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ARTICLE

Constitutional Administration

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Abstract. Administrative law rests on two fictions. The first, the nondelegation doctrine, imagines that Congress does not delegate legislative power to agencies. The second, which flows from the first, is that the administrative state thus exercises only executive power, even if that power sometimes looks legislative or judicial. These fictions are required by a formalist reading of the Constitution, whose Vesting Clauses permit only Congress to make law and the President only to execute the law. This formalist reading requires us to accept as a matter of practice unconstitutional delegation and the resulting violation of the separation of powers, while pretending as a matter of doctrine that no violation occurs.

This Article argues that we ought to accept the delegation of legislative power as a matter of doctrine because doing so can help remedy the undermining of the separation of powers. Accepting delegation as a matter of doctrine allows us to delineate the legislative, executive, and judicial components of administration and to empower each constitutional branch of government over the component corresponding to its own constitutional function. With this insight, for example, a legislative veto of the administration's legislative acts is constitutional.

This Article seeks to make one functionalist move (accepting delegation) in order to deploy formalist tools to restore some semblance of the original constitutional scheme of separate powers. It seeks to take both formalism, which has served merely to mask the administrative state's unconstitutional foundations, and functionalism, which has failed to offer any limiting principles to modern administrative practices, more seriously than modern scholars and doctrine do. A functionalist approach to delegation allows us to deploy formalism—but an honest formalism—to the separation of powers.

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Table of Contents

Introduction

Many of administrative law's modern debates and key constitutional decisions may be understood as expressions of either functionalism or formalism. Modern doctrine, as a formalist matter, assumes that Congress does not delegate legislative power to agencies because under Article I, Section 1 of the Constitution, only Congress may make law.[1] The doctrine also assumes that when agencies make rules (or adjudicate them), they ultimately exercise only executive power—though it may be "quasi-legislative" or "quasi-judicial"[2]—because Article II, Section 1 declares that the President and his administration may execute but not make or adjudicate the law.[3]

One school of formalists, recognizing that this is what the Constitution requires, rejects the modern administrative state because Congress routinely delegates its legislative power, even though the doctrine pretends it does not. Further, although the doctrine pretends that agencies are merely executing the law, agencies are in fact routinely exercising legislative and judicial power as well, undermining the constitutional separation of powers.[4]

Many functionalists, on the other hand, entirely accept this state of affairs, arguing that other procedural mechanisms, such as those required by the Administrative Procedure Act (APA), may acceptably replace the constitutional separation of powers.[5] Or they advocate unoriginalist practices that

1. U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . . .").

2. *See infra* Part II.B (discussing Humphrey's Ex'r v. United States, 295 U.S. 602 (1935)).

3. U.S. CONST. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America.").

4. *See* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014) (answering yes to the question posed by the book's title); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1254 (1994) (arguing that one can be committed either to the administrative state or to the Constitution but not to both).

5. *See* Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 448 (1987) (explaining that the APA's procedural safeguards embody compromise between functionalist advocates for and formalist critics of the administrative state); *id.* at 448 nn.116-18 (collecting APA safeguards intended to replicate the protections of separation of powers); *id.* at 492 (arguing that vast changes in the national government since the Founding "call for an approach [to constitutional interpretation] that takes changed circumstances into account, but at the same time reintroduces into the regulatory process some of the safeguards of the original constitutional system"). For an argument that there exists a new kind of separation of powers within the administrative state, see Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 520-22 (2015).

Peter Strauss argues that all three branches must exercise control over administrative agencies such that no one branch gains too much control. Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 579-80 (1984). But, he claims, "it is not terribly important to number or allocate the

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accommodate the modern administrative state but attempt to make it better reflect the original constitutional purposes of the separation of powers.[6] Justice Byron White's famous dissent in *INS v. Chadha*, where he advocates a legislative veto to bring the legislative and executive branches more into balance, is the classic example of the latter kind of attempt.[7]

This Article advances a new approach to resolving modern administrative law's two core constitutional difficulties of delegation and separation of powers. It argues that we ought to accept, as a functionalist matter, the delegation of legislative power to agencies. It does no good for the doctrine to mask the unconstitutional foundation of modern administration for the mere sake of constitutional appearances. This Article argues that recognizing the practical reality of legislative delegation will accomplish much more. Indeed, if we make this one functionalist move—if we accept one unoriginalist precedent at the core of modern administrative government—we open up a panoply of formalist solutions to the problematic combination of legislative, executive, and judicial powers in the executive branch, a combination that the Framers understood to be the very definition of tyranny.[8] And, as we shall see, these formalist solutions also mitigate at least some of the harms to republicanism that stem from the delegation of legislative power from Congress to agencies.

Once we accept delegation, we can openly acknowledge that the administrative state exercises not only executive but also legislative and judicial power.[9] We can then delineate the legislative, executive, and judicial

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horses that pull the carriage of government." *Id.* at 580; *see also id.* at 596 (explaining that constitutional separation of powers has little relevance to the administrative state). He argues for separation of functions and checks and balances but with little regard to the original constitutional scheme. *Id.* at 578-81. This Article argues that, to the contrary, the way we allocate those powers is very important if our goal is not just *some* kind of checks, balances, and functional separation of powers but rather a *constitutional* separation of powers. Strauss admits that his view of administration—which mostly accepts the modern administrative state as it is—fits uncomfortably with a formal reading of the Constitution. *Id.* at 580-81. Gary Lawson, who opposes the modern administrative state, thinks that one must choose either the administrative state or the Constitution. Lawson, *supra* note 4, at 1231 ("The post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution. . . . Faced with a choice between the administrative state and the Constitution, the architects of our modern government chose the administrative state, and their choice has stuck.").

6. Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 CORNELL L. REV. 1, 2-4 (1994).

7. INS v. Chadha, 462 U.S. 919, 969-74 (1983) (White, J., dissenting).

8. *See infra* notes 26-27 and accompanying text.

9. Indeed, many scholars openly recognize that agencies are exercising all three kinds of power. *See infra* notes 85-86 and accompanying text. Some recognize it as a problem, whereas others see it as a virtue. *Compare* Sunstein, *supra* note 5, at 446 (noting that some modern scholars find it problematic "that the New Deal agency combines

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components of administration and empower each constitutional branch of government over the component corresponding to its own constitutional function. In this way—under what this Article calls "constitutional administration"—administrative law can be made more consistent with the Constitution without sacrificing administrative law's engendering values. The only constitutional sacrifice we must make is one that has already been made and cannot be undone. Delegation, even if unconstitutional as the Constitution was originally understood,[10] has become part of our constitutional order.[11]

The legislative veto is one example of the possibilities authorized by constitutional administration.[12] The debate over the legislative veto normally consists in two positions: Some accept that the legislative veto is unconstitutional and believe that its unconstitutionality makes it impermissible.[13] Others accept its unconstitutionality but argue that we should permit it because the administrative state as it exists is *also* unconstitutional.[14] That is, the legislative veto is an otherwise unconstitutional mechanism that makes the unconstitutional administrative state somewhat more constitutional.

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executive, judicial, and legislative functions"), *with id.* at 447 (noting that "the combination of functions" was "celebrated as a virtue" by proponents of the administrative state in the New Deal era).

10. *See infra* notes 89-94 and accompanying text.

11. One scholar has recently done some work in this area, proposing as I do that administrative law doctrine ought to recognize that Congress delegates legislative power to agencies. Kathryn A. Watts, *Rulemaking as Legislating*, 103 GEO. L.J. 1003, 1005-09 (2015). Watts's piece focuses on the implications of this recognition for judicial review of rulemaking, *id.* at 1024-52, which I discuss only cursorily in Part II.C.2. It thus serves as an excellent complement to that Subpart, even though my analysis of *Chevron* deference differs rather substantially from Watts's. *Compare infra* Part II.C.2 (arguing that *Chevron* review should be limited like the presumption of constitutionality), *with* Watts, *supra*, at 1027-37 (arguing that *Chevron* deference as it currently exists would be more justified if the Court openly recognized the delegation of legislative power). Watts's piece also confirms the view that modern nondelegation is a fiction and that there is significant value in recognizing delegation as reality. *See id.* at 1005-08. Watts claims that her article "is the first to systematically explore how the central premise of the nondelegation doctrine has influenced administrative law as a whole, and how many significant administrative law doctrines might be altered or clarified if the Court recognized rulemaking as a constitutional exercise of delegated legislative power." *Id.* at 1007. If that is right, then this Article is the second, and in many ways broader, effort to explore the ramifications of abandoning the nondelegation fiction for all three branches of government.

12. *See infra* Part II.A.

13. That is the *Chadha* Court's view and is articulated by McCutchen. *See* McCutchen, *supra* note 6, at 30 ("As the *Chadha* majority demonstrated, the legislative veto is not consistent with a formalist reading of the constitutional text. Thus, standing alone, the legislative veto should not be allowed.").

14. *Id.* at 37-39.

Constitutional administration breaks ground in this debate. With constitutional administration's insight into delegation, a legislative veto of the administration's *legislative* acts would be constitutional. Under modern doctrine, a legislative veto would always be unconstitutional because if agencies are merely executing the law, then Congress must repeal or amend a law to undo an execution of it that Congress does not like. That requires the assent of both houses of Congress and the President. Constitutional administration allows us to recognize that in some instances—such as when agencies engage in certain kinds of rulemaking—agencies are in the throes of *making* a law, and so there has not yet been a law made that requires bicameralism and presentment to repeal or amend.

Constitutional administration also raises new possibilities for executive power.[15] It posits that a presidential supervisory and removal authority ought to extend equally to executive branch agencies and to independent commissions[16]—but only with respect to the executive functions of either. This Article suggests that presidential administration[17] is required as a constitutional matter over the enforcement actions of independent commissions. This ought to please advocates of the unitary executive because, under this view, the President is unitary with respect to the administration's executive powers.[18] But it also ought to please the traditional advocates of agency independence or congressional administration because the President will have nonunitary, perhaps even minimal, power over the administration's legislative and judicial functions.

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15. *See infra* Part II.B.

16. Currently, Congress is permitted to insulate independent commissions (but not executive branch agencies) from such supervision and removal authority. *See infra* Part II.B.

17. *See generally* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001) (making the case for presidential control over administrative agencies, including over their rulemaking functions).

18. As I explain further below, I do not take a position on the question whether all of the nonlegislative and nonjudicial functions of agencies are "executive" or whether there exists another category of power called "administrative" over which Congress can assign control to officials other than the President. *See infra* Part III.B. *Compare* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 39-41 (1994) (arguing that there is an "administrative" power over which Congress can retain substantial control), *with* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 544-50 (1994) (arguing that there is no "administrative" power but merely an "executive" power over which the President must have unitary control). What I will argue—contra Lessig and Sunstein—is that *prosecution*, at minimum, is an executive and not an administrative power. *See infra* notes 210-17 and accompanying text. Thus, whether on their view or the Calabresi-Prakash view, the President must have the ability to supervise and control the enforcement activities of the independent agencies.

Judicial possibilities also follow from constitutional administration.[19] First, this model justifies significantly limiting *Chevron* deference[20] by drawing a parallel to the courts' presumption of constitutionality when reviewing congressional legislation.[21]

Second, this Article shows that constitutional administration better explains than does existing doctrine certain distinctions in Supreme Court cases involving administrative discretion. For example, it justifies the different standards of judicial review applied to agency inaction in the rulemaking and enforcement contexts.[22]

Third, constitutional administration would allow the vast majority of contemporary administrative adjudications—usually adjudications over benefits, such as social security disability payments—to remain untouched because they are executive in nature.[23] Yet it would require traditionally judicial adjudications—those that impose criminal penalties or civil fines or otherwise affect life, liberty, or traditional property—to receive de novo review by an Article III court.[24] Others have argued for this distinction, but this Article adds to the literature by pointing to an obvious precedent for judicial review of agency adjudications: the method of magistrate and bankruptcy judges delivering reports and recommendations to Article III district judges. Constitutional administration requires administrative law judges (ALJs), in any truly judicial adjudication and absent consent of the parties to the proceedings, similarly to deliver reports and recommendations to Article III judges, who must then review both conclusions of law and fact de novo.

To be sure, these insights may not apply to significant swaths of administrative activity that defy easy classification as legislative, executive, or judicial. As for those activities, Congress and the President can continue seeking compromises to establish the appropriate controls and structures. But at least for some important classes of cases—certain rulemakings, enforcement, and specific kinds of judicial activity—the administrative action *can* be confidently characterized as mostly legislative, mostly executive, or mostly judicial. The insights here will thus apply. That will be no small achievement.

All that is required to enact this Article's model of constitutional administration is three short, relatively uncomplicated acts of Congress, each with

19. *See infra* Part II.C.

20. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984).

21. *See infra* Part II.C.2.

22. *See infra* Part II.C.3.

23. *See infra* Part II.C.4.

24. *See infra* Part II.C.4. This distinction is the one piece of the model that does not depend on a rejection of the nondelegation fiction.

existing statutory precedent.[25] Perhaps more importantly, there are no obvious political hurdles to enacting these three laws. Although they would work a profound constitutional reform of the administrative state, none requires a tectonic shift in the practices of the administrative state. These reforms are, put simply, possible and practicable.

The remainder of this Article proceeds as follows. Part I offers a brief discussion of the importance of separation of powers, the implications of the rise of the administrative state, and the administrative state's two foundational fictions. Part II, the centerpiece, attempts to delineate the administrative state's functions and demonstrate how each branch of government can assert more control over the administrative functions corresponding to its own constitutional function—legislative, executive, or judicial. It then explains constitutional administration's implications for the legislative veto, presidential administration and unitary executive theory, and judicial review. It then proposes three short and uncomplicated statutes—each of which is politically feasible and supported by existing precedent—to bring these insights into effect. Part III considers three objections to the model and demonstrates that constitutional administration sustains administrative law values. The final Part concludes.

I. The Problem of Modern Administration

This Part reveals the problem constitutional administration seeks to redress. It exhibits the two formalist fictions that mask the administrative state's unconstitutional foundations. It then argues that we ought to accept as a *doctrinal* matter the first of these foundations, legislative delegation, as constitutionally established through history, practice, prudence, and policy. That does not mean, however, that we must accept the second foundation of administrative law: the largely unchecked combination of powers in the executive branch and even within individual agencies. The first Subpart explains how that second foundation works a far greater and more dangerous violation of the constitutional order than the first. The second Subpart describes how the rise of delegation and the doctrinal fictions at the core of administrative law undermine the separation of powers. The remainder of this Article will show that we can reject this violation of the separation of powers by accepting delegation.

25. *See infra* Parts II.A.6, II.B.4, II.C.5.

A. The Power of Separation of Powers

James Madison declared that the combination of powers in one branch was the very essence of tyranny:

> The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. Were the federal Constitution, therefore, really chargeable with this accumulation of power, or with a mixture of powers, having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system.[26]

Many in the Founding generation repeated this refrain.[27] As shown below, it was thought to be essential for the preservation of liberty, the very possibility of republican government, and energetic and efficient administration.

The separation of powers combined with checks and balances was the chief innovation of the Constitution. It was critical for the survival of liberty in a republican regime. The British government had had a "mixed regime," or what was later called a "balanced constitution," that mixed the various *classes* of men—Crown, lords, and commons—but did not include a separation of *powers*.[28] The competing classes of society, each with differing interests, could

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

27. *See, e.g.*, THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA (1787), *in* THE ESSENTIAL JEFFERSON 77, 99 (Jean M. Yarbrough ed., 2006) ("All the powers of government, legislative, executive, and judiciary, result to the legislative body. The concentrating [of] these in the same hands is precisely the definition of despotic government."); Letter from John Adams to Richard Henry Lee (Nov. 15, 1775), *quoted in* M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 146 (Liberty Fund 2d ed. 1998) (1967) ("A legislative, an executive and a judicial power comprehend the whole of what is meant and understood by government. It is by balancing each of these powers against the other two, that the efforts in human nature towards tyranny can alone be checked and restrained."). For other American examples, see GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787, at 548-50 (1969).

The great Montesquieu, whose influence on the Framers is well known, also expressed this sentiment:

> When legislative power is united with executive power in a single person or in a single body of the magistracy, 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.
>
> All would be lost if the same man or the same body of principal men, either of nobles, or of the people, exercised these three powers: that of making the laws, that of executing public resolutions, and that of judging the crimes or the disputes of individuals.

MONTESQUIEU, THE SPIRIT OF THE LAWS 157 (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (1748).

28. THE FEDERALIST NO. 47 (James Madison), *supra* note 26, at 302 (discussing blended powers in the British constitution); Martin S. Flaherty, *The Most Dangerous Branch*, 105

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check one another and prevent one from gaining too much power over the others.[29] The system depended on monarchical, aristocratic, and hereditary elements.

What was to be done in the democratic and revolutionary fervor of 1776? As M.J.C. Vile describes, Americans understood the separation of powers to be the natural replacement for the mixed regime.[30] Functional separation had begun to exist in the English constitutional system before the American Revolution.[31] That background and the philosophical evolution of the doctrine provided Americans with the intellectual foundation necessary for the new system.[32] Once the nondemocratic elements of government were eliminated after the Revolution, all that remained of the old doctrine—aimed as it was at securing liberty and preventing tyranny—was the separation of powers. Hence, Vile observes that the separation of powers "emerged in response to democratic attacks upon the constitutional theory of privilege."[33]

While at first the development of separation of powers in state constitutions and the minds of many revolutionaries demonstrated an "antipathy towards checks and balances,"[34] the revolutionaries quickly came to understand that a complete separation of powers—where the executive has no check on the legislature—could be as tyrannical as no separation at all.[35] Thus, the Americans began looking toward "their experience of the balanced constitution for the solution to their problems."[36] By the time the U.S. Constitution was framed, separation of powers doctrine in America had

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YALE L.J. 1725, 1757 (1996) (describing the mixed regime). Martin Diamond nicely summarized the difference: "The mixed regime combines undivided power with a people divided into the few and the many; the separation of powers combines divided governmental power with an undivided people . . . ." MARTIN DIAMOND, *The Separation of Powers and the Mixed Regime* (1978), *in* AS FAR AS REPUBLICAN PRINCIPLES WILL ADMIT: ESSAYS BY MARTIN DIAMOND 58, 61 (William A. Schambra ed., 1992). For a discussion of the "balanced constitution," see VILE, *supra* note 27, at 74-77, 80-82. The English constitution of the eighteenth century, while not abandoning the division of classes, also adopted some degree of a functional separation of powers. *Id.*

29. For a discussion of this understanding of the mixed regime, see DIAMOND, *supra* note 28, at 60-61; and VILE, *supra* note 27, at 25. For a summary of the mixed regime's developments under the balanced constitution, see VILE, *supra* note 27, at 81.

30. VILE, *supra* note 27, at 132-33, 145-47.

31. *See id.* at 72.

32. *See id.* at 140-43 (explaining how Montesquieu's writings replaced mixed government and the balanced constitution with separation of powers as the central paradigm of revolutionary American political debate).

33. *Id.* at 146.

34. *Id.* at 155.

35. *See id.* at 158.

