ESSAY

TREATING THE ADMINISTRATIVE AS LAW: RESPONDING TO THE "JUDICIAL AGGRANDIZEMENT" CRITIQUE

Chad Squitieri†

Modern separation-of-powers jurisprudence—including key decisions decided during the Supreme Court's 2023-24 term—has been critiqued on the grounds that it constitutes "judicial aggrandizement," i.e., that it impermissibly empowers federal courts to decide separation-of-powers questions better left to Congress and the President. This "judicial aggrandizement" critique goes too far to the extent it suggests that federal courts may not play any role in enforcing the separation of powers. After all, ours is a system of a President and Congress constrained by a written Constitution—not a King in Parliament free to act outside of judicial constraint. But the "judicial aggrandizement" critique is persuasive to the extent it recognizes that federal courts must not play an exclusive role in policing the separation of powers. That is in part because, as this Essay will explain, administrative agencies can help federal courts enforce the separation of powers.

Recognizing the complementary role that agencies can play in enforcing the separation of powers may require understanding "law" in a new light. That new light—which was actually lit more than two thousand years ago—is offered by a natural law tradition. That tradition recognizes "law" as a tool for instilling in actors those characteristics (called "virtues") that enable actors to perform their functions excellently. Thus, by treating the "administrative" (i.e., agency action) as "law" (i.e., a tool for instilling virtue), agencies can help legislators develop the virtues that those legislators need to perform their constitutional functions excellently.

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† Assistant Professor of Law, Catholic University of America, Columbus School of Law. Thanks to J. Joel Alicea, Beau J. Baumann, Eli Nachmany, Natalie Schmidt, and Adam J. White for their comments. Thanks also to McKenzie Mixon for her research assistance.

INTRODUCTION

Modern separation-of-powers jurisprudence rests on two presumptions. First, that Congress has fallen short of fulfilling its constitutionally assigned lawmaking function by delegating too much policymaking authority to administrative agencies. And second, that courts can help Congress properly fulfill its lawmaking function. Scholars have debated the merits of the first presumption—most notably in debates concerning the nondelegation doctrine (which places limitations on Congress's ability to delegate lawmaking authority to administrative agencies),[1] and the major questions doctrine (which requires Congress to be explicit if it wishes to delegate "major" authority

[1] Chad Squitieri, *Who Determines Majorness?*, 44 HARV. J. L. & PUB. POL'Y 463, 469 (2021).

to an agency).[2] But this Essay will respond to a growing critique concerning the second presumption. In particular, this Essay will respond to the critique that, when deciding modern separation-of-powers cases, courts have impermissibly aggrandized judicial power at the expense of the political branches.

This "judicial aggrandizement" critique takes many forms. One scholar, for example, argues that the "[t]he judges are out of control," in part because they have used "administrative law cases to aggrandize themselves."[3] Two other scholars use slightly different terminology to argue that the courts are in the midst of a "juristocratic counterrevolution."[4] Indeed, this line of critique has proven so prevalent that, to keep track of the various claims, two additional scholars proposed a new "taxonomy for understanding different aspects of contemporary judicial power."[5]

And it is not just scholars who have critiqued separation-of-powers jurisprudence on judicial aggrandizement grounds. In the 2023–24 Supreme Court term, three justices offered their own thoughts on the topic. In a separation-of-powers case concerning presidential immunity, Justice Jackson critiqued the Court for "aggrandizing power in the Judiciary and the Executive, to the detriment of Congress."[6] In a separate case concerning administrative adjudication, Justice Sotomayor characterized the Court as participating in a judicial "power grab," and warned that "[j]udicial aggrandizement is as pernicious to the separation of powers as any aggrandizing action from either of the political branches."[7] And when critiquing the Court's overruling of a case affording deference to agency interpretations of law, Justice Kagan described the Court as replacing a "rule of judicial humility" with "a rule of judicial hubris," and observed that "[i]n recent years, this Court has too often taken for itself decision-making authority Congress assigned to agencies."[8]

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2 *Id.* at 472.

3 Josh Chafetz, *The New Judicial Power Grab*, 67 ST. LOUIS U. L.J. 635, 635, 648 (2023).

4 Nikolas Bowie & Daphna Renan, *The Separation-Of-Powers Counterrevolution*, 131 YALE L.J. 2020, 2028 (2022).

5 Allen C. Sumrall & Beau J. Baumann, *Clarifying Judicial Aggrandizement*, 172 PENN. L. REV. ONLINE 24, 24 (2023).

6 Trump v. United States, 603 U.S. __, __ (2024) (Jackson, J., dissenting).

7 Sec. & Exch. Comm'n v. Jarkesy, 603 U.S. __, __ (2024) (Sotomayor, J., dissenting).

8 Loper Bright Enterprises v. Raimondo, 603 U.S. __, __ (2024) (Kagan, J.,

The judicial aggrandizement critique is persuasive in part, even if not in full. It is persuasive to the extent it maintains that courts should not be the *sole* entities responsible for ensuring that Congress does not violate the Constitution's separation-of-powers principles. In a constitutional system with three coequal branches, no one branch is supreme. But the critique goes too far to the extent it suggests that courts should play *no* role in enforcing the separation of powers. In short, the response to the judicial aggrandizement critique is to recognize that, although courts may play a role in enforcing separation-of-powers principles, other entities can (and should) complement those judicial efforts.

What other entities can help courts ensure that Congress does not upset the careful way in which the Constitution separates and vests federal power? This Essay contends that administrative agencies have a role to play. In particular, administrative agencies can use *law* to encourage Congress to fulfill its constitutionally assigned function—even when Congress has political incentives to avoid doing so.

In advancing the argument that administrative agencies can use law to help Congress fulfill its function, this Essay adopts a natural law understanding of law.[9] That understanding recognizes that the purpose of law is to instill in actors those character traits (called "virtues") that help actors carry out their functions excellently.[10] Working within a natural law tradition, this Essay contends that virtue-instilling law can be deployed both by courts vested with the judicial power, and by administrative agencies empowered to exercise executive power on the President's behalf. In short, both courts and agencies can use law to help legislators develop the characteristics (i.e., virtues) that those legislators need to fulfill their lawmaking functions excellently.

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dissenting).

9 This Essay uses the phrase "natural law tradition" to refer to the specific tradition offered by those natural law thinkers who incorporate virtue ethics into their work. *See, e.g.*, LEE J. STRANG, ORIGINALISM'S PROMISE 237–38 (2019) (referring to "the relationship between natural law and virtue ethics" and stating that "[t]he virtues work hand in hand with natural law directives to facilitate pursuit of human flourishing"); THOMAS AQUINAS, SUMMA THEOLOGIAE I-II, Q. 94 art. 3 ("[T]here is in every man a natural inclination to act according to reason: and this is to act according to virtue. Consequently, considered thus, all acts of virtue are prescribed by the natural law . . . ."). Within this specific tradition, "the virtue of practical wisdom perfects one's capacity to correctly *identify* the principles of natural law," and "[t]he moral virtues ensure that one's appetites for goods are properly ordered" which "ensures that one's vision of what the natural law requires is not blurred." STRANG, *supra*, at 238.

10 *Infra* Part II.B.

How might administrative agencies instill virtue in federal legislators? The opportunities are plentiful and run the entire range of what can be referred to as "administrative" action. As used here, "administrative" action includes relatively formal action—such as the promulgation of regulations or the adjudication of cases. Administrative action also includes less formal action—such as the output that agency officials produce when drafting guidance documents or responding to congressional inquiries. It is by recognizing these types of *administrative* action as *law* (i.e., as a tool for instilling in legislators the virtues that the legislators need to fulfill their lawmaking functions excellently) that one can understand what it would mean to treat the *administrative* as *law*.

In advancing that argument, this Essay will focus on the four cardinal virtues: courage, prudence, temperance, and justice. In short, legislators need *courage* to make policy decisions in the face of political pressures, *prudence* to identify the proper means for achieving proper goals, *temperance* to resist various vices that often distract government officials, and *justice* to recognize the limitations imposed by the Constitution's vesting of legislative powers in a collective Congress. Importantly, agencies can take administrative action to help instill those virtues in legislators.

