LIBERAL FREEDOM, THE SEPARATION OF POWERS, AND THE ADMINISTRATIVE STATE

By Eric MacGilvray*

Abstract: *Contemporary critiques of the administrative state are closely bound up with the distinctively American doctrine that republican freedom requires that the legislative, executive, and judicial powers be exercised by separate and distinct branches of government. The burden of this essay is to argue that legislative delegation and judicial deference to the administrative state are necessary, or at least highly desirable, features of a democratic separation of powers regime. I begin by examining the historical and conceptual roots of the separation of powers doctrine, paying particular attention to the unique way in which it was adapted to fit the American case. I then examine three concerns that the resulting constitutional system raises about the republican freedom of those who are subject to it—which I call the accountability, legitimacy, and stability concerns—and argue that the administrative state is a useful, albeit imperfect, tool for reducing the unavoidable tension between these concerns. The thrust of this discussion is to push us away from "in principle" objections to the administrative state, and back toward the kinds of prudential considerations that are associated with ordinary liberal politics. More importantly, the aim of the essay is to encourage sober reflection on the real dangers that face the American constitutional system under current circumstances.*

KEY WORDS: freedom, liberalism, republicanism, separation of powers, mixed government, administrative state

> "This state will perish when legislative power is more corrupt than executive power."
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> – Charles de Montesquieu, *The Spirit of the Laws*, book 11, chapter 6

I. Liberal Freedom

A liberal polity makes two kinds of freedom available to its citizens.[1] On the one hand, it seeks to create the social conditions under which it becomes possible for its citizens to make genuinely *responsible* choices. From this point of view we act freely if and to the extent that we control the social conditions under which we act, in the sense that we have either authorized those conditions ourselves or are able to supervise and control those who

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[1] Here and in the following two paragraphs I draw on ideas that are developed further in my book *Liberal Freedom* (New York: Cambridge University Press, forthcoming).

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did. In traditional terms, this kind of freedom consists in self-government; it marks the distinction, for example, between obeying the (possibly implicit) wishes of a secret police and being subject to a properly enforced system of law that we played, or could have played, a role in making, and whose content we can contest if necessary. On the other hand, a liberal polity seeks to create a domain of genuinely *non-responsible* choice; that is, it seeks to ensure that we're able to make decisions about certain fundamental aspects of our lives —who to associate with, how to express ourselves, what career to pursue, what religion to practice (if any), how to dispose of our property, and so on—without being answerable either to the state or to other people (unless we choose to be) for the decisions that we make. From this point of view we act freely if and to the extent that we can decide for ourselves how to respond to the pattern of opportunities, and the corresponding pattern of potential costs and benefits, that we face. Needless to say, our non-responsible choices affect the opportunities, and thus the choices, that are available to other people, often in ways that we didn't intend, and thereby undermine the kind of control that's associated with freedom understood as responsible choice. Indeed, when a sufficiently large number of people enjoy this kind of freedom in roughly equal measure, a pattern of outcomes—and a corresponding pattern of potential costs and benefits—is created that no one can predict, control, or take responsibility for.

As a shorthand—and following much precedent—I will refer to the first kind of freedom that I've described as *republican freedom*—keeping in mind that it often depends only indirectly on "republican" institutions in the traditional political sense—and to the second kind of freedom as *market freedom*—keeping in mind that it's often exercised in social spaces that aren't "markets" in the traditional economic sense. Where republican freedom consists in the ability to hold others responsible for the social conditions under which we act, market freedom consists in the ability to act in ways that affect other people without being responsible to them for doing so. Needless to say, neither kind of freedom is absolute: just as it's impossible to imagine a society in which everyone is always responsible for everything that they do, so too is it impossible to imagine a society in which no one is ever responsible for anything that they do. Moreover, since allowing people to make non-responsible choices often leads to a diminution of republican freedom, securing the conditions for responsible choice will often require a diminution of market freedom. A liberal polity is therefore charged not only with providing both republican and market freedom to its citizens, but also with striking an appropriate balance between them. It will sometimes be appropriate on liberal grounds to sacrifice a certain amount of republican freedom for the sake of more market freedom, just as it will sometimes be appropriate to sacrifice a certain amount of market freedom for the sake of more republican freedom. In the language of moral philosophy, liberal freedom is more like an Aristotelian virtue than a contractarian side-constraint or a utilitarian maximand.

The complicated structure of liberal freedom helps to account for the equally complicated structure of its practical entailments. Politically speaking, liberals are committed to limited and democratically accountable government, individual rights, and the rule of law; socially speaking, they're committed to the elimination of hereditary privilege, the separation of political from ecclesiastical power, and the deconstruction of class, gender, and racial hierarchies; economically speaking, they're committed to free trade, the opening of careers to talents, and the existence of a social safety net. Like the underlying conceptions of freedom that they're built upon, these practical commitments often work at cross purposes: political freedoms can be used to subvert the rule of law or to violate individual rights, associational freedoms can be used to entrench hereditary privilege or to reinforce social hierarchies, economic freedoms can be used to undermine free trade or to weaken the social safety net, and so on. A liberal politics therefore centers around the messy and contentious project of balancing the claims of republican and market freedom—of public responsibility and private non-responsibility—against one another. Liberals don't agree (to say the least!) about how this balance should be struck, but they do agree in giving priority to republican freedom in the procedural sense that the necessary tradeoffs have to be made in publicly visible and contestable ways and for publicly avowable reasons. A liberal polity is committed, in short, to holding republican and market freedom together in a single political vision, defining their respective limits, and maintaining a fruitful tension between them.

How does the existence of an "administrative state"—that is, of an independent, professional, and bureaucratically organized civil service—tend to promote or hinder these aims? The distinction between republican and market freedom allows us to distinguish two kinds of worries that liberals might have about the administrative state so defined. On the one hand, its regulatory and oversight functions pose a standing threat to market freedom: after all, the main purpose of the administrative state is to manage the negative externalities that the non-responsible choices of market actors (in the broad sense in which I've defined that term) would otherwise generate. The administrative state is thus a natural target of criticism for those who think that the balance between republican and market freedom has been struck in a way that's insufficiently friendly to the latter value. On the other hand, the claim of the administrative state to independence poses a standing threat to republican freedom: after all, citizens can't be said to control the social conditions under which they act, and thus can't be said to be fully responsible for the choices that they make, if and insofar as those conditions are defined by a bureaucracy that's responsible only to itself. The administrative state is thus also a natural target of criticism for those who think that the government is insufficiently accountable to its citizens. In short, the liberal conception of freedom that I've articulated allows us to distinguish concerns about the *scope* of the administrative state—the extent to which its actions diminish the enjoyment of market freedom—from concerns about its *structure*—the extent

to which the way in which those actions are taken diminishes the enjoyment of republican freedom.