36. *Id.* at 161.

evolved to incorporate checks and balances as the primary safeguard for separation of powers and for liberty itself.[37]

The Constitution hence enshrined the separation of powers by "vest[ing]" legislative power in Congress, "vest[ing]" executive power in the President, and "vest[ing]" judicial power in the courts.[38] But these powers would not be entirely separate, a point Madison famously made:

> [T]he 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 to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition.[39]

The brilliance of the constitutional design was that although the powers would be separate, they would not be entirely separate. Each branch would have some hand in the exercise of power by the others, its own ambitions and institutional interests serving as checks on those of the other branches.[40]

The very existence of liberty thus depended on such a system. When eighteenth-century Americans talked about *constitutional* government, they spoke of the allocation of power.[41] The British government had not been republican, but it was still thought to be, at least in its uncorrupted form, constitutional.[42] (Recall that the Declaration of Independence did not declare that King George III was unfit to rule a free people because he was a king;

37. *Id.* at 166-68.

38. U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . . ."); *id.* art. II, § 1 ("The executive Power shall be vested in a President of the United States of America."); *id.* art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); *see also* Calabresi & Prakash, *supra* note 18, at 567, 569, 588 (explaining that the Vesting Clauses establish the Constitution's separation of powers).

39. THE FEDERALIST NO. 51 (James Madison), *supra* note 26, at 321-22.

40. For example, the President has a hand in the legislative power through his veto, U.S. CONST. art. I, § 7; the Senate has a hand in the executive power when it comes to appointments and ratification of treaties, *id.* art. II, § 2, cl. 2; and both the legislative and judicial branches have a role in impeachments, *id.* art. I, § 3, cl. 6. Madison explained that Montesquieu, by separation of powers, "did not mean that these departments ought to have no partial agency in, or no control over, the acts of each other" but rather that "where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted." THE FEDERALIST NO. 47 (James Madison), *supra* note 26, at 302-03.

41. *See* VILE, *supra* note 27, at 132-33 (describing "constitutional government" and "constitutional theory" in terms of the balanced constitution or the separation of powers).

42. *See id.* at 58-59 (discussing the "balanced constitution" of the "restored monarchy").

rather, he was unfit to rule such a people because he was an unjust king.)[43] The very purpose of constitutionalism was to distribute power to prevent tyranny. The separation of powers advances that end because rights are better secured if no citizen can be deprived of them unless a legislative body decides that there shall be a law permitting such deprivation, an executive decides to enforce that law, and a court adjudicates the facts of a particular case to determine that the law applies to a particular individual.[44] And separation of powers with checks and balances—where each branch has some overlap with the others—ensures that abuse is less likely at each stage of that process. The importance of these mechanics cannot be overstated: "[I]n the America of 1787 the doctrine of the separation of powers . . . remained itself firmly in the centre of men's thoughts as the essential basis of a free system of government."[45]

The separation of powers was also understood to enhance democracy by helping solve the problem of faction. Separation of powers was in part a response to the precarious republican experiments during the years of the Articles of Confederation, under which state legislatures often exercised the whole power of government.[46] Or perhaps it would be more accurate to say that checks and balances were a response to the pure separation of powers in many state governments at this time (in which the legislative branch happened to predominate).[47] Either way, factions can more easily gain control over one body than three.[48] This may be another way of saying that separation of powers preserves liberty because faction undermines liberty. In any case, separation of powers was understood to be necessary not only for the preservation of liberty but also for the very possibility of republican government.

The Founders also seem to have thought that the separation of powers would enhance the administration of government. One of the critical defects of the Articles of Confederation was the lack of a federal executive.[49] Congress

43. THE DECLARATION OF INDEPENDENCE para. 30 (U.S. 1776) ("A Prince whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people."). Martin Diamond has made this point. MARTIN DIAMOND, *The Revolution of Sober Expectations* (1974), *in* AS FAR AS REPUBLICAN PRINCIPLES WILL ADMIT, *supra* note 28, at 209, 214.

44. I take this to be Montesquieu's argument in the quotation in note 27 above.

45. VILE, *supra* note 27, at 133.

46. *See* Flaherty, *supra* note 28, at 1766-67.

47. *See supra* note 35 and accompanying text.

48. For an illustration of the power of faction over revolutionary state legislatures, see WOOD, *supra* note 27, at 403-09.

49. *See* ARTICLES OF CONFEDERATION OF 1781, art. IX, paras. 1, 4 (granting various executive powers to the Congress under the Articles); Sunstein, *supra* note 5, at 432 (arguing that one of the Confederation's key defects was the lack of a strong executive).

foundered time and again as it tried to take on an executive role, finally ceding much of that role to various secretaries.[50] Separation of powers, as embodied in the new Constitution, would create a specialized division of labor. Not only that, but pride and self-interest would induce officers of each competing branch to seek to do their jobs well.[51] And a government well administered is less likely to fall into the anarchy and illiberalism of the first decade after independence.[52]

The very essence of American constitutionalism, then, is its particular brand of separation of powers modified by checks and balances. The particular balance struck by the Framers—although surely not the only possible balance—was thought absolutely critical for the survival of free government. No government at all—whether republican, monarchical, mixed, or something else entirely—could ever be free without a proper distribution of power in which the ambition, interest, and pride of each part serves as an effective check on the ambition, interest, and pride of all the others.

B. The Birth of Two Fictions

The core of American constitutionalism has been sacrificed to administrative governance. The executive branch exercises not only executive power but also legislative power by promulgating important and controversial rulemakings despite robust congressional debate on the very subjects of those rulemakings.[53] The executive and its agencies enforce their own rules in

50. Flaherty, *supra* note 28, at 1772.

51. DIAMOND, *supra* note 28, at 67. M.J.C. Vile, in his interpretation of Montesquieu, has elaborated that each branch requires personnel with a different sort of temperament. VILE, *supra* note 27, at 100. Executive officials need passion and energy, while judges ought to be characterized by "sang-froid" or indifference. *Id.*

52. We might recall the words of Alexander Pope, quoted by Alexander Hamilton in *The Federalist Papers*: "For forms of government let fools contest—That which is best administered is best." THE FEDERALIST NO. 68 (Alexander Hamilton), *supra* note 26, at 414.

53. Recent controversial acts of agency rulemaking, involving important political issues that had been debated for years in Congress, include the Environmental Protection Agency (EPA) Clean Power Plan regulating carbon dioxide emissions and the Federal Communication Commission (FCC) Open Internet Order regulating the Internet. *See* Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60); Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601 (2015), https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A1_Rcd.pdf. For a discussion of the legislative debates in Congress, see ANGELE A. GILROY, CONG. RESEARCH SERV., RS22444, NET NEUTRALITY: BACKGROUND AND ISSUES 4-5 (2009); and Abigail R. Moncrieff, *Reincarnating the "Major Questions" Exception to* Chevron *Deference as a Doctrine of Noninterference (or Why* Massachusetts v. EPA *Got It Wrong)*, 60 ADMIN. L. REV. 593, 635-37 (2008).

proceedings in front of their own ALJs.[54] The Securities and Exchange Commission (SEC) is perhaps the worst offender, routinely bringing enforcement actions in front of its own judges, who rarely rule against the SEC.[55] Multiple federal courts have now heard challenges to the SEC's practice of adjudicating enforcement actions in front of its ALJs.[56]

Unwilling to expressly endorse the antirepublican premises of the administrative state (extolled explicitly by its progressive founders), American administrative law doctrine has disguised this antirepublican and anticonstitu-

54. Both the EPA and the FCC, for example, can enforce their regulations in their own adjudicatory proceedings. 33 U.S.C. § 1319 (2015) (authorizing EPA administrative adjudications); 47 U.S.C. §§ 403, 409 (2015) (authorizing FCC adjudications). The FCC explains its enforcement and adjudicatory powers on its website. *Enforcement Primer*, FED. COMM. COMMISSION, https://www.fcc.gov/general/enforcement-primer (last visited Feb. 2, 2017).

55. As the Eleventh Circuit recently explained, "Congress authorized the Securities and Exchange Commission . . . to bring civil actions to enforce violations of the Securities Exchange Act of 1934 . . . and regulations promulgated thereunder. The Commission is empowered to bring such an action either in federal district court or in an administrative proceeding before the Commission." Hill v. SEC, 825 F.3d 1236, 1237 (11th Cir. 2016). For a general account of the SEC's practice of bringing enforcement actions before its own judges and two challenges to that practice, see Jean Eaglesham, *SEC Wins with In-House Judges*, WALL ST. J. (May 6, 2015, 10:30 PM ET), http://on.wsj.com/1IijA10, which notes that the SEC wins 90% of cases in front of its own judges but only 69% of cases in federal courts; and Peter J. Henning, *S.E.C. Faces Challenges over the Constitutionality of Some of Its Court Proceedings*, N.Y. TIMES: DEALBOOK (Jan. 27, 2015, 8:58 AM), http://nyti.ms/1JzY33b. Justices on the Court often recognize that agencies exercise all three kinds of power. *See, e.g.*, City of Arlington v. FCC, 133 S. Ct. 1863, 1877-78 (2013) (Roberts, C.J., dissenting); Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 488 (2001) (Stevens, J., concurring in part and concurring in the judgment) ("The Court has two choices. We could choose to articulate our ultimate disposition of this issue by frankly acknowledging that the power delegated to the EPA is 'legislative' but nevertheless conclude that the delegation is constitutional because adequately limited by the terms of the authorizing statute. Alternatively, we could pretend, as the Court does, that the authority delegated to the EPA is somehow not 'legislative power.' Despite the fact that there is language in our opinions that supports the Court's articulation of our holding, I am persuaded that it would be both wiser and more faithful to what we have actually done in delegation cases to admit that agency rulemaking authority is 'legislative power.'" (footnote omitted)); INS v. Chadha, 462 U.S. 919, 986 (1983) (White, J., dissenting) ("There is no question but that agency rulemaking is lawmaking in any functional or realistic sense of the term."); Humphrey's Ex'r v. United States, 295 U.S. 602, 628 (1935) ("In making investigations and reports thereon for the information of Congress under § 6, in aid of the legislative power, [the Commission] acts as a legislative agency. Under § 7, which authorizes the commission to act as a master in chancery under rules prescribed by the court, it acts as an agency of the judiciary.").

56. Both the Eleventh Circuit and Second Circuit have concluded that Congress intended the agency to decide the constitutional claims in the first instance. *Hill*, 825 F.3d at 1237; Tilton v. SEC, 824 F.3d 276, 279 (2d Cir. 2016).

tional regime. This Subpart explains how this occurred.[57] It claims that we ought to accept, to at least some degree, the antirepublicanism of modern administration so that we might recover the very core of constitutionalism itself.

The modern administrative state is often said to have begun with the creation of the Interstate Commerce Commission in 1887,[58] "but it was not until the New Deal that the modern agency became a pervasive feature of American government."[59] Before then, the Supreme Court rarely tackled the question of legislative delegation, upholding delegations "on the somewhat strained rationale that the transferred authority was limited to factual determinations necessary to the application of the legislative will or to filling in certain 'details' pertinent to the legislative purpose."[60]

In *J.W. Hampton, Jr. & Co. v. United States*, however, the Court confronted the President's power (delegated from Congress) to set tariff rates.[61] Article I, Section 8 of the Constitution grants Congress, not the President, the power to lay and collect taxes and duties.[62] The "flexible tariff provision" of the Tariff Act of September 21, 1922 authorized the President to amend the tariff schedule established by Congress if he determined there were differences in the "costs of production" for particular articles in the United States compared to the costs of production for those articles in the principal competing foreign country.[63] The provision authorized the President to amend the tariff to equalize such differences if the rate established by Congress did not already do so.[64]

The Court in that case established the famous "intelligible principle" test: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."[65] The Court upheld the flexible tariff provision of the 1922 Act. It cited three leading state and federal cases that held that, because Congress had set forth an

57. For another account of the rise of the nondelegation doctrine (and its fictional nature), see Watts, *supra* note 11, at 1010-18.

58. Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 776 (2013); James O. Freedman, *Crisis and Legitimacy in the Administrative Process*, 27 STAN. L. REV. 1041, 1044-45 (1975).

59. Sunstein, *supra* note 5, at 424 n.9.

60. Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 7 (1982) (footnote omitted) (citing United States v. Grimaud, 220 U.S. 506, 517 (1911); and Cargo of the Brig Aurora v. United States, 11 U.S. (7 Cranch) 382, 386 (1813)).

61. 276 U.S. 394, 404 (1928).

62. U.S. CONST. art. 1, § 8.

63. *J.W. Hampton*, 276 U.S. at 400-01.

64. *Id.* at 401.

65. *Id.* at 409.

intelligible principle, it had not delegated legislative power at all and the executive was thus merely executing the law. The Court first quoted a case from Ohio:

> The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority *or discretion as to its execution*, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.[66]

Then a railway rate case from Minnesota:

> They have not delegated to the commission any authority or discretion as to what the law shall be,—which would not be allowable,—but have merely conferred upon it an authority and discretion, *to be exercised in the execution of the law*, and under and in pursuance of it, which is entirely permissible. The legislature itself has passed upon the expediency of the law, and what it shall be. The commission is intrusted with no authority or discretion upon these questions.[67]

And finally another tariff case the Court had confronted nearly forty years earlier:

> After an examination of all the authorities, the Court said that while Congress could not delegate legislative power to the President, this Act did not in any real sense invest the President with the power of legislation, because nothing involving the expediency or just operation of such legislation was left to the determination of the President . . . . *What the President was required to do was merely in execution of the act of Congress.* It was not the making of law.[68]

J.W. Hampton and the cases it cited make clear that the birth of the administrative state was deemed constitutional on the understanding that Congress was not delegating legislative power and the executive branch thus only executed the law. Modern administrative agencies could not be constitutional *unless* this were true.

To be sure, it may be that some rulemaking (perhaps of the sort the Court addressed in these cases) is not really legislative; perhaps the "intelligible principle" is precise enough in some cases that all that is required is an analysis of changing factual conditions. In the case of such rulemaking, the President or commission does not exercise much discretion in "the application of such rules to particular situations and the investigation of facts."[69] The flexible tariff provision may be such an example, depending on how difficult it is to ascertain

66. *Id.* at 407 (emphasis added) (quoting Cincinnati, Wilmington & Zanesville, R.R. Co. v. Comm'rs of Clinton Cty., 1 Ohio St. 77, 88-89 (1852)).

67. *Id.* at 408-09 (emphasis added) (quoting State *ex rel.* R.R. & Warehouse Comm'n v. Chi., Milwaukee & St. Paul Ry. Co., 37 N.W. 782, 788 (Minn. 1888), *rev'd*, 134 U.S. 418 (1890)).

68. *Id.* at 410-11 (emphasis added).

69. *Id.* at 408 (quoting Interstate Commerce Comm'n v. Goodrich Transit Co., 224 U.S. 194, 214 (1912)).

the costs of production.[70] So might ratemaking statutes, insofar as "just and reasonable rates" may be a "specific enough term of art" susceptible of straightforward application.[71]

Even if that is so, the narrow reading of the nondelegation doctrine[72] espoused in *J.W. Hampton* did not last long. Only twice—both times in 1935—has the Supreme Court invalidated a statute on nondelegation grounds.[73] As Gary Lawson observes, this failure to enforce the nondelegation doctrine "has not been for lack of opportunity."[74] The Court and most scholars maintain that the doctrine is too difficult to administer.[75] As a result, current doctrine provides little restraint on congressional delegations of power. Congress's "intelligible principles" are today so broad that it is hard to escape the conclusion that Congress in fact delegates legislative power to the President and independent commissions.

For example, the Securities and Exchange Act proscribes the use or employment, "in connection with the purchase or sale of any security," of "any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."[76] The FCC has the power to grant broadcast licenses to applicants "if public convenience, interest,

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70. Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 369 (2002).

71. *Id.* at 386 (quoting Gary Lawson, *Who Legislates?*, 1995 PUB. INT. L. REV. 147, 153-54 (book review)).

72. I use the term interchangeably with "nondelegation" because, as I argue here, nondelegation is a fiction and, as others have argued, the nondelegation doctrine was never very constraining. *See, e.g.*, Aranson et al., *supra* note 60, at 7.

73. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 542 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388, 433 (1935).

74. Lawson, *supra* note 4, at 1240; *see also* Lawson, *supra* note 70, at 371 ("After 1935, the Court abandoned any serious nondelegation analysis.").

75. As Justice Scalia explained:

> [W]hile the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts. Once it is conceded, as it must be, that no statute can be entirely precise, and that some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it, the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree. . . . Since Congress is no less endowed with common sense than we are, and better equipped to inform itself of the 'necessities' of government; and since the factors bearing upon those necessities are both multifarious and (in the nonpartisan sense) highly political[,] . . . it is small wonder that we have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law. As the Court points out, we have invoked the doctrine of unconstitutional delegation to invalidate a law only twice in our history, over half a century ago.

Mistretta v. United States, 488 U.S. 361, 415-16 (1989) (Scalia, J., dissenting).

76. 15 U.S.C. § 78j(b) (2015).

or necessity will be served thereby."[77] To these we might add commissions with the power to set "just and reasonable" rates (depending on one's view of how specific that term of art is).[78] And the recent Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), among other things, gives the Federal Deposit Insurance Corporation the power to "liquidate failing financial companies that pose a significant risk to the financial stability of the United States" if it "determine[s] that such action is necessary for purposes of the financial stability of the United States."[79]

Even though congressional delegations have become so broad as to be, for all intents and purposes, delegations of lawmaking power, the fiction that they are not legislative delegations is alive and well in the case law.[80] The strength of this fiction is evident in *INS v. Chadha*, which this Article will describe in more detail in its discussion of the legislative veto:

> To be sure, some administrative agency action—rulemaking, for example—may resemble "lawmaking." . . . This Court has referred to agency activity as being "quasi-legislative" in character. Clearly, however, "[i]n the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."[81]

This fiction is most bluntly expressed in the recent case of *City of Arlington v. FCC*.[82] The Court, in a footnote, explained that although agency rulemakings are "legislative" in "form," under "our constitutional structure they *must be* exercises of . . . the 'executive Power.'"[83]

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77. 47 U.S.C. § 307(a) (2015).

78. One example is the Federal Energy Regulatory Commission. *See* 16 U.S.C. §§ 824d, 842e (2015).

79. 12 U.S.C. §§ 5384, 5386 (2015).

80. *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472-76 (2001) (holding that the Clean Air Act instruction to set "ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on [the] criteria [documented in § 108] and allowing an adequate margin of safety, are requisite to protect the public health" was not a delegation of legislative power (alterations in original) (quoting 42 U.S.C. § 7409(b)(1))).

81. INS v. Chadha, 462 U.S. 919, 953 n.16 (1983) (alteration in original) (citation omitted) (first quoting Humphrey's Ex'r v. United States, 295 U.S. 602, 628 (1935); and then quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 539, 587 (1952)).

82. 133 S. Ct. 1863 (2013).

83. *Id.* at 1873 n.4 (quoting U.S. CONST. art. II, § 1). Many scholars also recognize this fiction. *See, e.g.*, Flaherty, *supra* note 28, at 1728 (describing the administrative state as a "colossal array of agencies that legislate and adjudicate under any but the broadest definition of 'executing' the laws"); M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 603 (2001) (explaining that modern legal doctrine requires, for example, delegations to the EPA under the Clean Air Act to be executive in nature and that such delegations are "legitimate only if they [do] not represent legislation"); *see also* Watts, *supra* note 11, at 1005-06.