To be sure, increasing congressional influence over policy might mean reducing the policymaking influence that agencies currently wield. And for that reason, agency officials might have little interest in instilling in legislators the virtues those legislators need to take power away from agencies. The first step in instilling virtue in *legislators* might therefore be to develop more virtuous *agency officials*—a task I have begun to take on in recent work.[11] But putting that work to the side, it is useful to think through how agency officials *could* instill virtue in legislators—even if those officials do not currently have the incentive to do so.

What's more, instilling virtue in legislators is not a job for agency officials alone. Instead, courts can help ensure that *agency officials* have the incentive to instill virtue in Congress. In short, the roles played by administrative agencies and the judiciary are complementary and interlocking—which is hardly a surprise given the Constitution's system of three coequal branches, each of which can be used to check and balance the excesses and shortcomings of the other two branches.

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11 *See generally*, Chad Squitieri, *Administrative Virtues*, 76 ADMIN. L. REV. 599 (2024).

Part I of this Essay is split into three subparts. Part I.A discusses the "problem" that sits at the core of modern separation-of-powers jurisprudence, *i.e.*, the idea that Congress is not fulfilling its lawmaking function. Part I.B discusses the "solution" *i.e.*, the manner in which courts have sought to get Congress to fulfill its lawmaking function. Part I.C then discusses the "problem with the solution," *i.e.*, recent scholarly critiques of judicial efforts to influence congressional behavior. Part II will then propose an alternative means of correcting the "problem" of a Congress that is not fulfilling its lawmaking function. That alternative means requires recognizing *administrative* action as *law* capable of instilling virtue in federal legislators. Finally, Part III will apply this Essay's alternative solution by outlining how administrative agencies could instill legislators with the four cardinal virtues.

I
CONGRESS: THE PROBLEM, THE SOLUTION, AND PROBLEM WITH THE SOLUTION

Part I.A. will outline an alleged problem with the Congress. Part I.B will then detail the judicially proposed solution for that problem. Part I.C will then highlight a scholarly critique of that "solution."

A. The Problem

In an era of political polarization, it can be difficult to find areas of agreement. It is therefore notable that political and legal commentators of various stripes have agreed that a particular "problem" plagues modern federal policymaking. That problem is a Congress unwilling to do its job.[12] Indeed, this idea of a broken Congress has proven so prevalent that one scholar, Beau J. Baumann, has described the idea as form of "Americana."[13]

As Baumann catalogues, the idea of legislative decline is

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[12] *See, e.g.*, Sarah Isgur, *Why is Congress Broken? Because the Other Branches Are Doing Its Job*, POLITICO (May 19, 2022), https://www.politico.com/news/magazine/2022/05/19/supreme-court-activists-lose-congress-00033478 [https://perma.cc/6YSN-6P8A]; Derek Willis & Paul Kane, *How Congress Stopped Working*, PROPUBLICA (Nov. 5, 2018), https://www.propublica.org/article/how-congress-stopped-working [https://perma.cc/8PLC-B852].

[13] Beau J. Baumann, *Americana Administrative Law*, 111 GEO. L. J., 465, 486 (2023) ("Americana administrative law describes an idea of legislative decline that motivates an accretion of decisionmaking authority toward either the Judicial Branch or the Executive Branch.").

"pervasive" across administrative law scholarship.[14] One popular conception of the "problem" contends that the modern Congress works within a *delegate-broadly-then-lobby* framework. Pursuant to that framework, legislators first *delegate* broad powers to agencies. Legislators then privately *lobby* agency officials to exercise that delegated power in a way that benefits the individual legislator. This framework allows an individual legislator to dictate federal policy in ways that the legislator might not have been able to achieve if the legislator had to develop policy through the wheeling and dealing inherent in the collective lawmaking process. As then Professor (now Judge) Neomi Rao described, "[d]elegating authority allows opportunities for members [of Congress] to assert 'particularized control' over administration, control that can circumvent the difficult collective action problems of legislation."[15] For this reason, "[l]egislators . . . have persistent incentives to delegate."[16] As Professor John Hart Ely overserved: "it is simply easier, and it pays more visible political dividends, to play errand-boy-cum-ombudsman than to play one's part in a genuinely legislative process."[17]

To be sure, Baumann takes issue with the idea that Congress has fallen short of fulfilling its job.[18] But as even he recognizes, this widely presumed "problem" stands at the core of modern separation-of-powers jurisprudence.[19] Given the widespread agreement among scholars and jurists concerning the existence of the "problem," I will ask readers to assume for purposes of this Essay that, despite competing arguments from scholars such as Baumann, Congress has indeed fallen short of fulfilling its lawmaking function. This will allow this Essay to more squarely address the second presumption inherent in modern separation of powers jurisprudence—namely, that the *courts* are able to correct the alleged "problem"

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14 *Id.* at 487.

15 Neomi Rao, *Administrative Collusion: How Delegating Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1484 (2015) (quotations and citation omitted); *but see* Baumann, *supra* note 13, at 511 (contending that "Rao's fixation on collective legislating endangers congressional power" and is it odds with "how congressional experts conceive of Congress's role.").

16 *Id.*

17 JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 131 (1980); *see also*, Adam J. White, *Democracy, Delegation, And Distrust*, HOOVER INST. (Mar. 12, 2019), https://www.hoover.org/research/democracy-delegation-and-distrust [https://perma.cc/TG2Q-XX27].

18 Baumann, *supra* note 13, at 516.

19 *See, e.g.*, *id.* at 486.

of a broken Congress.

B. The Solution

If it is assumed that Congress's delegate broadly then lobby framework presents a problem, what is the solution? As noted above, modern separation-of-powers jurisprudence presumes that courts can assist in remedying the situation. This is best seen in recent efforts to reinvigorate two judge-made doctrines.

The first is the nondelegation doctrine. That doctrine "prohibits Congress from delegating its legislative powers to other entities, such as administrative agencies."[20] And "[t]oday the doctrine permits Congress to delegate decision-making discretion to agencies so long as the agency's discretion is cabined by an 'intelligible principle' set by Congress."[21]

The second doctrine is the major questions doctrine. While "[t]he nondelegation doctrine considers what authority Congress *can* delegate, . . . the major questions doctrine is said to speak to *whether* Congress has delegated authority."[22] But "in practice," the major questions doctrine is better understood as a tool that empowers courts "to tell Congress *how* it can delegate authority."[23] More specifically, courts may invoke the doctrine to require that Congress use exceptionally clear statutory language when Congress wishes to delegate "major" policy making authority to an agency.[24]

In short, the nondelegation and major questions doctrines prohibit Congress from delegating some discretion outright, and "major" discretion absent judicially approved language. The two doctrines thus offer examples of the judiciary designating itself as the entity responsible for policing separation-of-powers issues that outline the relationship between Congress and agencies. And other decisions—such as the Presidential immunity, agency adjudication, and agency deference cases referenced above—offer similar examples of the Court recognizing itself as playing a central role in enforcing separation-of-powers principles.[25]

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20 Squitieri, *supra* note 1, at 469.
21 *Id.*
22 *Id.*
23 *Id.*
24 *See* West Virginia v. EPA, 597 U.S. 697, 723 (2022).
25 *Supra* Introduction.

C. The Problem with the Solution

Modern separation-of-powers jurisprudence has been critiqued on the grounds that it relies too centrally on federal courts. Professors Nikolas Bowie and Daphna Renan, for example, argue that "[m]odern separation-of-powers law is premised" on the "misunderstanding" that "the U.S. Constitution imposes unwritten but judicially enforceable limits on the power of one branch of government to interfere with the others."[26] They refer to that purported misunderstanding of the separation of powers as "juristocratic,"[27] and contend that the misunderstanding has wrongly replaced an older, "republican" conception of the separation of powers.[28]

Under the "republican" conception of the separation of powers, "representative institutions . . . distill constitutional meaning and enforce constitutional limits as part of the deliberation and compromise necessary to pass legislation."[29] The upshot of embracing this republican conception is to accept "that Congress and the President, working through the interbranch legislative process, should decide whether any particular institutional arrangement is compatible with the Constitution's separation of powers."[30] More succinctly, the republican conception maintains that enforcing the separation of powers is a matter "for the representative branches," rather than the courts.[31] Adopting "[t]he republican conception" of the separation of powers would therefore "necessitate[] a shift in the locus of *authoritative* decisions on the separation of powers from the judiciary to the political process."[32]

Professors Bowie's and Renan's argument would result in a significant change to how jurists and scholars think about the separation of powers.[33] Indeed, the two scholars "are aware of no statutory design, enacted to date" which would permit a court to rule that a statute violates a republican conception of separation-of-powers principles.[34] In explaining this significant departure from current understandings of the law,

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26 Bowie & Renan, *supra* note 4, at 2024.