These two kinds of concerns aren't always kept distinct, in large part because critics of the administrative state typically have both of them in mind: they want to reduce or "roll back" its regulatory scope, but often frame their arguments in structural terms, arguing that the very existence of an administrative state is freedom-threatening. Conversely, defenders of the administrative state sometimes treat its structural shortcomings as a regrettable but necessary by-product of its legitimate regulatory aims. Nor is it hard to see why the debate often takes this form. Debates about the proper *scope* of the administrative state take place on the familiar terrain of questions about the proper content of liberal freedom more generally speaking: all liberals agree that the claims of republican and of market freedom both have weight, that they often come into conflict, and that they must therefore somehow be balanced against one another. From this point of view the proper extent of market freedom—and thus the extent to which it should be limited or regulated—is a matter of judgment about which reasonable people can disagree. (This not to say, of course, that these disagreements are superficial or easily resolved, or that we necessarily agree about how the boundaries of "reasonable" disagreement should be drawn.) Debates about the proper *structure* of the administrative state cut deeper: if it can be shown that the administrative state in its current form is simply incompatible with the enjoyment of republican freedom, then liberal critics of the administrative state would have access to an "in principle" rather than an "on balance" set of objections against it (recall that liberals agree in giving procedural priority to republican freedom). From this point of view, the aim is not simply to shift the balance of policy considerations in the direction of greater market freedom, but rather to reconstruct—or, as Steve Bannon once put it, to "deconstruct" —the administrative state altogether. In other words the structural critique (as I will call it) exchanges the mundane politics of institutional reform for the sexier politics of constitutional re-founding.

Before I consider the merits of the structural critique it will be helpful to make its terms more precise. I'll start by stipulating two premises, each of which is, I hope, relatively uncontroversial. The first premise is that functionally speaking the administrative state isn't an optional feature of political life under modern conditions. Modern economies, societies, and polities are simply too complex, and change too quickly, for them to be entirely or even largely governed by statute or by the norms and procedures of common law. In this sense the rise of the administrative state—saying nothing, again, about its proper scope—was inevitable, and it's no accident that its essential features have been replicated in all sufficiently advanced societies regardless of cultural tradition or political history.[2] The question, then, isn't

[2] In order to reject this premise, as some of my colleagues in this forum will want to do, we would have to explain how the various externalities that are generated by market behavior,

whether the administrative state should exist, but rather how it should itself be administered. The second premise is that in the United States the administrative state is in fact under the *de jure* control of both Congress and the courts. That is, Congress has the power to alter or revoke the statutory authority under which administrative agencies operate, and its appropriations[3] and oversight powers give it the power to substantially influence their everyday conduct. Similarly, Article III courts have the power to overturn administrative actions or (more controversially) nonactions that they find to be illegal or arbitrary. The structural critique therefore hinges on two more limited claims: on the one hand, the constitutional claim that Congress doesn't have the authority to alienate its power to make binding rules to the executive branch, even in part—a claim known as the nondelegation principle—and on the other hand, the empirical claim that under current standards of judicial review—embodied most notably in the principle of *Chevron* deference—the courts allow administrative agencies excessive latitude in interpreting the nature and scope of their own statutory authority.

The counterfactual scenario that the structural critique appeals to is therefore not one in which the administrative state doesn't exist, or even necessarily one in which the scope of its responsibilities has been substantially reduced—although as I've said this is certainly a key desideratum for many of its proponents. Rather, the structural critique calls, at least implicitly, for a political system in which the regulatory and oversight functions that are needed to keep republican and market freedom in balance are administered (more) directly by Congress and overseen (more) closely by the courts—or, in the case of "independent" agencies, by the President.[4] The structural critique therefore puts its proponents in the somewhat odd position of urging powerful institutions—and thus, *a fortiori*, powerful people—to use their power, and my analysis takes this apparently puzzling fact as its focal point. The burden of this essay is to argue that legislative delegation and judicial deference to the administrative state are necessary, or at least highly desirable, features of the American constitutional system, and that the structural critique is therefore fundamentally misguided.

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ranging from pollution and environmental degradation to unsafe products and working conditions to monetary instability, would otherwise be managed—or why they don't need to be.

[3] Self-funding agencies are a partial exception, but Congress can of course still revoke their funding authority.

[4] Even here there's some hesitation; Gary Lawson points out, for example, that "the Court believes—*possibly correctly*—that the modern administrative state could not function if Congress were actually required to make a significant percentage of the fundamental policy decisions": Gary Lawson, "The Rise and Rise of the Administrative State," *Harvard Law Review* 107 (1994): 1241 (emphasis added). Gillian Metzger has observed more recently that "judicial anti-administrativism … has a notably rhetorical air, seemingly unwilling to follow through on the radical implications of its constitutional complaints" in "1930s Redux: The Administrative State Under Siege," *Harvard Law Review* 131 (2017): 95.

I begin by examining the historical and conceptual roots of the familiar republican doctrine of the separation of powers, on which both the structural critique of the administrative state and the American Constitution itself are built, paying particular attention to the unique way in which this doctrine was adapted to fit the American case (Section II). I then examine three concerns that the resulting system raises about the republican freedom of those who are subject to it—which I call the accountability, legitimacy, and stability concerns—and argue that the administrative state is a useful, albeit imperfect, tool for reducing the unavoidable tension between them (Section III). According to this line of argument, the question is not whether the existence of the administrative state is incompatible with the constitutional separation of powers —and thus with republican freedom—but rather how best to govern the administrative state within what I will refer to as a democratic separation of powers regime. I conclude with some tentative reflections along these lines; reflections that, as the epigraph to this essay suggests, put the onus for reform squarely on Congress, but primarily via its oversight rather than its legislative powers (Section IV). As I've already suggested, this line of argument does nothing to answer the question of whether the balance between republican and market freedom has been properly struck—a question that probably no one would answer in the affirmative at that level of abstraction. Rather, the thrust of this discussion is to push us away from the "in principle" objections to the administrative state that are raised by the structural critique, and back toward the kinds of prudential considerations that I've associated with ordinary liberal politics. More importantly, the aim of this essay is to encourage sober reflection on the real dangers that face the American constitutional system under current circumstances.

