal cases such as *Morrison v. Olson*, it undermines the rule of law as Waldron appears to understand it.

Finally, it is worth noting that there is no intrinsic tension between the rule of law and the notion of doctrinal cycling. The rule of law prizes stability and predictability, but it does not require that the law remain static. In Lon Fuller's canonical formulation, the rule of law is undermined when actors "cannot orient" their action in reliance upon a rule because of "frequent changes" to the substance of the law.[197] It is certainly true that some of the cases we have identified mark rather abrupt doctrinal pivots that would have been hard to predict ex ante.[198] But we do not think that most of the observed separation-of-powers cycling has been so rapid, or so stochastic, as to undermine officials' or private actors' capacity to understand and obey the law. Nor do we believe that most of the abrupt discontinuities across lines of precedent undermine the rule of law. Horizontal coherence across the jurisprudence is not generally considered a prerequisite of the rule of law. As a result, legislatures and judges are free to carve up the regulatory landscape based on qualitative and quantitative distinctions that might otherwise seem arbitrary.[199]

5. Normative Pluralism and the Risk of Tyranny

Recognizing the inevitable friction between competing values coheres with another familiar touchstone of separation-of-powers thinking: the resistance to "tyranny." In *The Federalist 47*, Madison famously glossed tyranny as the "accumulation of *all* powers, legislative, executive, and judiciary, in the same

law context. *See* Todd D. Rakoff, *The Shape of Law in the American Administrative State*, 11 TEL AVIV U. STUD. L. 9, 28 (1992) ("[I]n the American context, the . . . rule of law should be understood to demand that all exercises of official power have a legal structure, which can exist in any one of several forms.").

197. LON L. FULLER, THE MORALITY OF LAW 39 (rev. ed. 1964).

198. In our own experience as observers of the Court, both *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010), and *Stern v. Marshall*, 131 S. Ct. 2594 (2010), were rather surprising decisions.

199. Consider common practices like the use of drug weight to calculate sentences in the narcotics contest, or the use of emissions concentrations to trigger the application of civil and criminal environmental laws. The numerical thresholds used in such contexts are often arbitrary, in the sense that they do not track points of discontinuous policy effects. Nevertheless, they are not generally seen as inconsistent with the rule of law.

hands . . . ."[200] He explicitly did not reject *all* intermingling or interaction between the branches. Rather, he identified and rejected the corner solution of an *absolutist* resolution to the problem of interbranch coordination.[201] Against the risk of a singular, even celebrated tyrant, Madison positioned the Congress and the courts.[202] And against a populist congressional juggernaut, he situated the President and the courts.[203] His larger agenda thus focused on preventing absolute concentrations of State power that would be immune from the back-and-forth of politics via interbranch consideration—a concern ultimately about a *static* institutional equilibrium no longer responsive to divergent values articulated through the democratic process.[204] From Madison's perspective, at least, therefore, a central theoretical difficulty of the Constitution's separation of powers was the articulation of a static, textual mechanism that would induce a dynamic, fluid equilibrium in practice.

Consistent with his anti-tyranny orientation, Madison intimated a constitutional theory of *capture* in the most catholic sense of that term—a concern that any one branch or faction could or would entrench itself in ways that prioritized one normative value to the exclusion of all others.[205] The domination by any one particular branch or element—by an interest-group lobby, congres-

200. THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added).

201. *Id*. Likewise, in the course of a discussion of the Madisonian model, George Carey describes Aristotle's view of tyranny as "capricious and arbitrary government wherein all powers, as we conceive of them today, were vested in the hands of one." *See* George W. Carey, *Separation of Powers and the Madisonian Model: A Reply to the Critics*, 72 AM. POL. SCI. REV. 151, 154 (1978). Carey's focus on "capricious and arbitrary" government, though, does not help identify what counts as "arbitrary."

202. THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961) ("A dependence on the people is, no doubt, the primary control on the government . . . .").

203. For example, in *Federalist No. 49*, Madison famously warned against too much popular control over the Constitution. THE FEDERALIST NO. 49, at 316-17 (James Madison) (Clinton Rossiter ed., 1961).

204. We here agree with Chafetz's observation that "the Constitution does not dictate a stable allocation of decision-making authority; rather, it fosters the ability of the branches to engage in continual contestation for that authority." Josh Chafetz, *Congress's Constitution*, 160 U. PA. L. REV. 715, 769 (2012); *see also* Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 COLUM. L. REV. 1595 (2014) (developing a bargaining-based model of such contestation).

205. Others have suggested a linkage between the separation of powers and the resistance to capture, but on narrower and more mechanical terms. *See, e.g.*, Jide O. Nzelibe & Matthew C. Stephenson, *Complementary Constraints: Separation of Powers, Rational Voting, and Constitutional Design*, 123 HARV. L. REV. 617, 632 (2010) (creating a model that incorporates the separation-of-powers argument that "it is more difficult for a faction to capture two branches of government than to capture only one"). We seek here to extend this point beyond the bare unit of the branch.

sional committee, the civil service, the military, or political parties—equates roughly with the domination by a particular value, whether it be efficiency, democratic accountability, or the rule of law.[206] Specifically, domination arises when a value is locked in through an institutional arrangement that denies or silences the articulation of other important values. Therefore, a goal of the separation of powers, on Madison's view, is to preclude this sort of normative monopolization by promoting the ebb and flow of negotiation and compromise. In this respect, the anti-tyranny value conflicts with any and all of the other values insofar as Madisonian fears of domination lead to a general skepticism of the forceful expression of any and all of those values.

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In sum, the separation of powers is a design for governance in which a constellation of competing values is promoted and blended through institutional arrangements created by the republican process. These values are likely, if not inescapably, incompatible. As a result, they—like the three branches themselves—stand in a perpetually uneasy relation to one other. This would be of little significance if we could parse out the contested values, assigning specific values to specific doctrinal categories. But value pluralism does not work that way. Rather, a diversity of normative concerns permeates each of the five doctrinal categories mapped in Part I. As a result, the Court cannot respond to normative pluralism by treating each of these five lines of jurisprudence as a normatively distinctive "island," within which the Justices concentrate on promoting a single normative value. Instead, the Court must grapple with normative pluralism *within* all of the doctrinal categories. It is this imperative for pluralism within and across doctrinal domains that serves as a motor for cycling in so many of the pockets of separation-of-powers jurisprudence.

Perhaps the coexistence of multiple normative values in each and every doctrinal line is best evidenced in the Court's treatment of individual challenges to national security policies. As many commentators have observed, discrete challenges implicate liberty, democratic accountability, rule-of-law, and effective administration concerns.[207] And courts must endeavor to balance, harmonize, or choose among these oft-competing values. Of course, normative pluralism is not confined by any measure to the foreign affairs and national security contexts. In matters of domestic governance the Court has likewise evinced greater

206. *See* Michaels, *supra* note 16, at 553-56.

207. *See, e.g.*, RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 34 (2006) (positing a liberty/security trade-off).

or lesser sensitivity to effective administration in the form of bureaucratic expertise; populist administration, as evidenced by special solicitude for public participation; political accountability, as expressed principally through heightened presidential involvement; and the specialness of *public* governance when considering delegations to potentially self-dealing private actors.[208]

Normative conflicts, in short, are endemic within and between doctrinal categories in the separation-of-powers context. Madison's ambition for the separation of powers was not a synthesis dissolving those inevitable tensions. It was rather a device for their mediation via the constant ebb and flow of politics in which competing normative imperatives meet and blend.[209] Many of the jurisprudential threads described in Part I are broadly consistent with this goal. The Court defends against perceived concentrations of tyranny on some occasions and promotes effective administration of the laws at other moments.

B. The Thick Political Surround

Our second foundational predicate of the separation of powers concerns the institutional context in which competing and sometimes conflicting values are reconciled. How, that is, are various normative values advanced and tested against one another? There is, we posit, a complex ecosystem of intrabranch and entirely external actors not traditionally accounted for in the separation-of-powers literature that do a lot of the work pushing and pulling, advancing prized values, and jockeying with one another. Vindication of separation-of-powers values, therefore, can hardly be accounted for by looking exclusively at the constitutional branches *qua* branches. The battleground is much wider and often subterranean. The combatants are also much more diverse.

This Section catalogs a *thick political surround* of actors both external and internal to the three branches. We demonstrate that denizens of this ecosystem influence the realization of separation-of-powers values. At times they do so indirectly and often seamlessly as integral subunits of one of the three branches. Alternatively, they exert their influence by more direct and sometimes confrontational means, pressing from the outside on one of the branches or those branches' subunits.

Accounting for the thick political surround represents a radical departure from standard treatments of structural constitutionalism. Those standard

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208. *See supra* text accompanying notes 30-47.

209. Michaels, *supra* note 160, at 91 ("The federal tripartite scheme is itself not a blueprint for value maximization but rather for accommodation and balancing the seemingly conflicting commitments to majoritarianism, federalism, limited government, and the rule of law.").

treatments focus, myopically we think, upon the *branches* as fixed units of analysis to the exclusion of other considerations. And, though most observers are by now quite sensitive to the diversity within Congress, they all too often continue treating the executive as a monolithic whole.[210] Such standard treatments produce relatively sharp distinctions between constitutionally specified institutions on the one hand, and partisan dynamics on the other hand, and further validate those insisting on a crisp divide between law and politics.

We question these treatments. In our view, it is often better to decompose political life into more granular institutions (not to mention networks and communities of affinity) acting within, across, and outside the branches. Doing so provides more analytic purchase, while remaining relatively tractable.[211] It also recognizes that political and institutional dynamics are crosscutting, rather than acoustically separate. To be sure, this does not mean losing sight of the "branch" entirely. But it does mean—contra the standard operating practice of current constitutional law—that strict adherence to the three-branch paradigm risks obscuring deeper dynamics.

Our recognition of the thick political surround's relevance to structural constitutionalism redeems important elements of a pluralistic tradition that have long animated American political thought. Separation's early American theorists recognized the significance of intermediating institutions in the promotion, contestation, and realization of all the normative values at play in our constitutional order. In *Federalist No. 44*, Madison identified states as intermediating institutions capable of frustrating federal tyranny.[212] In doing so, however, he warned that there is "no such intermediate body between the State legislatures and the people interested in watching the conduct of the former," and thus worried that "violations of the State constitutions are more likely to remain unnoticed and unredressed."[213] In this passage, Madison recognized the important role that civil society could play in realizing the plural

210. *See* Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1035 (2011); Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227, 232-42 (2016).

211. It is possible to push toward even more granular levels of analysis, looking at discrete units or even individuals within or around the branches. But we think the mid-range focus we endorse is sufficiently predictively reliable as well as manageable, in contrast to yet more granular efforts that are likely to be recalcitrant without concomitant analytic payoffs. We also resist the simplifying term "politics": we think "thick political surround" better captures the mix of institutions, individuals, and interest groups pursuing concerns that are sometimes, but not always, aptly described as "political."

212. THE FEDERALIST NO. 44, at 286 (James Madison) (Clinton Rossiter ed., 1961).

213. *Id.*

values embedded in the separation of powers and seemingly lamented the absence of such a bulwark.

Madison need not have struck such a wistful note. Early chroniclers of the American social order recognized what Madison evidently failed to see, namely that civil society was alive and well, regularly shaping political outcomes. Most famously and perceptively, Alexis de Tocqueville marveled at a fledgling nation of joiners, activists, and social and political gadflies, convening, petitioning, and litigating with a frequency and intensity that jolted the young French aristocrat.[214] In our view, the thick strata of private actors that made such a strong impression on de Tocqueville have always shaped constitutional structures and influenced the promotion of constitutional values.[215]

The thick political surround is, to be sure, big and unwieldy. For ease of presentation, we divide the surround into its internal and external components—and take up each component in turn.

1. The Internal Political Surround

Our account starts with the *internal* institutional surround—the wide array of individuals, groups, and organizational actors who form part of one of the two political branches. These actors are distinguished by their access to specific channels through which they can advance, elaborate, realize, or obstruct federal law and regulation. While such actors can also operate outside of the branch that formally houses them, they are usefully distinguished from other, truly external actors insofar as their legal standing within a constitutional branch vests them with distinctive, privileged means of influencing branch-level affairs.

a. Intra-Executive Actors

The executive branch contains the largest, most diverse, and perhaps most influential contingent of internal actors. Long treated by legal scholars as uni-

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214. *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 225-27, 231-35 (Harvey C. Mansfield & Delba Winthrop, eds. & trans., Univ. of Chi. Press 2000) (1835, 1840).

215. More recently, John McGinnis has developed an argument for the importance of non-State intermediating institutions as alternative mechanisms for generating social norms where constitutional mechanisms have failed. John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CALIF. L. REV. 485, 526-43 (2002). Our argument, by contrast, focuses on the role of the thick political surround as an integral element of the separation of powers.

tary,[216] the executive branch is in fact highly fragmented.[217] Most obviously, it is divided between White House offices and line agencies. Each line agency might have an agenda distinct from the President's and may well seek to evade presidential control.[218] And each agency possesses its own distinct institutional culture and, at times, distinct approach to legal questions. Most basically, agencies can be arrayed along a spectrum from purely independent to purely executive bodies.[219] Though all executive agencies must be at least potentially responsive to the White House,[220] there is some divergence with respect to each of the agencies' relationship to various congressional oversight committees, other agencies, and the specific communities it regulates or serves. This diversity is reflected in, among other things, differential treatment of agencies by the courts.[221] More germanely, this diversity is also reflected in several lines of cases described in Part I. The current mix of standards and rules in the removal context, for example, enables a heterogeneous array of vertical control arrangements. The complex deference landscape after *Chevron* and *Mead*, moreover, explicitly accommodates diverse combinations of institutions and institutional actors to participate in administrative policymaking, while at the same time signaling a preference for those combinations that are most inclusive and procedurally robust.[222]

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216. *See, e.g.*, Magill & Vermeule, *supra* note 210, at 1035 ("[A]gencies are typically treated as unitary entities.").

217. *See* Huq, *supra* note 16, at 893 ("[A]n executive often labeled 'unitary' turns out on closer inspection to be at war with itself.").

218. On agencies' efforts to insulate themselves from or to altogether evade White House control, see Elizabeth Magill, *Foreword: Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 882-91 (2009); Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1782-84, 1793-96 (2013); and Note, *OIRA Avoidance*, 124 HARV. L. REV. 994, 1007-12 (2011).