27 *Id.* at 2025.

28 *Id.* (italics omitted).

29 *Id.*

30 *Id.* at 2030 (italics omitted).

31 *Id.*

32 *Id.* at 2110 (emphasis added).

33 *See id.* at 2025 (recognizing that the "*juristocratic* separation of powers" "took control of the American imagination" nearly a century ago).

34 *Id.* at 2030.

Professors Bowie and Renan work to connect the republican conception of the separation of powers to a broader "republican tradition" advanced by "English natural-rights theorists."[35] They then contend that "[t]he normative values underlying the separation of powers in eighteenth-century England . . . found fertile soil in the new American republic."[36]

Professor Josh Chafetz has similarly argued that the justices on the Supreme Court have deployed "anti-Congress rhetoric in administrative law cases to aggrandize themselves."[37] He thinks that the Court "has earned a little contempt,"[38] and he has argued in more striking terms that "courts are the enemy, and always have been."[39] Elsewhere he has proposed "cutting off the Supreme Court's air-conditioning budget" and "tearing down" the Supreme Court building, which he refers to as a "quasi-fascist temple."[40]

Other scholars have offered related critiques—although using different terms. Indeed, critiques of the Court have grown so pervasive that two scholars—Baumann and Allen C. Sumrall—have proposed a taxonomy of terms to make sense of the various arguments.[41] In particular, Sumrall and Baumann "advance a taxonomy for understanding different aspects of contemporary judicial power by untangling several concepts: judicial supremacy, juristocracy, judicial activism, and judicial

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35 *Id.* at 2033 (italics omitted); *see also* Nikolas Bowie & Daphna Renan, *The Supreme Court Has Grown Too Powerful. Congress Must Intervene*, N.Y. TIMES (Oct. 11, 2024), https://www.nytimes.com/2024/10/11/opinion/laws-congress-constitution-supreme-court.html (stating that "[t]he Constitution does not define" the phrase "the judicial power," but that "[i]n Britain, the same phrase has long referred to judges' power to enforce, not second-guess, the laws passed by Parliament") [https://perma.cc/NU69-GVG8]. Professors Bowie and Renan are clear to state, however, that they "aim[] to reconstruct the republican separation of powers in the American constitutional imagination—not because it came first but because . . . it is more normatively compelling." Bowie & Renan, *supra* note 4, at 2031.

36 Bowie & Renan, *supra* note 4, at 2041.

37 Chafetz, *supra* note 3, at 648 (citations omitted).

38 Josh Chafetz, *The First Name of a Supreme Court Justice is Not Justice*, N.Y. TIMES (June 2, 2023), https://www.nytimes.com/2023/06/02/opinion/supreme-court-john-roberts-contempt.html [https://perma.cc/ST3U-FHC6].

39 CSPAN, *Legislative and Administrative Constitutional Political Economy*, at 34:45 (Nov. 18, 2022), https://www.c-span.org/video/?524348-6/legislative-administrative-constitutional-political-economy, at 34:45 (quoted in Rob Wolfe, *How to Fix the Supreme Court*, WASH. MONTHLY (Jan. 8, 2024) https://washingtonmonthly.com/2024/01/08/how-to-fix-the-supreme-court/) [https://perma.cc/9YS8-UZVB]).

40 CSPAN, *supra* note 39, at 40:28–40.

41 Sumrall & Baumann, *supra* note 5, at 29–36.

self-aggrandizement."[42] They contend that "[j]udicial aggrandizement," which describes the phenomenon when the judiciary "successful[ly] deploy[s] . . . ideas and norms that reinforce the judiciary's role as the final arbiter of political disputes at the expense of other governing institutions," "captures what is distinctive about, but not new to, the Roberts Court's behavior."[43]

II
ADMINISTRATIVE ACTION AS AN COMPLEMENTARY SOLUTION

Part II of this Essay will respond to the "judicial aggrandizement" critique highlighted above by arguing that, although the critique is wrong to the extent it suggests that courts *cannot* enforce the separation of powers, the critique is persuasive to the extent that it maintains that courts should not be the *sole* enforcers of the separation of powers. That is because both courts and administrative agencies can use "law," as understood within a natural law tradition, to ensure that Congress does not upset the careful way that the Constitution separates and vests federal power.

A. Law

What is the meaning of law within the natural law tradition? A good place to start is with two of the tradition's most respected thinkers: Aristotle and St. Thomas Aquinas.[44] Aquinas defines "law" as an "ordinance of reason for the common good, made by him who has care of the community, and promulgated."[45] And both Aquinas and Aristotle conclude that the proper effect of law is to instill virtue.[46]

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42 *Id.* at 24 (unitalicized).

43 *Id.* at 28, 37, 38. As to what Sumrall and Baumann see as "new," they contend that "[t]he Roberts Court is exceptional in its willingness to deploy rhetoric justifying its role outside and above the separation of powers and demean other constitutional actors in a way that few previous Courts would have dared." *Id.* at 42.

44 Portions of Part II.A were first published in Squitieri, *supra* note 11.

45 2 THOMAS AQUINAS, SUMMA THEOLOGIAE I-II, Q. 90 art. 4.

46 ROBERT P. GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY 26 (Oxford Univ. Press 2022) (referring to "Aristotle's claim that legal coercion can help put people into shape . . . by settling them down and habituating them to virtue"); Timothy Cantu, *Virtue Jurisprudence and the American Constitution*, 88 NOTRE DAME L. REV. 1521, 1525–26 (2013) ("Both St. Thomas and Aristotle are of the opinion that legislators instill virtue . . . in their subjects by forming habits in them.").

1. *Virtue*

What is a virtue? A virtue is a characteristic that is both instrumental to achieving excellence, and a constitutive part of what it means for something to be excellent.[47] An object's excellence is identified in relation to the object's ultimate purpose (in Greek, *telos*).[48] An excellent steak knife, for example, has a sharp blade and firm handle—two characteristics (virtues) that help the steak knife fulfill its ultimate purpose (*telos*), which is to cut steak.[49] Similarly, a human's virtues are those characteristics that enable a human to achieve its *telos*.

For both Aristotle and Aquinas, a human's ultimate natural end (*telos*) is encapsulated by the Greek term *eudaimonia*,[50] or human flourishing.[51] That is because humans pursue *eudaimonia* as an end in itself.[52] To be sure, humans pursue other ends (*e.g.*, eating, sleeping, and working). But those other ends are *subordinate* ends pursued for the sake of something else (the ultimate natural end of which is *eudaimonia*).[53]

Virtues assist a human in achieving *eudaimonia*. There are at least two categories of virtue relevant to the present discussion.[54] First are the intellectual virtues, such as

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47 *See* ARISTOTLE, ARISTOTLE'S NICOMACHEAN ETHICS bk. 2.6, at 33 (Robert C. Bartlett & Susan D. Collins trans., Univ. Chi. Press 2011) ("[E]very virtue both brings that of which it is the virtue into a good condition and causes the work belonging to that thing to be done well."); 2 AQUINAS, *supra* note 45, at I-II Q. 56 art. 3 (defining virtue as "a habit by which we work well").

48 *See* Arete, OXFORD REFERENCE, https://www.oxfordreference.com/display/10.1093/oi/authority.20110803095423468;jsessionid=0B274B98A0DB1F68BD71A40A1AA50BDB [https://perma.cc/ZF9B-G57R].