Even though our jurisprudence pretends that the executive branch only executes the law, in reality the administrative state exercises a combination of all three powers of government—legislative, executive, and, as we shall see later, judicial. We merely call it all "executive." Even Supreme Court Justices recognize this when speaking in dicta:

> Although modern administrative agencies fit most comfortably within the Executive Branch, as a practical matter they exercise legislative power, by promulgating regulations with the force of law; executive power, by policing compliance with those regulations; and judicial power, by adjudicating enforcement actions and imposing sanctions on those found to have violated their rules. The accumulation of these powers in the same hands is not an occasional or isolated exception to the constitutional plan; it is a central feature of modern American government.[84]

And the scholars who acknowledge that, despite its label, the administrative state combines all three powers are legion.[85] In the words of David Rosenbloom, "[i]n essence, all three governmental functions have been collapsed into the administrative branch. Thus, public administrators make rules (legislation), implement these rules (an executive function), and adjudicate questions concerning their application and execution (a judicial function). The collapsing of the separation of powers has been well recognized."[86] Only our jurisprudence has refused to recognize it.

Viewing the same problem from another angle, many have claimed that although the Framers feared the aggrandizement of the legislative branch, today we ought to fear the aggrandizement of the executive branch.[87] Modern formalism—which is really a *fictitious* formalism—forecloses remedies such as

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84. *City of Arlington*, 133 S. Ct. at 1877-78 (Roberts, C.J., dissenting).

85. *See, e.g.*, Lawson, *supra* note 4, at 1233 ("[A]gencies typically concentrate legislative, executive, and judicial functions in the same institution, in simultaneous contravention of Articles I, II, and III."); Strauss, *supra* note 5, at 583 (noting that the functions agencies perform "belie simple classification as 'legislative,' 'executive,' or 'judicial,' but partake of all three characteristics"); Sunstein, *supra* note 5, at 446 (noting that some modern scholars argue that one of the problems of administrative agencies "is that the New Deal agency combines executive, judicial, and legislative functions").

86. David. H. Rosenbloom, *Public Administrative Theory and the Separation of Powers*, 43 PUB. ADMIN. REV. 219, 225 (1983).

87. *See, e.g.*, Edward Cantu, *The Separation-of-Powers and the Least Dangerous Branch*, 13 GEO. J.L. & PUB. POL'Y 1, 42 (2015) ("As Justice White made so poignantly clear, by striking down the legislative veto, the Court refused the chance to mitigate the effects of delegation and thus prevent what many still fear is the eventual over-aggrandizement of the executive due to ever-increasing delegation."); Flaherty, *supra* note 28, at 1727-28; Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 954 (2005) ("If the goal of separation of powers law is to avoid the accumulation of 'excessive' power in one branch, the rise of the administrative state suggests that congressional abdication of legislative power to the executive is at least as much of a problem as congressional self-aggrandizement.").

the legislative veto because it pretends that all administrative power is executive power.[88] Constitutional administration offers a formalist solution to the problem of formalist jurisprudence. To accept it, one need only reject the fictitious formalism of nondelegation. This rejection demands two recognitions. First, Congress delegates legislative power. Second, agencies exercise not only executive but also legislative and judicial power. These recognitions, in turn, facilitate a formalist reassertion of the Constitution over the administrative state: depending on the particular administrative function at hand, the corresponding constitutional branches of government can reassert control over those functions.

Before the remainder of this Article shows how this can be done, we must confront one remaining hurdle: Are we justified in accepting unconstitutional delegation but rejecting a violation of the separation of powers? That question requires significant theoretical treatment for which we have not the space. This Article thus leaves the reader with a few observations. First, what it is not arguing: that legislative delegation is constitutional as an original matter.[89] Other scholars have made this argument, or have at least argued that delegation is within the realm of possible original meanings of Article I's Vesting Clause.[90] But the language of Article I states that "all" legislative power therein granted "shall" be vested in Congress.[91] There is no clearer way of expressing the point without bordering on redundancy.[92] Even more fundamentally, if Congress

88. *See infra* Part II.A.1 (discussing INS v. Chadha, 462 U.S. 919 (1983)).

89. If the reader agrees with those scholars, discussed here, who see no problem with delegation as an originalist matter, then the argument of this Article does not require any constitutional sacrifice at all. It would be entirely formalist and originalist to accept delegation doctrinally and thus the implications drawn out in this Article.

90. *See, e.g.*, Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2181 (2004); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000); *see also* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 489 (2001) (Stevens, J., concurring in part and concurring in the judgment) ("My view is not only more faithful to normal English usage, but is also fully consistent with the text of the Constitution. . . . [The Vesting Clauses] do not purport to limit the authority of either recipient of power to delegate authority to others."); Watts, *supra* note 11, at 1021-23.

91. U.S. CONST. art. I, § 1.

92. Although Merrill argues otherwise. *See* Merrill, *supra* note 90, at 2114-39. His argument boils down to the text's—and the historical record's—silence on delegation. *Id.* at 2116-17, 2127. But it seems plain that such a consequential power would not have been presumed through silence. In fact, it is interesting that as part of Merrill's theory of Article I, he takes the position that Congress must *clearly authorize* its delegations. *See id.* at 2100. But that makes one wonder—why is it sufficient for the Constitution to grant (or delegate to) Congress this power through an ambiguous silence rather than its own clear authorization?

could delegate power to whomever it wished,[93] it could dictate fundamental change in republican government as we know it without a recurrence to the people via a constitutional convention. The nature of our regime cannot be changed except by such a recurrence.[94]

This Article argues rather that delegation ought to be accepted, even if originally unconstitutional, for a few reasons. First, as argued above,[95] few can deny that the separation of powers is far more critical to the survival of liberty than a firm nondelegation principle.[96] To be sure, the Framers expected that a republican legislature would best secure liberal and public-minded legislation.[97] They thus required that lawmakers be elected by the people. But they also recognized that even that is not enough. Consider the words of Thomas Jefferson in criticizing his state's constitution:

> All the powers of government, legislative, executive, and judiciary, result to the legislative body. The concentrating [of] these in the same hands is precisely the definition of despotic government. *It will be no alleviation that these powers will be*

93. Consider that the legislation struck down in *Schechter Poultry* delegated enormous discretion to the President to issue "codes of fair competition" for entire industries with almost no guidance, and the industries themselves would have a role in approving the codes. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 521-22, 537 (1935). If Article I, Section 1 permitted delegation, then this statute would be constitutional.

94. *See* THE FEDERALIST NO. 49 (James Madison), *supra* note 26, at 313-14 ("As the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived, it seems strictly consonant to the republican theory to recur to the same original authority, not only whenever it may be necessary to enlarge, diminish, or new-model the powers of government, but also whenever any one of the departments may commit encroachments on the chartered authorities of the others. . . . There is certainly great force in this reasoning, and it must be allowed to prove that a constitutional road to the decision of the people ought to be marked out and kept open, for certain great and extraordinary occasions. But there appear to be insuperable objections against the proposed recurrence to the people, as a provision in all cases for keeping the several departments of power within their constitutional limits."). The proposal here accepts the delegation of legislative power, but only that which has already occurred in our long tradition of administrative practice. By assumption this, too, modifies our regime without a recurrence to the people, but it is not so fundamental a change as would occur were we to permit the delegation of any and all legislative power, as would be permissible on the view of those who argue Article I, Section 1 permits delegation.

95. *See supra* Part I.A.

96. There is undoubtedly a connection between nondelegation and the separation of powers, insofar as a strictly enforced nondelegation doctrine would prevent the blending of powers within agencies. The argument here is that *assuming* the nondelegation doctrine is unenforceable, the separation of powers can still be salvaged through a doctrinal acceptance of nondelegation.

97. *See, e.g.*, THE FEDERALIST NO. 10 (James Madison), *supra* note 26, at 82 (explaining how republicanism allows legislators to "refine and enlarge the public views" and allows for a more extensive republic more "favorable to the election of proper guardians of the public weal").

> *exercised by a plurality of hands, and not by a single one.* 173 despots would surely be as oppressive as one.[98]

Having democratically elected lawmakers matters not if all power is concentrated in the lawmaking body. Conversely, a king *may* be fit to rule a free people if he is a just king—if he preserves the liberty of the people, as was thought to occur under the balanced constitution.[99] Thus, that unelected agencies "make law" matters little in comparison to the great danger arising from their combining all powers of government.

Second, accepting delegation does not mean Congress has no role in supervising agency lawmaking. Congress still makes law to a large degree and can otherwise ensure that agencies make law according to its wishes; this Article does not in any way suggest that by accepting delegation we must jettison the "intelligible principle" standard. Indeed, accepting that delegation is otherwise unconstitutional justifies continuing adherence to this legal principle—it will maintain certain limits on Congress's otherwise freewheeling (and unconstitutional) ability to delegate.[100] Moreover, as this Article will argue, accepting the reality of delegation allows Congress to assert *more* control over agency rulemaking—by, for example, exercising a properly conceptualized legislative veto.[101] By thus accepting delegation we actually mitigate the harms to republicanism it causes under current jurisprudence.

Lastly, there is great truth in the observation that delegation has become a part of our constitutional order. Modern government simply could not exist without it.[102] Moreover, delegation has to some extent always been with us, as far back as the First Congress.[103] Prudence thus demands that we accept it to a

98. JEFFERSON, *supra* note 27, at 99 (emphasis added).

99. *See supra* notes 28-29, 41-43 and accompanying text.

100. Merrill and Watts argue that because delegation of legislative power is constitutional, it makes no sense to require an intelligible principle. Merrill, *supra* note 90, at 2165; Watts, *supra* note 11, at 1021 n.109, 1022 n.117. By recognizing delegation as unconstitutional, we at least have some semblance of a guarantee of republican rule.

101. *See infra* Part III.A.1-3.

102. *See* Mistretta v. United States, 488 U.S. 361, 372 (1989) ("[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society, . . . Congress simply cannot do its job absent an ability to delegate power under broad general directives."); David Schoenbrod, *Separation of Powers and the Powers That Be: The Constitutional Purposes of the Delegation Doctrine*, 36 AM. U. L. REV. 355, 357 (1987) (noting that "[a]gencies play a prominent role in modern life" and suggesting that the nondelegation doctrine is what has allowed this).

103. Gary Lawson catalogs six statutes frequently cited for the proposition that early Congresses delegated legislative authority to the executive. Lawson, *supra* note 70, at 396-402. He argues, however, that most of these were not genuine delegations, *id.*, and adds that there is explicit evidence from the Second Congress's debate over the establishment of post roads that Congress did not believe it had the power to delegate its legislative power, *id.* at 402-03.

large degree. In contrast, the concentration of all powers of government in the hands of agencies has never been embedded in our constitutional order, as evidenced by efforts to ensure checks and balances and some semblance of separation of powers within agency processes.[104] Although the progressive founders of modern administration saw the concentration of power as a virtue,[105] no serious scholar or court in the modern day has advocated for a pure concentration of such power without checks. The question, then, is how to ensure those checks. Constitutional administration provides the answer: we can use the separation of powers at the core of our constitutional system.

II. A Tripartite Theory of Administrative Law

Having thus rejected both fictions and accepted the first unconstitutional foundation of administrative law, there is no need for us to accept the second. The remainder of this Article seeks to redress that second, greater constitutional violation and show how each branch of government can assert control over the functions of administration corresponding to its own constitutional function. This Article submits that reform is possible. All that is required is three short, uncomplicated acts of Congress, addressing each constitutional branch of government and each with existing statutory precedent. There are

104. *See* sources cited *supra* note 5.

105. WOODROW WILSON, *The Study of Administration* (1887), *in* WOODROW WILSON: THE ESSENTIAL POLITICAL WRITINGS 231, 242 (Ronald J. Pestritto ed., 2005) ("And let me say that large powers and unhampered discretion seem to me the indispensable conditions of responsibility. Public attention must be easily directed, in each case of good or bad administration, to just the man deserving of praise or blame. There is no danger in power, if only it be not irresponsible. If it be divided, dealt out in shares to many, it is obscured; and if it be obscured, it is made irresponsible. But if it be centred in heads of the service and in heads of branches of the services, it is easily watched and brought to book."); *see also* FRANK J. GOODNOW, POLITICS AND ADMINISTRATION: A STUDY IN GOVERNMENT 21 (reprint 1914) (1900) ("The attempt was made at the time of the formation of our governmental system . . . to incorporate into it the principle of the separation of powers. . . . What had been a somewhat attractive political theory in its nebulous form became at once an unworkable and unapplicable rule of law."); *id.* at 23 ("Actual political necessity however requires that there shall be harmony between the expression and execution of the state will. Lack of harmony between the law and its execution results in political paralysis."); JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 1 (1938) ("[T]he administrative process springs from the inadequacy of a simple tripartite form of government to deal with modern problems."); *id.* at 69 ("The chief virtue of this modern tendency toward delegation is that it is conducive to flexibility—a prime quality of good administration."); Lawson, *supra* note 4, at 1231 ("Faced with a choice between the administrative state and the Constitution, the architects of our modern government chose the administrative state, and their choice has stuck."); Rosenbloom, *supra* note 86, at 225 ("[I]n this country [the administrative state] represents an effort to reduce the inertial qualities of the system of separation of powers.").

no obvious political hurdles to enacting these changes. And although these three acts would work a significant constitutional reform of the administrative state, none would cause a tectonic shift in the everyday workings of agencies.

To summarize what is to come: First, under constitutional administration, a properly conceived legislative veto is constitutional. Drawing from administrative law's reigning formalist fictions, the Supreme Court in *INS v. Chadha*[106] distinguished between the nature of the act of vetoing (legislative) and the nature of the vetoed act (executive).[107] Once we accept, however, that certain administrative acts are legislative, a legislative veto of *those* acts becomes constitutional. The Rules Enabling Act supplies a model for a proposed Rulemaking Enabling Act with just this sort of veto. This Act would apply the procedures of federal court rulemaking—with the significant addition of a properly *legislative* legislative veto—to the rulemaking of the entire administrative state. It would allow Congress three options when faced with agency rulemaking: it could take no action, thereby letting the rulemaking become law; it could enact the rulemaking via statute with amendments, as with the Rules Enabling Act; or it could veto the rulemaking.

Second, once Congress asserts control over the lawmaking functions of the administrative state, far less risk inheres in modern presidential administration. While the President will continue to have a role in the rulemaking process (just as he has a role in the traditional legislative process), opponents of a unitary executive will have far less to fear from the chief executive under this system. The President's role vis-à-vis rulemaking would not be substantially different from his role vis-à-vis the traditional legislative process.

The President's authority over other administrative functions, however, will increase. Specifically, the President's direct control ought to extend to all of the administrative state's executive functions—*no matter where those functions are exercised*. Under constitutional administration, Congress would have renewed authority over the rulemaking of both, say, the independent Federal Trade Commission (FTC) and the executive-branch EPA. Correspondingly, the President (if he is to be unitary) must have renewed authority over the executive functions of both. The debate over the status of independent agencies must therefore be reconsidered in light of constitutional administration, but very little existing doctrine needs to change. Indeed, modern constitutional doctrine would pose no obstacles to enactment of the modest reform of independent agencies proposed here—the elevation of enforcement directors to constitutional officers appointed by the Senate and removable by the President.

Finally, constitutional administration requires a simple reform—again with statutory precedent—to the judiciary's role in reviewing administrative

106. 462 U.S. 919 (1983).

107. *See infra* text accompanying notes 123-25.

actions. As previously suggested and later discussed, most administrative adjudications by commissions or ALJs would remain undisturbed because they are arguably executive in nature.[108] When, however, it comes to the stuff of 1789 Westminster[109]—when our lives, liberty, or property hang in the balance—ALJs, as a constitutional matter, must deliver their findings as reports and recommendations to Article III judges. Congress can enact this process quite easily by following the models of bankruptcy and magistrate judges.

The changes prompted by constitutional administration advance the separation of powers but retain the values of administrative law. The vast majority of the administrative state's functions would remain undisturbed. Indeed, Congress would silently pass over most rulemakings, as would the President, and most administrative rules would become law as they do today. Administrative agencies would still be respected for their technical expertise; but insofar as what must be done with that expertise is a political question, the political branches of government would become truly responsible. This model, in other words, retains the values of expertise and efficiency that made the administrative state so attractive to its progressive founders but sustains a significant measure, if not a full measure, of constitutional sanction.

A. The Legislative Veto and a Rulemaking Enabling Act

1. Toward a legislative veto of legislative acts

The history of the legislative veto is well known. Its inclusion in various statutes was a concession to Congress in exchange for specific delegations of power to the administrative state.[110] The first such veto provision was enacted in 1932 and, by the time the legislative veto was struck down in *Chadha*,[111] 295 legislative veto provisions existed in 196 statutes.[112] Congress only issued legislative vetoes 230 times, and nearly half the time—on 111 occasions—these vetoes invalidated suspensions of deportation.[113] In the most famous such instance, the House of Representatives vetoed the suspension of deportation issued by the Attorney General to a British citizen of East Indian descent, Jagdish Chadha, and five other noncitizens.[114]

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108. *See infra* text accompanying notes 281-82.

109. *See infra* note 275 and accompanying text.

110. *Chadha*, 462 U.S. at 968-74 (White, J., dissenting).

111. *Id.* at 952-59 (majority opinion).

112. *Id.* at 944.

113. Kagan, *supra* note 17, at 2257.

114. *Chadha*, 462 U.S. at 923-26.

In Chadha's case, the Attorney General acted under section 244 of the Immigration and Nationality Act, which authorized him to suspend deportation proceedings for noncitizens who could show good moral character and that their deportation would result in extreme hardship.[115] The Attorney General, exercising his authority through an immigration judge, found that Chadha met the requirements for suspension of deportation and submitted a report of that suspension to Congress as required in that section's legislative veto provision.[116] Waiting until the last possible moment to act, the Immigration, Citizenship, and International Law Subcommittee; the full House Committee on the Judiciary; and then the full House of Representatives vetoed Chadha's suspension without discussion, solely on the subcommittee chairman's representations that Chadha and the other five noncitizens did not meet the statutory requirements for suspension of deportation.[117] When the immigration court reopened his case to implement the veto, Chadha moved to terminate the proceedings on the ground that section 244 was unconstitutional,[118] ushering in perhaps the most important separation of powers case in American history.

The Supreme Court held that because the legislative veto was a legislative act—that is, it "had the purpose and effect of altering the legal rights, duties, and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the Legislative Branch"[119]—it could not be constitutional without meeting the requirements of bicameralism and presentment in Article I, Sections 1 and 7 of the Constitution.[120] That is, it would have to be passed by the other legislative chamber and signed by the President. Because the House could not legislate on its own without the Senate (and the President), the legislative veto of Chadha's suspension was unconstitutional.[121] Six Justices adopted this approach, while Justice Powell would have held the veto an unconstitutional act of judicial power.[122]

115. *Id.* at 924.

116. *Id.* at 924-25.

117. *Id.* at 926.

118. *Id.* at 928.