219. *See* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 835 (2013) (challenging the binary view of agencies as "independent" or "executive" and insisting instead that agencies "fall along a spectrum" between those poles); *see also* Stavros Gadinis, *From Independence to Politics in Financial Regulation*, 101 CALIF. L. REV. 327, 336 (2013) ("[T]he degree of agency independence, and the institutional features that guarantee it, vary across agencies and across jurisdictions.").

220. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2277-79 (2001) (describing the use of mandatory cost-benefit analysis to control agencies during the Reagan era).

221. *See* Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 TEX. L. REV. 499 (2011).

222. *See* United States v. Mead Corp., 533 U.S. 218, 236-37 (2001); *id.* at 246 (Scalia, J., dissenting) (describing the availability of a *Chevron* "safe harbor" for agency interpretations undertaken in the course of rulemaking and formal adjudication).

Nested within each of these agencies, in addition, are political appointees and career civil servants. The latter can be further grouped into lawyers, economists, engineers, and social workers, all serving specific functions and operating according to distinctive professional norms and commitments.[223] The ensuing mélange of intra-executive actors invites the forging of strategic alliances and the sharpening of rivalries both within and across agencies and also with actors in other constitutional branches.

It is beyond the scope of our project here to identify and discuss comprehensively each of these intra-executive actors, affinity groups, and institutions and to explain how their manifold interactions shape branch-level behavior and ultimately the separation of powers. Instead, we provide a quick sketch of some key participants, and do so to illuminate our conception of the thick political surround and to underscore that ecosystem's pertinence to separation-of-powers jurisprudence.

First, presidentially appointed leaders of agencies, whether officially independent or technically beholden to the White House, with their politically appointed deputies, counsels, and assistants, play a decisive role in federal administration and thus also in constitutional governance. Congress often gives these agency leaders the statutory authority to make final decisions regarding the promulgation of legislative-like rules that carry the force of law. Congress also endows these agency leaders with the discretion to dispose of claims adjudicated within the agencies.[224]

As a practical matter, agency leaders are well positioned to set agencies' substantive agendas, to decide how to prioritize competing policies, and to select among targets against which to initiate enforcement proceedings. Though generally relied on to advance the President's agenda[225] and, in so doing, to reinforce political accountability within the administrative arena, these officials'

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223. *See* Magill & Vermeule, *supra* note 210, at 1078, 1082 (discussing the dominant roles played by lawyers); *see also* Jerry L. Mashaw, *Law and Engineering: In Search of the Law-Science Problem*, 66 LAW & CONTEMP. PROBS. 135, 136-37 (2003) (discussing the role of engineers within federal agencies); Karen M. Tani, *Welfare and Rights Before the Movement: Rights as a Language of the State*, 122 YALE L.J. 314, 319, 338 (2012) (discussing social workers' role in the Social Security Bureau).

224. There is longstanding debate as to whether statutory delegations to agency leaders exclude presidential direction. *See, e.g.*, Kevin M. Stack, *The President's Statutory Powers To Administer the Laws*, 106 COLUM. L. REV. 263, 270-74 (2006) (describing the nineteenth-century controversy over statutory delegations).

225. *See, e.g.*, Matthew C. Stephenson, *Mixed Signals: Reconsidering the Political Economy of Judicial Deference to Administrative Agencies*, 56 ADMIN. L. REV. 657, 667 & n.17 (2004) (citing numerous sources that provide "strong evidence of presidential influence over agency policy").

positions may and do diverge from the White House's.[226] White House officials derisively label such divergence "going native."[227] "Going native" implies that some agency leaders have turned their backs on their appointing President and chosen instead to identify with the career civil servants or other long-term stakeholders, such as congressional patrons or the beneficiaries of agency programs. Yet White House frustration (and presidential accountability) aside, agency leadership autonomy often enhances other normatively desirable values such as effective governance and the rule of law insofar as identification with long-term stakeholders promotes stable and predictable agency policies.[228] In this spirit, leading accounts of bureaucratic autonomy underscore the entrepreneurial role played by agency leadership in depoliticizing agencies, thereby enabling dispassionate expert administration to flourish.[229]

Agency leaders also act outside the branch they inhabit, in effect operating like the external actors that are addressed below. They can do so by allying themselves with members of the media, special interests, and members of Congress.[230] Agency leaders have shown great dexterity in the legislative arena, influencing controversial and consequential legislation. For example, the commissioner of the mid-century federal Bureau of Narcotics, Harry Anslinger, played a pivotal role in framing the use of opiates and marijuana as *criminal law* problems, and then arguing to the public for punitive legislation such as mandatory minimum sentences.[231] Anslinger's example shows how officials can foster a sufficiently broad and engaged political base of their own, allowing them to make direct appeals to the electorate and Congress. They can also collaborate with similarly positioned officials at the state or municipal level to se-

226. For a fuller discussion of the discrete role played by agency leaders, see Michaels, *supra* note 16, at 538-40; and Michaels, *supra* note 210, at 236.

227. *See* Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1300-04 (2006).

228. Stability and predictability are typically seen as prototypical elements of the rule of law. *See* Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 8-9 (1997); *see also* FULLER, *supra* note 197, at 39 (arguing that the rule of law is violated when there are "such frequent changes in the rules that the subject cannot orient his action").

229. *See, e.g.*, DANIEL P. CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATIONS IN EXECUTIVE AGENCIES, 1862-1928, at 353-62 (2004).

230. For a discussion of the forging of alliances within and outside the scope of the administrative arena, see Michaels, *supra* note 210, at 243-48, 252-54.

231. *See* DORIS MARIE PROVINE, UNEQUAL UNDER LAW: RACE IN THE WAR ON DRUGS 83-86 (2007); *see also* MARIE GOTTSCHALK, THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA 65 (2006) ("For more than three decades, Anslinger used the bureau as a perch to incite national hysteria about drugs.").

cure policy goals[232] or even collaborate with their counterparts in other nations.[233] These internal actors' successes on external stages is aided in no small part by their status as executive officials, which bespeaks authority, competence, and deep (budgetary) pockets.

Second, with or without agency-leadership support, career civil servants play a central role in shaping branch-level action. They have considerable influence over the design, drafting, and administration of agency rules as well as decisions about how to enforce those rules in favor of would-be beneficiaries and against perceived transgressors.[234] Civil servants are numerous, heavily relied upon by agency leaders (whose average tenure is approximately two years[235]), and—most importantly—insulated from politically motivated personnel actions.[236] Their independence helps further, enrich, or obstruct the President's administrative interests.[237] Among other things, civil servants can prioritize legalistic values and professional norms—and discount arguments that sound in political expedience and public opinion polls. On this optimistic account, the constructive yet combative influence of civil servants may moderate the partisan political nature of the executive branch, changing the mix of values championed by that branch in the separation-of-powers arena. Bureaucratic insulation creates opportunity for mandarin expertise to infuse American public policy, seemingly in ways that conflict with assurances of democratic accountability, but also in ways that may promote effective administration and the rule of law.[238] Indeed, in Harold Bruff's telling, it is the civil servants who counter-

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232. Crime control again provides a useful example. Lisa Miller has documented the growing role in congressional hearings played by law-enforcement agencies from all levels of government. *See* LISA L. MILLER, THE PERILS OF FEDERALISM: RACE, POVERTY, AND THE POLITICS OF CRIME CONTROL 73-84 (2008).

233. *See* Ashley Deeks, *Checks and Balances from Abroad*, 83 U. CHI. L. REV. 65, 85-86 (2016) (documenting interactions between national security and intelligence agencies and foreign governments, and arguing that these interactions have constraining effects).

234. We include ALJs within the broader rubric of civil servants.

235. *See* David Fontana, *Government in Opposition*, 119 YALE L.J. 548, 610 (2009).

236. *See* Michaels, *supra* note 16, at 540-47.

237. *See* DAVID E. LEWIS, THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE 30 (2008) (finding that federal civil servants "often feel bound by legal, moral, or professional norms to certain courses of action and these courses of action may be at variance with the [P]resident's agenda"); Strauss, *supra* note 27, at 586 (remarking on the civil servant's distinctive values and commitments).

238. *See, e.g.*, Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 94 (2008) ("The majoritarian interest in strong presidential control is stronger when expected presidential responsiveness to majoritiarian [sic] preferences is stronger, when political parties are less polarized, when bureaucratic preferences are more distant

balance the agency leaders and thus function as a "bulwark to the rule of law."[239]

This understanding of the potentially rivalrous nature of the civil service-agency leadership relationship seems to be one that the courts appreciate and implicitly endorse. In cases such as *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*[240] and *Massachusetts v. EPA*,[241] the Supreme Court has worried about politicized agency decision making and thus elicited supplemental input from career administrative experts. As Jody Freeman and Adrian Vermeule write, the Court in these cases "overr[o]de executive positions that they found untrustworthy, in the sense that executive expertise ha[d] been subordinated to politics."[242] Finally, like agency heads, civil servants also can act externally by forging relationships with members of the media, members of Congress, beneficiary communities, regulated industries, or their counterparts overseas or at the state or local levels.[243]

The net effect of these intrabranch and cross-branch entanglements can, however, be ambiguous. Sometimes, industrious civil servants save the day; on other occasions they use their legal insulation and mandarin reputations to slack or advance their own parochial agendas. Consider, for example, the pivotal role that elements of the national security bureaucracy have played in impeding releases from the detention facility at Guantánamo Naval Base, effectively derailing President Obama's plan to close the facility by the end of his tenure in office.[244] As one of us has demonstrated empirically, bureaucratic entrepreneurship (via backchanneling, lobbying, and leaking) has fueled congressional op-

from majoritarian preferences, and when the majority's political interests change relatively rapidly.").

239. *See* HAROLD H. BRUFF, BALANCE OF FORCES: SEPARATION OF POWERS LAW IN THE ADMINISTRATIVE STATE 408 (2006).

240. 463 U.S. 29 (1983).

241. 549 U.S. 497 (2007).

242. Jody Freeman & Adrian Vermeule, Massachusetts v. EPA*: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 52.

243. *See, e.g.*, Michaels, *supra* note 210, at 252-55, 259-60 (describing various strategic alliances civil servants may enter into with, among others, members of Congress and members of civil society); John Hudson & Dan De Luce, *Diplomats' Dissent Bolsters Calls for U.S. Assault on Assad*, FOREIGN POL'Y (June 17, 2016), http://foreignpolicy.com/2016/06/17/diplomats-dissent-bolsters-calls-for-u-s-assault-on-assad [http://perma.cc/DN9J-NVJD] (describing a leaked "memo drafted by bureaucrats deep within the bowls of the State Department" objecting to the Obama Administration's policy on Syria).

244. *See* Aziz Z. Huq, *The President and the Detainees*, 165 U. PA. L. REV. (forthcoming 2017) (manuscript at 3-7) (on file with authors).

position to Guantánamo's closure.[245] Although disagreement still abounds about how best to address the Guantánamo facility's future, cross-branch entrepreneurship by the national security bureaucracy has, at least in this one case, resulted in a poisoned and distorted political atmosphere and perpetuated detentions that civilian and military officials can no longer justify on policy grounds alone.[246]

Additional actors with more discrete or domain-specific tasks also abound. In addition to military officials,[247] there are inspectors general (IGs),[248] participants in congressionally commissioned or agency-commissioned advisory groups,[249] and a fleet of service contractors and other private actors deputized to advance the State's aims.[250] Each of these actors also influences how the executive branch presents itself to other branches and the public, and thus further complicates how separation-of-powers values are realized. For example, although organizationally subordinate to the civilian leadership in the Pentagon, the military has expertise, its own extensive legal codes, cultural practices, and operational authorities, and no shortage of political soapboxes.[251] This de facto independence from presidential control[252] betrays any conception of the executive branch as monolithic, or even exclusively under civilian control, and courts extending particular deference on military matters seem to signal a judicial appreciation of a somewhat autonomous (and intrinsically valuable) military infrastructure.[253] Inspectors general are principally internal auditors of agencies,

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245. *See id.* (manuscript at 29-35).

246. *See id.* (manuscript at 25-29).

247. *See* BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC 43-64 (2010).

248. *See* PAUL C. LIGHT, MONITORING GOVERNMENT: INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY 2-4 (1993).

249. One such notable body is the Independent Payment Advisory Board, which was created to help the Department of Health and Human Services improve the quality and lower the costs of Medicare. *See* 42 U.S.C. § 1395kkk (2012).

250. For wide-ranging studies of government contractors and other private deputies helping design and carry out domestic regulatory, domestic counterterrorism, and overseas security initiatives, see generally GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 23 (Jody Freeman & Martha Minow eds., 2009); PAUL R. VERKUIL, OUTSOURCING SOVEREIGNTY 1 (2007); and Jon D. Michaels, *Deputizing Homeland Security*, 88 TEX. L. REV. 1415 (2010).

251. *See, e.g.*, Deborah N. Pearlstein, *The Soldier, the State, and the Separation of Powers*, 90 TEX. L. REV. 797, 803-04 (2012); *see also* Michaels, *supra* note 160, at 174-76 (describing the deference accorded to the uniformed military by other governmental actors and institutions).

252. *See, e.g.*, Pearlstein, *supra* note 251, at 803-04.

253. *See, e.g.*, Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 377 (2008) (reaffirming the granting of "great deference to the professional judgment of military authorities concerning

identifying and, one hopes, deterring agency wrongdoing particularly with respect to the misuse of funds.[254] Both IGs and the military leadership have ready access to Congress and thus have occasion and, no doubt, reason to operate externally, in addition to their intra-executive efforts.[255] The accelerating use of (and often overwhelming dependence upon) federal contractors is such that some estimates suggest they are now as numerous as federal civilian workers, with many tasked with highly sensitive, discretionary responsibilities in the formulation and implementation of agency policies.

Notwithstanding their overlapping or substitutable responsibilities, contractors and civil servants are very different beasts. Whereas civil servants are protected by law and custom from adverse employment actions absent cause, contractors generally depend quite literally on agency leaders to renew their contracts, thus ensuring the continuation of their work.[256] As a result, they are quite rationally presumed to be much more politically compliant.[257] Thus the choice to deploy contractors instead of civil servants is a consequential one, in part because contractors are more likely to advance a political, probably presidentialist, unitary administrative agenda (over one that is more rivalrous and disaggregated, moderated by longer-term, professionalized bureaucratic inter-

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the relative importance of a particular military interest" and citing and relying heavily on "declarations from some of the Navy's most senior officers" (quoting Goldman v. Weinberger, 475 U.S. 503, 507 (1986))); *Goldman*, 375 U.S. at 507 ("Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society."). Such deference extends even to the military's assessment of the importance of racial diversity. *See* Grutter v. Bollinger, 539 U.S. 306, 331 (2003) (relying extensively on the amicus brief filed by retired military officers and civilian defense leaders and giving particular weight to military officials' representations of the importance of a diversity among the officer corps). There is, of course, a dark side to such deference. *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 218-23 (1944) (deferring to the military on matters deemed to be within the purview of military judgment).