49 *See* Corey A. Ciocchetti, *Tricky Business: A Decision-Making Framework for Legally Sound, Ethically Suspect Business Tactics*, 12 CARDOZO PUB. L. POL'Y & ETHICS J. 1, 20 (2013).

50 *See* Eudaimonia, OXFORD REFERENCE, https://www.oxfordreference.com/display/10.1093/oi/authority.20110803095800495 [https://perma.cc/EW74-8JXD].

51 *See id.*; Richard Kraut, *Aristotle's Ethics*, STAN. ENCYCLOPEDIA PHIL., (July 2, 2022), https://plato.stanford.edu/entries/aristotle-ethics/[https://perma.cc/J9B4-YV5A]. Aquinas would add that humans also have a super-natural *telos* (eternal beatitude). *See* J. BUDZISZEWSKI, COMMENTARY ON THOMAS AQUINAS'S VIRTUE ETHICS 104 (2017).

52 *See* Lee J. Strang, *Originalism and the Aristotelian Tradition: Virtue's Home in Originalism*, 80 FORDHAM L. REV. 1997, 2022 (2012) ("Virtue ethics is teleological because the goal towards which the virtues enable their possessor to move is human flourishing.") (citation omitted).

53 ARISTOTLE, *supra* note 47, bk. 1.7 at 11.

54 *Id.* at 25; Strang, *supra* note 52, at 2018. Christian thinkers have recognized a third category of virtue (*i.e.*, the theological virtues). *See*

wisdom.[55] These "virtues of thought," which "enable proper exercise of reason,"[56] can be developed "mostly from teaching."[57] Second are the moral virtues.[58] These "virtues of character . . . assist [with] living according to reason."[59] Moral virtues must be developed through action, which ultimately result in a form of habituation.[60]

2. *Law's Relationship With Virtue*

Each moral virtue exists between two vices.[61] To use Aristotle's discussion of courage as an example: "[H]e who avoids and fears all things and endures nothing becomes a coward, and he who generally fears nothing but advances toward all things becomes reckless."[62] The moral virtue of courage thus stands in between two vices: a deficiency of courage (cowardice) and an excess of courage (recklessness).[63]

To develop a moral virtue (like courage), one must be regularly put to the test so that one can develop the habit of acting virtuously.[64] Consider, for example, how a law punishing soldiers for cowardice on the battlefield might encourage the solider to face danger. By encouraging the solider to face danger, the law can help the soldier develop the virtue of courage. To be sure, a soldier who acts out of fear of being punished might only be *mimicking* courageous behavior. But the idea behind habituation is that, as the soldier routinely *mimics* courageous behavior, the soldier can develop a courageous habit over time. This simple example demonstrates what Aquinas put more succinctly: "[T]he proper

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BUDZISZEWSKI, *supra* note 51, at 64.

55 ARISTOTLE, *supra* note 47, bk. 1.13 at 25.

56 Brad Kallenberg, *The Master Argument of MacIntyre's 'After Virtue'* (2011) (italics omitted), Religious Studies Faculty Publications 66, at 32; *see also* Strang, *supra* note 52, at 2018.

57 ARISTOTLE, *supra* note 47, bk. 2.1 at 26.

58 *Id.*; *see also* Strang, *supra* note 52, at 2018.

59 Kallenberg, *supra* note 56, at 32 (italics omitted).

60 ARISTOTLE, *supra* note 47, bk. 2.1 at 26 ("[M]oral virtue is the result of habit."); Lawrence Solum, *Legal Theory Lexicon 012: Virtue Ethics*, LEGAL THEORY BLOG (Mar. 19, 2023), https://lsolum.typepad.com/legal_theory_lexicon/2003/11/legal_theory_le.html [https://perma.cc/2T67-N2PV].

61 ARISTOTLE, *supra* note 47, bk. 2.6 at 35 ("Virtue is also a mean with respect to two vices . . . .").

62 ARISTOTLE, *supra* note 47, bk. 2.2 at 28.

63 *Id.*

64 *Id.* at 29 ("[F]or as a result of abstaining from pleasures, we become moderate; and by so becoming, we are especially able to abstain from them. Similar is the case of courage . . . .").

effect of law is to lead its subjects to . . . virtue."[65]

B. Administrative Action

Part II.A offered a conception of "law." The next step in explaining what it would mean to treat the "administrative" as "law" is to explain what is meant by "administrative." What follows in Part II.B is therefore a non-exhaustive list of the types of administrative actions that agencies might use as "law" capable of instilling virtue in legislators.

1. *Rulemakings*

One type of administrative action is a rulemaking. There are at least two forms of rulemakings. The first (and less common) form is a "formal rulemaking," which is when an agency issues a rule (*i.e.*, a regulation) after essentially conducting a "trial, complete with pre-trial proceedings, oral presentation of evidence before a hearing officer who cannot engage in ex parte communications, burdens of proof and persuasion, cross-examination, proposed findings of fact and conclusions of law, and a written decision based on the hearing."[66]

Cross-examinations within formal rulemakings offer a prime opportunity to influence legislative behavior. In particular, an agency official's cross-examined testimony can make clear to the observing public that the official thinks legislators should be more involved in particular policy decisions. This can place political pressure on Congress to act. To be sure, agency officials may not wish to offer such testimony (on the grounds that it would highlight a lack of agency authority). But it is precisely because some officials may not *wish* to so testify that the adversarial nature of cross-examination can prove particularly useful.

The second and more common form of rulemaking is an "informal rulemaking."[67] Informal rulemakings offer at least two opportunities for agency officials to influence legislators' behavior. The first opportunity stems from the public and stakeholder outreach that agencies participate in during the

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65 2 AQUINAS, *supra* note 45, at I-II, Q. 92 art. 1; *see also id.* at I-II, Q. 95 art. 1. ("[I]n order that man might have peace and virtue, it was necessary for laws to be framed.")

66 Aaron L. Nielson, *In Defense of Formal Rulemaking*, 75 OHIO ST. L.J. 237, 243 (2014).

67 *Id.* at 240 ("In the years following *Florida East Coast Railway*, formal rulemaking has been largely forgotten.").

informal rulemaking process.[68] Agency officials participating in such outreach can inform members of the public, or White House personnel,[69] that Congress needs to act on a particular topic with more specificity. This can, in turn, generate political pressure on legislators to so act.[70]

The second opportunity agency officials have to influence legislators during the informal rulemaking process stems from the written rule itself. For starters, agencies could promulgate rules that regulate legislators *directly*. For example, Congress sometimes vests agencies with the authority to promulgate rules that promote "the public interest."[71] An agency with such authority might determine that one way to promote "the public interest"[72] is to promulgate rules ensuring that *legislators* (in addition to private citizens) exhibit key virtues. Less dramatically, agencies could influence legislators' behavior through rule preambles, which "provid[e] advice about the meaning, application, and implementation of the agency's regulations."[73] Because preambles already serve as "an authoritative status for guiding the *courts* and the *public* about the rule's application,"[74] agencies can readily repurpose preambles to also speak to *legislators* more directly.

2. *Adjudications*

Agencies also act through adjudications. "Formal" adjudications, like formal rulemakings, often require trial-like

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68 *See, e.g.*, News Release, Wage & Hour Div., U.S. Dep't of Labor, *Department of Labor Announces Proposal to Restore, Extend Overtime Protections for 3.6 Million Low-Paid Salaried Workers*, https://www.dol.gov/newsroom/releases/whd/whd20230830 [https://perma.cc/P2B7-U755] ("Today's announcement follows months of extensive outreach to employers, workers, unions and other stakeholders . . . .").

69 *See, e.g.*, Off. of Mgmt. & Budget, *Hearing from You: How OIRA Meets with the Public*, THE WHITE HOUSE, https://www.whitehouse.gov/omb/information-regulatory-affairs/modernizing-regulatory-review/hearing-from-you-how-oira-meets-with-the-public/ [https://perma.cc/E75Q-SHCX].