II. The Separation of Powers and the Mixed Constitution

The most immediately striking feature of the structural critique of the administrative state is the extent to which it's bound up with the distinctively American doctrine that republican freedom requires that the legislative, executive, and judicial powers be exercised by separate and distinct branches of government; that, as James Madison put it in *Federalist* 47, "[t]he accumulation of all powers legislative, executive and judiciary, in the same hands, whether of one, a few or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." Gary Lawson neatly summarizes the awkward implications of this line of argument for the administrative state in its current form: "[t]he United States Congress today," he points out, "frequently delegates [its] general legislative authority to administrative agencies, in contravention of Article I. Furthermore, those agencies are not always subject to the direct control of the President, in contravention of Article II. In addition, those agencies sometimes exercise the judicial power, in contravention of Article

III. Finally, those agencies typically concentrate legislative, executive, and judicial functions in the same institution, in simultaneous contravention of Articles I, II, and III. In short, the modern administrative state openly flouts almost every important structural precept of the American constitutional order."[5] Ronald Pestritto goes so far as to suggest that "[t]he rise of the administrative state *required* the defeat of the separation of powers as a governing principle, at least as it was originally understood, and its replacement by a system that allows delegations of power, combination of functions, and the insulation of administration from the full measure of political control."[6]

The association between republican freedom and the separation of powers can be traced back to Charles de Montesquieu's analysis of the English constitution in his seminal treatise *The Spirit of the Laws* (1748) —a book that was, apart from the Bible, the most frequently cited text during the American Founding period.[7] Montesquieu's reasoning is straightforward: he defines political liberty as "the right to do everything the laws permit," and thus as the "tranquility of spirit which comes from the opinion each one has of his security" in a law-governed society. He draws here on the traditional republican association of freedom with the absence of arbitrary power—that is, of power that can be exercised at will (*ad arbitrium*) by those who hold it. This explains his appeal to "tranquility of spirit": republican freedom doesn't consist in the absence of constraint, but rather in the absence of arbitrary power, and thus of the fear that constraints can be imposed by the powerful at will.[8] Because the human tendency to seek and abuse power is so pervasive, the enjoyment of republican freedom is necessarily a matter of careful institutional design: "So that one cannot abuse power," Montesquieu argues, "power must check power by the arrangement of things." In particular, it's a necessary condition for the enjoyment of republican freedom that not only ordinary citizens, but also the government itself, be law-abiding. Because governments are typically in

[5] Lawson, "Rise and Rise of the Administrative State," 1233.

[6] Ronald J. Pestritto, "The Progressive Origins of the Administrative State: Wilson, Goodnow, and Landis," *Social Philosophy and Policy* 24 (2007): 24 (emphasis added). As Pestritto points out, the Progressive-era reformers were candid about the incompatibility between the traditional separation of powers doctrine and their preferred model of governance.

[7] Donald Lutz finds that Montesquieu was cited twice as much as the next most-cited figure (Blackstone) in the 1780s, and four times as much during the crucial period of 1787–1788. Indeed Montesquieu accounted for nearly 30 percent of all citations on the Federalist side, and for 25 percent of citations on the Anti-Federalist side, during the ratification debates: Donald S. Lutz, "The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought," *American Political Science Review* 78 (1984): 189–97.

[8] The implications of republican freedom have been worked out most carefully in recent years by the philosopher Philip Pettit; see in particular his *Republicanism: A Theory of Freedom and Government*, 2nd ed. (New York: Oxford University Press, 1999 [1997]), and more recently in *On the People's Terms: A Republican Theory and Model of Democracy* (New York: Cambridge University Press, 2012). For my own understanding of republican freedom, which is largely consistent with Pettit's, see Eric MacGilvray, *The Invention of Market Freedom* (New York: Cambridge University Press, 2011), esp. chap. 1.

an excellent position to disobey their own laws with impunity, Montesquieu concludes that liberty is only secure if the distinct powers to make, enforce, and apply the law are placed in different hands: "When legislative power is united with executive power," he argues, "there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically. Nor is there liberty if the power of judging is not separate from legislative power and from executive power. If it were joined to legislative power, the power over the life and liberty of the citizens would be arbitrary, for the judge would be the legislator. If it were joined to executive power, the judge could have the force of an oppressor."[9]

Montesquieu's analysis of the English constitution was novel—and by no means uncontested[10]—but it proved to be so influential that just forty years later Madison could begin *Federalist* 51 with the sweeping claim that "separate and distinct exercise of the different powers of government … is admitted on all hands to be essential to the preservation of liberty." However, there's an important difference between Montesquieu's position and Madison's, which arises from the fact that Montesquieu builds his defense of the separation of powers on top of an ancient model of republican freedom with which it was, at least in the English case, closely associated. In particular, he insists that the separation of legislative, executive, and judicial powers will only work in practice if the powers are assigned to (or divided between) different classes or estates in society: "All would be lost," he argues, "if the same man or the same body of principal men, either of nobles, or of the people, exercised these three powers." Here again his reasoning is straightforward: the formal separation of powers won't have any practical effect if the powers themselves are placed in the hands of people who share a common set of interests, and who therefore can't be relied upon to "check" one another in practice. Political liberty therefore depends on what Montesquieu takes to be the fact that "[i]n a state there are always some people who are distinguished by birth, wealth, or honors" — the hereditary nobility, most obviously, but also the monarchy and arguably the wealthy—and who can therefore be counted upon to defend their constitutional prerogatives against the encroachment of those who aren't "distinguished" in this way.

Montesquieu alludes here to the traditional republican idea that freedom isn't secure under any "simple" constitution, whether monarchical,

[9] Charles de Montesquieu, *The Spirit of the Laws* [1748], trans. Anne Cohler, Basia Miller, and Harold Stone (New York: Cambridge University Press, 1989), 157, 155 (book 11, chapters 6, 3, and 4). A more accurate translation of the first sentence of the latter passage would be to say that "one can fear that the same monarch or senate *would make* tyrannical laws *in order* to execute them tyrannically" (*ne fasse … pour les executer …*).

[10] The most prominent skeptic was probably David Hume, who argued that corruption in British public life "is chiefly to be ascribed to our established liberty, when our princes have found the impossibility of governing without parliaments, or of terrifying parliaments by the phantom of prerogative": "Of Refinement in the Arts" [1752], in *Political Essays*, ed. Knud Haakonssen (New York: Cambridge University Press, 1994), 111.