254. LIGHT, *supra* note 248, at 23-25, 43. But recent events suggest a White House effort to limit their efficacy. *See* Eric Lichtblau, *Tighter Lid on Records Threatens To Weaken Government Watchdogs*, N.Y. TIMES (Nov. 27, 2015), http://www.nytimes.com/2015/11/28/us/politics/tighter-lid-on-records-threatens-to-defang-government-watchdogs.html [http://perma.cc/ML5E-3EHC].

255. For an example of congressional lobbying by the Joint Chiefs of Staff on a controversial public policy matter, see GARY L. LEHRING, OFFICIALLY GAY: THE POLITICAL CONSTRUCTION OF SEXUALITY BY THE U.S. MILITARY 137 (2003).

256. *See* Jon D. Michaels, *Privatization's Pretensions*, 77 U. CHI. L. REV. 717, 748-49 (2010) (characterizing contractors as having financial incentives to support agency leaders' agendas).

257. *See id.*

ests regularly at odds with the interests and commitments of the incumbent administration).[258]

b. Intra-Congressional Actors

The bicameral Congress also has a roster of internal players subsumed within and across the two chambers. These players warrant consideration in any analysis of the separation of powers because they not only shape important policy outcomes, but also shape those outcomes differently than might be predicted from an analysis of Congress *proper*. There are, to begin, party-selected House and Senate leaders, who wield considerable power over their institutions and over coalitions that caucus together. Congressional leaders—often serving relatively provincial constituencies, as evidenced by recent Senate Democratic leaders from Nevada and South Dakota—have specific formal powers such as intra-house appointments and access to special briefings and disclosures by the executive branch.[259] The congressional leaders also possess informal agenda-setting powers and make committee assignments. They often act as agents of the "party-in-the-government,"[260] rather than as agents of the institution they serve. Principally because of their assignment and agenda-setting powers, congressional leaders' work overlaps with that of congressional committees.[261] Ranging from the Senate Foreign Relations Committee to the House Ways and Means Committee, these relatively stable subgroups of senators and House members take the lead in framing and conducting debate—sometimes, as in *Chadha*,[262] in ways the Court finds problematic—directing,

258. *See id.*

259. *See* Rafael Gely & Asghar Zardkoohi, *Understanding Congressional Reform: Lessons from the Seventies*, 35 HARV. J. ON LEGIS. 509, 515 (1998) (noting that "party leaders can sanction dissident members, by influencing the committee assignment process"); Heidi Kitrosser, *Congressional Oversight of National Security Activities: Improving Information Funnels*, 29 CARDOZO L. REV. 1049, 1053-58 (2008) (discussing briefing of congressional leadership, but not members, in the national security context); *see also* Chafetz, *supra* note 204, at 736-37 (describing tools Congress can use in such investigations, such as the contempt power).

260. *See* V.O. KEY, JR., POLITICS, PARTIES, & PRESSURE GROUPS 163-65 (5th ed. 1964). In the federal budgeting process, moreover, "dutiful committee members [simply] ratify the policies set by party leaders." Elizabeth Garrett, *The Congressional Budget Process: Strengthening the Party-in-Government*, 100 COLUM. L. REV. 702, 717 (2000).

261. Barry R. Weingast & William J. Marshall, *The Industrial Organization of Congress; or, Why Legislators, Like Firms, Are Not Organized as Markets*, 96 J. POL. ECON. 132, 143-55 (1988).

262. The *Chadha* Court noted that the one-house veto "resolution had not been printed and was not made available to other Members of the House prior to or at the time it was voted on. So far as the record before us shows, the House consideration of the resolution was based on

monitoring, and funding federal initiatives, investigating wrongdoing,[263] and advancing or quashing proposed bills. They also provide influential glosses on enacted legislation via committee reports that some judges use to guide their statutory interpretations.[264] Bridging the two chambers, a range of "unorthodox" institutional arrangements such as budget resolutions and the now-infamous reconciliation process have developed in response to the breakdown of the traditional bicameral process.[265]

Within Congress, a further array of important positions and offices are populated by appointed technocrats rather than the members themselves. The Congressional Budget Office (CBO) and the Government Accountability Office (GAO), for example, are particularly influential congressional entities. Both help define and interpret the annual budget.[266] And both sharpen, clarify, and challenge the positions of members of Congress on controversial legislation, such as the Patient Protection and Affordable Care Act.[267] Lastly, both directly influence wider political and legal debates. Members of Congress, not to mention executive branch officials (and governors, special-interest groups, and the like), are constrained from making unsubstantiated economic or fiscal claims that the CBO could easily rebut or from taking actions that would invite a stern rebuke from the GAO.[268]

Representative and [Subcommittee Chair Joshua] Eilberg's statement from the floor . . . ." INS v. Chadha, 462 U.S. 919, 926 (1983). That single statement was moreover of questionable clarity and, perhaps, veracity. As the Court further noted, "It is not at all clear whether the House generally, or Subcommittee Chairman Eilberg in particular, correctly understood the relationship between the" Attorney General's decision to suspend deportation and the instant proposal to veto that decision through a one-house vote. *Id.* at 927 n.3. And later, the Court thought Eilberg engaged in "obfuscation." *Id.* at 928 n.3.

263. James Hamilton et al., *Congressional Investigations: Politics and Process*, 44 AM. CRIM. L. REV. 1115, 1118 (2007) (documenting the history of congressional investigations over time).

264. For a powerful case in favor of legislative history's use by a sitting judge, see ROBERT A. KATZMANN, JUDGING STATUTES 35-39 (2014).

265. *See generally* BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS (4th ed. 2012) (documenting the emergence of such processes).

266. For example, the GAO is statutorily required to examine government accounting practices and highlight reporting concerns about particular programs to Congress. 2 U.S.C. §§ 683-85 (2012).

267. *See* Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 102 (2015) (discussing lower courts' use of the CBO's Congressional Budgeting Score in statutory interpretation).

268. For the influence of the CBO on Congress, see, for example, Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 764 (2014). The CBO, for example, makes influential deficit forecasts that may have an impact on executive choices. *See,*

c. Judicial Actors

Our central focus in this Article is the play of forces within and between the political branches. Yet two of the five lines of cases charted in Part I—namely, those concerning judicial deference to agencies and the constitutionality of non-Article III adjudication—directly involve the federal judiciary. The judicial branch surely experiences internal conflict, due to geographical dispersal, life tenure, and political currents from which judges enjoy no shelter. Nevertheless, the federal judiciary is likely more cloistered from external forces—via rules against ex parte proceedings and professional norms against political engagement. The judiciary is also less subject to internal disruptions, if only because of the clear hierarchy of the federal court system, the general commitment to principles of precedent, and the division between judges and their support staff. (Whereas agency leaders and members of Congress are often outclassed by their seasoned, expert staffs, rarely would we find a similarly inverted dynamic, or even parity, when it comes to federal judges and their still wet-behind-the-ears term clerks.) More generally, the judiciary has a more coherent and stable set of institutional interests that suppress internal, ideological conflict, that prove unwelcoming to the denizens of the political branches, and that thus result in a unified approach more in keeping with the standard treatments of branches as monoliths.[269]

2. The External Political Surround

The internal ecology of important players within the executive and legislative branches is complemented by a diverse external ecosystem of actors who influence how the separation of powers plays out. These actors are the lineal

e.g., Jackie Calmes, *Budget Office Warns That Deficits Will Rise Again Because Cuts Are Misdirected*, N.Y. TIMES (Sept. 17, 2013), http://www.nytimes.com/2013/09/18/us/congressional-budget-office-predicts-unsustainable-debt.html [http://perma.cc/8AY5-3NZP] (discussing CBO warnings). The GAO also adjudicates bid protests, that is, challenges to the awarding of particular contracts to particular vendors. For discussions and critiques of the GAO's authority, see Robert S. Metzger & Daniel A. Lyons, *A Critical Reassessment of the GAO Bid-Protest Mechanism*, 2007 WIS. L. REV. 1225, 1249-66. To be sure, the epistemic environment of the separation of powers is also shaped by other such congressional administrative entities. The Library of Congress's Congressional Research Service, for one, generates useful documentation on a range of legal, institutional, and policy issues. On the uses of these reports, see Stephanie Strom, *Group Seeks Access to Congressional Research*, N.Y. TIMES (May 4, 2009), http://www.nytimes.com/2009/05/05/us/05research.html [http://perma.cc/7673-H2P9].

269. For extended discussion of the judiciary's institutional incentives, see Aziz Z. Huq, *Judicial Independence and the Rationing of Constitutional Remedies*, 65 DUKE L.J. 1, 63-70 (2015).

descendants of Madison's intermediating institutions (including the states) and de Tocqueville's civil society.

To begin, we have the public itself acting in its diverse democratic capacities. This democratic public votes, assembles, protests, petitions Congress, speaks, and sues the government. These opportunities for public engagement empower various factions, marginal and median, across a heterogeneous and fractious electorate. The public, or at least those individuals and groupings sophisticated enough to employ the available tools, is also legally empowered to influence the administrative process through requests for agencies to promulgate rules, through its substantive participation in the rulemaking process, through its access to information under the Freedom of Information Act,[270] and of course through its ability to bring suits challenging the lawfulness or reasonableness of agency action.[271] At times we see the Court seemingly privileging agency actions that have benefitted from public scrutiny and engagement. For example, much to the dismay of unitary executive theorists, *Mead* establishes a hard-to-rebut presumption that courts grant the less generous *Skidmore* deference to agency interpretations that have bypassed public notice and comment.[272] *Mead* nudges agency officials to engage in more notice-and-comment rulemaking, since those who do so are far more likely to be rewarded with the more deferential *Chevron* review.[273] Despite this judicial encouragement and solicitude, structural and asymmetric limitations on participation—such as economic or educational barriers to entry—matter for any number of reasons. For our purposes, they matter most insofar as certain voices that we expect to be heard in the separation-of-powers scrum will be unnaturally amplified to the exclusion or muffling of others.

Second, and distinct from the public at large, there are the two main political parties, the influence of which some claim eclipses the formal separation of powers.[274] Parties reflect efforts to pool resources and magnify influence among

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270. 5 U.S.C. § 552a(4)(B) (2012).

271. *Id.* § 702.

272. *See* United States v. Mead Corp., 533 U.S. 218, 229-31 (2001); Michaels, *supra* note 16, at 565-66; *see also* David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201-02 (expressing dismay that the greatest degree of deference is not awarded to the decisions of the highest-ranking agency officials).

273. *Mead*, 533 U.S. at 244-46 (Scalia, J., dissenting) (anticipating and lamenting that agencies will shift away from informal decision making in the direction of notice-and-comment rulemaking).

274. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2323 (2006). We assume the two main political parties remain relatively internally co-

those who hold a common set of views.[275] Parties pursue their members' substantive interests through action in all three branches of government. Partisan influences thus mold the agenda and the output of congressional processes. Partisan incentives shape the jurisdiction and personnel of the federal courts.[276] Depending on how representative and inclusive they are, parties can sharpen or obscure the contestation of values and interests in the separation-of-powers arena.

Third, local and state governments also influence how the separation of powers plays out in practice.[277] This is obviously true when federal programs are administered by the states, as is the case with many health, welfare, education, and housing initiatives. In the context of these programs, states often seek to intervene not just at the agency level (where they appeal separately to agency leaders and civil servants), but also with the White House, Congress (where they once again appeal separately to their states' contingent of elected legislators as well as to the relevant committee chairs), and the courts.[278] Indeed, the Court has shown itself to be particularly receptive to states' challenges to federal executive action (or inaction) involving immigration, the environment, and health care.[279] In one environmental case, *Massachusetts v. EPA*, the Court con-

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hesive and effective, but recognize that this assumption may prove false if a partisan realignment or other shock to our party system were to occur.

275. Matthew E. K. Hall, *Rethinking Regime Politics*, 37 LAW & SOC. INQUIRY 878, 880 (2012) (noting that "coalitions use organized political parties to take control of government institutions in order to pursue their political, legal, and policy goals").

276. Howard Gillman, *How Political Parties Can Use the Courts To Advance Their Agendas: Federal Courts in the United States, 1875-1891*, 96 AM. POL. SCI. REV. 511, 513 (2002); Hall, *supra* note 275, at 881; *cf.* MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS, at viii (1981) (describing the judicial appeals process as means "by which central political regimes consolidate their control over the countryside").

277. *See, e.g.*, Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 486-498 (2012) (recognizing states as helping to safeguard the separation of powers in an era of executive dominance); Miriam Seifter, *States as Interest Groups in the Administrative Process*, 100 VA. L. REV. 953, 991-1001 (2014) (highlighting the involvement of state interest groups in the federal administrative process).

278. *See, e.g.*, MITCHEL N. HERIAN, GOVERNING THE STATES AND THE NATION: THE INTERGOVERNMENTAL POLICY INFLUENCE OF THE NATIONAL GOVERNORS ASSOCIATION 32-42, 146-52, 165-67 (2011); Bulman-Pozen, *supra* note 277, at 488-98. For the Court's recognition of the importance of state views before the federal judiciary, see *infra* note 280 and accompanying text.

279. For an example in the health care domain, see *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012). For an example in the immigration space, see *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2257 (2013). *See also* Neal Devins & Saikrishna Bangalore Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty To Defend*, 124 YALE L.J. 2100, 2140 (2015)

ferred what it called "special solicitude" on states, finding states to have Article III standing even when similarly situated private parties may not.[280] Local influence is further registered when local and state officials, such as big-city mayors, state governors, or attorneys general, ascend the national stage and influence policy by leveraging their standing with the public and their political parties.[281]

Fourth, recent work by Daniel Abebe and Ashley Deeks, among others, has brought into focus the diverse ways in which a range of friendly and antagonistic foreign actors, including governments and their equivalents, intervene in the separation of powers to influence policy outcomes.[282] In the national security context, Deeks has argued that American intelligence agencies choose among different policy tools in part on the basis of their foreign counterparts' likely willingness to cooperate or protest.[283] Foreign intelligence agencies therefore not only create opportunities to circumvent domestic-law constraints—as occurs when allies agree to spy on each other's domestic populations—but also supply constraints of their own on policies, such as surveillance and detention, with important separation-of-powers ramifications. Abebe, by contrast, points out that high-level American diplomats, when formulating foreign policy, necessarily account for the interests of foreign allies and opponents.[284] Diplomatic interactions between sovereigns influence domestic policy agendas, sometimes with constitutional repercussions. Presidential efforts to manage multilateral relationships, for example, can lead to executive orders that courts later interpret to preempt state laws.[285] When diplomatic entreaties to the State Depart-

(discussing the failure of state attorneys general to defend certain state statutes in the immigration domain).