70 Indeed, "congressional offices" might themselves "facilitate scheduling [of 12866 meetings] for individual constituents." OFF. OF INFO. & REGUL. AFF., DRAFT GUIDANCE IMPLEMENTING SECTION 2(E) OF THE EXECUTIVE ORDER OF APRIL 6, 2023 (MODERNIZING REGULATORY REVIEW) 9 (Apr. 6, 2023), https://www.whitehouse.gov/wp-content/uploads/2023/04/ModernizingEOSection2eDraftGuidance.pdf [https://perma.cc/6XJU-HEAZ].

71 Jodi L. Short, *In Search of Public Interest*, 40 YALE J. REG. 101, 109 (2023) ("The term 'public interest' appears in the U.S. Code no less than 1,280 times.").

72 *Id.*

73 Kevin M. Stack, *Preamble as Guidance*, 84 GEO. W. L. REV. 1252, 1256 (2016) (quoting 5 U.S.C. § 553(c)).

74 *Id.* at 1257 (emphases added).

procedures.[75] But while rulemakings are typically prospective and general, adjudications typically deal with the past behavior of a more specific set of actors.[76]

It is often the case that an adjudication is performed by a special agency adjudicator, such as an administrative law judge ("ALJ").[77] But less formalized adjudications take place throughout the administrative state. A federal postal agent determining whether a package has sufficient postage, for example, is technically engaging in an informal adjudication.[78]

Importantly, existing Supreme Court precedent permits agencies to *develop policy* through adjudications.[79] This offers agencies an opportunity to use adjudicatory powers to encourage legislators to act virtuously. For example, the SEC is statutorily empowered to direct "by order . . . as necessary or appropriate in the public interest," that a securities exchange may deny "membership to any . . . natural person associated with a registered broker or dealer . . . who is subject to a statutory disqualification."[80] There is little good reason to presume that the SEC must use that adjudicative power to police the behavior of Congress's principals (*i.e.*, private citizens) but not legislators themselves. This is particularly so in a modern environment where "[a]t least 97 . . . members of Congress bought or sold stock, bonds or other financial assets that intersected with their congressional work or reported similar transactions by their spouse or a dependent child."[81] The SEC could use its adjudicatory power to ensure that legislators do not unjustly use their positions of influence for personal financial gain. Other agencies could similarly use adjudications to develop policies that influence legislators' behaviors—with an eye toward encouraging those legislators to virtuously fulfill Congress's lawmaking function.

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75 *See, e.g.*, 5 U.S.C §§ 556, 557 (outlining formal adjudication procedures).

76 *See* Jeffrey J. Rachlinski, *Rulemaking Versus Adjudication: A Psychological Perspective*, 32 FLA. ST. U. L. REV. 529, 544, 550–51 (2009).

77 Aaron L. Nielson, Christopher J. Walker & Melissa F. Wasserman, *Saving Agency Adjudication*, (SSRN last revised May 24, 2024, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4563879) [https://perma.cc/B5VA-29K5], at draft 3.

78 *See* Emily S. Bremer, *The Rediscovered Stages of Agency Adjudication*, 99 WASH. U. L. REV. 377, 379–80, 393 (2021).

79 Sec. and Exch. Comm'n. v. Chenery Corp., 332 U.S. 194, 203 (1947).

80 15 U.S.C. § 78f(c)(2).

81 Alicia Parlapiano, Adam Playford & Kate Kelly, *These 97 Members of Congress Reported Trades in Companies Influenced by Their Committees*, N.Y. TIMES (Sept. 13,2022), https://www.nytimes.com/interactive/2022/09/13/us/politics/congress-members-stock-trading-list.html [https://perma.cc/MEM7-BSA4].

3. Subregulatory Action

Agencies can also act through subregulatory action. Subregulatory action does not purport to *change* the law (like rulemakings and adjudications are sometimes thought to do). Instead, subregulatory action only purports to comment on existing law.

Consider Frequently Asked Questions ("FAQs") published on agency websites. The Department of Labor's Wage and House Division, for example, publishes FAQs concerning a host of issues—including minimum wage requirements.[82] The FAQs do not purport to change existing minimum wage requirements (which are set by statute and implementing regulations). But the Division can signal subtle shifts in its interpretation of existing minimum wage requirements by altering FAQ language.

Another example of subregulatory action is the publication of enforcement manuals, which outline how an agency intends to enforce existing law.[83] Like with changes to FAQs, agencies can signal changes in how existing law will be enforced by amending its public-facing enforcement manuals.

Finally, other examples of subregulatory action include the publication of policy statements, which are "issued . . . to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power," and the publication of interpretive rules, which are "statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers."[84] Although not binding, policy statements and interpretive rules can often be of interest to agency outsiders. A regulated entity manufacturing Widget *y*, for example, might be interested in learning that an agency has developed a new policy dedicating agency resources to focus on Widget *y*.

How might an agency use subregulatory action to instill virtue in federal legislators? Well, an agency could target *legislators'* behavior via its FAQs, policy statements, and

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82 WHD, *Questions and Answers About the Minimum Wage*, DEPT. OF LABOR, https://www.dol.gov/agencies/whd/minimum-wage/faq [perma.cc/P982-34KK].

83 *E.g.*, WHD, *Field Operations Handbook*, DEPT. OF LABOR, https://www.dol.gov/agencies/whd/field-operations-handbook [perma.cc/5YJP-88LN].

84 ACUS, *Agency Guidance Through Policy Statements*, Admin. Conf. Recommendation 2017-5, available at https://www.acus.gov/recommendation/agency-guidance-through-policy-statements#_ftnref1, at 1 (quoting ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947)) [perma.cc/TT2B-ACVC].

interpretive rules. A soft exercise of this power might involve an agency updating its website FAQs to address common vices observed in legislators' interactions with the agency (*e.g.*, inappropriate lobbying efforts conducted by legislators). A more aggressive exercise of this power might involve an agency making clear via an interpretive rule that legislators are subject to the agency's understanding of its statutory authority to promote the "public interest." For example, the SEC might update enforcement memoranda to exhibit a focus on legislators engaging in insider trading. Such memoranda might explain that because members of Congress hold unique positions of public trust, their behavior can impact securities markets in unique ways.

4. *Assisting in the Legislative Process*

Although the issuance of new rulemakings and adjudications are sometimes thought of as making "law," those actions are perhaps better understood as interpretations of statutory law. And as a formal matter, enacting federal statutes is a task the Constitution assigns exclusively to the President and Congress.[85] But agencies often play an important—albeit informal—role in shaping federal legislation.

As one scholar explains, "[f]ederal agencies help draft statutes."[86] They do so by "propos[ing] substantive legislation to Congress that advances agency and [a Presidential] Administration['s] objectives, and . . . weigh[ing] in substantively with agency and Administration policy positions on pending legislation."[87] Agencies can also shape federal legislation by sharing their "subject matter expertise" with Congress in an effort to "help[] Congress avoid pursuing legislation that would unnecessarily disrupt the current statutory and regulatory scheme."[88]

Agencies can use their informal seats at the lawmaking table to alter legislators' behavior. For example, when agency officials are asked to weigh in on draft legislation containing too broad a delegation of power, agency officials can encourage legislators to narrow the delegation. Agency officials can also use their influence to get legislators to agree to statutory language that clearly empowers agencies to play a role in

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85 *See* U.S. CONST. ART. I, SEC. 7 (bicameralism and presentment); U.S. CONST. ART. II, SEC. 3 (presidential recommendations).

86 Christopher J. Walker, *Legislating in the Shadows*, 165 U. PA. L. REV. 1377, 1378 (2017).

87 *Id.*

88 *Id.* at 1379.

policing legislators' behavior directly. An example is offered by the Congressional Accountability Act of 1955 ("CAA"),[89] which "requires Congress to apply to itself many of the same employment laws that apply to the private sector and the executive branch of the federal government."[90]

The CAA established the Office of Congressional Workplace Rights ("OCWR"), which seeks "to advance workplace rights, safety and health, and accessibility in the legislative branch of the federal government."[91] The CAA can be thought of as promoting various virtues—including by prohibiting *unjust* forms of discrimination,[92] and by monitoring forms of *intemperance* that rise to the level of sexual harassment.[93] Future statutes could mimic the CAA, or even give agencies an incentive to oversee legislators' actions by making an agencies' ability to use appropriated funds contingent on the agency publishing an annual report on relevant congressional behavior.