119. *Id.* at 952.

120. *Id.* at 946-51, 954-55; *see also* U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."); *id.* art. I, § 7 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it.").

121. *Chadha*, 462 U.S. at 956-59.

122. *See id.* at 922; *id.* at 963-67 (Powell, J., concurring in the judgment).

The Court in *Chadha* distinguished the act of vetoing from the vetoed act based on the responsible constitutional actor: "When the Executive acts, he presumptively acts in an executive or administrative capacity as defined in Art. II. And when, as here, one House of Congress purports to act, it is presumptively acting within its assigned sphere."[123] The Court thus noted that the Attorney General's underlying action was executive: "When the Attorney General performs his duties pursuant to § 244, he does not exercise 'legislative' power. . . . [H]is administrative activity cannot reach beyond the limits of the statute that created it—a statute duly enacted pursuant to Art. I, §§ 1, 7."[124] But it held, on the other hand, that the House's veto was legislative.[125] As the Supreme Court would subsequently say in *City of Arlington*, it *had* to be this way: under the Constitution, only Congress legislates, and the executive only executes.[126] In layman's terms, the Court said that to change an execution of the law that Congress does not like, Congress must amend or repeal the law and satisfy both bicameralism and presentment.

Once we accept the reality of legislative delegation and recognize the administrative state's different functions, it becomes clear that under at least some circumstances a legislative veto should be constitutional—specifically, a legislative veto of *legislative* acts should be constitutional.[127] If Congress delegates its legislative power to agencies, then agencies are not *executing* the law when they are promulgating rules; they are in fact in the throes of making new law. And when new law has not yet been made, there is no law for Congress to repeal or amend. If an agency is in the throes of making a new law and Congress, in accordance with whatever limits it specified in its delegation of power to the agency, steps in and withdraws its consent, then the proposed law (the rulemaking) could not become an actual law because it would not have the consent of both Congress and the President. Put another way, if Congress can delegate its legislative power, it can delegate it with conditions—including the condition that it should be permitted an opportunity to review any proposed legislation before it becomes law.

The point may be made another way. The holding of *Chadha* is often interpreted to mean that when Congress acts it acts legislatively, and thus anything it does must meet the requirements of bicameralism and presentment.

123. *Id.* at 951-52 (majority opinion).

124. *Id.* at 953 n.16.

125. *Id.* at 952.

126. City of Arlington v. FCC, 133 S. Ct. 1863, 1873 n.4 (2013) (explaining that although agency rulemakings are "legislative" in "form[]," under "our constitutional structure they *must be* exercises of . . . the 'executive Power'" (quoting U.S. CONST. art. II, § 1, cl. 1)).

127. Whether the authority to suspend removal exercised in *Chadha* is a legislative act to which the following analysis applies is discussed further below. *See infra* notes 171-72 and accompanying text.

But this is only true because of the combined work of Sections 1 and 7 of Article I of the Constitution. Section 7 specifies how a bill shall become law—after it "shall have passed" in the House and Senate and after presentment to the President.[128] Because Section 1 vests the legislative power in Congress, the bill "shall have passed" in the House and Senate when those two bodies exercise their legislative powers directly. Yet once we recognize delegation and accept it doctrinally—once we sacrifice part of the original meaning of Section 1—that means Congress can now *delegate* its power to pass these laws. In other words, to become law a bill must "have passed" in the House and Senate, but the House and Senate can determine exactly what it means to "have passed" in their chamber. They can decide that a bill is "passed" when an agency promulgates a rulemaking pursuant to a delegation of power so long as they do not withdraw their consent to such passage through a veto.

We can imagine how such a statutory scheme could work by taking the Rules Enabling Act as a model. That Act delegates authority to the Supreme Court—which in turn delegates that authority to the Judicial Conference of the United States—to create rules for the federal courts, such as the Federal Rules of Civil Procedure and the Federal Rules of Evidence.[129] Once the Supreme Court promulgates the rules or amendments to the rules, it delivers them to Congress, which then has seven months to act on them.[130] If Congress does not act, these rules automatically become the law.[131]

Now consider this scheme in the context of the legislative veto. Suppose the provision said: "If Congress takes no action in these seven months, that shall be construed as assent to the rules. But if Congress takes *any* action—by enacting an amended version of the rules or by affirmatively disapproving of the proposed rules—then Congress shall not be construed to have assented." In this universe, there are only five possible combinations of actions the constitutional branches of government can take—with five different results—that would meet the requirements of bicameralism and presentment. Two of them involve a legislative veto.

First, Congress approves or amends the rulemaking, as in the Rules Enabling Act, and the President signs. The proposed rulemaking or the amended rulemaking meets the requirements of bicameralism and presentment and thus becomes law.

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128. U.S. CONST. art. I, § 7 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it.").

129. 28 U.S.C. §§ 2072-2073 (2015).

130. *Id.* § 2074.

131. *Id.*

Second, Congress approves or amends the rulemaking, but the President rejects its enactment (the rulemaking either in its original or amended form). In that case, *neither* the original nor the amended rulemaking becomes law because the President has refused to sign it; presentment is not satisfied. If the President refused to sign the amended rulemaking because he preferred the original rulemaking, the original rulemaking would have the President's approval but not Congress's because Congress's enactment nullified its implied consent. The original rulemaking cannot be the law.

Third, Congress vetoes the rulemaking. This is the legislative veto. In this situation, Congress has withdrawn its tacit consent in our imagined Rules Enabling Act. If the proposed rulemaking now became law, that would violate bicameralism and presentment because, although the rulemaking might have the President's support, it will not have been approved by any explicit or tacit act of Congress.

Fourth, Congress takes no action at all, thus assenting to the rules as it does under the real Rules Enabling Act—and as it presumably would do regularly if it had the power to review all administrative rulemakings. Now, as also happens regularly in the modern administrative state, the President either glowingly approves of the rulemaking (and quite possibly takes ownership of it[132]) or does nothing at all. In either case the rulemaking becomes law without his signature; it has the tacit assent of both Congress and the President.

Fifth, Congress takes no action at all, thus assenting to the rulemaking as under modern doctrine, but the President does not approve. He then, under constitutional administration, has the constitutional authority to veto the rulemaking.[133] This is the executive version of the legislative veto, but because the President already has a legislative veto power, perhaps we should call it the executive-administrative veto. If the President truly disapproves of the rulemaking—even if Congress has assented to it—then there is no law because there has been no presentment.[134]

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132. *See, e.g.*, Kagan, *supra* note 17, at 2299-303 (discussing President Clinton's "public assertion of ownership of agency action").

133. If we analogize to the timeframe the President has to veto normal acts of legislation, he would have ten days to veto the rulemaking. U.S. CONST. art. I, § 7 ("If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it . . . .").

134. Congress could, perhaps, override the President's administrative veto. There are two ways this could play out. Perhaps Congress can override only with an affirmative vote of two-thirds of its members. But because Congress can consent through silence, perhaps it should be permitted to override through silence. That is, if Congress takes no action at all, that should be construed as the entire body consenting to the original rulemaking and thus overriding the President's veto. In this case, a President's administrative veto would actually require the *affirmative* support of one-third plus one members of Congress. Only that way would we know that the original rulemaking

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It bears repeating that this insight does not extend to underlying administrative acts that are executive or judicial in nature. If the underlying act in *Chadha* is executive, the outcome of that case would be the same in this universe: if Congress were to veto the executive decision to withhold removal, it would be exercising executive power that it does not have to decide how the law ought to be applied. A similar analysis obtains for judicial acts. If Congress and the President together enacted a law overturning a particular judicial decision, that would meet the requirements of bicameralism and presentment. But Congress would be exercising the judicial power of the United States, which is not vested in that body.[135] Not only, then, would its enactment not be law because it would not be prospective or general,[136] but it would also contradict the Constitution's vesting of the judicial power in the federal courts.[137]

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has less than two-thirds support in Congress and thus the President's veto should be sustained.

135. U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); *see* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 219 (1995) (explaining that Congress may not "command[] the federal courts to reopen final judgments" because doing so "violate[s] [the] fundamental principle" that the judiciary, not Congress, says what the law is).

136. *See* LON L. FULLER, THE MORALITY OF LAW 33-35 (rev. ed. 1969) (arguing that two qualities of "law" are that it is prospective and general); *cf.* U.S. CONST. art. I, § 9, cl. 3 ("No . . . ex post facto Law shall be passed.").

137. Congress and the President may have some ability to engage in judicial functions insofar as they historically could pass private bills. *See* Peter L. Strauss, *Was There a Baby in the Bathwater?: A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L.J. 789, 802-03. Even if private bills were used in the past, they at least required bicameralism and presentment, which a congressional veto of a judicial act would not satisfy. There is also an interesting historical wrinkle insofar as judges in common law countries do often "make" law. At the federal level, for example, the courts effectively engage in lawmaking when fleshing out the contours of the notoriously broad Sherman Act. *See* 15 U.S.C. §§ 1-4 (2015); United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 385-87 (1956); SmithKline Corp. v. Eli Lilly & Co., 427 F. Supp. 1089, 1120 (E.D. Pa. 1976) ("The Sherman Act is necessarily broad in its text and interpretation to allow the courts to evaluate the nature and character of new and changing patterns of product distribution that have been tried since the Act's passage."), *aff'd*, 575 F.2d 1056 (3d Cir. 1978); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 44-45 (1985). It is an interesting question whether Congress could veto a judicial opinion that lays down new law, somewhat similar to the House of Lords' historically serving as a court of final appeal in England. VILE, *supra* note 27, at 59-60. But no matter how much of this common law judicial lawmaking survives in the United States at the federal level—recall that *Erie* disclaimed the existence of a "federal general common law," leaving state courts to do most common law judicial lawmaking, Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938)—as a general and theoretical matter, the federal judiciary does not make law. As Hamilton said in a justly famous passage, the judiciary "may truly be said to have neither force nor will but merely judgment." THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 26, at 465

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The history of the legislative veto must thus be rewritten. It is a product of administrative law's reigning formalist fictions. Under constitutional administration, a defense of the legislative veto need not cede any constitutional ground beyond what has already been ceded by permitting delegation. Under this model, the nature of the act of vetoing takes on the nature of the vetoed act. Thus, certain legislative vetoes would be unconstitutional while others would not. A legislative veto of an executive or judicial act, for instance, could never be constitutional, but a legislative veto of a legislative act would be.

2. A few observations

Notice a few things. Suppose we expanded from the Rules Enabling Act to the Rulemaking Enabling Act—suppose, that is, our statute applied to all rulemakings by all administrative agencies, whether in the executive branch or in an independent commission. First, much of the administrative state would operate as usual. For most rulemakings, Congress and the President would assent by taking no action, or perhaps Congress would take no action and the President would enthusiastically take ownership of the newly enacted rulemaking. This routinely happens in the modern administrative state, and this model is consistent with much modern practice. It accepts that Congress can consent by taking no action and thereby accepts the validity of delegation. It does not seek to reinvigorate the nondelegation doctrine and thereby undo the entire administrative state.

When Congress *does*, however, take some action indicating disapproval—by passing its own version of or vetoing a rulemaking—that would be enough to nullify the rulemaking. The President's signature, currently required under the Congressional Review Act,[138] would not be constitutionally necessary.

One might counter that agency rulemakings are also somewhat executive because agencies exercise powers delegated to them by a particular statute (the Food, Drug, and Cosmetic Act or the Clean Water Act, for example) that has gone through bicameralism and presentment. Rejecting the nondelegation fiction, however, makes clear that Congress can reserve whatever legislative power it desires in any particular delegation. Under the Rulemaking Enabling Act—a draft of which I provide shortly—the agency would not have authority to promulgate a rulemaking without affording Congress an opportunity to object. In other words, it is not Congress that would be exceeding its

(formatting altered). Or in Justice Marshall's still more famous formulation, "[i]t is emphatically the province and duty of the judicial department to say what the law *is*. Those who *apply* the rule to particular cases, must of necessity expound and interpret that rule." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (emphasis added).

138. 5 U.S.C. §§ 801-808 (2015); Note, *The Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162, 2163 (2009).

constitutional authority by vetoing the proposed rulemaking, but rather the agency that would be exceeding its statutory authority by exercising power without meeting the conditions of the delegation.

The executive-administrative veto might also seem jarring. It should not, however, for two reasons. First, such a veto would rarely be used, though one can imagine that it would be used somewhat more frequently at the beginning of a new presidential administration of a different political party from the predecessor administration.[139] As a general rule, this power would remain largely unused because Presidents still take significant ownership over administrative rulemakings promulgated during their own administrations.[140] There also would be tremendous political costs associated with an executive veto of an administrative rulemaking. Most Presidents would surely be charged with wasting time and resources and meddling with expertise, especially if Congress had approved the rulemaking or assented through inaction.

More importantly, although the executive-administrative veto might seem a new idea, its *principles* are as old as the Constitution itself—indeed, even older. The executive-administrative veto is required by the Constitution's Presentment Clause. For any legislative rule to become law, whether enacted first by Congress or proposed first by an agency rulemaking, it requires the President's assent. The President, like Congress, can give his assent through silence—and as such, much of the modern administrative state would operate undisturbed. When the President disapproves of a rule becoming final under his tenure, however, it is his constitutional prerogative to veto it (subject to a two-thirds congressional override).

Note briefly the many administrative virtues of this model. Congress delegates rulemaking responsibility to the expert. In the Rules Enabling Act, for instance, it delegates to the Supreme Court and the Judicial Conference.[141] The experts use their expertise to come up with a proposal. Whether and how to *use* that expertise, which is invariably a political question, then becomes a matter for Congress and the President to determine. And practically speaking, only truly important rulemakings would even register on the radar of the political branches. This model thus fuses technocratic and administrative values with constitutional procedure and political accountability.

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139. In the same way, as of the end of 2016, the Congressional Review Act has been successfully used only once—when President Bush and Congress voted down a regulation that originated in the Clinton era but became final just as the new President took office. Note, *supra* note 138, at 2162-63. A President is unlikely to agree with Congress to veto a rulemaking conceived during his own administration or the administration of a predecessor of the same political party.

140. *See* Kagan, *supra* note 17, at 2299-303.

141. 28 U.S.C. §§ 2072-2073 (2015).

Lastly, consider the current effort of some in Congress to pass the REINS Act, which would also give Congress significant control over the administrative state.[142] It is helpful to see how the Rulemaking Enabling Act differs from the REINS Act. The latter, which operates under modern administrative law doctrine, would require all significant rulemakings to be passed by Congress and signed by the President before they became law.[143] This would avoid the legislative veto problem altogether because the default rule is that the rulemakings do not become law without congressional action. That is, because the REINS Act must obey the limitations on legislative vetoes created by *Chadha*, it can only give Congress authority over agencies by reversing the normal operation of the administrative state—agency rulemakings only become law if Congress affirmatively approves them. If the REINS Act were passed, many rulemakings would not become law because Congress could not muster the willpower to vote on them all. The Rulemaking Enabling Act, on the other hand, reverses this inertia: it accepts delegation to agencies and allows agency rules by default to become law. It is only when Congress affirmatively acts that those rulemakings may not become law. The Rulemaking Enabling Act, then, is far more politically practicable than the REINS Act, but it is more *doctrinally* challenging under modern administrative law.[144]

3. The possibility—but not inevitability—of one-house vetoes

If both the House and Senate approve, reject, or accept by inaction the original rulemaking, or enact the same amended version, then the constitutional requirement of bicameralism has surely been met. But what if only one House disapproves? It seems that to let the proposed rulemaking become law would violate bicameralism. Under constitutional administration, a one-house veto would certainly be constitutional.

The question is whether a one-house veto is required. Recall that under this system, when Congress and the President sign an organic bill into law, they can choose just how to delegate their lawmaking power to agencies—for example, they can reserve a part of their lawmaking power by retaining a

142. Regulations from the Executive in Need of Scrutiny Act, H.R. 427, 114th Cong. (2015).

143. *See id.* sec. 3, § 802(a)(2).

144. The House of Representatives has recently passed other regulatory reforms that similarly fail to tackle the core difficulties of modern administrative government. The Regulatory Accountability Act of 2017, for example, would require more agency collaboration with the centralized Office of Information and Regulatory Affairs and more detailed justifications for proposed rulemakings. *See* Regulatory Accountability Act of 2017, H.R. 5, 115th Cong. (2017). Whether this Act would lead to more congressional control of rulemaking may well be doubted; it does, however, show the political will for reform. The proposals in this Article supply methods for Congress to retain far more control at little political expense.

legislative veto power. They can reserve a power to review rulemakings for a seven-month period. They can also enact an executive-administrative veto provision into the statute. *But the statute need not do any of these things.* Under this system, nothing would *prevent* Congress and the President from enacting a law that delegates all of their lawmaking power to an agency, just as they do today under modern administrative law. The statute *could* authorize agencies to promulgate rulemakings with the force of law without retaining any congressional or presidential veto power and without creating a seven-month waiting period. And under this system, Congress *could* enact the REINS Act, thereby requiring all major rulemakings actually to be enacted into law.

Congress, in other words, can *choose* how much of its power to delegate and how much to reserve. It can delegate all (as it does today), it can delegate almost nothing (as would be the case under the REINS Act), or it can do something in between—as it would do under the Rulemaking Enabling Act. That act could reserve a one-house veto power, it could reserve only a bicameral veto power, or it could reserve a presidential veto power, or a combination of the presidential veto power with one of the first two. The point is that Congress and the President can enact one veto measure without enacting any of the others. When they choose what legislative powers to reserve for themselves in their delegation to agencies, they can forgo the reservation of a one-house veto power or even an executive-administrative veto power.

4. Rulemaking as lawmaking

If Congress is to be permitted to veto legislative acts, we must have some understanding of what kinds of administrative acts are legislative in nature. This is by no means an easy task. There is a vast literature on what constitutes "legislative" power.[145] The problem is distinguishing between policy discretion executive in nature—such as the decision not to expend resources enforcing particular laws or even implementing the "details" of a statutory scheme[146]—and discretion that is legislative in nature. Some circularly but nevertheless legitimately claim that policy discretion important enough to justify congressional action requires congressional action[147] or that rulemakings "that affect private rights to such a degree, and that so traditionally have been done

145. *E.g.*, Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377, 1391-92 (1994); Lawson, *supra* note 4, at 1239; David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1252-60 (1985).

146. *See* Lawson, *supra* note 70, at 338-39 (discussing the discretion inherent in many executive acts).

147. *See, e.g.*, Lawson, *supra* note 4, at 1239.

by the legislature, and that so thoroughly partake of general rulemaking . . . must be done by Congress or not at all."[148]

But the correct answer is still more intuitive than that: an act of legislative power defines the boundary between permitted and forbidden conduct.[149] Without that act, an individual does not know what is lawful or unlawful to do. This definition of legislative power is consistent with the spirit of Locke's discussion on legislative power, which he explains is the power to make standing laws so people know what is rightfully theirs (and what they rightfully may do).[150] Under this definition, even the issuing of individual licenses would be legislative if the only prior guidance as to entitlement to such

148. Calabresi, *supra* note 145, at 1391. M. Elizabeth Magill discusses similar definitions of legislative power from Martin Redish and David Currie. Magill, *supra* note 83, at 622 n.54.