280. 549 U.S. 497, 520 (2007).

281. *See, e.g.*, Colin Provost, *When Is AG Short for Aspiring Governor? Ambition and Policy Making Dynamics in the Office of State Attorney General*, 40 PUBLIUS 597, 604 (2009) (reporting that about fifty-four percent of attorneys general who began their service between 1988 and 2003 eventually ran for higher office).

282. *See* Daniel Abebe, *The Global Determinants of U.S. Foreign Affairs Law*, 49 STAN. J. INT'L L. 1 (2013) [hereinafter Abebe, *Global Determinants*]; Daniel Abebe, *Rethinking the Costs of International Delegations*, 34 U. PA. J. INT'L L. 491, 492 (2013); Abebe & Huq, *supra* note 136, at 793-94; Deeks, *supra* note 233, at 86-88.

283. *See* Deeks, *supra* note 233, at 76-86.

284. *See* Abebe, *Global Determinants*, *supra* note 282, at 19.

285. *See, e.g.*, Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 421-25 (2003) (discussing the preemptive effects of the Agreement Concerning the Foundation "Remembrance, Responsibility and the Future," Ger.-U.S., July 17, 2000, 39 I.L.M. 1298); *see also* Abebe & Huq, *supra* note 136, at 736-39 (situating *Garamendi* in a longer line of cases of presidential preemption motivated by foreign affairs concerns).

ment fail, foreign sovereigns can appeal directly to American courts in the form of amicus briefs (which judges seem to cite at a disproportionately high rate)[286] or to Congress and, derivatively, the American people.[287] As Abebe shows, it is often infeasible to gauge the actual balance of federal, interbranch power without accounting for foreign and trans-national actors.[288]

C. *Normative Pluralism and the Thick Political Surround in Separation-of-Powers Case Law*

For the reasons just discussed, normative pluralism and the thick political surround are indeed key background predicates for understanding the separation of powers in practice. But are those predicates relevant to the work of the courts? We conclude this Part by showing how the jurisprudential shifts detailed in Part I suggest a judicial sensitivity not just to normative pluralism (which appears on the surface of opinions and in everyday juridical patter) but also, more subtly, to the thick political surround. This Section thus presents evidence that in each of the five lines of precedent mapped in Part I the Court has grappled—albeit in an inchoate and perhaps unwitting fashion—with the background theoretical predicates we have identified here.

To be very clear at the threshold, our argument in this Section is not that the Court has conceived the two predicates of the separation of powers in the way we do, or that the Justices, whether as individuals or as a collectivity, have refined some theoretically sophisticated way of accounting for those predicates in the form of workable doctrine. Rather, our more modest claim is that some instances of rules-standards cycling suggest latent awareness of the thick political surround's potential to generate virtuous or deleterious forms of politics—to the betterment or subversion of the separation of powers. The analytic and normative framework we have so far developed and will further develop in Part III enables us to posit a theory of rules-standards cycling (and a corollary ac-

286. *See* Kristin E. Eichensehr, *Foreign Sovereigns as Friends of the Court*, 102 VA. L. REV. 289, 319-24 (2016).

287. *See* Julie Hirshfeld Davis & Michael D. Shear, *Netanyahu Speech Raises Burden for Obama on Iran Nuclear Talks*, N.Y. TIMES (Mar. 3, 2015), http://www.nytimes.com/2015/03/04/us/politics/netanyahu-speech-to-congress-obama-iran-nuclear-talks.html [http://perma.cc/57CH-PVRZ] (describing Israeli Prime Minister Netanyahu's speech to Congress and the American people criticizing President Obama's Iran policy).

288. *See* Abebe, *Global Determinants*, *supra* note 282, at 4 (arguing that "the level of internal constraints on the President should vary with the level of external constraints on the United States").

count for assessing where and when such cycling may be most profitably employed).

First, recall the trajectory of the nondelegation doctrine.[289] The Court started with an "intelligible principle" norm operating initially as a standard; the doctrine momentarily hardened, pivoting in 1935 in a rule-like direction; then, just as abruptly, a course correction softened the doctrine once again, leaving us with a permissive standard. The new standard was, however, subject to several rule-like carve out exceptions: categorical bans on private delegations, redelegations to legislators (in the form of legislative vetoes), and assignments of line-item veto powers (over already enacted legislation).

We can understand these oscillations in the following way: The Court initially encouraged widespread institutional experimentation within the burgeoning federal administrative state. The Court hesitated during the "First New Deal" as Congress transferred massive, largely unconstrained power to agencies and private actors alike. Once it became apparent that the administrative domain had grown more orderly, inclusive, and democratically and legally accountable, the Justices felt confident that they could relax the doctrinal strictures, intervening again only surgically to prune away what they took to be the more problematic forms of experimentation.

We therefore think that these doctrinal shifts evince an implicit sensitivity to the thick political surround. When and where the Court balked—again, private delegations, legislative vetoes, and presidential line-item vetoes[290]—it was with respect to practices that departed in important ways from the ordinary forms of delegations, which typically facilitate exercises of federal power reflecting widespread participation (and broad buy-in) from an inclusive, heterogeneous set of engaged actors. Notwithstanding the Court's experience with these exceptional and ultimately unacceptable delegations, the Court stayed true to the baseline "intelligible principle" framework, signaling its continued willingness to encourage and endorse exercises of federal power that are the product of a thick and healthily competitive ecosystem of internal and external actors. To be sure, a healthily competitive and inclusive thick political surround does not *guarantee* that only desirable outcomes emerge from the administrative process. But, in such a context, it is not clear that more rule-like application of the nondelegation doctrine will elicit better results, either on the substantive merits or with respect to the inclusiveness of the administrative process. As a

289. *See supra* Section I.A.

290. Indeed, the Court's rule-like approach to the first New Deal can usefully be explained by the absence of a healthy political surround in that regulatory context. *See* Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1257 (1986).

result, the trajectory of the nondelegation doctrine is at the very least congruent with judicial sensitivity to the thick political surround.

Second, in the removal context,[291] *Humphrey's Executor* can be read as recognizing particular sensitivity to the thick political surround.[292] Simply stated and contra *Myers*, not all top agency officials are in the same position vis-à-vis the President and Congress.[293] Certain officials play roles that are functionally and normatively inconsistent with close political supervision. (One such role would be adjudication.) Others occupy positions where such supervision would yield negligible benefits, given the pressures emanating from internal professional and civil-service constituencies, or even be counterproductive in policy terms given the short-term goals of Presidents. (One such realm might be that of monetary policy.) Were it not for judicial flexibility respecting different mechanisms of control, Congress might not have been as willing to experiment with a broad, variegated administrative state tailored to the needs and demands of difficult pressing social and economic dislocations.

The first judicial gesture toward that dynamic in *Humphrey's Executor* was rather blunt, but the jurisprudence cycled later toward an even more open-ended standard in *Morrison v. Olson*.[294] *Morrison* announced a highly textured, fact-dependent standard that permitted institutional differentiation within the executive branch in the form of an independent prosecutor. By validating this element of the internal political surround, the *Morrison* Court evinced (here quite explicit) sensitivity to the risk of executive misconduct enabled by a concentration of authority within the presidency.[295] The Independent Counsel Act, which was challenged in *Morrison*, had been "a direct byproduct" of the Nixon White House's thwarting of investigations into the Watergate break-ins.[296] An amicus brief filed by the U.S. Senate in the Supreme Court also highlighted the connection between the risk of executive-branch misconduct and the need for

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291. *See supra* Section I.B.

292. 295 U.S. 602, 624-25 (1935).

293. In fairness, dicta from *Myers* seems to reflect the Court's concession that perhaps its categorical rule would have to give way in adjudicatory contexts. *See* Myers v. United States, 272 U.S. 52, 135 (1926).

294. 487 U.S. 654, 690-91 (1988).

295. *Id.* at 677 ("Congress, of course, was concerned when it created the office of independent counsel with the conflicts of interest that could arise in situations when the Executive Branch is called upon to investigate its own high-ranking officers.").

296. Ken Gormley, *An Original Model of the Independent Counsel Statute*, 97 MICH. L. REV. 601, 608 (1998). On the catalytic effect of the Watergate scandal more generally on legislative oversight of the presidency, see FREDERICK A. O. SCHWARTZ, JR. & AZIZ Z. HUQ, UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR 20 (2007).

an unorthodox structural arrangement.[297] Sensitivity to this historical context may thus help explain the softening of the *Myers* rule into the *Morrison* standard, which was more capable of accommodating a wider variety of policy concerns.

Morrison seems to remain good law on the scope of the removal power in some contexts, but it has now been circumscribed by the *Free Enterprise Fund* carve-out for double for-cause removal procedures.[298] Can this partial tacking back to rules in *Free Enterprise* be justified in terms of shifts in the thick political surround? Perhaps the carve-out is justified by the fact that the Court envisions no circumstance under which dual-insulation of agency officials would be warranted. The attenuation of democratic accountability, one of the key normative values, is—at least by the five-Justice majority's lights—simply too great.[299] Perhaps more telling for our purposes is the further carve-out *within* the carve-out that Chief Justice Roberts recognizes for politically insulated ALJs working in independent agencies. The dual-insulation of ALJs does not seem to raise Article II concerns of the sort that motivated the *Free Enterprise Fund* Court. This may be because the Court conceived of ALJs as embedded within a healthier political surround (rightly and properly cut off from presidential politics given their judicial responsibilities), or, more cynically, it may be because eliminating ALJs would shift a heap of high-volume, mundane, and even ministerial disputes onto the doorstep of the federal judiciary.[300]

Third, in the domain of agency interpretative authority,[301] the best evidence of judicial sensitivity to normative pluralism in the thick political surround is *Mead*, which (through a return to the *Skidmore* standard) acknowledges the diversity of administrative practices and then assigns different normative weights to distinct agency procedures and practices. *Mead* opened up opportunities for

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297. Brief for the U.S. Senate as Amici Curiae Supporting Petitioners at 30, *Morrison*, 487 U.S. 654 (No. 87-1279), 1988 WL 1031591.

298. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 499 (2010); *see also supra* text accompanying notes 68-70 (discussing the Court's pivot from the open-textured *Morrison* standard toward a per se rule against multilevel removal protections).

299. One of us has identified a slate of empirical and theoretical grounds to doubt the cogency of this pessimistic diagnosis and its somewhat wooden application in *Free Enterprise Fund*. *See* Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 24-52 (2013) (arguing against the categorical position taken by *Free Enterprise Fund*).

300. *See supra* text accompanying notes 150-152. *Free Enterprise* also does not address the dual-insulation of civil servants within independent agencies. For possible reasons why the insulation of civil servants within independent agencies raises unhealthy political surround concerns (of the sort that the dual insulation of ALJs may not), see Michaels, *supra* note 210, at 283-86, 288.

301. *See supra* Section I.C.

greater federal-court sensitivity to institutional heterogeneity. As a result, it might be praised as allowing Congress a greater menu of design choices from which to choose (responsibly). After all, Congress can be comforted by the fact that courts will more fully supervise the administrative process, encouraging thick, inclusive administrative participation, while discouraging (or at least more aggressively scrutinizing) unilateral decision making that reflects an unwillingness to engage fully with the broad, diverse public and other interested stakeholders.

Indeed, we could drill down further. Just as *Mead* reflects a greater judicial appreciation of the need to accommodate the increasingly diverse forms of administrative action when it comes to reviewing agencies' statutory interpretations, cases today are signaling a similar need when it comes to reviewing agencies' interpretations of their own rules. For decades, courts have reflexively and categorically extended so-called *Auer* (or *Seminole Rock*) deference in a rather blunt, one-size-fits-all fashion.[302] Calls to abandon *Auer* deference are today loud and seemingly getting louder.[303] Many propose that courts apply something akin to *Skidmore* deference.[304] Motivating these calls is a concern over agencies' concentration of power—specifically, the power to propose vague rules and the corresponding power to interpret those rules with considerable flexibility and latitude.[305] A *Skidmore*-like approach would give courts greater leave to police those subsequent interpretations (as well as more leverage to encourage agency officials to be more inclusive and solicitous of many opinions when formulating an interpretative decision). Though *Auer*'s days

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302. *See* Auer v. Robbins, 519 U.S. 452, 461 (1997); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945).

303. *See, e.g.*, Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1211 (2015) (Scalia, J., concurring); *id*. at 1213 (Thomas, J., concurring); Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1338-39 (2013) (Roberts, C.J., concurring) (signaling an openness to reconsidering *Auer* deference); *id*. at 1339-42 (Scalia, J., concurring in part and dissenting in part) (conveying a readiness to overturn *Auer*).

304. *See, e.g.*, John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 616, 618 (1996) ("[C]ourts should evaluate agency interpretations of regulations under the standard of judicial review prescribed by *Skidmore v. Swift & Co*.").

305. *Id.* at 618, 647-48; *see also* Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2168 (2012) (contending that *Auer* deference "creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit"); Talk Am. Inc. v. Mich. Bell Tel. Co., 131 S. Ct. 2254, 2267 (2011) (Scalia, J., concurring) (similar). *But see* Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of* Auer, 83 U. CHI. L. REV. (forthcoming 2016) (manuscript at 12-14), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2716737 [http://perma.cc/ADC2-9DDK] (questioning claims of agency bad faith).

may well be numbered, at least some commentators recognize that a sea change may not be necessary since "*Auer*'s 'domain' is [already] increasingly limited by a series of important carve-outs—carve-outs that 'tailor deference to variety,' just as *United States v. Mead* limits *Chevron*."[306] The details of those carve-outs need not detain us here.[307] What suffices is the observation that here is yet another context in which the courts seem open to jurisprudential pruning to encourage and promote healthier forms of administrative engagement.