aristocratic, or democratic, because freedom isn't possible in any state that's dominated by a single factional interest. Freedom requires instead a "mixed" constitution in which the competing interests of different classes are balanced against one another. Unlike the distinctively modern doctrine of the separation of powers, the idea of the mixed constitution dates back to classical antiquity; it's generally credited to the Greek historian Polybius (c. 200-118 BCE), who devotes Book 6 of his *Histories* to an analysis of the Roman constitution with the aim of explaining "by what means and by virtue of what political institutions almost the whole world fell under the rule of one power." By way of answer Polybius presents his famous cycle of constitutions, according to which each of the "pure" regime types inevitably degenerates into its corrupt form —monarchy into tyranny; aristocracy into oligarchy; and democracy into "mob rule" [*oklokratia*] —and that each of the corrupt regimes is just as inevitably overthrown and replaced by its more inclusive rival—tyranny by aristocracy; oligarchy by democracy—until the anarchy of mob rule leads to the restoration of monarchy (or tyranny), thus beginning the cycle anew. The only way to break the cycle, and thus to preserve the freedom of the polity against internal or external despotism, is to create a constitution in which elements of each of the three "pure" regimes are present and none is able to dominate the others. Polybius names the Spartan and Roman constitutions as paradigmatic examples of such an arrangement, and argues that in the Roman case the mixture of regimes is so artful that "it is impossible even for the Romans themselves to declare with certainty whether the whole system [is] an aristocracy, a democracy, or a monarchy."[11]

On Polybius's account, the mixed constitution allowed Rome to reap the benefits of class conflict while avoiding its pitfalls: "whenever some common external threat compels the three [elements] to unite and work together," he observes, "the strength which the state then develops becomes quite extraordinary … because all parties vie with one another to find ways of meeting the needs of the hour." On the other hand, "[w]henever one of the three elements swells in importance, becomes overambitious and tends to encroach upon the others," it "can be blocked or impeded by the rest, with the result that none will unduly dominate the others or treat them with contempt. Thus the whole situation remains in equilibrium since any aggressive impulse is checked, and each estate is apprehensive from the outset of censure from the others."[12] The view that a mixed constitution is essential to the preservation of liberty exercised enormous influence over classical, medieval, and Renaissance political thought, not least because the

[11] Polybius, *The Histories*, book 6, chapters 2-10, quoting Ian Scott-Kilvert's translation in *The Rise of the Roman Empire*, ed. F. W. Walbank (New York: Penguin Press, 1979), at 302, 312. Polybius's analysis builds on the famous sixfold typology of constitutions that is laid out in Book 3 of Aristotle's *Politics*, although Aristotle, unlike Polybius, treats democracy as a "perverse" form of rule.

[12] Polybius, *Histories*, 317–18 (book 6, chapter 18).

Roman republic served as the outstanding model for those who sought alternatives to monarchical rule: it's endorsed by Cicero in the first two books of his *Republic*, by Thomas Aquinas in the *Summa Theologiae*, and by Machiavelli in the opening chapters of his *Discourses on Livy*.[13] As we've seen, Montesquieu's defense of the separation of powers rests upon, and indeed assumes, the constructive form of class conflict that a mixed constitution makes possible, in keeping with his guiding precept that in a free regime "power must check power by the arrangement of things," and he echoes Polybius closely in his description of how a separation of powers system can be expected to function in practice: "The form of these three powers," he suggests, "should be rest or inaction. But as they are constrained to move by the necessary motion of things, they will be forced to move in concert."[14]

The American Founders were of course neither unaware nor dismissive of Montesquieu's observation that the formal separation of powers is nugatory unless the different branches can be counted on to use the constitutional tools that are available to them: Madison emphasizes in *Federalist* 51 that "the interest of the [officeholder] must be connected with the constitutional rights of the place," and that "the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department, the necessary constitutional means *and personal motives* [emphasis added], to resist encroachments of the others." However, the separation of powers doctrine takes on a very different character when it's detached from the mixed constitution tradition on which it was originally built. Indeed, the very language that we often use to describe the workings of the American Constitution—the language of "checks and balances"—is misleading on this count: as David Wootton has shown, "the idea of checks and balances implies the bringing together of two analytically and historically distinct traditions, that of the mixed or balanced constitution (a tradition in which the word 'check' plays no part) and that of the separation of powers (a tradition which makes no mention of balances)." Even in Montesquieu, Wootton argues, "the two ideas are kept radically separate: balance is invoked in the context of a discussion of the mixed constitution of the Roman republic as described by Polybius; checks in the context of a discussion of the separation of powers as exemplified by England"[15]—although as we've seen, the distinction between the two traditions is blurred in Montesquieu's discussion because the English constitution as he understood it fit both models.

[13] Cicero, *De Re Publica*, book 1 §§41–55, 65–9, book 2 §§57, 65; Aquinas, *Summa Theologiae* 1a2ae q 95 art 4 resp and q 105 art 1 *passim*; Machiavelli, *Discourses on Livy*, book 1, chapters 2–6.

[14] Montesquieu, *Spirit of the Laws*, 155, 164 (book 11, chapters 4 and 6). The Platonic ring of the latter quotation is an artifact of translation; the French reads "*Ces trois puissances devraient former un repos ou une inaction …*"

[15] David Wootton, "Liberty, Metaphor, and Mechanism: 'Checks and Balances' and the Origins of Modern Constitutionalism," in David Womersley, ed., *Liberty and American Experience in the Eighteenth Century* (Indianapolis, IN: Liberty Fund, 2006), quoted at 243.

The American system of government, by contrast, isn't "mixed" in any sense of the term: all officeholders are ultimately accountable to "the people"—or, as was the case in 1788, to a white, male, and propertied subset of them. It follows, in Wootton's terms, that the American system is one of checks without balances,[16] and much of its novelty arises from the Federalists' efforts to replicate by artificial means the conflict of interests, and thus of motives, that existed naturally (at least on Montesquieu's account) in the English case and in the classical examples of "mixed" constitutions, and that made "checking" a matter of course in those regimes. The complicated system of indirect elections, staggered terms of office, and nested constituencies that the Constitution enacts is intended to do exactly this; to reconcile republican freedom with popular sovereignty by ensuring that officials who are all ultimately accountable to "the people" are nevertheless accountable to different people at different times and in different ways. This may explain why Madison insists that "ambition must be made to counteract ambition" instead of saying, as Montesquieu had, that "power must check power": the Constitution doesn't depend for its proper functioning on the existence of a balance of *power* between the various factions that are represented in each branch, but rather on the personal *inclination* of public officials to defend their constitutional prerogatives by "checking" their rivals in the other branches. As we'll now see, despite its ingenuity this distinctively American implementation of the separation of powers doctrine—which I will refer to as a "democratic separation of powers regime"—raises an equally distinctive set of concerns when seen from the standpoint of republican freedom.