149. And of course, some kinds of judicial decisions, such as those interpreting the Sherman Act, are also partly legislative. *See supra* note 137. Common law judicial lawmaking is just that—legislation by a different method.

150. In his *Second Treatise*, Locke writes that the legislative authority "cannot assume to its self a power to Rule by extemporary Arbitrary Decrees" but is rather bound to promulgate "*standing Rules* . . . by which every one may know what is his." JOHN LOCKE, TWO TREATISES OF GOVERNMENT 358-59 (Peter Laslett ed., Cambridge Univ. Press student ed. 1988) (1690) (emphasis in original). If before a rulemaking a man does not know what is his or what he may do, and afterwards he is told what is or is not his and what he may or may not do, it would seem that that is policy discretion legislative in nature. Alexander Hamilton similarly defined legislative power as the power "to prescribe rules for the regulation of the society." THE FEDERALIST NO. 75 (Alexander Hamilton), *supra* note 26, at 450. For further discussion of definitions of legislative power, see Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1310-17 (2003), which discusses Locke, Montesquieu, Blackstone, and Founding-era sources to support a definition of legislative power similar to Hamilton's; and Merrill, *supra* note 90, at 2124-25, which discusses Alexander and Prakash's, Locke's, Hamilton's, and Madison's definitions.

David Schoenbrod's definition of legislative power is similar:

> What marks a rule, in my view, is its statement of permissible versus impermissible conduct. Thus the statute that prohibited unreasonable pollution in a society where there were established customs as to pollution would qualify as a rule no less than a statute that limited pollution to given numeric quantities. In contrast, a statute that prohibited pollution that an agency deemed unreasonable where there were no established customs would not provide a rule, but would rather call upon the agency to do so.

Schoenbrod, *supra* note 145, at 1255.

Some laws may be ambiguous as to particular classes of cases, and the executive's decision whether to prosecute those cases or not is an act of policy discretion marking the boundary between permissible and impermissible conduct. *See, e.g.*, Magill, *supra* note 83, at 613 n.26. Even then, however, an individual knows in advance there is a possibility that his conduct is prohibited because there are standing laws prohibiting conduct the description of which plausibly applies to the conduct in question. Moreover, if the statute is genuinely ambiguous, normally the executive's decision to prosecute (rather than not to prosecute) will not actually have the force of law at all because the courts will apply the rule of lenity.

licenses is that they must be in the public interest. It is only at the point of issuance that one knows what is or is not permitted and so the issuance is legislative in nature.

This definition of legislative power would exclude rulemakings that direct official behavior, because how agency officials act in enforcing the law does not ultimately determine the rights of the private parties subject to the law.[151] At the same time, a general rulemaking power to direct official behavior could be considered at least partially legislative if it grants the executive broad discretion, and there is no good reason to deny Congress the power to review such rulemakings if it thinks it appropriate.[152] Finally, some of Congress's power—for example, the power to establish post roads—does not affect the primary rules of private conduct but is still legislative.[153] The full contours of what constitutes legislative power require treatment in a dedicated work. For present purposes it is sufficient to understand that legislative power is susceptible of some definition, and at minimum it includes some threshold level of discretion to determine the primary rules of private conduct.

There are, of course, those who claim it is impossible meaningfully to differentiate among legislative, executive, and judicial power.[154] I shall revisit that criticism in Part III, but it is helpful to preview the response: the indeterminacy criticism is largely rooted in the inability of the Supreme Court to distinguish among the powers in important and contested cases.[155] That inability stems largely from the formalist universe in which the Court lives, in which it goes to great lengths to argue that any exercise of power by the

151. Philip Hamburger argues that the early rulemaking authority cited by proponents of delegation was of this kind and, therefore, not legislative power. HAMBURGER, *supra* note 4, at 83-95.

152. The nondelegation doctrine, after all, assumes that the breadth of discretion is what determines whether a statute unlawfully delegates legislative power. *Cf., e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474 (2001) ("The scope of discretion § 109(b)(1) allows is in fact well within the outer limits of our nondelegation precedents. In the history of the Court we have found the requisite 'intelligible principle' lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion . . . ."). And Chief Justice Marshall, in the first nondelegation case, made the distinction between exclusively legislative acts and those that Congress could exercise but also that it could share. Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42-43 (1825) ("It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself.").

153. U.S. CONST. art. I, § 8 ("The Congress shall have Power To . . . establish Post Offices and post Roads . . . ."); Lawson, *supra* note 70, at 402-03 (discussing the Second Congress's debate over delegation of its power to establish post roads).

154. *See infra* Part III.A.

155. *See infra* Part III.A.

executive is executive power. Thus, what to most people would intuitively be "legislative" is often described as only "quasi-legislative" but ultimately executive.[156] Hence the confusion—and the criticism.

In any event, a full defense of this Article's definition of legislative power is not necessary. There is no need at this juncture to define everything that may be an administrative exercise of legislative power. We are in search of workable rules, and we can adopt a simple one: any rulemaking regulating private conduct on the part of an agency is legislative action because such rulemakings usually demarcate permissible and impermissible conduct for the first time.

Agencies could, however, circumvent this workable rule by proceeding to make law through agency *adjudications* rather than rulemakings, as the National Labor Relations Board does and as the Supreme Court permitted in *Chenery II*[157] and *NLRB v. Bell Aerospace Co.*[158] In those instances, the line between legislative functions and judicial functions blurs. Nevertheless, as discussed in Part II.C below, many of the adjudicatory functions of the administrative state are more properly considered "executive" functions, which demonstrates that not all "adjudications" are judicial.[159] Insofar as an adjudication establishes "new principle[s]"[160] to be applied prospectively, it can be considered legislative and subject to the veto of Congress.[161] Certainly, Congress should not permit adjudications to replace rulemakings for the purpose of avoiding the congressional veto power.

Other acts might be legislative as well. When criteria are so vague as to provide no true guide to behavior—for example, when licenses shall issue if they are in the "public interest"—then any act determining what is or is not permissible even in a particular case is legislative in nature because it determines the primary rules of private conduct and because the discretion to decide on such rules is extraordinarily broad. If the Attorney General's immigration-related discretion is extraordinarily broad, then he may be exercising legislative and not executive power. But again, we are in search of workable rules, and it may be enough to stop at rulemakings (and some adjudications). The rule is only marginally overinclusive, and more surely it is

156. *See infra* Part II.B.1; *see also supra* text accompanying note 81.

157. SEC v. Chenery Corp. (*Chenery II*), 332 U.S. 194, 202-03 (1947).

158. 416 U.S. 267, 294 (1974) ("The views expressed in *Chenery II* and *Wyman-Gordon* make plain that the Board is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board's discretion.").

159. *See infra* Part II.C.4.

160. *Chenery II*, 332 U.S. at 207.

161. This same principle could be applied to judicial lawmaking under, for example, the Sherman Act. *See supra* notes 137, 149 and accompanying text.

underinclusive, but its adoption would be a substantial improvement on modern practice.

5. The Rulemaking Enabling Act under modern doctrine

This Article proposes three statutory reforms, one for each branch of government. As we shall see, Congress could enact the executive and judicial reform statutes without creating problems under modern doctrine. (Modern doctrine does not *require* such reforms as a constitutional matter, but it does permit them.)[162] The legislative reform proposed here poses a more difficult problem: Would any of the vetoes exercised under the Rulemaking Enabling Act without the concurrence of both houses of Congress and the President violate the holding in *Chadha*? If yes, why should Congress take a chance on this statute?

The answer is that Congress has the duty to interpret the Constitution for itself. Under modern conceptions of judicial power, the Supreme Court is often seen as the ultimate arbiter of the Constitution's meaning; that is, the Supreme Court has become an agent of judicial *supremacy* rather than judicial *review*.[163] But historically that was not the case. As James Madison wrote in 1834, "[a]s the Legislative, Executive, and Judicial departments of the United States are co-ordinate, and each equally bound to support the Constitution, it follows that each must, in the exercise of its functions, be guided by the text of the Constitution according to its own interpretation of it . . . ."[164] Others in the Founding era and early republic agreed,[165] and early Congresses in fact

162. *See infra* Parts II.B.3, II.C.4.

163. *See* Brian M. Feldman, Note, *Evaluating Public Endorsement of the Weak and Strong Forms of Judicial Supremacy*, 89 VA. L. REV. 979, 986-87 (2003).

164. Letter from James Madison to Mr. — (1834), *quoted in* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 145 (2004).

165. M.J.C. Vile collects quotations from Jefferson and Jackson, both arguing that each branch of government must decide for itself what the Constitution means. VILE, *supra* note 27, at 181 ("Each department of government must have 'an equal right to decide for itself what is the meaning of the Constitution in the cases submitted to its action.'" (quoting Letter from Thomas Jefferson to Judge Spence Roane (Sept. 6, 1819))); *id.* at 190 ("The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both." (quoting Andrew Jackson, Veto Message (July 10, 1833))).

For an excellent discussion of the rejection of judicial supremacy in the early republic by an author writing almost a century ago, already concerned with the rise of judicial supremacy, see WILLIAM M. MEIGS, THE RELATION OF THE JUDICIARY TO THE CONSTITUTION 215-40 (1919), which collects several more quotations from past U.S. Presidents and jurists.

routinely interpreted the Constitution.[166] Lincoln also thought that Congress should reenact the Missouri Compromise after the Supreme Court invalidated it in the *Dred Scott* case.[167] As David Currie has argued,

> [n]otwithstanding the Supreme Court's later imperialistic assertion that its decisions . . . [are] binding on other branches, there was at least a grain of truth in Lincoln's position as well. For the courts' only authority is to decide 'cases' and 'controversies' that are brought to them for decision; they have no power to bind anyone but the parties. Therefore, within broad limits, Congress should be free to invite the courts to reconsider their interpretations.[168]

It also seems probable that the presumption of constitutionality rests on this old view that Congress has authority to interpret the Constitution.[169]

Congress can therefore engage in an act of constitutional interpretation (interpreting the Vesting Clause of Article I, Section 1) by enacting the Rulemaking Enabling Act—or at least, as others have argued, it ought to recover its prior practice of doing so.[170] Even if the Court disagrees with the proposition that Congress can interpret the Constitution for itself, the Rulemaking Enabling Act would at a minimum give the Supreme Court serious reason to revisit the breadth of its holding in *Chadha* and rethink the nondelegation doctrine.

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166. DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801, at ix-x (1997); Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707, 708 (1985).

167. DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801-1829, at 141 (2001). The strongest claim against judicial supremacy was made by Lincoln in relation to *Dred Scott*:

> I do not forget the position assumed by some that constitutional questions are to be decided by the Supreme Court, nor do I deny that such decisions must be binding *upon the parties to that suit*: while they are also entitled to very high respect and consideration in all parallel cases by all the department of the government. . . . [I]f the policy of the government upon the vital questions affecting the whole people is to be irrevocably fixed by the decisions of the Supreme Court, the moment they are made, as in ordinary cases between parties in personal actions, the people will have ceased to be their own masters, having to that extent resigned their government into the hands of that eminent tribunal.

MEIGS, *supra* note 165, at 232 (emphasis added) (quoting Abraham Lincoln, First Inaugural Address (Mar. 4, 1861)). This strong claim maintains that the Court only binds the parties to the suit—in *Chadha*, for example, Congress and Chadha himself.

168. CURRIE, *supra* note 167, at 141 (footnotes omitted).

169. Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 354-55 (1936) (Brandeis, J., concurring). Take for example one of the quotations Justice Brandeis cited in *Ashwander*: "It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body, by which any law is passed, to presume in favour of its validity . . . ." Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 270 (1827).

170. Fisher, *supra* note 166, at 717-31; *id.* at 744 ("Even after courts hand down a decision, there are opportunities for Congress to test the soundness of the decision by passing new legislation and supporting further litigation."); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 243-45, 344-45 (1994).

The Court could take a narrower approach by limiting *Chadha* to the correct holding that Congress cannot veto an executive or judicial act. Under the Rulemaking Enabling Act, Congress can only veto legislative acts, like rulemakings that create primary rules of private conduct.[171] By contrast, the Attorney General in *Chadha* exercised discretion in a particular case to withhold the removal of a particular individual—a fact-bound determination applicable to a single individual that looks executive, or even judicial, but not legislative.[172]

6. Proposed text of a Rulemaking Enabling Act

A Rulemaking Enabling Act that requires all rulemakings legislative in character to be considered by Congress—which could then take action or approve by inaction—would be constitutionally permissible were the Court to accept the reality of delegation. The following is a proposed draft of a Rulemaking Enabling Act, which can serve as the basis of legislative discussions:

> Any agency of the United States, as defined by Chapter 5 of the Administrative Procedure Act, shall transmit to the Congress not later than May 1 of the year in which a rule prescribed under section 553 of that chapter is to become effective a copy of the proposed rule. Such rule shall take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law.
>
> All independent commissions, which engage in the making of prospective rules generally applicable in nature, shall, notwithstanding anything to the contrary in governing statutes existing at the time of this statute's enactment, transmit to the Congress not later than May 1 of the year in which such a rule is to become effective a copy of the proposed rule. Such rule shall take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law.
>
> If the Congress enacts such rule, or an amended version of it, the rule, or the amended version, shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives. If any rule shall not be returned by the President within ten days after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it.
>
> If Congress takes no action in the allotted time, such inaction shall be construed as assent to the rule, but such rule must still be presented to the President and, before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives. If any such rule shall not be returned by the President within ten days after it shall have been presented to him, the same shall be a law.

171. *See supra* Part II.A.4.

172. INS v. Chadha, 462 U.S. 919, 963-65 (1983) (Powell, J., concurring in the judgment).

> If either house of Congress takes action on the rule but no final bill is enacted by the allotted time, Congress shall be construed to have taken no action and the rule shall become law. But if the full Congress enacts a resolution of disapproval, the rule shall not become law.[173]

This law is not only simple; it is politically practicable. It would leave much of the administrative state undisturbed, but both Congress and the President would have an incentive to enact it: each would get a new power over the administrative state.

B. Presidential Administration and a Modified Unitary Executive

Formalists find themselves in a quandary when it comes to executive power. Many believe that a unitary executive is constitutionally required. According to this view, the President should have full control over not only the rulemakings and other activities of executive branch agencies but also the activities of independent commissions over which he currently has far less control.[174] On the other hand, those who hold this view lament the tremendous growth of the President's power that attended the rise of the administrative state.[175] The combination of an unconstitutional state of affairs—a toothless nondelegation doctrine—with a constitutional unitary executive should be frightening to formalists. If Congress is to delegate great authority, is it not better to divide up that power rather than have it accumulate in one unitary executive?

Functionalists also find themselves somewhat ambivalent about the modern chief executive. On the one hand, as Elena Kagan has demonstrated,

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173. This last provision may be replaced with the optional one-house veto: "If the full Congress, or either the House or the Senate, enacts a resolution of disapproval, the rule shall not become law." Note that the first two paragraphs take the Rules Enabling Act as a model, *see* 28 U.S.C. § 2074 (2015), and the third and fourth paragraphs track the language of Article I, Section 7 of the Constitution, though I omit the provision for a pocket veto—which would defeat the purpose of permitting the rule in all circumstances to become law with both congressional and executive inaction, *see* U.S. CONST. art. I, § 7.

174. *See* Calabresi & Prakash, *supra* note 18, at 588 (arguing that the unitariness of the executive means that the President must exercise control over every agency and, conversely, that no agency over which he does not exercise control may exercise executive power); Lawson, *supra* note 4, at 1241-46 (arguing that the President must have some form of control over all subordinates to ensure the executive unitariness guaranteed by the Constitution); *cf.* Morrison v. Olson, 487 U.S. 654, 724-26 (1988) (Scalia, J., dissenting) (arguing that the President must at minimum have control over prosecutors exercising solely executive power).

175. *Cf.* Lawson, *supra* note 4, at 1248-49 (lamenting the combination of legislative, executive, and judicial power in administrative agencies—which, as Lawson claimed earlier, must be under the President's control); Sunstein, *supra* note 5, at 446-47 (noting this general criticism of the administrative state).

they find tremendous value in the political accountability afforded by a regime of presidential administration, a regime that is also more effective at achieving their desired policy outcomes.[176] But on the other, they wistfully recall the dream of apolitical bureaucrats applying technical expertise to social problems.[177]

Constitutional administration creates a compromise between these competing positions and should satisfy both functionalists and formalists. The idea is simple: the President ought to have unitary authority over all of the administrative state—independent commissions as well as executive branch agencies—but over its executive functions only. Formalists can then rest assured that their constitutional unitary executive will not have combined legislative, judicial, and executive powers. Functionalists, too, should appreciate political accountability across executive actions but recognize the remaining role for technocratic expertise—and responsiveness to Congress—when it comes to rulemaking or other legislative functions.

To be sure, it would be nigh impossible to prevent the President from exercising some legislative control over the rulemaking activities of executive branch agencies, in the same way that the President can also draft and propose legislation for introduction in Congress. Congress would, however, have a mechanism by which it could delegate legislative authority to independent commissions that would be largely independent of the President but whose executive activities would nevertheless be under his control.

But what functions are "executive"? Scholars debate whether the executive must be unitary or whether there is a class of "administrative" functions that

176. *See* Kagan, *supra* note 17, at 2331-46.

177. Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1174-75 (2014) (describing the "very real costs" associated with a model of presidential administration, including "loss of transparency for the regulated parties and the public; greater difficulty of congressional oversight; more politicization of the rulemaking process (the flip side of the democracy benefit); decreasing influence of the agency's unique expertise and knowledge of the record; and blurring or undermining delegation as the agency's statutory mandate is diluted by other policy and political goals").

There is a tension in liberal thought between the value of political accountability and the value of apolitical agency expertise. *See* Sunstein, *supra* note 5, at 444-45 ("There was some tension in the New Deal vision of the executive branch. The increase in presidential power was based on a belief in a direct relationship between the will of the people and the will of the President; hence the presidency, rather than the states or the common law courts, was regarded as the primary regulator. In contrast, the faith in bureaucratic administration was based on the ability of regulators to discern the public interest and to promote, though indirectly and through their very insulation, democratic goals. The tension between the belief in presidential lawmaking and the faith in administrative autonomy continues in contemporary debates over the roles of the President, Congress, and courts in the regulatory process.").

the Constitution leaves Congress authority to structure as it sees fit.[178] This Article does not seek to resolve this debate; it is unnecessary to do so here. What it does seek to show is that *prosecution*—or the enforcement of rules against private citizens—is an executive function over which the President must have ultimate control. Thus, whatever "administrative" power is, it does not include prosecution, and so the President must have control over the enforcement authority of independent commissions.

Whatever nonexecutive "administrative" power might otherwise include, it does not include purely judicial or legislative power.[179] That means the President should have no special power over the administrative state's legislative or judicial functions. Independent commissions, then, should be free to engage in rulemaking without fear of presidential control (or removal), but their enforcement activities must be subject to such control.[180] Whatever *other* functions such commissions might exercise, the argument presented here leaves it to others to decide whether those functions are more "administrative" or "executive." Over those functions, Congress and the President can seek their own compromises.