5. *Congressional Hearings and Correspondence*

Agencies also interact with Congress through hearings and written inquiries. Congressional hearings are often used as a means for Congress to exert Congress's will (or at least, the will of a few committee members) over the agency. For example, legislators might use a congressional hearing to "mak[e] sure agencies and programs are . . . fulfilling their statutory mission."[94] But congressional hearings can also be used as an opportunity for legislators to learn *from* agencies. In particular, hearings offer legislators a chance to discuss complicated issues with agency experts in order to "acquir[e]

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89 2 U.S.C. §§ 1301 *et seq*.

90 Office of Congressional Workplace Rights, *The Congressional Accountability Act*, https://www.ocwr.gov/the-congressional-accountability-act/ [https://perma.cc/CH9S-L3VA].

91 Office of Congressional Workplace Rights, *Our Office*, https://www.ocwr.gov/our-office/ [https://perma.cc/FZX3-YLWV]; *see also* Office of Congressional Workplace Rights, *The Congressional Accountability Act*, https://www.ocwr.gov/the-congressional-accountability-act/#:~:text=The%20CAA%20Reform%20Act%20changed,resolve%20claims%20alleging%20violations%20of [https://perma.cc/CH9S-L3VA] ("The CAA Reform Act changed the name of the office from the OOC to the Office of Congressional Workplace Rights (OCWR) . . . ").

92 *See* 2 U.S.C § 1311(a) (prohibiting discrimination within the meaning of several statutes).

93 *See* 2 U.S.C. § 1388(b).

94 Todd Garvey, Mark J. Oleszek & Ben Wilhelm, *Congressional Oversight and Investigations*, CRS (updated Dec. 13, 20233), https://crsreports.congress.gov/product/pdf/IF/IF10015 [https://perma.cc/8JJG-7D2S], at 1.

information" that might prove "useful in future policymaking."[95] Written correspondence can similarly be used to convey aspects of agency expertise *to* Congress.[96]

Agencies can use hearings and written correspondence to more directly influence legislators' behavior. For example, a testifying agency official might use a hearing to flag a need for legislators to enact clearer legislation. Relatedly, an agency official responding to a written congressional inquiry might address instances in which legislators have fallen short of fulfilling their constitutionally assigned lawmaking function.

More aggressively, agencies can hold their own hearings where *legislators* are the ones offering testimony. Within these hearings, agencies could inquire into potential legislative vices that negatively affect the agency's work. Similarly, agencies could use their own stationery and letterhead to request information from legislators—similar to how legislators already request information from agencies. Even in those instances in which legislators refuse to attend an agency hearing, or refuse to respond to an agency letter, the mere act of publicly inviting a legislator to a hearing, or sending a public letter, could have an instructive effect.

C. Subjecting Legislators to Law

Having defined "administrative" and "law" above, Part II.C will now apply those terms to the relationship between agency officials and legislators. To do so, Part II.C.1 will first establish what a legislators' end (*telos*) is—at least pursuant to the "problem" that sits at the core of modern separation-of-powers jurisprudence. Part II.C.2 will then explain why it is consistent with the Constitution to use law to instill in legislators the virtues that those legislators need to pursue their *telos*.

1. *The Legislator's* Telos

Recall that virtues are those characteristics that assist actors in fulfilling their function excellently.[97] And recall further that humans seek to achieve various subordinate ends (*e.g.*, eating, sleeping, and working) in pursuit of their ultimate natural *telos* (*eudemonia*).[98] Applying the framework of

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95 *Id.*

96 *E.g.*, *Letter from U.S. Treasury Secretary Janet L. Yellen to U.S. Speaker of the House Kevin McCarthy*, May 26, 2023, https://home.treasury.gov/system/files/136/Debt-Limit-Letter-to-Congress-Members-20230526-McCarthy.pdf [https://perma.cc/9PW7-UBH3].

97 *Supra* Part II.A.1.

98 *Id.*

ultimate and subordinate ends to the circumstances presented by federal legislators in the United States reveals that those legislators (as humans) should seek to develop the virtues that will assist them in achieving *eudemonia*. But like other humans (who play different roles within their family units, communities, and society at large), legislators should also seek to pursue various subordinate ends excellently. Put differently, a legislator moves toward *eudemonia* by performing their legislative role excellently—similar to how a butcher, brewer, teacher, and parent moves towards *eudaimonia* by performing the various tasks associated with their roles excellently.[99]

What subordinate end are federal legislators tasked with achieving? According to the "problem" assumed in Part I.A, federal legislators are tasked with working in concert with other federal legislators (and the President) to enact national policy through a particular lawmaking process. Under that understanding of the legislators' role, the purpose of treating administrative action as virtue-instilling law is to habituate legislators toward those characteristics that will enable legislators to perform that lawmaking task excellently. This means developing the virtues that can help legislators resist the temptation to engage in the delegate-broadly-then-lobby framework that permits legislators to evade the collective lawmaking process demanded by the Constitution.

2. *A Coequal Congress, Not a Supreme Parliament*

A critical reader might be able to accept that law can be used to instill virtue in *ordinary citizens*. After all, law seeks to instill virtue on a routine basis by, say, requiring military service (*i.e.*, instilling courage) or prohibiting excessive intoxication (*i.e.*, instilling temperance). However, the critical reader might be concerned that this Essay goes too far by arguing that law can be used to instill virtue in *legislators*. But that concern should dissipate once one recalls what the Constitution is—namely, a form of *law* that applies to government actors, including federal legislators. As one constitutional law scholar reminds, the "Constitution is the law that governs those who govern us."[100]

By making Congress subject to constitutional restraints,

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99 *See* LEE J. STRANG, ORIGINALISM'S PROMISE 238 (2019) ("The person or persons occupying authority roles need the virtues particular to the specific types of authority they exercise.").

100 Randy E. Barnett, *We the People: Each and Every One*, 123 YALE L. J. 2576, 2588 (2014).

"We the People" established a government distinct from that of England. One principal distinction is the distinction between (a) the English system of parliamentary supremacy and (b) the American system of a legally constrained Congress that operates as only one of three *coequal* branches of government.

As the English constitutional law scholar A.V. Dicey explained:

> The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament . . . has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.[101]

For this reason, "[t]he principle . . . of Parliamentary sovereignty" maintains that "[a]ny Act of Parliament . . . will be obeyed by the courts."[102]

The government of the United States is set up quite differently.[103] Indeed, the "Constitution's creation of a separate Executive Branch coequal to the Legislature was a structural *departure* from the English system of parliamentary supremacy."[104] Indeed, "one of the fundamental differences between our Government and the British Government" is that "Parliament was supreme" and "Congress is not."[105] That is in part because "Parliament's violations of the law of the land had been a significant complaint of the American Revolution . . . [a]nd experiments in legislative supremacy in the States had confirmed the idea that even the legislature must be made subject to the law."[106]

James Wilson, for example, "explained the Constitution's break with the legislative supremacy model at the Pennsylvania ratification convention."[107] As Wilson put it, "Sir William Blackstone will tell you, that in Britain . . . the

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101 A.V. DICEY, INTRODUCTION TO THE LAW OF THE CONSTITUTION 3–4 (10th ed. 1964).

102 *Id.* at 4.

103 *See* E. Garrett West, *Revisiting Contempt of Congress*, 2019 WIS. L. REV. 1420, 1450 (2018) (arguing that the U.S. "Constitution . . . rested on a theory of popular sovereignty that rejected what the Founders took to be the British notion of parliamentary sovereignty.").

104 United States, ex rel. Polansky v. Exec. Health Res., Inc., 599 U.S. 419, 450, (2023) (Thomas, J., dissenting) (emphasis added).

105 Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2038 (2020) (Thomas, J., dissenting).

106 Dep't of Transp. v. Ass'n of American R.Rs, 575 U.S. 43, 74–75 (2015) (Thomas, J., concurring in the judgment).

107 *Id.* at 75.