The fourth and fifth examples of cycling evince the least sensitivity to the normative concerns we have identified in this Part.[308] In the case of Article III jurisprudence concerning bankruptcy courts, we have shown that the Court has moved from a standard in cases such as *Katchen*[309] to a rule in cases such as *Northern Pipeline*[310] and *Stern*,[311] and then back partway to a standard in *Wellness International*.[312] These fluctuations stand in stark contrast to the relative stability of the Court's commodious interpretation of Article III in the agency adjudication context.[313]

We see little explanation of or justification for this cycling in terms of the thick political surround and normative pluralism. The Court's periodic turn to rules limiting the scope of bankruptcy jurisprudence can be glossed as evidence of its hostility to bankruptcy judges, perhaps due to a perception that those officials cannot be trusted with significant independent authority.[314] It is possible that concerns about the capture of the bankruptcy process by parochially minded insiders could justify the Court's occasional doctrinal shifts toward rules (and indeed, could also reflect a judicial effort to preserve the healthy internal ecosystem of the federal courts). But the Court has never even gestured toward a reason for its suspicion of bankruptcy judges—or why the latter warrant a jaundiced treatment while administrative agencies secure a relatively free pass to adjudicate a host of claims. One possible reason, we surmise, is that the Court thinks very differently about the political surround enveloping the ex-

306. Conor Clarke, *The Uneasy Case Against* Auer *and* Seminole Rock, 33 YALE L. & POL'Y REV. 175, 178 (2014) (citing United States v. Mead Corp., 533 U.S. 218, 236 (2001)).

307. For a discussion of carve-out cases, see *id.* at 182-91.

308. *See supra* Sections I.D, I.E.

309. *See* Katchen v. Landy, 382 U.S. 323, 339 (1966).

310. *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 67-68 (1982) (plurality opinion).

311. *See* Stern v. Marshall, 131 S. Ct. 2594, 2626 (2011) (Breyer, J., dissenting).

312. *See* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1942-43 (2015).

313. *See supra* text accompanying notes 150-155.

314. *See* Douglas G. Baird & Anthony J. Casey, *Bankruptcy Step Zero*, 2012 SUP. CT. REV. 203, 205.

ecutive branch than it does about the same such surround enveloping the judiciary. It is nevertheless our sense that, if anything, the ubiquity of political actors lurking around administrative adjudicators—and the relative absence of those types of actors in the more austere judicial surround—should lead to the opposite result.

Moreover, bankruptcy law, unlike administrative law, is largely procedural in character. It does not change the metes and bounds of private rights.[315] As one of us has argued elsewhere, the scope of bankruptcy courts' domain can be defined and delimited to the class of cases in which resolution in a federal forum casts no distorting shadow on the private ordering of state-law property and contract rights.[316] Lastly, bankruptcy judges comprise a relatively professional and non-ideological caste.[317] District court judges have ample tools, if not always sufficient inclination, to oversee their work.[318] There is little reason to think that any given aspect of the normative pluralism that the separation of powers aims to promote is imperiled by the institutional heterogeneity of current bankruptcy practice.

This brief analysis suggests that Article III-related separation-of-powers doctrine contains room for improvement, compared against a baseline of preserving normative pluralism and institutional heterogeneity. Given the comparative expertise of the bankruptcy bench, the close supervision available from the federal courts of appeals, and the necessarily sporadic and disjointed attention that the Supreme Court can give to these cases, there is a strong case for treating non-Article III bankruptcy courts the same way we treat non-Article III agency adjudicators: as an occasion for announcing an open-textured standard with ample room to accommodate both new policy considerations and the previously unconsidered policy concerns of different or emerging democratic actors. If anything, the differences between bankruptcy and agency adjudication would suggest that there should be more cycling in the latter context because of the wider diversity of adjudicative venues, substantive rights and in-

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315. Douglas G. Baird, *Bankruptcy Procedure and State-Created Rights: The Lessons of* Gibbons *and* Marathon, 1982 SUP. CT. REV. 25, 34-35 ("[F]ederal bankruptcy law is largely procedural, rather than substantive, as far as the creditors are concerned.").

316. *See* Casey & Huq, *supra* note 92, at 1205-17 (demonstrating that most bankruptcy law can be defined and operationalized with de minimis effect on private orderings of property and contract law).

317. Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 STAN. L. REV. 747, 748 (2010) (arguing that the bankruptcy bench "exhibit[s] the 'Article III values' [of] professional, creative, and non-ideological resolution of complex disputes").

318. *See id.* at 791 (discussing the ability of district judges to refer bankruptcy appeals to magistrate judges).

terests, and species of legal authority at stake across the panoply of federal agencies.

Finally, we demonstrated in Section I.E that the Court has tacked between rules and standards in its treatment of statutory authorizations for presidential initiatives in the foreign affairs and national security contexts. Whereas the Court has treated statutory text as a narrow authorizing rule in cases like *Youngstown*,[319] *Hamdan*,[320] and *Medellín*,[321] it has read statutes as broad standards in other instances, including cases concerning presidential power to settle claims against foreign nations[322] and concerning the executive's ability to detain citizens in military custody.[323]

This doctrinal instability in national security and foreign affairs is likewise difficult to explain in terms of normative pluralism and the thick political surround. On the one hand, the effects of the thick political surround in national security and foreign affairs are likely to be especially unstable both temporally and substantively because of the fluid and unpredictable nature of geopolitical conditions.[324] Consider, by way of illustration, the shifting pressures on immigration policy created by conflict in Central America, the evolving demands of national security policy given the threat from the Islamic State, and the periodic shocks from global economic changes. Hence, a set of doctrinal responses that are sensitive to changes in the thick political surround and to the corresponding changes in the proper balance of the system's plural values is likely to evince a considerable amount of variability. On the other hand, there is reason to ask whether judicial pivots in fact correspond in some reasoned fashion to the changing institutional ecosystem in this particular domain. Even if judges have all the necessary information, it still may be difficult for them to determine whether a rule or standard will generate better deliberative processes or substantive outcomes. This question of institutional competence is one to which we return in the Conclusion.

In summary, the Court's work product in the separation of powers reflects a measure of sensitivity to both normative pluralism and the thick political sur-

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319. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585-86 (1952) (plurality opinion); *id.* at 635-38 (Jackson, J., concurring).

320. Hamdan v. Rumsfeld, 548 U.S. 557, 620-24 (2006).

321. Medellín v. Texas, 552 U.S. 491, 506-14 (2008); *see supra* text accompanying notes 130-132.

322. *See* Dames & Moore v. Regan, 453 U.S. 654, 677 (1981); *supra* text accompanying notes 122-125.

323. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 538 (2004) (plurality opinion); *supra* text accompanying note 126.

324. Abebe, *Global Determinants*, *supra* note 282, at 4-5.

round, albeit imperfectly and inconstantly. We doubt that the Court theorizes the separation of powers in the terms we have developed; we doubt too that the Court has analyzed the occasions for rules-standards cycling with any rigor. Indeed, our brief review of the jurisprudence suggests only sporadic, seemingly unwitting, attention to the dynamics our Article highlights. After all, by our lights, some lines of separation-of-powers cycling can certainly be justified as sensible, perhaps intuitive responses to normative pluralism in the context of the thick political surround; other lines, however, seem unjustified, perhaps even a touch lawless.

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This Part has set forth two basic premises about the separation of powers and traced their palimpsest across the Court's jurisprudence. By way of conclusion, we reiterate those two foundational principles. First, the separation of powers cannot be reduced to a single normative value. Rather, cross-cutting currents of liberty, administrative efficiency, democratic accountability, and a commitment to the rule of law inform our governmental structure. Each of these normative tugs is evident in several lines of separation-of-powers jurisprudence. Second, threads of public participation, identified by Madison and de Tocqueville, knit together into a thick political surround of interest groups, institutional actors, political factions, and diffuse democratic masses that infuse and surround the branches, and necessarily inform the separation of powers' practical operation.

Normative pluralism in the thick political surround does not imply that the separation of powers is a free-for-all. The dynamic character of the separation of powers need not mean that any and all institutional arrangements are licit: it is quite clear that *some* institutional arrangements are out of constitutional bounds. Accordingly, the challenge is to develop a theory that sorts permissible from impermissible institutional settlements, while offering a reasonable explanation of how the Court crafts doctrinal instruments to distinguish these different arrangements in an evolving and complex normative and institutional environment. This is the challenge we now take up in Part III, where we consider justifications for particular species of doctrinal cycling and then suggest possible doctrinal frames for evaluating our institutionally and normatively complex separation of powers.

III. THE LOGIC OF RULES-STANDARDS CYCLING IN SEPARATION-OF-POWERS LAW

This Part demonstrates that, at least as a theoretical matter, rules-standards cycling can emerge from a judicial effort to honor plural separation-of-powers values in the context of a thick (and dynamic) political surround. Like many other regulators, courts may be well advised to employ both rules and standards to elicit a sensible mix of separation-of-powers values within this all-important but ever-changing thick political surround.

We begin by explaining the virtues of standards in separation-of-powers jurisprudence as well as their limitations. We thus identify patterns in which courts start with standards, and then shift to rules (which of course have their own virtues and shortcomings) before cycling back to standards. (The pattern can, to be sure, be reversed, starting with rules, softening into standards, and then hardening once more.) In developing this argument, we draw insights from illuminating discussions of cycling between rules and standards in other legal and social contexts, as well as illustrative examples from the case law discussed in the previous two Parts. Specifically, we identify correspondences and similarities between other observed instances of rules-standards cycling and those we discern in the separation-of-powers context. We conclude by offering some tentative thoughts on how the separation-of-powers doctrine might be organized to manage rule-standards cycling.

Again our claim is not that the mechanisms we identify here *explain* most instances of jurisprudential cycling. Rather, we seek to demonstrate what a coherent separation-of-powers jurisprudence may or could entail as a matter of first-order normative constitutional theory. If such a jurisprudence is desirable—a point we take up in the Conclusion—we think courts *should* embrace cycling. In short, our accounts of normative pluralism and the thick political surround combine to provide a single framework for analyzing rules-standards cycling in separation-of-powers jurisprudence. The normative justification for this framework provides a much-needed benchmark against which observed examples of rules-standards cycling can be evaluated and critiqued. It also gives us reason to think more critically about judges' competence in a separation-of-powers realm complicated and clouded by the hustle and bustle of the thick political surround.

A. The Allure of Standards

Our decision to begin at the standards end of the spectrum is not wholly arbitrary, although, given the circularity of cycling, we could just as easily have played out our argument beginning with rules. The Constitution prescribes

some hard-edged rules in the separation-of-powers domain, but it does not fully assign or clearly explain the allocation of many of the political branches' governing responsibilities and prerogatives.[325] Unsurprisingly, litigation tends to arise in the absence of a precise textual settlement.[326] Hence, it may be that Justice Kennedy is correct to say in *Public Citizen* that it is not at all surprising that the Appointments Clause has generated far less reticulated case law than the removal power.[327] The resulting tendency of initial litigation, especially at the Supreme Court level, to present difficult cases where there is no precise textual rule provides a compelling reason to begin with standards rather than rules.[328]

In the separation-of-powers context, difficult cases of first impression—on recess appointments, presidential line-item vetoes, and non-Article III adjudications of pendent state-law counterclaims—are surprisingly common.[329] Given the likely posture of most novel constitutional challenges, a judicial inclination to begin by announcing a standard is sensible. The promulgation of rules

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325. Manning, *supra* note 21, at 1978-85.

326. Regulated entities' divergent estimates of the law foster a greater likelihood of litigation. *See* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 13-17 (1984). Further, the sheer number of entities within the thick political surround raises the likelihood that one or another entity will file suit.

327. *See supra* text accompanying note 147. A countervailing argument is that textual clarity is itself not endogenous to the choice of words in the document. *See* Curtis A. Bradley & Neil S. Siegel, *Constructed Constraint and the Constitutional Text*, 64 DUKE L.J. 1213, 1238-67 (2015) (discussing "the construction of textual ambiguity or clarity" and contending that "the perception of clarity or ambiguity is itself often affected by interpretive considerations that are commonly thought to be extratextual"). As a result, textual clarity may sometimes be sufficient to generate settlement (as, for example, with respect to the threshold ages of the President, senators, and representatives), but a sufficient measure of political controversy may well be enough to transform a "plain" text into a contested one.

328. We see no error in attending to the general goals reflected by the Constitution and do not think that our organic document is exhausted by casuistic excavations of the text. As David Strauss has persuasively explained, constitutional law has never exclusively focused on the text, and in many instances, the text is only one datum (and then not a terribly important one) in constitutional interpretation. *See* David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1457 (2001) (noting that despite "all the attention that constitutional amendments receive . . . our constitutional order would look little different if a formal amendment process did not exist"); *see also* David A. Strauss, *Constitutional Fundamentalism and the Separation of Powers: The Recess Appointments Case*, 83 U. CIN. L. REV. 347, 360 (2014) ("The text of the Constitution is not invisible, but the main subject of constitutional law is the decisions. The same is true of constitutional litigation.").

329. *See generally supra* Part I (exploring the difficulty and complexity of issues in the separation-of-powers context). Our intuition is that separation-of-powers cases present issues of first impression more often than other doctrinal lines, such as federalism or individual rights.

requires information about what considerations should, and also should not, count in determining whether the law has been violated. But courts, like other decision makers, will often lack this information when a constitutional question first arises.[330] Starting with standards not only gives judges an opportunity to find their footing in unfamiliar institutional terrain, but also enables them to invite coordinate branches (and actors inhabiting the thick political surround) to offer responsive clarifications and experimental enhancements before the next separation-of-powers dispute arises. Instances where the Court has imposed a rule upon its first encounter with an institutional practice might well be criticized on this ground alone.[331] Hence, to the extent that first-cut judicial interventions limiting, for example, presidential removal powers or presidential line-item vetoes have generated sharp and categorical rules rather than standards, we think that the Court can rightly be criticized for acting without a robust empirical foundation. To be sure, some of those decisions may ultimately be correct, but we think that the Court would have been better served approaching the underlying question more tentatively over time in keeping with a more cautious, common-law-like methodology.

Starting with standards can be justified on grounds beyond this threshold epistemic advantage. To begin with, initially translating the separation of powers into a hard-edged rule rather than a standard might make it difficult to adapt to new and unexpected social or political pressures.[332] Excessive reliance on rules rather than standards as an initial matter will likely constrain ongoing democratic governance—prematurely ruling out some potential solutions and perhaps also disabling some elements of the thick political surround, locking in winners and losers, and deterring the losers from regrouping and refining their tactics in ways that could contribute greatly to the separation of powers.