This Subpart will proceed as follows: It first elaborates upon the debate over the unitary executive and then briefly discusses Elena Kagan's model of presidential administration. It then explains where constitutional administration fits. In so doing, it argues that the President must have control and authority over the enforcement activity of all agencies, including independent commissions, and explores some doctrinal consequences for *Humphrey's Executor v. United States*.[181] Finally, it proposes a short statutory provision, based on the statute creating U.S. Attorneys, to effectuate this reform.

1. Unitary administration

The "conventional" view in administrative law is that "the President lacks directive authority over administrative officials," that is, he "lacks the power to direct an agency official to take designated actions within the sphere of that

178. *Compare* Lessig & Sunstein, *supra* note 18, at 2-4 (arguing that there is an "administrative" power over which Congress can retain substantial control), *with* Calabresi & Prakash, *supra* note 18, at 544-50 (arguing that there is no "administrative" power but merely an "executive" power over which the President must have unitary control).

179. *See, e.g.*, Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42-43 (1825) ("It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself.").

180. Although if the Rulemaking Enabling Act were fully adopted, it would include an executive veto option over administrative rulemakings. *See supra* text accompanying notes 139-40.

181. 295 U.S. 602 (1935).

official's delegated discretion."[182] Gary Lawson admits that "early American history and practice reflect . . . to a considerable extent" the view of "most contemporary scholars . . . that Congress may vest discretionary authority in subordinate officers free from direct presidential control."[183] Lessig and Sunstein point to the early Postmaster General, the structure of the early Treasury Department, and the battle over the Bank of the United States to show that Congress seems to have had the authority to structure the executive branch such that some officials were not directly controllable by the President.[184] And Attorneys General in the nineteenth century divided over the question of direct presidential control of administrative officials,[185] though they all appear to have accepted the legality of removal.[186]

Lessig and Sunstein nicely sum up the conventional view, arguing that it is supported by the historical record: "It was clear that 'executive' functions must be performed by officers subject to the unlimited removal and broad supervisory power of the President. But it was equally clear that Congress had the constitutional power to remove from the President's authority officers

182. Kagan, *supra* note 17, at 2320, 2323-35; *see also* Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U. L. REV. 443, 443-45, 465-72 (1987) (stating this view); Morton Rosenberg, *Congress's Prerogative over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive*, 57 GEO. WASH. L. REV. 627, 634 (1989).

183. Lawson, *supra* note 4, at 1242.

184. Lessig & Sunstein, *supra* note 18, at 22-42; *see also* Strauss, *supra* note 5, at 600 ("If the Convention was clear in its choice of a single executive—and its associated beliefs that such a person might bear focused political accountability for the work of law-execution and serve as an effective political counterweight to Congress—it was ambivalent in its expectations about the President's relations with those who would actually do the work of law-administration and desirous of the advantages of congressional flexibility in defining the structure of government within the constraints of this choice.").

185. Kagan, *supra* note 17, at 2324 n.308 (citing two such Attorney General opinions denying directive—but not removal—authority over administrative officials and two affirming such authority).

186. For example, although Attorney General Bates agreed with his predecessors that "where the laws require a particular officer by name to perform a duty, not only must he perform it, but no other officer can lawfully do so, and were the President to perform it, so far from taking care that the laws were faithfully executed, he would be violating them himself," he also explained that if the President is dissatisfied, "[h]e has nothing to do but turn [the inferior officer] out, and fill his place with another man." Appeal of Ill. to the President, 11 Op. Att'y Gen. 14, 16 (1864). Similarly, Attorney General Wirt explained that although the President had no authority "to supersede" an appointment by law entrusted to the Postmaster General, if he were to make a corrupt appointment the President "is to take care, in such a case, that the Postmaster General be punished for this violation of the law: he has power to remove him—to appoint a successor; and through the medium of such successor, and by his instrumentality, to remove the deputy, and to see that his place be honestly supplied." The President & Accounting Officers, 1 Op. Att'y Gen. 624, 626 (1823).

having 'quasi-legislative' and 'quasi-judicial' functions."[187] That, indeed, is the line drawn in *Humphrey's Executor v. United States*,[188] which held that President Roosevelt could not remove a commissioner of the FTC except for the causes permitted by the governing statute.[189] The Court explained: "The commission is to be non-partisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law. Its duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative."[190] This conventional view, adopted by the Court and scholars alike, appears to rest on the notion that there is something about "law-administration" or "administrative power" that is distinct from "law-execution" or "executive power."[191]

Unitary executive theorists dispute this theory and history. They claim that there was no conception of "administration" different from "execution" in the eighteenth century; rather, the Founding generation used the terms interchangeably.[192] The Constitution explicitly establishes a trinity of powers but says nothing at all about this so-called "administrative" power.[193] And all of the "executive" power, the power to execute the law, is vested in the President of the United States alone.[194] These theorists find the administrative state unconstitutional so long as the President does not have authority to control it.

Unitarians disagree about which of the several methods of control are constitutionally required. Some argue that the President should have directive control over all discretionary agency decisions.[195] Although not all unitarians agree that the President must necessarily have directive control over the entire administrative apparatus, all agree that, at a minimum, the President must be able to remove agency heads. Thus, unitarians are particularly vexed by the independence of many independent commissions, whose officials cannot be removed at the President's will.[196]

187. Lessig & Sunstein, *supra* note 18, at 5 (footnote omitted).

188. 295 U.S. 602 (1935).

189. *Id.* at 631-32.

190. *Id.* at 624.

191. Lessig & Sunstein, *supra* note 18, at 42; Strauss, *supra* note 5, at 600.

192. Calabresi & Prakash, *supra* note 18, at 614-15.

193. *Id.* at 559-64.

194. *Id.* at 581-82.

195. Lawson, *supra* note 4, at 1242.

196. *See* sources cited *supra* note 174.

2. Presidential administration

Elena Kagan's model of presidential administration takes a slightly different approach. She accepts the conventional view of agency independence—the power of Congress to create agencies whose heads are not removable by the President.[197] But she argues that as a matter of statutory interpretation, it would be sounder to interpret federal statutes as conferring authority on the President to direct and supervise the functions—rulemakings and all—of the administrative state. "That Congress *could* bar the President from directing discretionary action," she writes, "does not mean that Congress has done so."[198] Kagan would have us choose one of two interpretive principles in the absence of explicit congressional instruction. The first maintains that, when it comes to executive branch agencies, Congress knows "that executive officials stand in all other respects in a subordinate position to the President, given that the President nominates them without restriction, can remove them at will, and can subject them to potentially far-ranging procedural oversight."[199] Therefore, we ought to assume that when Congress delegates to an executive branch official, it intends to give the President *directive authority* over that official too.[200] The second interpretive principle suggests that, "[w]hen the delegation in question runs to the members of an independent agency," Congress consciously acts to limit the President's control over those agencies.[201] Because those agency officials are not removable or subject to other procedural controls by the President, they should not be subject to his directive control either.[202]

Kagan's model of presidential administration thus does not seek to undo the distinction between independent commissions and executive branch agencies; she does not advocate a unitary executive.[203] But her model certainly advocates a powerful executive. The President would have directive authority over not only executive activity but also the rulemaking activity of the administrative state. Indeed, Kagan's article really only discusses administrative rulemakings. Her key examples of presidential administration from the Clinton years are his initiative directing the Food and Drug Administration to combat smoking through legislative rules and his directing the Secretary of

197. Kagan, *supra* note 17, at 2326.

198. *Id.* (emphasis added).

199. *Id.* at 2327.

200. *Id.* at 2327-28.

201. *Id.* at 2327.

202. *Id.*

203. *Id.* at 2326.

Labor to propose regulations using state unemployment insurance systems to support parents with newborns.[204]

Presidential administration, Kagan argues, offers an improvement in political accountability.[205] For the same reasons that Alexander Hamilton favored a unitary executive, presidential control over administration would also be efficient—the President can give energy and "dynamism" to the administration.[206]

Kagan's model thus leaves us with a few key considerations. A model of presidential administration does not resolve the problem of independent commissions or the unitary executive; it merely accepts the legal status quo ante. Nor does a model of presidential administration distinguish among types of administrative functions even within executive branch agencies, such as enforcement activity versus rulemaking. Indeed, the entire model centers on presidential direction of rulemakings—it accepts the reigning two fictions of administrative law.

3. Constitutional administration: the enforcement power

By rejecting the two reigning fictions, constitutional administration recognizes that the administrative state does not merely exercise executive power. The question then becomes: Which functions are executive and which are not? It is not necessary to settle this question for each and every exercise of administrative power; the answer is already clear when it comes to the most important activities of the administrative state. Rulemakings regulating private conduct are (at least almost always) legislative and ought to be treated as such.[207] Adjudications that, as I will discuss shortly, affect our common law rights and liberties are judicial. The other administrative activities are either "executive"—and thus the President must have control over them—or "administrative"—meaning that the President may or may not have directive control depending on whether one accepts unitary executive theory. But whatever else the independent commissions might do, their *enforcement* powers are surely executive in nature.

First, consider again the separation of powers problem, the very core of what constitutional administration seeks to redress:

> Consider the typical enforcement activities of a typical federal agency—for example, of the Federal Trade Commission. The Commission promulgates substantive rules of conduct. The Commission then considers whether to

204. *Id.* at 2281-84. *See generally id.* at 2284-303 (discussing presidential administration entirely related to administrative rulemakings).

205. *Id.* at 2331-39.

206. *Id.* at 2339-41.

207. *Supra* Part II.A.4.

> authorize investigations into whether the Commission's rules have been violated. If the Commission authorizes an investigation, the investigation is conducted by the Commission, which reports its findings to the Commission. If the Commission thinks that the Commission's findings warrant an enforcement action, the Commission issues a complaint. The Commission's complaint that a Commission rule has been violated is then prosecuted by the Commission and adjudicated by the Commission. This Commission adjudication can either take place before the full Commission or before a semi-autonomous Commission administrative law judge. If the Commission chooses to adjudicate before an administrative law judge rather than before the Commission and the decision is adverse to the Commission, the Commission can appeal to the Commission. If the Commission ultimately finds a violation, then, and only then, the affected private party can appeal to an Article III court. But the agency decision, even before the bona fide Article III tribunal, possesses a very strong presumption of correctness on matters both of fact and of law.[208]

At what stage of this operation ought the President to step in? If "enforcement" is executive, then clearly at the stage where the Commission decides to issue a complaint. Just as the President has control over the enforcement priorities of U.S. Attorneys—he may order them to prosecute or not prosecute a particular case and may remove them for whatever reason—the President must have such control over the enforcement priorities and actions of the FTC and other commissions.

This conclusion only requires us to recognize that enforcement activity is executive. Lessig and Sunstein, however, highlight that the President did not always have control over prosecutions: they show that the first federal district attorneys (now U.S. Attorneys) did not report to any central authority, that the Comptroller of the Treasury had authority to prosecute suits for revenue and was not controllable by the President, and that *state* authorities and private parties (as they still do to this day in *qui tam* actions) prosecuted federal actions and the President had no control over these actors.[209] Lessig and Sunstein thus conclude that prosecution may not have been considered a fully "executive" power (but rather an administrative power) and that the Framers therefore did not intend a unitary executive with control over prosecution.[210]

Their argument, however, is not persuasive. Their first piece of evidence ignores the critical issue: whether the President himself could have issued orders or countermanded actions of the original district attorneys. Indeed, Lessig and Sunstein concede in a footnote that Thomas Jefferson did exactly that: "Jefferson at least exercised the directory power when he ordered district attorneys to cease prosecution under the Alien and Sedition Acts."[211] Calabresi

208. Lawson, *supra* note 4, at 1248-49 (footnotes omitted).

209. Lessig & Sunstein, *supra* note 18, at 16-22.

210. *Id.* at 7-9, 22.

211. *Id.* at 18 n.75.

and Prakash explain that George Washington also instructed his attorneys; for example, he "'instructed' the attorney for the Pennsylvania district to *nol-pros* an indictment against the two individuals who had been accused of rioting," and he "directed the Attorney General 'to instruct the District Attorney to require from the [Revenue] Collectors of all the several Parts . . . information of all infractions [of the Neutrality Proclamation] that may come within their purview.'"[212]

As for Treasury suits, Calabresi and Prakash show that there is no evidence that the President did not have control over the Comptroller of the Treasury; nothing in the statute withheld the removal power from the President.[213] Even if matters of revenue collection are "administrative," it does not follow that criminal prosecutions (including those for civil fines) or other kinds of civil actions are also administrative and not executive.

Lessig and Sunstein's reference to state enforcement of federal law speaks more to their point about the unitariness of the executive than it does to the nature of the power to prosecute. Indeed, the nature of prosecutorial power does not change depending on whether it is wielded by state or federal officials. Nor does the fact that state officials enforce federal law address the question of the President's role when the federal government is responsible for this executive function.[214]

Addressing Lessig and Sunstein's last piece of evidence, Calabresi and Prakash observe that the British king historically had the power to pardon defendants in *qui tam* actions preemptively and thus that the executive still retained ultimate authority when private parties prosecuted the law.[215] Additionally, consider that *qui tam* actions are at most a vestigial component of the common law (and even of Roman criminal law) dating from a time long before kings exercised centralized authority and even longer before the

212. Calabresi & Prakash, *supra* note 18, at 659 (alterations in original) (quoting 32 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745-1799, at 386, 455 n.35 (John C. Fitzpatrick ed., 1939)).

213. *See* Calabresi & Prakash, *supra* note 18, at 653.

214. Consider the parallel to the federal courts. All federal judicial power is vested in the Supreme Court and any inferior courts Congress may establish. U.S. CONST. art. III, § 1. But it is well understood that the Framers expected state courts to hear federal cases; state courts' jurisdiction over federal matters would be concurrent with that of the federal courts, although perhaps subject to the possibility of ultimate review by the Supreme Court (or other federal court) over any federal question. Haywood v. Drown, 556 U.S. 729, 743-50 (2009) (Thomas, J., dissenting) (reviewing the historical evidence for this "Madisonian compromise"); Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 229-30 (1985) (summarizing the textual basis for concurrent jurisdiction). But no one has suggested that because state courts exercise some federal judicial power, that determines the structure of judicial review at the federal level.

215. Calabresi & Prakash, *supra* note 18, at 660-61.

development of separation of powers doctrine.[216] A vestigial exception to executive control of prosecution surely would not disprove the rule that prosecution is controlled by the executive.

As a constitutional matter, then, so long as we agree that under *any* conception of administrative and executive power the prosecutorial power is executive in nature, the President must have control over that power when exercised by federal officials.[217] But how can the President control the enforcement activities of independent commissions without the removal power? Even if the President possessed the power to remove commissioners, how could it be ensured that he would not remove them for causes having nothing to do with their enforcement activities? After all, the commissioners are responsible for all of the commission's activities, including rulemaking.

There are two possible solutions. The first is to amend the for-cause removal provisions in the governing statutes to permit removal based only on enforcement-related reasons. It would then be up to the courts to discern whether a President's reasons for removal are permissible or pretextual. That does not seem a plausible task for the courts.

The easiest solution—and it is truly simple, even if unfamiliar—is to create a commissioner who has ultimate responsibility within the commission for enforcement activities under its jurisdiction. These U.S. Attorney-like commissioners would need to authorize any enforcement action and be removable by the President while the other commissioners would not be.

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216. Richard A. Bales, *A Constitutional Defense of* Qui Tam, 2001 WIS. L. REV. 381, 385-86.

217. Harold Krent has written an entire article critiquing the idea that criminal law enforcement is a core executive power. Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275 (1989). His critique, however, is unsatisfactory. He first argues that Congress has wide power to structure executive enforcement of the law. But his evidence is quite odd. He notes that "the Constitution assigns Congress the fundamental task of defining the content of criminal laws." *Id.* at 282. But that is the legislative power and entirely beside the point. He next suggests Congress has "authority to decide how the criminal laws are to be enforced" because it "may specify what penalties are to be assessed for various criminal violations, what law enforcement agencies have jurisdiction over particular criminal investigations, and what procedures the executive branch must follow in investigating crimes." *Id.* at 283 (footnotes omitted). But deciding what the penalties for crimes shall be is also legislative. And it is well accepted that Congress may create inferior offices and departments to aid the President in execution of the laws—that speaks not a whit to the President's directive control over such inferior officers. He thirdly points to Congress's power of appropriation as "a potent weapon with which to influence the Executive's criminal law enforcement authority." *Id.* at 284. Yet again that is entirely beside the point. That Congress has the power of the purse and can influence the executive through use of that power says nothing at all about what is or is not executive power. Krent otherwise depends on many of the same points covered subsequently by Calabresi and Prakash. *Id.* at 285-309.

Many commissions already have directors of enforcement;[218] constitutional administration requires only that these already-existing officials be directly removable by the President. It would require a simple statutory enactment, of a few short paragraphs, to accomplish this innovation.

Enacting such a simple law would not violate any existing doctrine. *Humphrey's Executor v. United States* held that Congress could protect FTC commissioners from presidential removal through the use of for-cause provisions.[219] The rationale was that the independent commission was not executive; instead, its "duties [were] neither political nor executive, but predominantly quasi-judicial and quasi-legislative."[220] The FTC "exercises no part of the executive power" but rather performs "duties as a legislative or as a judicial aid";[221] it "was created by Congress as a means of carrying into operation legislative and judicial powers, and as an agency of the legislative and judicial departments."[222] But when it comes to the properly executive functions, the holding of *Myers v. United States*[223] governs and the President must have plenary removal power. The *Humphrey's Executor* Court explained the holding in *Myers*: "A postmaster is an executive officer restricted to the performance of executive functions. He is charged with no duty at all related to either the legislative or judicial power."[224]

That observation would apply equally to the enforcement commissioners.[225] Indeed, constitutional administration buttresses the reasoning of *Humphrey's Executor*. To the extent the commissions are legislative aids—to the extent they exercise delegated legislative power—Congress can insulate them

218. *See, e.g.*, Press Release, SEC, George Canellos and Andrew Ceresney Named Co-Directors of Enforcement (Apr. 22, 2013), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171514832 (describing the promotion of two individuals to be co-directors of the SEC's enforcement division).

219. 295 U.S. 602, 631-32 (1935).

220. *Id.* at 624.

221. *Id.* at 628.

222. *Id.* at 630.

223. 272 U.S. 52 (1926).

224. *Humphrey's Ex'r*, 295 U.S. at 627.

225. The Court in *Morrison v. Olson* modified the rule in *Myers* and held that "the real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light." 487 U.S. 654, 691 (1988). Thus the Court permitted for-cause removal of an independent counsel who exercised executive power. *Id.* Ignoring the unitary executive problem for the time being and assuming this case will remain good law, the President still ought to have plenary removal authority over the enforcement commissioners because their authority to enforce law is far broader than the narrow authority of the temporary independent counsels in *Morrison*. Of course, if one accepts the unitary executive theory and that prosecution is an executive act, then *Morrison* was wrongly decided.

from presidential control. Insofar as the commissions exercise executive power, however, the President constitutionally controls them.