Parliament may alter the form of the government; and that its power is absolute, without control."[108] But in America, "an improvement in the science and practice of government" had been "[t]o control the power and conduct of the legislature, by an overruling constitution."[109] Archibald Maclaine observed similarly that, in contrast with Parliament, Congress "is to be guided by the Constitution" and "cannot travel beyond its bounds."[110] In sum, "the founding generation did not subscribe to Blackstone's view of parliamentary supremacy,"[111] but decided to instead establish a federal Congress that would be subject to constitutional restraints that could not be altered through ordinary legislation.

The distinction between a supreme English Parliament and a legally constrained, coequal Congress, presents problems for those scholars seeking to significantly limit (if not eliminate) judicial enforcement of the Constitution's separation-of-powers principles. Recall, for example, Professor Bowie's and Professor Renan's argument that it should be "Congress and the President," rather than the courts, who "should decide whether any particular institutional arrangement is compatible with the Constitution's separation of powers."[112] More recently they have argued that the Constitution "empowers Congress to pass and the president to sign whatever laws *they think* are 'necessary and proper for carrying into execution' all the powers vested by the Constitution."[113] That argument might be consistent with a system of Parliamentary supremacy, in which the so-called King in Parliament has "the right to make or unmake any law whatever," and in which courts have no "right to override or set aside the legislation of Parliament."[114] But the argument is inconsistent with the distinct government established in the United States.

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108 *Id.* (quoting 2 J. ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 432 (2d ed. 1863)).

109 *Id.*

110 *Id.* (quoting 4 J. Elliot, DEBATES ON THE FEDERAL CONSTITUTION 63 (2d ed. 1863)).

111 *Id.* at 74.

112 Bowie & Renan, *supra* note 4, at 2030 (italics omitted); *see also id.* at 2110 ("The republican conception necessitates a shift in the locus of authoritative decisions on the separation of powers from the judiciary to the political process.").

113 Bowie & Renan, *supra* note 35 (emphasis added).

114 DICEY, *supra* note 101, at 39–40; *see also id.* at 39 (explaining that, "Parliament means, in the mouth of a lawyer . . . the [Monarch], the House of Lords, and the House of Commons," which is sometimes referred to more specifically as the "Queen [or King] in Parliament").

In the United States, Congress and the President are limited by a written Constitution that cannot be amended through ordinary legislation agreed to by the President and Congress.[115] Far from recreating a King-in-Parliament empowered to enact whatever laws "*they think*" necessary and proper,[116] the Necessary and Proper Clause only empowers Congress (with participation by the President through recommendation and presentment)[117] to enact those laws which "*shall* be necessary and proper."[118] And that "mandatory language" of the Necessary and Proper Clause "clearly implies that such laws must *in fact* be necessary and proper and not merely *thought by Congress* to be necessary and proper."[119]

At this point, a critical reader might be willing to concede that Congress (unlike Parliament) is subject to higher legal requirements (*e.g.*, the Constitution's separation-of-powers principles) that can be enforced by coequal *courts*. But such a reader might still express reservation with the idea that an *administrative agency* can similarly use law to keep Congress in check. After all, when one typically considers the relationship between agencies and Congress, one typically presumes that it is Congress that imposes legal constraints on agencies—not the other way around.

To be sure, Congress *can* work with the President to impose statutory constraints on agency action. But the Constitution's unique creation of three coequal powers leads logically to the conclusion that the *executive* power exercised by agencies (on the President's behalf) is capable of providing

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115 *See* U.S. CONST. ART. V (outlining the constitutional amendment process).

116 Bowie & Renan, *supra* note 4 (emphasis added).

117 U.S. CONST. ART. I, SEC. 7 (presentment); U.S. CONST. ART. II, SEC. 3 (presidential recommendations).

118 U.S. CONST. ART. I, SEC. 8, CL. 18 (emphasis added); *see also*

119 Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L. J. 267, 276 (1993); *see also id.* at 276–285 (elaborating on the argument that Congress does not have unfettered discretion to determine what laws are necessary and proper); *but see* John F. Manning, *Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 6 (2014) (arguing that the Necessary and Proper Clause "delegates to Congress broad and explicit (though not limitless) discretion to compose the government and prescribe the means of constitutional power," which means that "the Court should respect reasonable legislative exercises of the discretion that the people delegated to Congress rather than the Court"); William Baude, *Sharing the Necessary and Proper Clause*, 128 HARV. L. REV. F. 39, 39 (2014) (responding to Professor Manning and arguing "that historical practice, *McCulloch v. Maryland*, and the text [of the Necessary and Proper Clause] itself all *permit*, though may not require, a less deferential judicial interpretation" of Congress's Necessary and Proper Clause power) (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)).

a legitimate check on Congress's exercise of its *legislative* powers—similar to how courts use their *judicial* power to do the same. Indeed, a federal system of three coequal powers, each being used to "check and balance" the others, is a core component of the Constitution's design.[120] To the extent, then, that administrative agencies may lawfully exercise executive power, administrative agencies should use that power to help the President participate in the Constitution's system of checks and balances.

D. Complementary

Having argued above that administrative agencies can play a role in instilling virtue in legislators, the purpose of this Part II.D is to clarify that agencies should only play a role that *complements* (but does not replace) judicial efforts to enforce the separation of powers.[121] There are at least two reasons why this should be the case.

The first reason concerns the careful way the Constitution separates and vests federal power. The Constitution establishes three separate and coequal branches—none of which is supreme. To replace a system that relies solely on the courts enforcing the separation of powers with a system that relies solely on agencies would be to replace one problem with another. Each coequal branch has its own unique means of policing the constitutional excesses and deficiencies of the other two.

Second, administrative and judicial efforts to enforce the separation of powers are interlocking and synergetic. To use a concrete example, judicial efforts to limit Congress's ability to insulate agency officials from Presidential removal can create an environment in which agency officials face the political repercussions of unpopular policy decisions.[122] This can create in agency officials the incentive to pass a political hot potato back to Congress—*i.e.*, give agency officials the incentive to call on legislators to make politically dangerous decisions

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120 *See* THE FEDERALIST NO. 51. (James Madison) ("[T]he constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other.").

121 Private entities can also play a role in instilling virtue, as governmental law does not offer the exclusive means of instilling virtue. *See* GEORGE, *supra* note 45, at 27 ("Aristotle argues that where the *polis* is failing to do its job, other institutions, including households, should do what they can to prevent immorality.").

122 *See, e.g.*, Christopher J. Walker & Aaron L. Nielson, *Congress's Anti-Removal Power*, 76 VAND. L. REV. 1, 4 n.6 (2023) (collecting Presidential removal cases).

themselves (rather than allow legislators to punt politically dangerous decisions to agency officials). In short, it is by working *together* that agencies invoking executive power and courts invoking judicial power can provide a check on Congress exercising legislative power.

III
INSTILLING VIRTUE IN CONGRESS

Part I discussed the widespread idea that Congress has fallen short of its constitutionally assigned lawmaking function, as well as scholarly critiques of the judiciary's efforts to get Congress to better fulfill that function. Part II then proposed how administrative action could help instill virtue in legislators, and thus complement judicial efforts to get Congress back to work. Part III will now explain in greater detail how agencies can instill in legislators the four "cardinal" virtues of prudence, justice, fortitude, and temperance.[123] There are, of course, other virtues in addition to those four.[124] But the cardinal virtues are of enhanced importance in the natural law tradition, which makes them a logical place to start.

A. Prudence

Prudence is sometimes referred to as "practical wisdom."[125] Drawing on Aristotle, Aquinas describes prudence as "right reason applied to action,"[126] and as an excellence in "decid[ing] in what manner and by what means" an objective should be accomplished.[127] A prudent actor is thus one who can grasp the relevant moral circumstances surrounding a particular decision and demonstrate an excellence in choosing the appropriate means of accomplishing particular objectives.[128]

Selecting between various means of achieving national policy requires the prudent legislator to be well-versed in the particular circumstances in which policy decisions are necessitated. For example, to make a prudent decision

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123 2 AQUINAS, *supra* note 45, at I-II Q. 61 art. 1 ("We know that there are four cardinal virtues, viz. temperance, justice, prudence, and fortitude.").