III. Accountability, Legitimacy, and Stability

An appreciation of how the separation of powers and the mixed constitution work together in Montesquieu's analysis, and of how they come apart in the American case, raises three familiar concerns about the republican credentials of the American regime. The first concern arises from the fact that the constitutional "checks" that give the separation of powers its practical force don't depend on the separation but rather on the mixing of

[16] There are at least a dozen references in the *Federalist* to the *checking* of power, but only three references to a constitutional *balance* of power (as opposed, for example, to a military balance of power). The first is a passing reference in number 9 to "legislative balances and checks"; Hamilton is presumably alluding to bicameralism, where a balance between the houses was indeed the goal. The second is a reference in number 71 to "the balance of the constitution," where Hamilton defends the length of the president's term by warning about "[t]he tendency of the legislative authority to absorb every other." The aim here is not to "balance" the legislative and the executive, but rather to ensure that the former doesn't eclipse the latter altogether. The third reference to balancing comes in a passage from Jefferson's *Notes on the State of Virginia* that Madison criticizes in number 47. Jay refers in number 2 to a "well-balanced government," but it's not clear from the context what he means by that phrase.

powers.[17] The president checks the Congress by exercising the legislative power of the veto, and the Congress checks the president by exercising the executive power to declare war and (in the case of the Senate) to ratify treaties and consent to executive appointments. The Congress also checks the president and the (presidentially-appointed) judiciary by exercising the judicial power to impeach and remove public officials, and the judiciary is (tacitly) given the power to check Congress by exercising the legislative power of repealing or reinterpreting legislation that's incompatible with the "fundamental" law of the Constitution. This mixing of powers was a particular target of criticism by the Anti-Federalists, who held that each branch should perform only a single function—an argument that Madison considered powerful enough that he devoted two papers of the *Federalist* (numbers 47 and 48) to rebutting it. The Anti-Federalists typically appealed to the value of simplicity in this context; Patrick Henry, for example, complained that "this government is of such an intricate and complicated nature, that no man on this earth can know its real operation."[18] As Bernard Manin has shown, however, they were really concerned about accountability: when "each branch is authorized, but not required, to exercise a part of the function primarily assigned to another," he points out, "the people cannot systematically associate each with a certain type of task. Before laying the blame, then, the people must trace *case by case* the particular process which resulted in the decision that they condemn."[19] This is of course very difficult to do, especially when a decision or policy outcome results from the *failure* of a given branch to act—and as we've seen, the structural critique of the administrative state hinges in part on the failure of Congress and the courts to make use of the powers that they nominally possess.[20] Call this the *accountability concern.*

[17] As A. V. Dicey observes, "Montesquieu misunderstood on this point the principles and practice of the English constitution, and his doctrine was in turn, if not misunderstood, exaggerated, and misapplied by the French statesmen of the Revolution," for whom the separation of powers "mean[t] neither more nor less than the maintenance of the principle that while the ordinary judges ought to be irremovable and thus independent of the executive, the government and its officials ought (whilst acting officially) to be independent of and to a great extent free from the jurisdiction of the ordinary Courts"—a principle that "lends itself easily to the justification of tyranny": A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. (Indianapolis, IN: Liberty Classics, 1982 [1915/1885]), chap. 12, quoted at 220, 226.

[18] Cited in Herbert J. Storing, *What the Anti-Federalists Were For: The Political Thought of the Opponents of the Constitution* (Chicago: University of Chicago Press, 1981), 54; cf. chap. 7 *passim.*

[19] Bernard Manin, "Checks, Balances and Boundaries: The Separation of Powers in the Constitutional Debate of 1787," in Biancamaria Fontana, ed., *The Invention of the Modern Republic* (New York: Cambridge University Press, 1994), 45–46 (original emphasis).

[20] The point is nicely illustrated by the passage of the Affordable Care Act in 2009–2010. Many progressives believe that the health care reforms implemented by the ACA are deficient. To what should they attribute those deficiencies? Are they due to a failure of leadership or policy acumen on the part of President Obama or his cabinet officials? The inconvenient ideological positioning of the rightmost Democratic senator? The procedural rules of the Senate itself? The refusal of Congressional Republicans to cooperate in the legislative process? The

The second concern arises from the fact that the Constitution pits the executive and legislative branches of government against one another under circumstances in which each of them can plausibly claim to speak for the same constituency, that is, the people as a whole. In a mixed constitution, conflict among branches is a function of the underlying conflict of interests among the different classes of people that they represent, and the sign of an adequate compromise is that each class is willing (however grudgingly) to sign off on it. In a democratic separation of powers regime, by contrast, conflicts are resolved not according to the relative weight of the interests concerned, but rather according to what Madison calls the "constitutional rights" of the various officeholders. Needless to say, this places enormous pressure on those constitutional rights, which are bound to seem in many cases like artificial and arbitrary obstacles—parchment barriers, if you will—standing in the way of the people's will. As the political scientist Juan Linz puts it, "when a majority of the legislature represents a political option opposed to the one the president represents … who has the stronger claim to speak on behalf of the people: the president or the legislative majority that opposes his policies? Since both derive their power from the votes of the people in a free competition among well-defined alternatives, a conflict is always possible and at times may erupt dramatically. There is no democratic principle on the basis of which it can be resolved, and the mechanisms the constitution might provide are likely to prove too complicated and aridly legalistic to be of much force in the eyes of the electorate."[21] Call this the *legitimacy concern*.

A third and closely related concern arises from the fact that under the Constitution the preservation of republican freedom doesn't depend in the first instance on the actions of ordinary citizens, who the Founders were generally reluctant to invest with direct political power, but rather on the internal workings of the government itself—workings which are, as we've seen, hard for ordinary citizens to make sense of even under the best of circumstances. In a mixed constitution, the paradigmatic threat to republican freedom arises when one *class of people* gains too much power at the

Supreme Court's finding that a key portion of the law was unconstitutional? Each of these (not mutually exclusive) explanations—and this is of course not an exhaustive list—is plausible. So what's a progressive voter to do? Similarly, many conservatives are equally convinced, albeit for very different reasons, that the reforms implemented by the ACA are deficient, and yet the Republican Party failed to repeal and (or) replace it in the two years (2017-2018) when it had unified control of the federal government, despite the fact that this had been a central campaign promise for four consecutive election cycles. To what should they attribute this failure? Was it due to a failure of leadership or policy acumen on the part President Trump or his cabinet officials? The inconvenient ideological positioning of the leftmost Republican senator? The procedural rules of the Senate itself? The refusal of Congressional Democrats to cooperate in the legislative process? The Supreme Court's failure to find key portions of the law unconstitutional? Again each of these (not mutually exclusive) explanations is plausible. So what's a conservative voter to do?