What is more, the American experience with state-building suggests that judicial reliance on rules may also destabilize the constitutional project as a

330. *See* Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 992 (1995) ("The first problem with rules is that it can be very hard to design good ones. In many areas, people lack enough information to produce rules that will yield sufficiently accurate results.").

331. *But see* David A. Super, *Against Flexibility*, 96 CORNELL L. REV. 1375, 1380, 1382-83 (2011) (critiquing the general presumption in legal thinking that it is best to delay difficult, rule-like decisions with the expectation that better and sharper decisions can be made when more information becomes available).

332. *See* Jon Elster, *Intertemporal Choice and Political Thought*, *in* CHOICE OVER TIME 35, 43 (George Loewenstein & Jon Elster eds., 1992) (identifying the need to find "an optimal balance between stability and rigidity" in constitutional design).

whole.[333] Federal responses to the New Deal are a canonical example of virtuous, perhaps even necessary, experimentation in response to dynamic institutional and demographic changes.[334] But the New Deal was hardly the first time that such adaptability was called for. In the early nineteenth century, for example, legislators and Presidents struggled to reconcile their constitutional understandings of modest grants of federal power with the practical imperative of creating an effectual network of roads and canals, forming a national bank, and acquiring vast tracts of western lands.[335] To be sure, it is always possible to appeal to inchoate notions of constitutional necessity in order to vindicate ultra vires actions.[336] But judicial refusal to recognize claims of practical necessity in cases of first impression seems to be a distinct second-best to the ex ante use of capacious and accommodating standards that can more candidly account for the diversity of pressures upon the separation of powers' plural values and the resulting need for flexibility in governance.[337] The case for standards and the experimentation and innovation they enable is particularly strong where we encounter no textual prohibition against the democratic polity's choice of institutional forms.

Relatedly, standards engage democratic virtues even if no change in circumstances occurs. They allow different political coalitions drawn from the thick political surround, facing diverse social and political dilemmas, to negotiate and jockey among themselves to propose and produce any number of institutional solutions that embody different but quite possibly reasonable permutations of the separation of powers' normative goals. Standards hence

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333. The rigid amendment rule in Article V of the Constitution may have hindered such useful experimentation, but might have an independent justification: it provided an assurance to political factions that their early investments in the project of building the new republic would not be exploited. *See* Aziz Z. Huq, *The Function of Article V*, 162 U. PA. L. REV. 1165, 1191-1222 (2014) (identifying and analyzing this hold-up problem).

334. Michaels, *supra* note 16, at 526-27 (describing how the New Deal state arose from "relentless pressures of modern times" (citation and quotation marks omitted)).

335. *See* Alison L. LaCroix, *The Interbellum Constitution: Federalism in the Long Founding Moment*, 67 STAN. L. REV. 397, 409-40 (2015) (recounting debates around the limits of the spending power from this period).

336. Thomas Jefferson, for example, justified the 1803 Louisiana Purchase in these terms. *See* Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810), *in* 9 THE WRITINGS OF THOMAS JEFFERSON 279, 279 (Paul Leicester Ford ed., 1892-99) ("[S]trict observance of the written law is doubtless *one* of the high duties of a good citizen, but it is not *the highest*. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation.").

337. In contrast, note that a constitutional rule supported by a single central value would not suffer from this vulnerability. It is thus precisely the separation of powers' normative pluralism that makes standards so useful.

accommodate the normative pluralism represented within democratic contestation better than rigid rules that would lock in certain combatants' institutional preferences or altogether preempt engagement between and among those would-be combatants in the thick political surround.[338]

The Court's jurisprudence applying Article III to agency adjudication[339] and its *Chevron-Mead* jurisprudence,[340] in particular, evince such openness to experimentation. In both domains, openness might be analyzed in terms of the evolving thickening political surround. As the internal political surround of intra-agency lawyers, civil servants, and ALJs has become denser, as civil-service protections have taken root, and as democratic forces have demanded an even greater array of interventions from the regulatory state, the case for requiring strict, uniform, and conforming practices within the executive has become weaker. Even if the Court is not consciously responding to those shifts, its relaxation of rules into standards can be justified in those terms.

Finally, standards have a related virtue, which might be termed an anti-Thayerian effect. Famously, James Thayer worried about the emasculating effect of judicial review on legislative and executive incentives to deliberate seriously on the Constitution.[341] But standards framed in terms of vague, normatively freighted terminology are not self-applying. They instead require regulated entities to engage in normatively oriented deliberation.[342] That is, officials acting in good faith against the backdrop of judge-made standards cannot help but confront the meaning of fraught, contested terms such as democracy, efficiency, and accountability.[343] In so doing, they are more likely to articulate pub-

338. A rule can reflect a compromise between different normative values. That compromise, however, is stable over time and therefore insensitive to novel and unforeseen considerations. Hence, it is likely to be inferior to a standard.

339. *See* Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 587 (1985) ("The enduring lesson of *Crowell* is that practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III.").

340. *See supra* text accompanying notes 75-84.

341. *See* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 130-38 (1893) (arguing that where "a power so momentous as this primary authority to interpret is given [to legislatures]," legislative decisions "are entitled to a corresponding respect").

342. *See, e.g.*, Shiffrin, *supra* note 17, at 1222 (describing how vague standards can "requir[e] that the citizen who aims to be compliant, whether from motives of justice or motives of prudence, grapple with the relevant moral concepts directly"). Shiffrin's argument concerns moral deliberation, but her argument logically extends to other kinds of deliberation and engagement.

343. Congress, to be sure, has been inconstant in the scrupulousness of its attention to constitutional questions. *Cf.* Abner J. Mikva, *How Well Does Congress Support and Defend the Constitu-*

licly how they understand those obligations in a fashion that renders government more transparent and its participants more thoughtful and disciplined.[344] This forcing of public deliberation may be especially valuable if courts are reluctant to probe legislative and executive intent directly, as has historically been the case.[345] Standards may therefore provide a solution to the arguably pervasive, but difficult to police, problem of "constitutional bad faith."[346]

None of this is to say that the Court will inevitably begin with standards rather than rules. As we explore below, cognizance of the thick political surround might also drive the Court to adopt a rule as a threshold matter, as it did in the removal cases beginning with the rule set forth in *Myers*.[347] Such an alternative starting point, however, seems to make sense in only a minority of cases.

B. The Movement from Standards to Rules . . .

Starting with standards does not mean we commit to standards long term. Over time, standards tend to be refined, hardened, or narrowed, and thus begin to transform into rules. We envision at least three dynamic forces potentially at work here, with the caveat that one is more of a theoretical possibility than an observed reality.

First, standards almost invariably harden over time. This is because as both judges and administrators see similar legal challenges recurring with some frequency, there are strong incentives to recall formal and informal precedents,[348] develop guidelines, employ "rules of thumb,"[349] and rely on "historical gloss,"[350]

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tion?, 61 N.C. L. REV. 587, 588 (1983) (noting that "the legislature has for the most part . . . left constitutional judgments to the judiciary").

344. For a similar point, see Kathleen M. Sullivan, *The Supreme Court 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 67 (1992), which argues that "standards make visible and accountable the inevitable weighing process that rules obscure."

345. *See generally* Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784, 1784 (2008) (tracing the history of judicial review of legislative purpose and noting that "for most of our history, courts have shied away from [this] inquir[y]").

346. On the pervasiveness of the bad-faith concern, see David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 918 (2016), which notes that "constitutional law is distinguished not only by exceptionally low levels of bad faith talk inside the courts but also by exceptionally high levels of bad faith talk outside the courts."

347. *See supra* text accompanying notes 53-60.

348. Schauer, *supra* note 18, at 316-17.

349. *Id.* at 316.

350. Historical gloss comprises evidence of the "traditional ways of conducting government" that is used to "give meaning" to the Constitution. Mistretta v. United States, 488 U.S. 361, 401 (1989) (citation omitted).

if for no other reason than to lower the transaction costs of mundane or repetitive governance.[351] When a once-novel problem begins arising regularly, the common-law method of adjudication, with its central reliance on precedent and stare decisis, is likely to nudge in the direction of a rule.[352] An example of a standard calcifying into a rule through common-law adjudication can be found in the jurisprudence on judicial deference to agency interpretations. As we explained in Section I.C, the shift from *Skidmore* to *Chevron* involved a gradual hardening of an open-textured standard in the course of iterative common-law litigation.[353] Even before *Chevron*, and within the multifactor *Skidmore* test, the Court had started to delineate a class of cases in which agency interpretations reliably secured a weightier measure of deference.[354] As a result, when *Chevron* was decided it was seen by some knowledgeable commentators as less of a revolution than a clarifying restatement of what everyone had already begun to understand.[355] By most accounts Justice Stevens, *Chevron*'s author, himself never viewed or intended that decision to effect a dramatic shift in the law of agency statutory interpretation.[356]

Even in the absence of common-law adjudicators, officials tasked with interpreting and applying a standard will likely supplement their initially open-

351. *Cf.* Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 681 (D.C. Cir. 1973) (noting that "the availability of substantive rule-making gives any agency an invaluable resource-saving flexibility in carrying out its task of regulating parties subject to its statutory mandate").

352. Schauer, *supra* note 18, at 316-17.

353. *See supra* text accompanying notes 72-78.

354. *See, e.g.*, Chrysler Corp. v. Brown, 441 U.S. 281, 295-316 (1979) (explaining that "properly promulgated, substantive agency regulations have the 'force and effect of law'" (citing Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977); Foti v. INS, 375 U.S. 217, 222 (1963); United States v. Mersky, 361 U.S. 431, 437-38 (1960); Atchison v. Scarlett, 300 U.S. 471, 474 (1937))); *cf.* NLRB v. Brown, 380 U.S. 278, 291 (1965) ("Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.").

355. *See, e.g.*, KENNETH CULP DAVIS, ADMINISTRATIVE LAW OF THE EIGHTIES: 1989 SUPPLEMENT TO ADMINISTRATIVE LAW TREATISE § 29:16, at 505-07 (2d ed. 1989) (opining that *Chevron*'s command of controlling deference to reasonable legislative regulations reflected longstanding doctrine); *see also* Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235, 1241 (2007) ("In fact, *Chevron*'s two steps merely reflect pre-*Chevron* deference principles.").

356. *See, e.g.*, Deborah N. Pearlstein, *A Measure of Deference: Justice Stevens from* Chevron *to* Hamdan, 43 U.C. DAVIS L. REV. 1063, 1068-69 (2010) ("[I]f you talk to the law clerk who worked on the *Chevron* opinion, there really does seem to be a sense that the opinion was intended only to describe what the Justice thought the law was at the time—not to change the face of administrative law for the following thirty years.").

ended directives with "more specific 'guidelines' or 'rules of thumb,'" that reflect their growing body of knowledge and experience.[357] These guidelines and "rules of thumb" then filter into judicial opinions in the form of "historical gloss."[358] Hence historical gloss, normally considered a neutral judicial tool for constitutional interpretation, in fact conduces to a drift from separation-of-powers standards to separation-of-powers rules.

Historical gloss comprises evidence of the "traditional ways of conducting government" used in order to "give meaning" to the Constitution.[359] In many cases, these "traditional ways" will be the products of actors in the internal thick political surround. Indeed, it may well be that the prospective reliance on such "traditional ways" in constitutional interpretation creates a marginal incentive for some within the internal thick political surround to develop and publicize practices and adhere to set routines. Courts have long looked to such practice-based evidence in order to give content to vague or ambiguous constitutional norms.[360] When courts use such evidence—either to restrict or to allow a challenged governmental course of action—they express the prevailing legal norm a bit more precisely. In short, a norm that was previously open-textured becomes a bit more textured, a bit more nuanced, and a bit more rule-like.

An example of this can be found in the Court's 2014 decision on recess appointments, *NLRB v. Noel Canning*, where the majority opinion relied on "historical practice" to permit appointments during intrasession congressional recesses and also to reject a requirement that a vacancy must initially occur during a given recess.[361] The Court further invoked historical practice to cast doubt on the President's power to make recess appointments during recesses of less than ten days' duration.[362] *Noel Canning* thus simultaneously licensed and restricted presidential discretion. Both elements of the decision, though, added

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357. Schauer, *supra* note 18, at 316.

358. *See, e.g.*, Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 417-24 (2012) (explaining how the "historical gloss" argument has shaped the scope of the President's powers).

359. Mistretta v. United States, 488 U.S. 361, 401 (1989) (citation omitted).

360. *See, e.g.*, *id.* ("Our 200-year tradition of extrajudicial service is additional evidence that the doctrine of separated powers does not prohibit judicial participation in certain extrajudicial activity."); *see also* Dames & Moore v. Regan, 453 U.S. 654, 686 (1981) ("Past practice does not, by itself, create power, but 'long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent . . . .'" (quoting United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915))).

361. 134 S. Ct. 2550, 2600-06, 2610-17 (2014).

362. *Id.* at 2567 ("There are a few historical examples of recess appointments made during intersession recesses shorter than 10 days.").

precision to a previously uncertain constitutional text. In this fashion, the *Noel Canning* decision pressed the law on recess appointments toward precision and away from open-texturedness. Judicial invocation of historical gloss therefore became a mechanism for the movement from standards to rules.

Second, there is a less organic but no less dynamic way in which standards evolve into rules. In some cases, the Court may detect some inhabitants of the thick political surround abusing the Court's permissive standards in ways that subvert the normative pluralism of the separation of powers. This may be the result of opportunism and disregard for underlying constitutional norms or merely an instance of "self-interest seeking with guile."[363] The Court would therefore step in to limit or proscribe certain exploitative practices or forms of participation by imposing hard-edged rules, tightening a standard, or by creating a rule-like carve out from that still-broad standard's application. That is, the Court might recognize that its experiment-encouraging standards are subject to abuse in ways that subvert the normative pluralism of the separation of powers.

As intimated above, there are exceptions to the dynamic practice of allowing experimentation and then pruning the most destructive or exploitative forms of such experimentation. We are unlikely to encounter such judicially encouraged experimentation when confronted with a particularly strong first showing of exploitation or abuse (or readily apparent signs of imminent exploitation or abuse). Under such, likely rare, conditions, courts may well begin with a rule, rather than a standard.[364] Yet even in these contexts, courts that rush to announce a rule run the risk of preemptively proscribing new and entirely salutary forms of democratic or institutional engagement.