124 BUDZISZEWSKI, *supra* note 51, at 20–33, 54–64 (discussing additional virtues).

125 *See, e.g.*, R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About a Prosecutor's Ethical Duty to "Seek Justice,"* 82 NOTRE DAME L. REV. 635, 649 (2006).

126 2 AQUINAS, *supra* note 45, at I-II Q. 47 art. 2.

127 *Id.* at II-II Q. 47 art. 7.

128 *Id.*

regarding environmental policy, the prudent legislator would need to have a firm grasp on key circumstances regarding environmental science, and further understand how those circumstances interact with a multitude of other issues—such as those concerning national defense, education, etc. Although generalist legislators may not come to Washington with much expertise in those substantive areas of regulation, agencies can help instill practical wisdom (*i.e.*, prudence) in Congress by educating Congress as to the morally salient circumstances in which policy decisions must be made.[129] In this sense, agencies can teach Congress to fish (*i.e.*, teach Congress how to make good policy in given areas), rather than leave Congress dependent on a steady supply of agency–supplied fish (*i.e.*, rather than leave Congress dependent on agency–established policy). This can be accomplished through the various forms of administrative action described in Part II.B, although congressional hearings seem like a logical place to start. In such hearings, agency officials could present legislators with various means to choose from, and ask legislators to take action by choosing between those means themselves.

B. Justice

Justice concerns giving each person their due.[130] Determining what is due from one person to another (*i.e.*, determining what is just) requires examining the circumstances of particular relationships. What one owes their counterparty in a business transaction, for example, can be quite different than what one owes their employer, country, spouse, or children.[131]

A just federal legislator should be mindful of two key relationships. The first is that between the legislator and "we the People," who vested Congress with particular powers. On this front, a modern legislator working within the delegate-broadly-then-lobby framework delegates too much power away, and thus unjustly gives too *little* work to "We the People." The second relationship concerns the legislator and the broader, collective Congress. On this front, a modern legislator working within the delegate-broadly-then-lobby

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129 Prudence is an intellectual virtue, which can be developed "mostly from teaching." ARISTOTLE, *supra* note 47, at 1103a15 (Book 2.1, p. 26).

130 2 AQUINAS, *supra* note 45, at II-II Q. 58 art. 1 ("Justice is a habit whereby a man renders to each one his due by a constant and perpetual will.").

131 *See* BUDZISZEWSKI, *supra* note 51, at 244 (discussing different types of justice concerning different relationships).

framework unjustly exercises too *much* power by seeking to influence policy through personal lobbying, rather than collective lawmaking.

By instilling the virtue of justice in legislators, agency officials can help legislators resist the temptation to both unjustly give too much power away by delegating broadly, and unjustly claim too much power for themselves by lobbying agencies. As to limiting delegations, agency officials could notify legislators (through rulemakings, adjudications, subregulatory guidance, or congressional hearings and correspondence) when delegations of power run afoul of the Constitution's nondelegation principle. Indeed, recognizing agency officials as having the authority to identify unconstitutional delegations can address a common critique of the judge-made nondelegation doctrine—which maintains that the doctrine lacks a *judicially* manageable standard because it turns on a question of policy rather than law.[132] In other words, even if *judges* cannot enforce the Constitution's nondelegation principle, *agency officials* could.

As to limiting legislators' lobbying efforts, agency officials can instill justice in legislators by turning a cold shoulder to legislators' attempts to lobby agency officials. In substitution, agency officials could demand that legislators support their lobbying requests with evidence of broader congressional support. Such evidence could take the shape of a statement by a relevant congressional committee that has been empowered by relevant House or Senate rules to take certain actions, or a joint resolution of the House and Senate.[133]

C. Fortitude

A third cardinal virtue is fortitude, also referred to as courage.[134] One source of danger in the modern administrative state is the political danger associated with making politically unpopular policy decisions. Modern legislators can duck politically dangerous policy decisions by delegating broad policy-setting authority to administrative agencies.[135] This

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132 *See, e.g.*, Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 354–55 (2002) (referring to a "plethora of scholars").

133 Of course, efforts to actually *change* the law would have to abide by the Constitution's bicameralism and presentment requirements. *See* INS v. Chadha, 462 U.S. 919, 959 (1983).

134 *See, e.g.*, R. George Wright, *Constitutional Cases and the Four Cardinal Virtues*, 60 CLEV. ST. L. REV. 195, 196 (2012).

135 *See* White, *supra* note 17 (discussing John Hart Ely's observation concerning Congress's "propensity not to make politically controversial decisions").

creates a culture of congressional cowardice, in which legislators do not have to face the danger of making potentially unpopular decisions.

Agency officials can help instill fortitude in legislators by shifting more policymaking decisions toward legislators, thereby giving the legislators more opportunities to confront (and overcome) their fear of political danger. For example, an agency official might use a rule preamble to explain that there is a serious problem in need of a national solution, but that the agency cannot address the problem without more precise congressional input. Relatedly, agency officials could make similar comments during stakeholder meetings held during the rulemaking process, cross-examined testimony offered in an adjudicatory context, or information provided in written correspondence with Congress (to suggest only a few examples).

D. Temperance

Finally, a fourth cardinal virtue, temperance, regulates the human appetite concerning food, alcohol, and sexual relations.[136] Congress already plays a role in ensuring that *agency officials* do not act intemperately. Consider Congress's reaction to allegations that agency officials at the Federal Deposit Insurance Corporation exhibited intemperance concerning sex and alcohol.[137] In response to those allegations of intemperance, various legislators called for investigations into the agency.[138]

One need not follow the news too closely to recognize that *legislators* have occasionally faced their own allegations of intemperance. And although Congress has often sought to deal with allegations in-house,[139] a healthy system of checks and balances calls for oversight from outside Congress as well.

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136 *See* 2 AQUINAS, *supra* note 45, at II-II Q. 141 arts. 1, 4.

137 Rebecca Ballhaus, *Strip Clubs, Lewd Photos and a Boozy Hotel: The Toxic Atmosphere at Bank Regulator FDIC*, WALL ST. J. (Nov. 13, 2023), https://www.wsj.com/us-news/fdic-toxic-atmosphere-strip-clubs-lewd-photos-boozy-hotel-12c89da7 [https://perma.cc/8Z3Q-8XVL].

138 *See, e.g.*, Press Release, *Brown Leads Committee Democrats in Calling for an Independent Investigation of FDIC Culture*, Sen. Sherrod Brown (Nov. 17, 2023), https://www.brown.senate.gov/newsroom/press/release/sherrod-brown-leads-committee-democrats-calling-independent-investigation-fdic-culture [https://perma.cc/A3TJ-LSQM].

139 *See, e.g.*, Elana Schor, *Congress' Sexual Harassment System, Decoded*, POLITICO (updated Nov. 21, 2017), https://www.politico.com/story/2017/11/21/congress-sexual-harassment-slush-fund-255547 [https://perma.cc/C7Q8-DJB8].

Indeed, agencies can play a role in overseeing legislators' behavior.

For example, agencies with the regulatory authority to address acts of intemperance in general might consider how they could similarly exhibit a focus on legislators.[140] Even when agencies do not have authority to formally regulate legislators' actions, agencies could use softer powers. For example, like how Congress holds hearings and requests information in order to oversee agency officials, agencies could invite legislators to agency hearings and issue written information requests to legislators in order to address allegations concerning legislators' acts of intemperance. Doing so could help legislators avoid and correct vices that distract legislators from fulfilling their lawmaking function excellently.

CONCLUSION

Modern separation-of-powers jurisprudence—including key cases in the Supreme Court's 2023–24 term—has been criticized on the grounds that it impermissibly aggrandizes judicial power. This Essay has argued that, although that critique goes too far to the extent it maintains that courts should play *no* role in enforcing the separation of powers, the critique is persuasive to the extent it recognizes that courts should not play the *sole* role in enforcing the separation of powers. That is in part because administrative agencies can play a complementary role in enforcing the Constitution's separation-of-powers principles. By treating administrative action as law capable of instilling virtue in legislators, agencies can help legislators develop the characteristics they need to perform their constitutionally assigned functions excellently.

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140 *See, e.g.*, 29 CFR § 1604.11 (Equal Employment Opportunity Commission regulation concerning sexual harassment).