[21] Juan J. Linz, "The Perils of Presidentialism," *Journal of Democracy* 1 (1990): 53.

expense of the others, and is therefore able to impose its will on the whole. In a democratic separation of powers regime, by contrast, the paradigmatic threat to republican freedom arises when one *branch of government* gains too much power at the expense of the others. It follows that public officials are not only expected to place the common good ahead of their own factional interests—a familiar republican concern—but also to place their institutional prerogatives ahead of both their factional interests *and of the common good as they perceive it.* That is, presidents and Congressional majorities often sincerely believe that their policies are in the best interests of the polity as a whole—and often have considerable evidence that the people agree with them—but are nevertheless thwarted by one of the many veto players in the system. Here again—and in the more ordinary cases when a particular branch simply wants to advance the avowedly factional interests of the party that controls it—enormous pressure is placed on the constitutional framework: after all, politicians typically enter public life to get their favored policies enacted, not to defend the prerogatives (or respect the boundaries) of the offices that they happen to hold.[22] In the limit, we have reason to fear an outcome in which, as Bruce Ackerman puts it, "one or another power assaults the constitutional system and installs itself as the single lawmaker"; a scenario that he refers to as the "Linzian nightmare," and that has of course come to pass in many presidential systems, though thankfully not (yet) in the United States.[23] Call this the *stability concern.*

Needless to say, the stability of the American constitutional system, and indeed of any democratic separation of powers regime, depends on its ability to keep the accountability and legitimacy concerns in check. The problem is that under such a regime the practical demands of accountability and legitimacy often point in different directions. That is, where legitimacy depends on the absence of conflict between the branches, accountability requires that those conflicts (when they exist) be defined as clearly as possible. It follows that efforts to clarify lines of accountability will often exacerbate legitimacy concerns by making it clear when objectionable policy outcomes are the result of a stalemate between the elected branches, each of which claims a popular mandate. In such cases, failures to act, or to act with sufficient vigor, in the face of popular demands—or an insistence on taking vigorous action in the face of popular ambivalence[24]—will be attributed (not unreasonably) to a failure of the system, or (sometimes less reasonably) to failures on the part of the people who have been chosen to operate it. The public will be tempted to turn in such cases to

[22] This may explain why federal oaths of office emphasize the duty of fidelity that elected officials owe to the Constitution: the president swears to "preserve, protect and defend the Constitution of the United States," and members of Congress swear to "support and defend the Constitution of the United States."

[23] Bruce Ackerman, "The New Separation of Powers," *Harvard Law Review* 113 (2000): 645.

[24] This is of course a less likely outcome given the many veto points in the system.

whoever—typically the president—is able to "get things done."[25] Conversely, efforts to improve the legitimacy of political outcomes will often blur lines of accountability: policymakers are obliged to cooperate in the making of public policy despite the fact that they have (by design) very different electoral incentives. Not surprisingly, the resulting policies are often suboptimal or even incoherent.

The stability of a democratic separation of powers regime therefore depends on the existence of a kind of saving ambiguity in the policymaking process; one that doesn't push the demands either of accountability or of legitimacy too far. It's doubtful whether the Framers fully grasped the scope of this dilemma, since they didn't anticipate the rise of a party system—or, to the extent that they did anticipate it, they considered it to be incompatible with good republican government. The fact that the necessary ambiguity has nevertheless largely been present despite the (inevitable) rise of a party system may be seen as a matter of happy circumstance: throughout most of the history of the United States, the major political parties have been pluralistic and relatively nonideological, with cross-cutting cleavages—most notably along sectional lines—creating substantial space for inter-party cooperation. The two periods in which partisan cleavages were laid bare—the Civil War and the Great Depression—are, not coincidentally, also widely regarded as moments of Constitutional "re-founding." In each case, as Linz's analysis would predict, an alarming amount of power was suddenly concentrated in the hands of the President, the opposing party was temporarily excluded from or sidelined in the legislative process, and the terms of Constitutional government were redefined to accommodate social and political demands that had been building up for decades. Not surprisingly, given the inherent conservatism of the federal lawmaking process, each of these settlements proved to be extraordinarily durable from a legal point of view. And not surprisingly, given the fundamental nature of the issues and interests involved, they each gave rise to substantial resistance—much of it, in the case of the post-Civil War settlement, extralegal.

One of the outstanding developments in American politics over the past twenty-five years has been the emergence of ideologically unified and polarized political parties in the context of a closely divided electoral landscape. The ideological gap between Republican and Democratic members of Congress is as wide today as it has been for decades,[26] and the frequency of divided partisan control of the federal government is as great as it's

[25] Consider, for example, the perfectly intelligible accountability incentives that Congressional Republicans had in refusing to cooperate in the drafting of the Affordable Care Act or in the passage of routine legislative "fixes" after it became law—and the equally intelligible accountability incentives that President Obama had to take extralegal administrative action in order to ensure that the law worked as smoothly as possible despite their intransigence.

[26] There's disagreement about whether the evidence of Congressional polarization as measured by voting records reflects genuine polarization among members, or whether it's an artifact of effective agenda control by party leadership. From the standpoint of the argument being offered here, it doesn't matter which of these explanations is correct, since either scenario

ever been.[27] Perhaps not coincidentally, Congressional approval ratings are at or near historic lows, as is, according to some measures, Congressional productivity.[28] Needless to say, this is exactly the scenario in which the tension between the demands of accountability and legitimacy is likely to be most pronounced, and in which the "Linzian nightmare" of democratic instability is most likely to be realized. The situation is exacerbated by the overrepresentation of small states in the Electoral College and the Senate; an arrangement that creates a worrying gap between what we might call "constitutional legitimacy" and popular legitimacy. In two of the last six Presidential elections the winner in the Electoral College has lost the popular vote—something that had only happened twice in the preceding two hundred years. Moreover, a majority of the U.S. population is currently represented by just eighteen Senators (the total population of the nine largest states), and it is mathematically possible for a Senate majority to represent just 18 percent of the population (the total population of the twenty-six smallest states). The fifty Senators who voted to confirm Justice Brett Kavanaugh to a pivotal seat on the Supreme Court in October 2018 represented just 44 percent of the population. Trends in population growth and the growing partisan divide between urban and rural voters suggest that the gap between constitutional and popular legitimacy is likely to become wider over time.

When seen against the background of these developments, the structural critique of the administrative state seems to fundamentally misunderstand the nature of the constitutional challenge that we currently face. The most pressing problem—the one that poses the most direct threat to the stability of the American constitutional system—isn't the consolidation of executive, legislative, and judicial powers in a single branch of government, but rather the emergence of ideologically unified and polarized political parties, and the fact that the balance of power between them increasingly hinges on undemocratic features of the constitutional system. Under these conditions the administrative state provides exactly the kind of saving ambiguity that's necessary for the stability of a democratic separation of powers regime. Because administrative agencies take a great deal of nuts-and-bolts policy-making out of the hands of the ordinary legislative process, they're able to act decisively in ways that don't directly implicate, and that are therefore less likely to undermine the legitimacy of, the elected branches. And because the agencies are nevertheless ultimately accountable to those branches, their behavior is responsive in the long run to changes in public

will exacerbate the underlying tension between accountability and legitimacy—although the available remedies will of course be very different in each case.