There are several instances in the Court's separation-of-powers jurisprudence that might be glossed in roughly these standards-to-rules terms, although we caution once more that the Court does not frame its analysis in terms of normative pluralism and the thick political surround. The Court's resistance to private delegations springs to mind as an obvious instance where concerns about interest-group entrenchment and an absence of healthily competitive institutional dynamics might have motivated the shift from a standard to a rule altogether proscribing that administrative tool.[365] The seeming durability of

363. OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING 47 (1985).

364. *See supra* text accompanying notes 325-328 (explaining that the presence of clear textual commands or limitations can justify adopting a bright-line rule even in a case of first impression). For the reasons stated in Section III.A, though, we anticipate that the Court will more commonly begin with a standard.

365. *See supra* text accompanying notes 39-40.

the anti-private-delegation rule, moreover, suggests that the Justices remain categorically skeptical of the potentially corrosive form of politics that private delegations engender.[366]

Recall too *Chadha*'s insistence that only the "single, finely wrought and exhaustively considered . . . procedure" of bicameralism and presentment can be used to alter the effect of legal pronouncements.[367] *Chadha*'s expressed logic is in some tension with other, long-standing elements of the Court's jurisprudence, which render failures of bicameralism immune from judicial scrutiny as a result of the "enrolled bill" doctrine.[368] One can gloss the difference between *Chadha* and the nonjusticiability of bicameralism challenges more generally by postulating that the Court believed that factions in Congress had misused (or stood poised to misuse) the legislative veto. The Court's decision perhaps thus reflected not a formalist fidelity to Article I, Section 7's text, but rather a more situated judgment about the operation of Congress's (dysfunctional) internal political surround,[369] as no doubt evidenced by the Court's clear frustration with the procedural shoddiness and substantive duplicity associated with one-house veto votes.[370] Whether the outcome of *Chadha* should be endorsed or decried, therefore, should turn at least in part on an assessment of the Court's political judgment.

We stress this less organic path of the hardening of standards, which depends on judicial estimates of contingent institutional dynamics, to underscore that any such abrupt shift to rules comes at the expense of experimentation and innovation by virtuous or even newly arriving members of the thick political surround. This is not to say rule-like interventions are inherently problematic. We readily concede that the thick political surround may need policing. Starting with a standard allows the political dynamics time and space to play out. Disruptions or subversions may never arise. They may be dealt with internally or through the legislative process. But if all else fails, the courts may have to intercede, imposing some rules to discipline a potentially problematic surround. Doing so later in the process allows for the imposition of more surgical rules, prohibiting some targeted activities while leaving collateral forms of political

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366. *See, e.g.*, Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1237 (2015) (Alito, J., concurring) ("Congress 'cannot delegate regulatory authority to a private entity.'" (quoting Ass'n of Am. R.Rs. v. Dep't of Transp., 721 F.3d 666, 670 (D.C. Cir. 2013))).

367. INS v. Chadha, 462 U.S. 919, 951 (1983).

368. *See* Field v. Clark, 143 U.S. 649, 672 (1892). For an extended discussion and critique of that rule, see Ittai Bar-Siman-Tov, *Legislative Supremacy in the United States?: Rethinking the "Enrolled Bill" Doctrine*, 97 GEO. L.J. 323, 390 (2009).

369. For some evidence of that suspicion, see *supra* note 262 and accompanying text.

370. *Chadha*, 462 U.S. at 926-27, 927 n.3.

engagement unmolested. We hasten to add that sometimes cycling proves unnecessary. The very threat of judges moving toward a rule may be sufficient to discourage elements of the thick political surround from exploiting a permissive standard that allows considerable pluralistic jockeying. In effect, this supplies a countervailing consideration to the anti-Thayerian argument raised above: not only can rules be justified by their direct consequences, but they are also warranted when deployment of a standard would "fritter[] away resources" in the form of political conflict.[371]

Third, we briefly note an argument that perhaps ought to have more traction than it does in practice. In theory, standards are preferable to rules on efficiency grounds when the regulated conduct is (and remains) infrequent. There are ex ante savings from using a standard rather than a rule because standards are less costly to formulate as an initial matter: the relevant norm does not need to be distilled into a prospective expression. These ex ante savings will likely outweigh the costs of liquidating the standard seriatim via adjudication, particularly if there are few cases to adjudicate.[372] Imagine, for example, if the Constitution insisted only upon "adequate experience" instead of specifying minimum age requirements for those candidates seeking to serve as a member of the House or Senate, or to occupy the office of the President. It makes sense for the Constitution's drafters to expend considerable effort crafting a specific text to resolve problems that struck them as recurrent governance difficulties. By contrast, the Framers were seemingly less likely to expend effort speculating on hypothetical dilemmas that might arise one far future day. Only once they do arise does it make sense to eschew the original standard in favor of a more predictable rule that is now less costly to apply. Although new constitutional text can be supplied, responsive amendments may be difficult to secure in practice

371. Rose, *supra* note 18, at 591. Note that the argument here does not depend on the proposition that political conflict is necessarily undesirable. At least in a democracy, some measure of contestation over norms and policy is not only desirable, but probably necessary. On the other hand, at some point, such conflict becomes paralyzing or outright destructive. Where that line is crossed is a matter of judgment. What matters to our argument is that such a line exists.

372. Kaplow, *supra* note 11, at 621-22 ("If behavior subject to the law is infrequent, however, standards are likely to be preferable. Of particular relevance are laws for which behavior varies greatly, so that most relevant scenarios are unlikely ever to occur. Determining the appropriate content of the law for all such contingencies would be expensive, and most of the expense would be wasted. It would be preferable to wait until particular circumstances arise.").

(or imprudent to add).[373] Thus, a rule might emerge through judicial innovation.

Very tentatively, we discern some of this kind of adaptive standards-to-rules drift in the removal context, which might be understood as a response to the enlarged administrative state and increased litigiousness over the basic structures and practices of modern administrative governance. The same might be said of the foreign affairs context, where recent case law has clarified the President's powers to act domestically to further diplomatic ends as America's hegemonic role on the global stage has developed. Yet, the absence of more examples might also suggest that the Constitution contained an excess of rules, and that institutional and technological change drives us not from standards to rules, but in the other direction—a topic to which we now turn more fulsomely.

C. . . . And Back Again

The various pressures on the way norms are articulated in the separation-of-powers domain do not flow in only one direction. In addition to the dynamics described above, there are also countervailing forces that can catalyze the movement from rules back to standards.[374] We highlight three such hydraulic pressures here.

First, a virtue of rules may be that they embody "quite particular compromises,"[375] but in the context of normative pluralism, a rule that seemingly locks in one such compromise is not necessarily a positive result. Unlike standards, rules are not well suited to accommodating novel considerations, new developments, or unexpected contingencies. What might today register as an unacceptable intervention by a member of the thick political surround might tomorrow be seen as entirely virtuous due to other sets of changed circumstances.[376] As a rule is applied, courts will identify an increasing number

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373. An exception is the rule on presidential succession contained in the Twenty-Fifth Amendment. *See* U.S. CONST. amend. XXV.

374. Why do courts begin with a rule rather than a standard? It may be that judges underestimate the complexity of a given legal issue, and later find it prudent to soften their approach.

375. Manning, *supra* note 21, at 1973.

376. Consider the role that uniformed military lawyers played during the second Bush Administration in pushing back against civilian pressure to abandon rules against torture and cruel and degrading treatment. *See* Jane Mayer, *The Memo: How an Internal Effort To Ban the Abuse and Torture of Detainees Was Thwarted*, NEW YORKER (Feb. 27, 2006), http://www.newyorker.com/magazine/2006/02/27/the-memo [http://perma.cc/VU6N-NY9M]. Military efforts to influence civilian policy, which are usually condemned, were in this instance celebrated.

of situations in which those applications do not faithfully honor the initial compromise, prompting the courts to soften the hard edges, adding exceptions and permitting new considerations to enter the mix.[377] Further, as Carol Rose has observed, "[o]ur law seems to find . . . dramatic losses abhorrent."[378] Such losses need not arise only from exogenous change. In Rose's account of rules-standards cycling in property law, "ninnies, hard-luck cases, and the occasional scoundrels who take advantage of them" are the culprits who "muck up" rules by presenting cases whose outcomes under those rules the courts find distasteful, or even immoral.[379]

The thick political surround, we think, is replete with Rose's characters. Consider, for example, the litigant who brings a claim in a non-Article III forum, and then, upon losing in that forum, invokes a constitutional objection to agency adjudication.[380] That litigant's strategic behavior makes it difficult for the Court to shut the door entirely on non-Article III adjudication of a given strain (even if it were inclined to do so in the first place). But as the memory of the rule-motivating scoundrel fades, the Justices may throttle back the doctrine from a rule to a standard. This responsiveness to "occasional scoundrels" can also be glimpsed in another recent non-Article III adjudication decision, *Wellness International*.[381] Faced with a debtor who repeatedly engaged in "evasive and dilatory tactics,"[382] the Supreme Court declined to apply *Stern*'s "formalistic and unbending rules," but instead took account of "practical effect[s]" to allow waiver of an Article III objection.[383] It is not hard to read the *Wellness International* Court's retreat from the *Stern* rule's rigor as informed by distaste toward the actions of bad-faith litigants.

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377. Jessica Bulman-Pozen & David E. Pozen, *Uncivil Obedience*, 115 COLUM. L. REV. 809, 843 (2015) ("The rigidity of rules often means that they can be implemented in ways that are consistent with their terms—and therefore presumptively lawful—yet insensitive to their underlying purposes and presuppositions or to the customs of compliance and enforcement that have developed in a given context.").

378. Rose, *supra* note 18, at 598.

379. *Id.* at 587; *see also* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1745, 1773-74 (1976) (defending standards on the ground that they allow beneficial redistributive impulses and promote altruism).

380. For a case in which the Court explicitly acknowledged this problem, see *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 837-38 (1986), which documents a respondent's volte-face and refuses to allow him to benefit from it.

381. Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1944-45 (2015).

382. Wellness Int'l Network, Ltd. v. Sharif, 727 F.3d 751, 754 (7th Cir. 2013), *rev'd*, 135 S. Ct. 1932 (2015).

383. *Wellness Int'l*, 135 S. Ct. at 1944.

Second, the verbal formulations of rules often contain unintentionally ambiguous or vague terms that lend themselves to standard-like treatment. Limited judicial foresight makes a measure of ineffability inevitable whenever a constitutional norm is specified.[384] "Even the most specific of rules may be avoided" if the rule-interpreter decides "to engraft an exception to the rule at the moment of its application,"[385] especially in a domain characterized by normative pluralism. Even the judges who most embrace the orthodoxies of "formalism" are not immune from this temptation. For example, when the Court announced a firm rule against dual for-cause constraints on the President's removal authority in *Free Enterprise Fund*, it took pains to stress that its conclusion did not apply to agency adjudicators serving in independent agencies.[386] Although the *Free Enterprise Fund* Court used a rule to limit Congress's discretion to some extent, at the same time it fashioned this particular edge of the rule as a standard. Such a partial standard engrafted onto a simultaneously announced rule may imply that the Court is itself hesitant to lock in certain dynamics within the political surround.

Another, slightly different way in which functional instability arises is when statutory interpretation is necessarily embedded within the operation of a separation-of-powers rule, and judges retain large discretion over how to gloss legislative work product. We have suggested that this characterizes both *Youngstown* and *Chevron*—two legal regimes that have proved significantly more unstable than their verbal formulation might lead one to expect.[387] The result of ambiguous rules coupled with embedded statutory interpretation is predictable enough: their presence makes the respective legal regimes more likely to drift toward standard-like norms.

Third, given the heterogeneity of the thick political surround, it is possible that some of those ostensibly regulated by the rule, or who are handicapped by the rule's application, will seek to take advantage of the hard-edged character of the rule in order to claim an exemption or otherwise avoid its effects. Efforts to circumvent hard-edged rules will over time provoke what Brannon Denning and Michael Kent call "anti-evasion doctrines," or "doctrines developed by courts—usually designed as standards, as opposed to rules—that supplement

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384. *See* Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 CALIF. L. REV. 509, 524-25 (1994) (explaining why even "arbitrary stipulation" of meaning will not eliminate vagueness).

385. Schauer, *supra* note 18, at 312.

386. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 507 n.10 (2010) ("[O]ur holding also does not address that subset of independent agency employees who serve as administrative law judges.").

387. *See supra* Sections I.C, I.E.

other doctrines (designed as rules) to . . . prevent officials from complying with the form of the previously announced rule, while subverting [its] substance . . . ."[388] Although Denning and Kent supply examples from congressional power, federalism, and rights jurisprudences,[389] the dynamic they identify can be discerned in the separation-of-powers context too. One famous (albeit unlitigated) example of evasion in the separation-of-powers context is the "Saxbe fix," which allows a sitting legislator to secure a cabinet position notwithstanding the bright-line rule specified in the text of the Emoluments Clause.[390] When regulated entities seek routes around a rule, courts may shift away from hard-edged rules and embrace (or re-embrace) more multifactorial standards. The mere fact of a rule's exploitation, however, may not be sufficient to justify such a drift. It may be that a hard-edged rule, even when subject to some circumvention, is more manageable and effective in promoting separation-of-powers values than the best available standard. The effect of interest-group circumvention on rules, as a result, depends not only on the extent of such bad-faith behavior, but also on the relative attractiveness of an alternative standard.

This final dynamic, we note in closing, has a more salutary, alternative trajectory. For it is also possible that rules will be relaxed into standards because regulated actors have become sufficiently socialized into a normative disposition that severe and inflexible judicial regulation of the thick political surround is no longer warranted. Whether this more optimistic dynamic is observed, as opposed to its more pessimistic flip side, is—as with all of these dynamics—ultimately a question of empirics.

D. The Motors of Doctrinal Cycling

The preceding Sections have explored how various combinations of the separation of powers' normative pluralism and its thick political surround can catalyze judicial cycling between rules and standards. By adumbrating these forces, we have strived to illustrate—at least as a theoretical matter—how a rational, good-faith judge could end up moving between rules and standards in

388. Brannon P. Denning & Michael B. Kent, Jr., *Anti-Evasion Doctrines in Constitutional Law*, 2012 UTAH L. REV. 1773, 1776.

389. *Id.* at 1780-93.