[27] Between 1897 and 1969, the same party controlled the Presidency and both houses of Congress more than 80 percent of the time (29 out of 36 Congresses); since 1969 this has only been the case about 30 percent of the time (8 out of 27 Congresses).

[28] For an overview of the recent literature on Congressional productivity, see Sarah Binder, "The Dysfunctional Congress," *Annual Review of Political Science* 18 (2015): 85–101.

opinion, and thus in the political balance of power. If administrative action depended case-by-case on statute, as proponents of the nondelegation principle propose, then given the cumbersome and counter-majoritarian nature of the legislative process, it would almost certainly be substantially and persistently out of sync with the will of the people. Conversely, if administrative action depended solely on the will of the president, as proponents of the so-called "unitary executive" propose, then in cases of divided government such actions (or failures to act) would often involve a clear repudiation of the will of the Congress. In either case, the legitimacy of the constitutional system would be called into question, and its stability thereby undermined.

Needless to say, this "constitutional" defense of the administrative state as a kind of flywheel or safety valve within a democratic separation of powers regime offers a messy solution to a messy and ultimately unresolvable problem: it's an imperfect response to the imperfect constitutional system that we in the United States have inherited. A cleaner solution is offered by a parliamentary system, in which the executive and legislative powers are united, and in which policy outcomes can therefore be clearly attributed to the party or coalition of parties that's responsible for enacting them and easily overturned by the opposition when it comes to power. Under such a system, in which accountability and legitimacy point in the same direction, the ruling party or coalition has an incentive to design administrative agencies that are not only competent—because it wants to use them to achieve its policy goals—but also neutral—because it knows that they will eventually fall into the hands of the opposition. Similarly, agencies and civil servants have an incentive to cultivate a reputation for "neutral competence" in order to survive across changes in party control. All of this stands in sharp contrast to a democratic separation of powers regime, in which elected officials, because they can only make policy by cooperating with their partisan opponents, have an incentive to insulate administrative agencies from direct political control, and in which the agencies, because they're so insulated, often pursue their own policy agendas.[29] As we'll now see, where the stability of a parliamentary system depends on the stability of the parties and coalitions of which it's composed (and instability at that level suggests that political stability isn't available no matter what constitutional system is in place) the stability of a democratic separation of powers regime requires that legislators place their institutional prerogatives ahead of their partisan allegiances—an order of priorities that's not at all easy to maintain.

[29] For a useful analysis, see Terry M. Moe and Michael Caldwell, "The Institutional Foundations of Democratic Government: A Comparison of Presidential and Parliamentary Systems," *Journal of Institutional and Theoretical Economics* 150 (1994): 171–95. As Moe and Caldwell point out, the American separation of powers system lies at one end of a continuum at the other end of which lies the two-party "Westminster model" found in the United Kingdom. The administrative features of multiparty parliamentary regimes can be expected to fall somewhere between these two extremes.

IV. Deference, Delegation, and Corruption

As should already be clear, in rejecting the structural critique of the administrative state I don't mean to suggest that the American constitutional system is entirely healthy: far from it. Although the administrative state offers a useful (albeit imperfect) means of responding to the shortcomings of a democratic separation of powers regime, it gives rise to its own set of dangers; most notably that excessive power will be concentrated in the executive branch. Here again we can look to the history of the separation of powers doctrine for insights. Montesquieu concludes his discussion of the English constitution with the traditional republican observation that "[s]ince all human things have an end, the state of which we are speaking will lose its liberty; it will perish," just as "Rome, Lacedaemonia, and Carthage have surely perished." He follows this familiar platitude with the characteristically gnomic claim that serves as the epigraph for this essay: "This state will perish," he writes "when legislative power is more corrupt than executive power."[30] What does he mean? As we've seen, the separation of powers distinguishes the English state from its Roman, Spartan, and Carthaginian predecessors, and from the majority of republican states today. This distinctive institutional arrangement, we're meant to conclude, makes its liberty vulnerable in a distinctive way: *this* state, unlike the others, will perish when the legislative power becomes more corrupt than the executive.[31] Montesquieu defines corruption in traditional republican terms as the loss of virtue, which he defines in turn as "love of the homeland, that is, love of equality." By this he means that republican citizens should be equally devoted to the common good of the state; they should privilege the identity that they share —that of citizen—over the various factional identities that divide them. As he later puts it, "[m]en cannot render [the homeland] equal services, but they should equally render it services."[32] He therefore predicts that the English will lose their political liberty—their republican freedom—when the disposition to pursue factional interests is greater in the legislature than it is in the executive.

The thought behind this rather mysterious prediction is revealed when Montesquieu revisits the English constitution in book 19 of *The Spirit of the Laws*. There he abandons the traditional republican language of selfless virtue in favor of the characteristically modern (or, as we might now say, the characteristically Madisonian) language of competing interests. The defining issue of English politics, he argues, is the conflict of interest between the executive and the legislative, and each citizen's allegiance varies according to the prospect of benefit that he sees from the executive, which "has all the posts at its disposal" and can therefore incline "all who

[30] Montesquieu, *Spirit of the Laws*, 166 (book 11, chapter 6).
[31] Montesquieu discusses the fate of the other three republics—especially the Roman one — in his *Considerations on the Causes of the Greatness of the Romans and their Decline* (1734).
[32] Montesquieu, *Spirit of the Laws*, xliv, 43 (author's foreword; book 5, chapter 3).

would obtain something from it … to move to that side." Here again Montesquieu conceives of political liberty in terms of a balance of power between estates, as befits an heir to the mixed constitution tradition. But as a proponent of the separation of powers doctrine he also holds that the preservation of liberty depends on the checking of executive power by the legislature: "As these parties are made up of free men," he argues, "if one party gained too much, the effect of liberty would be to lower it while the citizens would come and raise the other party like hands rescuing the body." The hinge of this self-equilibrating "effect of liberty," he argues, is the representative legislature, which "has the trust of the people and is more enlightened than they," and so can "make them revise the bad impressions" that are created by "those who … most sharply oppose executive power" while remaining "unable to admit the interested motives of their opposition."[33] Here then is the solution to the riddle that's posed in Book 11 chapter 6: English liberty will be lost when the legislative power no longer serves this function—when for its own factional reasons it becomes either a tool in the hands of, or an implacable opponent to, the executive power.

Montesquieu—a student of Bolingbroke on this point[34]—saw royal patronage as the vehicle of corruption by means of which the monarchy could overcome the pride of estate that otherwise prevents both nobles and commoners from surrendering their liberty. The corresponding threat to republican freedom in the American polity is, as we've seen, the more insidious phenomenon of partisanship: when the president exceeds the constitutional authority of the office in a way that nevertheless satisfies the policy preferences of co-partisans in Congress, then it requires an almost heroic devotion to constitutional norms for those co-partisans to prioritize the procedural violation over the substantive achievement. Whether the mechanism is patronage or partisanship, the outcome is the same: as soon as factional interests supersede institutional ones, the delicate balance between accountability and legitimacy is upset and the stability of the constitutional system is thereby undermined. Under these conditions, as Ackerman puts it, "[p]residents break legislative impasses by 'solving' pressing problems with unilateral decrees that often go well beyond their formal constitutional authority; rather than protesting, representatives are relieved that they can evade political responsibility for making hard decisions; subsequent presidents use these precedents to expand their decree power further." Over time, he suggests, "the house is reduced to a forum for demagogic posturing, while the president makes the tough decisions unilaterally without considering the interests and ideologies represented by the leading political parties in congress"[35]—not an inapt description of the

[33] Ibid., 325–26 (book 19, chapter 27).
[34] See, for example, Robert Shackleton, "Montesquieu, Bolingbroke, and the Separation of Powers," *French Studies* 3 (1949): 25–38.
[35] Ackerman, "New Separation of Powers," 647.

contemporary political situation in the United States. The English solution to this dilemma—a solution that had already taken its nascent form in 1748—was of course to replace the executive power of the monarch with the executive power of the prime minister, and thus to abandon the separation of powers doctrine altogether. As we've seen, this approach has considerable advantages from an administrative standpoint, but it is of course not available to the American polity short of a constitutional revolution.

If the problem is partisanship, then it might seem that the obvious solution would be to give more power to the courts, which are, if not nonpartisan, at least less overtly partisan, and more insulated from partisan pressures, than their elected counterparts.[36] The criticisms of judicial review in this context—or, in positive terms, the defenses of *Chevron* deference—are by now familiar. Procedurally speaking, courts necessarily consider particular cases and can render only negative judgments, not constructive ones. Comprehensive judicial review of agency actions would therefore introduce a degree of uncertainty and inconsistency into the policymaking process that would work against the ideal of coherent and equitable governance, thereby diminishing the enjoyment of republican freedom. Substantively speaking, courts are ill-equipped to offer informed judgments about the often highly technical issues that administrative agencies exist to regulate. Given the choice between having policy determined by agencies staffed by experts and having it determined (at least *de facto*) by judges, the norm of judicial deference, despite its obvious shortcomings, seems pretty clearly to be the preferable option. The core argument of this essay, however, is a constitutional one: in a democratic separation of powers regime, close judicial oversight raises both accountability and legitimacy concerns, thereby making stability concerns more pressing over time. The last great constitutional crisis in this country—and the one from which current debates about the administrative state spring—was after all precipitated by judicial opposition over a period of decades to a program of legislative reform that had clear and persistent popular support at both the state and national levels. Whatever one thinks of its policy achievements, the Roosevelt presidency is probably as close as the American polity has come to a "Linzian nightmare."

There's no realistic substitute, then, for legislative oversight of the administrative state, and this brings us back to the worry that's expressed in the epigraph to this essay: How can we persuade legislators to take their constitutional role as seriously as, or more seriously than, their partisan allegiances? How can we persuade Republicans and Democrats to exercise their oversight responsibilities as fellow members of Congress and not—or not exclusively—as partisan opponents? There's considerable precedent for this kind of behavior in American history, but recent trends aren't encouraging.

[36] Montesquieu fails to consider this possibility because he conceives of the judicial power as being exercised by temporary "tribunals"—juries—rather than by judges, a fact that distinguishes it from its "visible" executive and legislative counterparts: *Spirit of the Laws*, 159, 325 (book 11, chapter 6; book 19, chapter 27).

Indeed, over the last twenty-five years, Congress has largely divested itself of its oversight capacities at exactly the same time as it's become a more partisan and polarized institution. The power of committee chairs has been sharply reined in and almost all legislation originates in and flows through chamber leadership, which is (as we would expect) itself highly partisan. Staff and committee budgets have been cut, as have the budgets of the various research offices—entities like the Congressional Budget Office, the Congressional Research Service, and the Government Accountability Office—on which Congress relies for independent information. Hearings tend to be occasions for political point-scoring rather than for genuine fact-gathering—a tendency that is of course exacerbated by the fact that most hearings are now televised. The onerous demands of campaign fundraising make it all but impossible for members to find the time to develop policy expertise even when they're so inclined, which makes effective oversight even more difficult. And not surprisingly, Congress increasingly attracts and promotes the kinds of members who are comfortable with and tend to flourish in this institutional environment.[37]

The idea of the mixed constitution is moribund today; a casualty of the triumph of democratic norms, and of democracy itself, over the course of the twentieth century.[38] The idea of the separation of powers, by contrast, is alive and well, thanks in large part to the American Founders' creative appropriation of Montesquieu's doctrine. I hope to have shown that the structural critique of the administrative state, despite the fact that it hinges on an appeal to the separation of powers, overlooks or misunderstands the limitations of that doctrine once it's been detached from its original association with the mixed constitution. As a result it misdiagnoses the threat to republican freedom that exists in the contemporary United States. The problem is not that the administrative state is incompatible with the separation of powers, but rather that effective oversight of the administrative state in a democratic separation of powers regime is incompatible with the extreme partisanship that has infected the Congress. To use Montesquieu's language, legislative power is now more corrupt than executive power, or is rapidly becoming so. I don't have a ready solution to this problem—corruption is, as the republican tradition teaches us, very hard to reverse—but we should start by giving it the right name. Questions about the proper *scope*

[37] For an influential analysis of these developments see Thomas E. Mann and Norman J. Ornstein, *The Broken Branch: How Congress Is Failing America and How to Get It Back on Track* (New York: Oxford University Press, 2006).

[38] Moribund, but not entirely dead: the political theorist John McCormick has called for the creation of a "People's Tribunate," to be populated by citizens selected by lot but excluding members of the wealthiest 10 percent of households and anyone who has previously held significant public office. This Tribunate, like its Roman namesake, would have the power to veto policies made by the "socioeconomic and political elites" who control the traditional branches of government, and could also appeal directly to the people to make policy via referendum: John P. McCormick, *Machiavellian Democracy* (New York: Cambridge University Press, 2011), 183–85.

of the administrative state—and thus about the proper scope of market freedom—are, as I've indicated, matters of political judgment, and ultimately of political power. Questions about the proper *administration* of the administrative state—and thus about the necessary conditions for the enjoyment of republican freedom—are ultimately matters of political virtue, constrained by the institutional environment within which political actors do their work. I hope that I have helped to clarify the nature and difficulty of those questions in the American case.

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