390. For illuminating discussions, see Michael Stokes Paulsen, *Is Lloyd Bentsen Unconstitutional?*, 46 STAN. L. REV. 907, 908-11 (1994); and Mark Tushnet, *Constitutional Workarounds*, 87 TEX. L. REV. 1499, 1501 (2009), which discuss the Saxbe fix as one example of a constitutional workaround that Congress can employ to escape the restrictions of the Emoluments Clause.

ways that seem to transcend ideological or methodological camps. In contrast, that same rational, good-faith judge could not vindicate the same range of normative values under evolving institutional conditions if she merely hewed to a single kind of legal norm, whether rule or standard. Stability in the form of stare decisis would do little to promote the full spectrum of relevant normative values given continuing developments, both good and bad, within the thick political surround. A recurring question surrounding allegations of undue influence by a particular actor or set of actors within the thick political surround is not susceptible to static judicial analysis. Circumstances change. Other actors in the thick political surround become more or less powerful. And other procedures become more or less transparent and inclusive.

Judges looking to what they did in previous cases is the judicial equivalent to what generals are often chided for: that is, *fighting the last war*. We were, perhaps, all too slow to realize that Vietnam was not World War II. Given growing inequalities in wealth and income, it might behoove judges to treat civil society today very differently from the civil society they encountered at the time the Administrative Procedure Act was enacted in 1946.[391] Thus, rather than being an indication of jurisprudential dysfunction, rules-standards cycling in the separation of powers can be a sensible response to a complex judicial task. And, again, we emphasize rules versus standards, and not formalism versus functionalism, to make clear that rational judges can coherently alternate between the two approaches without doing violence to their constitutional theories or normative commitments.

Importantly, the justifications we have developed for cycling in separation-of-powers law do not necessarily or even logically extend to cycling in the statutory interpretation contexts of *Chevron*[392] and *Youngstown*.[393] To the contrary, such oscillations in statutory interpretation contexts impose greater costs, undermining legislatures' abilities to predict how their interventions will be interpreted and applied.[394] Greater stability in the forms and methods of statutory interpretation thus may be independently desirable as a means of lowering

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391. *See* Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

392. *See supra* notes 76-78 and accompanying text.

393. *See supra* notes 115-118 and accompanying text.

394. *See* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1822-29, 1848, 1851 (2010) (exploring and endorsing the idea of "methodological stare decisis" and arguing in favor of judges "settling on a consistent approach" to statutory interpretation in order to "increase predictability and systemic coordination" for the many parties involved in statutory interpretation).

the cost of congressional action.[395] In the foreign affairs context, moreover, it is our impression that the Court does not stick with a rule or standard for an extended period of time. Rather, it seems to tack rapidly between rules and standards across different issues (e.g., military detention and the death penalty) and even within given issue domains (e.g., immigration).[396] Although rapid shifts are observed in other parts of the jurisprudence, the phenomenon attracts less notice because shifts in the modality of statutory interpretation do not have the precedential force, or salience, that changes in first-order constitutional rules possess.[397] Cycling in statutory interpretation may therefore result in even greater uncertainty and even higher obstacles to effectual congressional action.

Finally, we stress that our account is not intended to be comprehensive in the sense of exhausting all possible engines of cycling. Indeed, we acknowledge that cycling between rules and standards can emerge for other, less salutary reasons. For example, any decision-making procedure involving more than two participants making choices among more than two options can produce instability, with any choice being vulnerable to defeat by another.[398] As one of us has explored elsewhere, the possibility of decisional instability explains many structural constitutional rules.[399] Cycling might also occur if the ideological composition of the Court shifted over time in ways that led it to seesaw as a result. Although we have explained why ideological shifts in the Court do not appear to be the root explanation for much of the rules-standards cycling we identify, we concede that it is possible that some instances of instability in the separation-of-powers case law, just like some instances of instability in other

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395. To be sure, it may be that keeping legislative enactment costs high is a normatively desirable goal. But we are skeptical that stochastic judicial interpretation strategies are a good way to achieve that end.

396. *See supra* Section I.E.

397. *See, e.g.*, Gluck, *supra* note 394, at 1754 ("[T]he practice of giving precedential effect to judicial statements about methodology is generally absent from the jurisprudence of mainstream federal statutory interpretation . . . ."). This is certainly true in the *Youngstown* context, but perhaps not in the *Chevron* context where a veritable cottage industry has developed around scrutinizing the Justices' every utterance, intimation, and offhanded remark and documenting the slightest doctrinal twists and turns.

398. For a brisk and nontechnical introduction to the technical basis for this claim, see Amartya Sen, *Arrow and the Impossibility Theorem*, *in* ERIC MASKIN & AMARTYA SEN, THE ARROW IMPOSSIBILITY THEOREM 29, 33-36, 38 (2014).

399. *See* Aziz Z. Huq, *The Constitutional Law of Agenda Control*, 104 CALIF. L. REV. (forthcoming Dec. 2016) (manuscript at 20-38) (on file with authors) (describing how congressional, executive, and judicial agenda-controlling mechanisms can overcome the instability of democratic choice).

constitutional and statutory domains, simply reflect changes in the Court's personnel.

E. Organizing Frameworks for Judicial Review

We conclude this Part by sketching, albeit at a relatively high level of abstraction, three possible judicial strategies for enforcing the separation of powers in light of the realities of normative pluralism and institutional heterogeneity. The three alternatives developed below are intended as tentative suggestions of how courts might bring order—and make plain that they are bringing order—to the normative and empirical complexity immanent in the separation of powers. Each strategy picks out a different institutional dynamic as a potential focus of judicial attention. Choosing among these alternative strategies demands yet further normative deliberation. We bracket for now the question how to make this election (and indeed, whether to make the election at all), and instead simply illuminate a range of strategic options open to rational, good-faith judges in the separation-of-powers context.

Our analysis suggests that many internal and external actors influence the ebb and flow of interbranch relations, with any number of attendant effects on the separation of powers' plural values. Again, the separation of powers includes many diverse practices and patterns of institutional behavior. As a normative matter, however, not all these strains of influence merit the same measure of respect or approbation. A normative analysis of the separation of powers—and, more specifically, a judicial treatment of that structure—must recognize that some practices, persons, and outcomes emerging from the thick political surround are more legitimate than others. It must also develop a typology for organizing and analyzing different kinds of inter- and intrabranch dynamics.

Consider first the possibility that such a normative analysis should focus upon which *practices* inform the separation of powers. That is, evaluating the thick political surround would involve homing in on the form or modality of engagement between one or more of the players we have identified and the branch in question. It also requires asking whether this kind of engagement is legally authorized or otherwise consistent with the norms of democratic intercourse and the plurality of values underlying the separation of powers.

To flesh out what this means in practice, it is useful to consider legality as a criterion of legitimate institutional engagement. On the one hand, acting pursuant to express constitutional or statutory authorization or pursuant to express rights or prerogatives ought readily to satisfy this requirement. International treaty negotiations or commitments, governors' speeches criticizing federal policy, public comments on pending rules, and agency audits spear-

headed by inspectors general would all rank as acceptable practices. So too would those practices conventionally understood as within the legal rights of institutions and individuals, such as foreign governments' submission of amicus briefs, congressional committees' guiding of agency spending, and public lobbying of Congress, agencies, or the White House. Conversely, acting in contravention of constitutional or statutory law, or in some instances acting contrary to longstanding practice, would raise red flags about the separation-of-powers merits of that practice. Ignoble practices might include, among other things, lobbying federal judges or agency adjudicators, efforts by mid-level military officers to circumvent the chain of command, and agency actions taken unilaterally by either agency leaders or civil servants, excluding the views of the other (and excluding members of the public who are, of course, legally authorized to file comments, etc.).

A second potential lens for analysis would focus on whether the actor *properly belongs* in the thick political surround in the first instance. Do foreign lobbyists merit consideration? Should the nationality of the relevant actor matter? Perhaps influence by the Bank of England is appropriate, while entreaties from Iran's Guardianship Council are not? Likewise, how should government contractors be conceptualized: is their influence tolerable when performing ministerial or clerical duties but not when carrying out sensitive, discretion-laden policymaking responsibilities? We might even be so bold as to quibble with congressional committees. Are those that are truly representative of the plenary houses legitimate, meriting due respect within the thick political surround, whereas those committees that are unrepresentative of the bodies as a whole—such as the agricultural committees stacked with representatives from the Plains States—somehow suspect? These are of course difficult questions—empirically, politically, and often diplomatically—but ones we might need to consider once acknowledging the thick political surround and assessing its effect on a well-functioning separation of powers.

A final approach to assessing the thick political surround would look to *outputs*, rather than inputs, and would measure these outputs according to some criterion of desirable results. For example, this strategy would require asking whether an extra push by Group of 7 central bankers or North Atlantic Treaty Organization generals properly emboldens the executive branch as it battles Congress vis-à-vis primacy in matters of American diplomatic, defense, and international economic policy. The approach would also obligate courts to focus less on inquiring whether the composition of congressional committees is sufficiently diverse and more on whether the funneling of legislative work through said committees generates a desirable level of congressional constraint on the

executive.[400] And finally, it would require asking whether politically compliant contractors, who sideline independent civil servants, should be welcomed as agents of cost-saving, or condemned for consolidating administrative power in ways that make the executive branch problematically forceful (and unnaturally unitary).

CONCLUSION

The central aim of this Article has been to isolate and analyze an element of separation-of-powers jurisprudence that to date has been ignored or maligned. Across a wide variety of doctrinal contexts, the Court cycles between rules and standards, and back again. This cycling cuts across and blends the categories of formalism and functionalism. As a result, our account suggests that the canonical formalist/functionalist dichotomies generally used to evaluate separation-of-powers jurisprudence have been systematically obscuring a more complicated, more dynamic, and more interesting picture.

To better understand the potential justifications for such doctrinal cycling, we have returned to the first principles of our separation of powers. We have identified two predicate facts about the foundation of our constitutional design—normative pluralism and the thick political surround. Together, these predicates create fruitful conditions for doctrinal cycling between rules and standards. They do so by encouraging robust, inclusive political engagement while disciplining practices and persons deemed exploitative or threatening of a well-functioning separation of powers. We have thus offered here a theoretical framework for understanding and evaluating the normative and institutional pressures that shape the separation of powers. We have also provided links between that framework and the particular doctrinal instances of rules-standards cycling. Our framework not only illuminates the predicate institutional and normative conditions in which the separation of powers unfolds, but also charts the specific mechanisms that might connect normative pluralism and the thick political surround on the one hand to rules-standards cycling on the other. In concluding, we have offered a rough, tentative sketch of the kinds of doctrinal frames that rational, good-faith judges might adopt in a separation-of-powers jurisprudence. This sketch provides a sense of how judicial engagement with normative pluralism in the thick political surround might be conceptualized in a more systematic way.

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400. *See, e.g.*, Joshua D. Clinton et al., *Influencing the Bureaucracy: The Irony of Congressional Oversight*, 58 AM. J. POL. SCI. 387, 399 (2014) (concluding that increasing the number of congressional committees involved in oversight can undercut the ability of Congress to check the presidency or the bureaucracy).

Choosing among these judicial strategies—and indeed determining whether any one is attractive—requires a prior judgment about the institutional competence of federal courts to make the kind of evaluations that our framework suggests. To make those judgments, we believe courts must be sensitive to the manifold ways in which separation-of-powers goals are implicated in a policy domain. Judges must be cognizant of both the risks and opportunities presented by the thick political surround, ranging from the prospect of institutional capture by interest groups to the possibility that pressure from internal bureaucratic actors can generate salutary democratic accountability. Courts must also remain poised to revise previous judgments, as the elements of the thick political surround respond to prior rules or standards, or as new policy exigencies impinge upon, or even compromise, existing institutional arrangements.

Additional complications arise because federal courts do not stand, at least not fully, outside the thick political surround.[401] As Eric Posner and Adrian Vermeule have observed, it is a mistake to diagnose a public-law problem by drawing "upon the political science literature to offer deeply pessimistic accounts of the ambitious, partisan, or self-interested motives of relevant actors," but then to proceed by assuming that judges can somehow reach "public-spirited solutions" free of the pernicious forces that otherwise shape institutional behavior.[402] Staking out a robust role for the judiciary in separation-of-powers debates hence demands an extended defense of the courts' ability to play the role of a neutral arbiter[403] by successfully navigating ideological and institutional pressures of their own. That position also requires a comparative judgment about when judicial supervision will be superior to the arrangements negotiated by the political branches themselves.[404]

Whether the Court is capable of reaching informed judgments about these institutional dynamics, whether its deficiencies as a group of law office historians, economists, political scientists, and sociologists can be remedied by amicus briefing, and whether ideological preferences will swamp rigorous, principled evaluation are all difficult questions. Even more challenging are questions about the dynamic effect of judicial intervention on the separation of powers: Will such intervention elicit more desirable forms of behavior from the thick

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401. *See* Huq, *supra* note 269, at 53-58 (analyzing institutional determinants of Article III judges' preferences).

402. Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1745 (2013).

403. For contrasting assessments, compare Michaels, *supra* note 160, which offers an optimistic perspective, with Huq, *supra* note 269, at 75-80, which takes a more skeptical position.

404. *See, e.g.*, Huq, *supra* note 204, at 1674-86 (theorizing conditions under which judicial deference to politically negotiated outcomes will be superior to active judicial supervision).

political surround, and the branches they act upon, as various actors compete to elicit judicial endorsement by careful, deliberative, and open behavior? Or alternatively, will judicial enforcement of the separation of powers encourage narrowly focused interest groups to invoke that concept in judicial fora for parochial or partisan gain?[405] If courts are not able to disentangle sincere from self-interested invocations of the Constitution (or if that distinction is in practice muddled and hard to draw because of pervasive mixed motivations), then judges' interventions might have undesirable effects.

Reasonable people, we think, can disagree about the answers to these questions. This Article has not aimed to resolve finally those enduring puzzles, but is instead designed to show that previous scholarship has not gone far in identifying the terms on which debate about the judicial role enforcing the separation of powers must proceed. Indeed, having identified the salience of the thick political surround and normative pluralism, we see no turning back to the stale, over-determined formalism/functionalism binary. More importantly, we discern no basis for fixating on the three constitutional branches simply because it is too difficult to navigate the thick political surround.

With those cautionary disclaimers in mind, we hope that this Article broadens our understanding of a much-maligned domain of constitutional jurisprudence. We furthermore hope it has clarified what considerations are needed for the Court to advance successfully the competing and conflicting separation-of-powers values in the fluid, dynamic, and complex context of our federal government's thick political surround. Having clarified the foundational grounds of analysis, we anticipate that debate about the judicial enforcement of the separation of powers can proceed on less fallible and more clear-eyed terms.

405. For evidence of the analogous concern in the federalism context, see Aziz Z. Huq, *Does the Logic of Collective Action Explain Federalism Doctrine?*, 66 STAN. L. REV. 217, 295-98 (2014).