Constitutional administration differs from presidential administration in recognizing at least a limited unitary executive and rejecting the idea that the President must have directive control over administrative rulemaking. Such directive control would not necessarily be inconsistent with constitutional administration, however. Congress could still choose to place rulemaking functions in executive branch agencies rather than independent commissions. Moreover, even under the traditional tripartite constitutional scheme, the President often proposes legislation and works with Congress to generate support for, draft, and pass bills;[226] here he could similarly work with the agencies.

Because Congress would retain the power to review rulemakings under constitutional administration, presidential administration would no longer be necessary for political accountability. Constitutional administration may even *enhance* the technocratic values of the administrative state when it comes to rulemaking because Congress and the President would have the opportunity to mark up and debate rulemakings *after* the expert agency gives its recommendations. This model may maximize the efficiency, technocracy, and accountability values we seek from any theory of administrative law.

4. Proposed text of an Independent Commission Reform Act

Simple legislative language generally applicable to all independent commissions can bring this model into effect. The following proposed Independent Commission Reform Act takes word for word the statute creating the United States Attorneys, 28 U.S.C. § 541, and replaces "United States attorney" with "chief commissioner" and "judicial district" with "independent commission with enforcement authority organized under the laws of the United States." The remainder of the relevant statute—§§ 542-550—can be adapted to cover commissioners' oaths, vacancies, and so on. The crucial remaining element is their duties, which will, of course, be much narrower than the duties of U.S. Attorneys. Indeed, all of the U.S. Attorneys' duties in § 547—such as defending the United States in actions or prosecuting revenue collections—can be omitted, with the exception of prosecuting offenses and civil actions. That duty, tailored to each commission's jurisdiction, is added here as part (d):

226. Presidents routinely do this, for example, at their State of the Union addresses. *See, e.g.*, Frank Newport et al., *Americans' Views on 10 Key State of the Union Proposals*, GALLUP (Jan. 23, 2015), http://www.gallup.com/poll/181256/americans-views-key-state-union-proposals.aspx.

> (a) The President shall appoint, by and with the advice and consent of the Senate, a chief commissioner for each independent commission with enforcement authority organized under the laws of the United States.
>
> (b) Each chief commissioner shall be appointed for a term of four years. On the expiration of his term, a chief commissioner shall continue to perform the duties of his office until his successor is appointed and qualifies.
>
> (c) Each chief commissioner is subject to removal by the President.
>
> (d) Except as otherwise provided by law, each chief commissioner shall prosecute all offenses against the United States and all civil actions, suits, or proceedings in which the United States is concerned, to the extent permitted by each commission's governing statute.

Of course, under ordinary constitutional circumstances, defendants would be tried by U.S. Attorneys in federal courts with Article III judges. The chief commissioners would still proceed within the administrative apparatus, usually with ALJs presiding.[227] When it comes to rights and liberties that would have been heard at common law, however, the Constitution does not give us the luxury (not that we should want it) of forgoing Article III adjudication. Fortunately, it is easy enough to establish appropriate Article III review in these circumstances, as we already have a model for such review in the bankruptcy and magistrate systems. I turn to this, and other questions of judicial power, next.

C. Judicial Review of the Three Powers

Constitutional administration has implications for judicial review of the administrative state's legislative and executive functions and, in particular, for *Chevron* deference. As for judicial review of judicial functions, a large literature on administrative adjudications and their relation to the federal judicial power already exists.[228] This Article builds upon that literature and offers a specific legislative solution with existing statutory precedent to permit Article III courts to reassert control over a small but growing subset of administrative adjudications that require Article III adjudications as a historical matter. It advocates adopting the model of modern bankruptcy law—which requires Article I bankruptcy judges to deliver reports and recommendations for de novo review by Article III judges when it comes to traditional common law, private rights[229]—for all private rights cases decided by ALJs. This proposal is the only piece of constitutional administration that does not depend on rejecting the nondelegation fiction.

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227. *See, e.g.*, 29 U.S.C. § 160 (2015) (empowering the National Labor Relations Board to issue complaints and determine violations in its own tribunals before board members or ALJs).

228. *See infra* Part II.C.4.

229. *See infra* note 275 and text accompanying notes 257-61.

This Part will also show that existing doctrine to a large degree justifies constitutional administration. Even though the courts have had to invent two fictions to justify the constitutionality of the administrative state, they have on occasion adopted different modes of review of different agency functions, implicitly recognizing the tripartite combination of powers that agencies exercise. The argument here serves to justify some of these doctrines of judicial review but also to clarify and modify them in important ways. I begin with the current doctrinal landscape.

1. The current appellate model of judicial review

The current understanding of judicial review in the administrative context has two underlying characteristics: the appellate nature of all such review and the absence of explicit differentiation in the nature of review depending on the kind of power being exercised (though differentiation often occurs implicitly). Agency rulemakings are subject to deferential review under *Chevron* when matters of statutory interpretation are at issue.[230] When matters of fact and policy are at issue, especially technical policy, courts tend also to defer to an agency's expertise.[231] To be sure, courts also sometimes employ the "hard look" test to determine if an agency's actions are arbitrary or capricious,[232] but this hard look test has been explained as merely a spur to agency use of expertise over impermissible factors.[233] Thus, not only is administrative review not de novo, but its essential purpose is appellate in nature: it ensures that the agencies, either in rulemakings or adjudications, consider the appropriate factors.

De novo review is not available even in what appear to be properly judicial cases. The traditional narrative[234] of the evolution of the administrative exercise of judicial power begins with *Crowell v. Benson*,[235] in which the Supreme Court held that an administrative body may make factual

230. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

231. *See, e.g.*, Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87, 103 (1983) ("When examining this kind of scientific determination . . . a reviewing court must generally be at its most deferential.").

232. Kagan, *supra* note 17, at 2270; *see also* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins., 463 U.S. 29, 43 & n.9, 44 (1983); Sunstein, *supra* note 5, at 469-70.

233. Kagan, *supra* note 17, at 2270; Sunstein, *supra* note 5, at 470-71.

234. *See* Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 923-25 (1988); Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 943-44 (2011). Merrill departs from the traditional narrative, however, by arguing that the origins of the appellate review model of administrative law predate *Crowell v. Benson* by about twenty years. *Id.* at 953.

235. 285 U.S. 22 (1932).

determinations without de novo review by an Article III court, even in private rights cases.[236] Those cases had traditionally been heard by Article III courts, which reviewed them de novo as Article III's Vesting Clause seems to require.[237] Perhaps the greatest encroachment on Article III has been *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*, which held that Occupational Safety and Health Administration (OSHA) administrators could assess monetary fines based on agency adjudications whose factual determinations would not receive de novo review in Article III courts.[238]

Whatever the origins of this appellate model, what seems clear is that judicial review of administrative action is not de novo, even for many actions determining private, common law rights—the kind the Framers intended Article III courts to determine. Moreover, scholars discussing judicial review rarely observe that there ought to be differences in the kind of appellate (or other) review based on the nature of the administrative function at issue.[239] That is not to say that there are no doctrinal differences depending on the kind of administrative function being reviewed, only that the origins of such differences are rarely observed or explained. It is better, however, to differentiate among the functions explicitly to understand how the nature of review should correspond to the review of the constitutional branches of government engaging in those same functions.

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236. The act in question, the Harbor Workers' Compensation Act, permitted the United States Employees' Compensation Committee to make factual determinations and award appropriate damages. *Id.* at 36-37. In *Crowell*, the deputy commissioner had found that an employee was injured performing work for the employer upon navigable waters. *Id.* at 37. The district court granted a de novo hearing and held that the awardee was not in fact an employee at the time of his injury. *Id.* On appeal, the employer argued that the Committee's factfinding violated due process and was an unlawful exercise of the federal judicial power. *Id.* The Court upheld the district court's decree because the question of employer-employee relation was one of law and not of fact. *Id.* at 65. But the Court made clear that factual questions not involving constitutional rights did not require de novo review by an Article III court:

> Apart from cases involving constitutional rights to be appropriately enforced by proceedings in court, there can be no doubt that the Act contemplates that, as to questions of fact arising with respect to injuries to employees within the purview of the Act, the findings of the deputy commissioner, supported by evidence and within the scope of his authority, shall be final. To hold otherwise would be to defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task.

Id. at 46.

237. *See infra* Part II.C.4.

238. 430 U.S. 442, 450 (1977).

239. For discussions of judicial review generally that do not take these distinctions into account, see Fallon, *supra* note 234, at 975-91; Merrill, *supra* note 234, at 979-97; and Sunstein, *supra* note 5, at 463-78.

2. Judicial review of rulemaking: *Chevron*

Chevron deference is by now well engrained in administrative law. When an agency promulgates a rule interpreting an ambiguity in the statute the agency administers, courts first ask whether Congress has spoken on the specific issue in question. If Congress has not and the statute is ambiguous, the courts defer to the agency's interpretation of its governing statute so long as that interpretation is reasonable.[240] *Chevron* deference has been widely applied over the last thirty years, but it has always been a contested principle of law, and the fissure appears to be widening.[241] Constitutional administration advances the debate over whether to give deference to—and what kind of deference to give—agencies.

Understanding that agencies are not merely interpreting governing statutes but are rather *making law themselves* gives us an entirely different intuition as to what interpretive approach to adopt. If agencies are making law, should courts not review those laws with the same level of scrutiny as they do congressional enactments? Cass Sunstein has observed that "[t]he relationship of the Constitution to Congress parallels the relationship of governing statutes to agencies."[242] Constitutional administration goes further, recognizing that agencies are exercising the same power as Congress.

Courts ought to make sure agencies act within their delegated discretion, just as they ensure that Congress acts within the discretion delegated to it by the Constitution. So long as an agency is within the bounds of its governing statute, it has discretion to make policy choices—just as Congress freely makes policy choices within the bounds of the Constitution. Indeed, *Chevron* deference is specifically paralleled by the presumption of constitutionality in statutory interpretation: when a constitutional question is not clear, the courts "defer" to Congress's interpretation of the Constitution.[243]

But the presumption of constitutionality is not nearly as deferential to Congress as *Chevron* deference is to agencies. Judges do not give up as easily on constitutional interpretation as they seem to give up on statutory interpretation in the context of administrative delegations.[244] Rather, courts today look

240. United States v. Mead Corp., 533 U.S. 218, 229 (2001); Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

241. *Compare* City of Arlington v. FCC, 133 S. Ct. 1863, 1868-69 (2013) (holding that *Chevron* deference applies to an agency's determination of its own jurisdiction), *with id.* at 1877 (Roberts, C.J., dissenting) (arguing that *Chevron* should be more narrowly construed).

242. Sunstein, *supra* note 5, at 467 & n.211.

243. *See supra* note 169 and accompanying text.

244. Courts give up easily in *Chevron* cases because the agency's interpretation need not be the best one. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) ("If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the

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at the statute's text, context, intent, purpose, historical background, general background principles of law, conventions, and so on; only when these "traditional tools of statutory construction"[245] run out do courts deploy the presumption of constitutionality.[246] Because agencies are making law and not merely interpreting existing law, the same tools ought to be deployed in deciding whether a congressional statute genuinely sought to grant agencies the lawmaking power in question.[247]

The exact same constitutional values are served by adopting the same method of interpretation in both the context of interpreting the Constitution and the context of interpreting organic statutes. Recall that delegation is, as an original matter, unconstitutional.[248] Thus, courts should limit the delegation as much as possible, permitting only as much delegation as has truly been granted. Deploying all the tools of statutory construction to determine what power Congress actually intended to delegate empowers our elected representatives and serves the same republican purpose served when courts determine whether Congress has transgressed the limits of the powers "We the People" delegated to Congress in the Constitution.[249]

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statute, even if the agency's reading differs from what the court believes is the best statutory interpretation.").

245. *City of Arlington*, 133 S. Ct. at 1876 (Breyer, J., concurring in part and concurring in the judgment) (quoting INS v. Cardoza-Fonseca, 480 U.S. 421, 446 (1987)) (describing the use of these traditional tools in the context of determining Congress's statutory meaning).

246. John O. McGinnis, *The Duty of Clarity*, 84 GEO. WASH. L. REV. 843, 911-13 (2016) (describing this approach); *cf.* Edward C. Dawson, *Adjusting the Presumption of Constitutionality Based on Margin of Statutory Passage*, 16 U. PA. J. CONST. L. 97, 109 (2013) ("Moreover, at times, some Justices on the modern Court seem to view the presumption as a mere tiebreaker that will only prompt a vote to uphold the statute if other considerations are in equipoise."); Jonathan F. Mitchell, *Stare Decisis and Constitutional Text*, 110 MICH. L. REV. 1, 57 (2011) (describing the presumption of constitutionality as a "tiebreaker" that "the Supreme Court (sporadically) applies when litigants bring constitutional challenges to acts of Congress"). McGinnis has summarized early practice using the presumption of constitutionality:

> [T]he first obligation of a justice is to use the rich array of legal methods and mechanisms to clarify the meaning of ambiguous or vague text. Only if these kinds of analyses fail to clarify whether the legislation conflicts with the correct meaning of the Constitution, should the judiciary uphold the statute.

McGinnis, *supra*, at 908-09.

247. To be sure, judges will have less familiarity with technical and complex delegations to agencies than they have with constitutional delegations to Congress. It may be, then, that judges will end up exhausting the tools of statutory interpretation and deferring more often when interpreting agencies' governing statutes than when interpreting the Constitution—but the nature of review is nevertheless the same in the two cases.

248. *See supra* text accompanying notes 89-94.

249. An interesting wrinkle is whether Congress, which under constitutional administration assents to administrative "laws" through silence, can be viewed as having thus also agreed with an agency that its rule is consistent with its statutory

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3. Judicial review of executive actions

With perhaps one exception, constitutional administration has little to add to the traditional understanding of judicial review of executive actions. This is because a review of the President's actions via the administrative state is no different from a review of his powers traditionally. Madison was an executive official—a member of the administrative state of the early nineteenth century—when he refused to deliver Marbury's commission. The Court held that because Marbury's right had vested and the law conferred no discretion on Madison, the law required Madison to deliver Marbury's commission.[250] That is still the law applied today to ministerial actions of administrative officials.[251] Matters of administrative discretion, however, are generally unreviewable,[252] much as actions committed by the political question doctrine to the political wisdom of the President are unreviewable.[253]

Constitutional administration, however, helps clarify the modern doctrinal difference between judicial review of agency inaction in the rulemaking and enforcement contexts. The Court recently addressed the question of agency inaction in the prominent case *Massachusetts v. EPA*,[254] where it ordered the EPA to treat carbon dioxide emissions as air pollutants under the Clean Air

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authority. In other words, is *more* deference required now that we imagine Congress to assent to most rules? I do not think so. The virtue of accepting delegation is that it recognizes the inertia of the administrative state; it recognizes that Congress often does not have the political will to stop a particular rule from becoming the law. That does not mean, however, that the courts cannot then exercise an independent role in determining whether the agency rule, to which Congress has "assented," is consistent with the underlying governing statute.

250. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 162 (1803).

251. 28 U.S.C. § 1361 (2015) ("The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."); Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 577 (1838) ("Each and every of these cases recognises the authority of the judiciary, under an act of congress, to issue its mandate to a ministerial officer commanding the performance of a ministerial act."); Nat'l Wildlife Fed'n v. United States, 626 F.2d 917, 923 (D.C. Cir. 1980) ("Where a federal official has a clear obligation to perform a ministerial duty, a federal district court may issue a writ of mandamus under 28 U.S.C. section 1361 to compel the fulfillment of the obligation." (footnote omitted)); *see also* Lessig & Sunstein, *supra* note 18, at 58 ("[B]elievers in a strongly unitary executive have long yielded the point regarding 'ministerial' acts. No one thinks that the President may authorize administrative officers to violate the law.").

252. 5 U.S.C. § 701(a)(2) (2015) (precluding review where a decision is "committed to agency discretion by law"); *see* Heckler v. Chaney, 470 U.S. 821, 831-32 (1985) (concluding that agencies' decisions not to take enforcement actions are presumptively discretionary and thus unreviewable).

253. *Marbury*, 5 U.S. (1 Cranch) at 166.

254. 549 U.S. 497 (2007).

Act after the EPA refused a petition to commence rulemaking. The Court noted:

> [Agency] discretion is at its height when the agency decides not to bring an enforcement action. Therefore, in *Heckler v. Chaney* we held that an agency's refusal to initiate enforcement proceedings is not ordinarily subject to judicial review. Some debate remains, however, as to the rigor with which we review an agency's denial of a petition for rulemaking.
>
> There are key differences between a denial of a petition for rulemaking and an agency's decision not to initiate an enforcement action. In contrast to nonenforcement decisions, agency refusals to initiate rulemaking "are less frequent, more apt to involve legal as opposed to factual analysis, and subject to special formalities, including a public explanation." They moreover arise out of denials of petitions for rulemaking which (at least in the circumstances here) the affected party had an undoubted procedural right to file in the first instance. Refusals to promulgate rules are thus susceptible to judicial review, though such review is "extremely limited" and "highly deferential."[255]

Constitutional administration supports this distinction. Enforcement actions are executive in nature, and the refusal to enforce is part of the President's inherent discretion in deciding how to "take Care that the Laws be faithfully executed."[256]

Agency rulemaking, on the other hand, is a legislative function, and a different analysis obtains. Constitutional administration does not offer a strong position as to what that analysis should be, except that a court should review inaction in the same way it reviews any other action in the legislative (rulemaking) context. As already discussed, a court should first deploy all the tools of statutory interpretation and then—only as a last resort—defer to an agency's interpretation of its congressionally delegated authority.

4. Judicial review of adjudications

Article III vests the "judicial Power" of the United States in federal courts whose judges enjoy constitutional protections against political influence, including lifetime tenure during good behavior and salary protections.[257]

255. *Id.* at 527-28 (citations omitted) (first quoting Am. Horse Prot. Ass'n v. Lyng, 812 F.2d 1, 4 (D.C. Cir. 1987); and then quoting Nat'l Customs Brokers & Forwarders Ass'n v. United States, 883 F.2d 93, 96 (D.C. Cir. 1989)).

256. U.S. CONST. art. II, § 3; *In re* Grand Jury Subpoena, Judith Miller, 438 F.3d 1141, 1153 (D.C. Cir. 2006) ("It is well established that the exercise of prosecutorial discretion is at the very core of the executive function. Courts consistently hesitate to attempt a review of the executive's exercise of that function.").

257. U.S. CONST. art. III, § 1. For the importance of these protections, consider Hamilton's argument in *The Federalist Papers*:

> Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence. If the power of making them was committed either to the executive or legislature, there would be danger of an improper complaisance to

footnote continued on next page

Thus, an individual cannot be deprived of life or liberty—and historically could not be deprived of the fruits of his own labor—without an adjudication in an Article III court whose judges enjoy these protections.[258] Yet today, administrative agencies often adjudicate facts and law relevant to such rights without de novo review by Article III courts.[259] For example, in *Atlas Roofing*, discussed above, the Court permitted OSHA administrators to assess monetary fines based on agency adjudications whose factual determinations would not receive de novo review in Article III courts.[260] The National Labor Relations Act likewise permits the National Labor Relations Board to institute enforcement proceedings and order back pay to a wrongfully terminated employee.[261] A reviewing court must accept the board's findings if "supported by substantial evidence."[262] The Supreme Court has approved this Act on the

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> the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity to justify a reliance that nothing would be consulted but the Constitution and the laws.

THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 26, at 471.

Similarly,

> Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. The remark made in relation to the President is equally applicable here. In the general course of human nature, *a power over a man's subsistence amounts to a power over his will.* And we can never hope to see realized in practice, the complete separation of the judicial from the legislative power, in any system which leaves the former dependent for pecuniary resources on the occasional grants of the latter.

THE FEDERALIST NO. 79 (Alexander Hamilton), *supra* note 26, at 472 (emphasis in original).

258. Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 567 (2007) (describing these "'core' private rights"); *id.* at 569, 572, 578, 590 (arguing that these rights could not be abridged without an exercise of "'judicial' power" by Article III courts). For more on the contrast between traditional property, which derives from the fruits of one's own labor, and "new property," which derives from government largesse, see *id.* at 623. For a discussion of public rights, see Fallon, *supra* note 234, at 951-70. Although Merrill disputes that nineteenth-century jurists understood judicial power in terms of private versus public rights, stating that "either a court had authority to review administration action or not, and if it did, it decided the whole case," Merrill, *supra* note 234, at 952, his examples all suggest that only courts could deprive an individual of life, liberty, or property, *see id.* at 947-48, 950-51.

259. Lawson, *supra* note 4, at 1248 ("[I]t seems to me that Article III requires de novo review, of both fact and law, of all agency adjudication that is properly classified as 'judicial' activity. Much of the modern administrative state passes this test, but much of it fails as well.").

260. *See supra* note 238 and accompanying text.

261. Nelson, *supra* note 258, at 601-02; *see also* 29 U.S.C. § 160 (2015).

262. 29 U.S.C. § 160(e) ("The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.").

ground that the remedies were for statutory rights unknown at common law, even though the penalty deprived an individual of traditional property.[263]

Caleb Nelson has argued that, thus far, these encroachments on Article III are limited to property rights—that when life or liberty is at stake, agency adjudications still require de novo review if agencies adjudicate the matter at all.[264] He writes:

> There is little controversy [under modern doctrine], for instance, about the proper treatment of core private rights to life and liberty. Congress certainly can enact laws authorizing the incarceration or execution of people who commit particular crimes. But neither Congress nor its delegees in the executive branch can authoritatively determine that a particular individual has committed such a crime and has thereby forfeited his core private rights to life or liberty.[265]

Sure enough, no case has yet permitted an agency to adjudicate the *facts* where life or liberty is at stake. But Congress's "delegees in the executive branch" *have* authoritatively determined the *law* to be applied in criminal actions. In *United States v. Whitman*,[266] the Second Circuit recently upheld a jury instruction based on the SEC's interpretation of section 10(b) of the Securities Exchange Act of 1934. The *Whitman* court upheld liability for insider trading so long as the insider information was "at least a factor" in the trading decision, whereas another circuit had held that the law requires the information to have been a "significant" factor.[267] The district court in *Whitman* had derived the "at least a factor" standard from another case that had deferred to the SEC's interpretation of the statute to require only a "knowing possession" standard for liability.[268] In other words, the agency interpreted the law applicable to a criminal statute, and the federal judiciary deferred to that interpretation. The defendant, as a result, was sentenced to two years' imprisonment and a quarter-million dollar fine,[269] all without Article III's full constitutional protection. Justices Scalia and Thomas expressed concern over

263. Nelson, *supra* note 258, at 602 (citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48-49 (1937)).

264. *Id.* at 610.

265. *Id.*

266. 555 F. App'x 98 (2d Cir.), *cert. denied*, 135 S. Ct. 352 (2014).

267. *Id.* at 107 (quoting United States v. Smith, 155 F.3d 1051, 1066 (9th Cir. 2008)).

268. *Id.* (citing United States v. Royer, 549 F.3d 886, 899 (2d Cir. 2008)). A previous panel of the Second Circuit had approved of this standard in dicta, but there it evaluated the standard as part of the SEC's own rule rather than as part of the statute and also gave some deference to the SEC. United States v. Teicher, 987 F.2d 112, 120 (2d Cir. 1993) ("As the promulgator of Rule 10b-5, the SEC's interpretation that this rule only requires 'knowing possession' is entitled to some consideration."). If criminal liability were created only by the rule and not by the statute, that would provide even more reason to give less deference to the agency.

269. *Whitman*, 555 F. App'x at 100.

this problem in their writing accompanying the Court's denial of certiorari in *Whitman*—indeed, their writing suggests that the problem is widespread.[270]

There is a rather simple solution to this degradation of Article III in the administrative sphere. It is well known that in the bankruptcy context, when private rights are at stake, bankruptcy judges can only make reports and recommendations (of both law and fact) for Article III district judges to review de novo.[271] The cases establishing this principle, *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*[272] and *Stern v. Marshall*,[273] involved state law claims by one individual party against another individual party.[274] The rights involved were the "stuff of Westminster" that cannot be denied except by adjudication in a federal court.[275] These rights were at the core of what the term "judicial power" meant when the Constitution was drafted.[276] Thus the Supreme Court stated in the early case of *Murray's Lessee v. Hoboken Land & Improvement Co.*: "[W]e do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at

270. They write: "Other Courts of Appeals have deferred to executive interpretations of a variety of laws that have both criminal and administrative applications." 135 S. Ct. at 353 (Scalia, J., statement respecting the denial of certiorari) (citing United States v. Flores, 404 F.3d 320, 326-27 (5th Cir. 2005); United States v. Atandi, 376 F.3d 1186, 1189 (10th Cir. 2004); NLRB v. Okla. Fixture Co., 332 F.3d 1284, 1286-87 (10th Cir. 2003); *In re* Sealed Case, 223 F.3d 775, 779 (D.C. Cir. 2000); United States v. Kanchanalak, 192 F.3d 1037, 1047 & n.17 (D.C. Cir. 1999); and Nat'l Rifle Ass'n v. Brady, 914 F.2d 475, 479 n.3 (4th Cir. 1990)).

271. 28 U.S.C. § 157(c)(1) (2015) ("A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected."); Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165, 2175 (2014) (holding that a bankruptcy judge can make reports and recommendations in cases requiring de novo review by Article III courts).

272. 458 U.S. 50 (1982).

273. 131 S. Ct. 2594 (2011).

274. *Id.* at 2611; *Northern Pipeline*, 458 U.S. at 71-72. The Court recently held that when confronted with a *Stern* problem—a case in which the Bankruptcy Code gives bankruptcy courts authority to enter final judgment, but which Article III requires to be heard in an Article III court—the bankruptcy courts can simply submit reports and recommendations to district court judges. *Arkison*, 134 S. Ct. at 2175.

275. *Stern*, 131 S. Ct. at 2609 ("When a suit is made of 'the stuff of the traditional actions at common law tried by the courts at Westminster in 1789,' and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges in Article III courts." (quoting *Northern Pipeline*, 458 U.S. at 90 (Rehnquist, J., concurring in the judgment))).

276. *See id.*

the common law, or in equity, or admiralty . . . ."[277] The same solution ought to obtain for all determinations of private rights in administrative adjudications.

But not all administrative adjudications are adjudications of private rights. As the *Murray's Lessee* Court went on to explain, not all adjudicatory matters involve subjects of common law, equity, or admiralty:

> At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.[278]

Caleb Nelson (among others) has explained the distinction between private rights, public rights, and "privileges."[279] Private rights are the traditional Lockean rights to life and personal security, liberty (freedom from restraint or imprisonment), and private property.[280] Public rights belong to the public as a whole, and there need be no judicial review of how the government handles such rights because they are a matter of executive power.[281] So, for example, the courts have no authority (absent congressional authorization) to review how a federal land office assigns public federal land, but they *can* review a private dispute between two parties claiming that their private rights in that land have vested.[282]

Finally, although privileges like welfare benefits might operate like private rights, they are "entitlements" for the purpose of carrying out public ends.[283] Not all "private property," then, is a private right—entitlements can become private property, but they exist at the grace of government. There is a distinction between "new property"—such as social security benefits, government employment, or other property conveyed by government largesse[284]—and traditional property deriving from the fruits of one's own labor in a free enterprise system.[285] Blackstone defined this traditional right to private property as "the free use, enjoyment, and disposal of all [one's] acquisitions," which property and right "appertain and belong to particular

277. 59 U.S. (18 How.) 272, 284 (1856).

278. *Id.*

279. Nelson, *supra* note 258, at 566-68.

280. *Id.* at 567.

281. *Id.* at 571-72.

282. *Id.* at 577-78.

283. *Id.* at 567-68.

284. Fallon, *supra* note 234, at 964.

285. Nelson, *supra* note 258, at 566-74, 623.

men[] merely as individuals" and are not "incident to them as members of society."[286]

Many modern legal scholars and theorists, however, claim there should not be a distinction between new property and traditional property.[287] It is also clear that if the federal courts were required to adjudicate all claims involving new property, they would be overwhelmed.[288] Thus, Richard Fallon argues that so long as there is meaningful appellate review of adjudications of both kinds of property rights, the spirit of Article III is satisfied.[289]

But what is important for our purposes is the constitutional minimum. It may be that the public-private distinction is harmful to those "whose livelihoods ar[i]se from sources other than traditional property, or whose welfare require[s] nontraditional government regulation."[290] But those livelihoods can be protected by appellate review. (Consider that under the traditional understanding, no judicial review would be required at all.)[291] There is still value in providing the fuller protection of Article III to those private rights that would have received such protection at common law, even if the newer kinds of property only receive the protection afforded by appellate review.

There may also be normative reasons to distinguish between these kinds of property. As Nelson writes, following in the footsteps of Stephen F. Williams, traditional property rights under the common law and the free enterprise system depend on government for their protection—government must create the rules of the game and enforce them—but they do not depend on

286. 1 WILLIAM BLACKSTONE, COMMENTARIES *123, *138.

287. *See* Fallon, *supra* note 234, at 967 (arguing that modern constitutional and administrative law have rejected the distinction because livelihoods today often depend on this new property). Thomas Merrill challenges the distinction between private rights and public rights, arguing that there is no support in contemporary sources for such a view. Merrill, *supra* note 234, at 985. Merrill does not confront the vast judicial sources that Nelson amasses relying on just such a distinction, however, and he focuses his analysis on only one case involving one statute. *Id.* at 984-87. More importantly, Merrill's criticism, even relying on his own sources alone, is misplaced. He claims the distinction is between executive and judicial functions and that the judiciary did not want to "contaminat[e]" its proceedings with executive functions. *Id.* at 987-92. But the distinction between what is "executive" and what is "judicial" tracks almost perfectly the distinction between public rights and private rights.

288. Fallon, *supra* note 234, at 952-53.

289. *Id.* at 974-91; *see id.* at 988 ("[P]rivate rights do not merit treatment sharply distinct from public rights. There is no reason to assume that separation-of-powers values will be substantially more involved in private than in public rights cases.").

290. *Id.* at 967 (footnote omitted).

291. Nelson, *supra* note 258, at 613, 619. Nelson argues that even Fallon's view recognizes that some nontraditional property rights do not get any judicial review. *Id.* at 619.

government largesse.[292] Thus, if we normatively seek "individual independence from the state," traditional property has special value.[293] As one theorist has explained, as soon as economic livelihood is dependent on political favor, political freedom may vanish.[294]

Although the Supreme Court has strayed from the requirements of Article III and the traditional rights-privileges distinction, Congress ought to restore something of the original constitutional order by requiring de novo review of any agency adjudication that determines a private right. First, there is no doubt that if life or liberty is at stake, review of *both* the law and the facts must be de novo. Although the Supreme Court may well take up the *Whitman* issue whether the courts can defer to agency interpretations that lead to criminal penalties, Congress can in the meantime declare that lower federal courts should not defer to those interpretations. Second, when traditional private rights are at stake, Article III adjudication is necessary—meaning that all findings of fact and law must be reviewed de novo by an Article III court.

5. Proposed text of an Administrative Adjudications Act

There is already precedent for the kind of review proposed above. Congress can borrow from the existing bankruptcy statute[295] and the statute governing magistrate judges,[296] which require bankruptcy courts and magistrate judges, respectively, to prepare reports and recommendations for de novo Article III review. A simple statute could ensure this same review in the administrative context. It would need to do just three things: provide for the report and recommendation structure, define the adjudications at stake, and provide a solution to the problem of *Chevron* deference in hybrid criminal-administrative statutes. Taking the federal magistrate structure as a baseline, here is a proposed statutory reform of administrative adjudications:

> § 1. *Report and recommendation.* After a hearing required by section 554 of the Administrative Procedure Act, the agency, officer thereof, or administrative law judge presiding pursuant to section 556(b), shall submit proposed findings of fact and recommendations for the disposition, by a judge of a federal court having jurisdiction, for any matter which may determine the private rights of any party to the proceeding. If an agency that does not preside over the hearing requires the entire record to be certified to it for decision, as permitted by section 557(b), the agency may follow the procedures of that section, except that its final decision

292. *Id.* at 623.

293. *Id.* (quoting Stephen F. Williams, *Liberty and Property: The Problem of Government Benefits*, 12 J. LEGAL STUD. 3, 13 (1983)).

294. MILTON FRIEDMAN, CAPITALISM AND FREEDOM 7-21 (40th anniversary ed. 2002).

295. 28 U.S.C. § 157 (2015).

296. *Id.* § 636.

> must also be a report of proposed findings of fact and recommendations for the disposition of a judge of a federal court having jurisdiction over such matters.
>
> *Objections.* Within fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the agency. The judge may also receive further evidence or recommit the matter to the agency with instructions.
>
> *Consent of parties.* Upon the consent of the parties, pursuant to their specific written requests, the agency may forgo these procedures and enter final orders it otherwise has authority to enter by law.
>
> § 2. The procedures of section 1 shall apply to any adjudication of private rights conducted by any independent agency, notwithstanding anything to the contrary in existing governing statutes. Private rights include those that would be determined by traditional actions at common law, and include the right to be free of deprivation of property by fine.
>
> § 3. In the cases governed by this Act, and in any criminal case, the federal courts shall defer to agency interpretations of their governing statutes only to the extent the courts believe such interpretations are correct.[297]

III. Three Objections

There are three obvious objections to constitutional administration. First, many argue that it is impossible to distinguish among exercises of legislative, executive, and judicial power. This Article has addressed this criticism in small pieces throughout but will now give the criticism more sustained treatment. Second, it may be that administrative power is a "fourth power" of government; that is, it is not merely a combination of the other powers but transcends them. Thus, we ought not only to accept delegation but also this "administrative power" that partakes of all three kinds of traditional powers. Third, many object that if formalists and originalists give up on nondelegation, then there is no principle limiting what in the original Constitution or which of its formalist rules they should be willing to abandon. None of these objections is fatal.

297. The House of Representatives recently passed the Separation of Powers Restoration Act, H.R. 4768, 114th Cong. (2016), which would have the same effect on federal court deference as would section 3 of the Act proposed here.

A. The Indeterminacy of Separation of Powers

One commonly raised objection to any effort to treat the separation of powers seriously is that it is impossible to define and differentiate legislative, executive, and judicial power.[298] If the scholars who raise this objection are right, then constitutional administration might suffer from this difficulty. It turns out, however, that constitutional administration actually advances this debate as well—because much of the difficulty differentiating these powers stems from administrative law's reigning fictions, which this system rejects.

Much of the objection is rooted in the idea that it is impossible to differentiate the three constitutional functions in the most contested cases. M. Elizabeth Magill, for example, has argued: "[T]here is no well-accepted doctrine or theory that offers a way to identify the differences among the governmental functions in contested cases. . . . The sporadic judicial efforts to identify the differences among the governmental powers are nearly universally thought to be unhelpful."[299] For the latter proposition, Magill cites *Chadha* and *American Trucking*.[300] Recall that in *Chadha*, the majority held that Congress's act was legislative whereas Justice Powell considered it to be judicial;[301] it could also be considered executive because it directed official discretion in a particular case.[302] In *American Trucking*, the Court held that Congress's delegation of authority to the EPA under the Clean Air Act to set "ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on [the] criteria [documented in § 108] and allowing an adequate margin of safety, are requisite to protect the public health" was not a delegation of legislative power.[303] Although the statute conferred broad authority on the EPA to determine the air quality standards,

298. *See, e.g.*, Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1524 (1991) ("The implications and consequences of formalism are significant. First, it depends upon a belief that legislative, executive, and judicial powers are inherently distinguishable as well as separable from one another—a highly questionable premise."); William B. Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474, 503 (1989) ("[O]ne cannot find historical or geographical agreement among those articulating the doctrine about what the terms 'legislative,' 'executive,' and 'judicial' power mean, let alone how much of an 'intrusion' one branch of the government can make into the power of another without violating the prescribed separation."); Magill, *supra* note 83, at 604, 613-15, 618-23.

299. Magill, *supra* note 83, at 612.

300. *Id.* (citing Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001); and INS v. Chadha, 462 U.S. 919 (1983)).

301. *See supra* notes 121-22 and accompanying text.

302. Hence, scholars have noted that the power exercised by the INS in *Chadha* could be considered legislative, executive, or judicial. *See, e.g.*, McCutchen, *supra* note 6, at 39.

303. *American Trucking*, 531 U.S. at 472 (first alteration in original) (quoting 42 U.S.C. § 7409(b)(1)).

the Court noted that "[a] certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action."[304] Other scholars have discussed these and other key separation of powers cases in making the same argument.[305]

Elsewhere, Magill discusses the murky distinction between legislative and executive power:

> For example, consider the granting of licenses. Congress authorizes the Federal Energy Regulatory Commission (FERC) to grant licenses when they are "in the public interest" and sets forth a list of factors that indicate when the license would be in the public interest. In determining which of the various applicants should obtain a license, the FERC would be implementing that law. And, just as clearly, by granting or denying a license, the FERC would govern the rights and obligations of a third party [and thus would be legislating].[306]

Constitutional administration equips us to rebut this longstanding objection to formalism in separation of powers jurisprudence. Why have courts had so much difficulty differentiating these functions in cases where the answer seems reasonably clear? Because they have failed to reject administrative law's fictions—they believe that the exercise of delegated authority must constitutionally be the mere execution of the law. Thus, courts bend over backwards to describe what appear to be obvious delegations of legislative power as executive (as in *American Trucking*) and obvious exercises of executive power as legislative (as in *Chadha*). If the Supreme Court were to revisit its key separation of powers cases having accepted the reality of delegation, one suspects there would be much more coherence among the definitions of legislative, executive, and judicial power, at least in some important cases.

To be sure, "implementing" broad laws, to use Magill's terminology, appears to be both an executive and a legislative act. There is no doubt that the EPA in *American Trucking*, like the FERC when it grants licenses, was "implementing" the law passed by Congress. But the EPA was implementing that law *through legislative acts of its own*. "Implementing," in other words, is not inherently "executive." Congress could pass a law that grants the President authority "to issue any regulations in the public interest for the promotion of commerce and prosperity." If the President's agencies created rules through this delegated authority, they would be "implementing" the act of Congress, but in no way would they be "executing" the law. Rather, they would be implementing the act by making laws of their own and then executing those new laws.[307]

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304. *Id.* at 475 (quoting Mistretta v. United States, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting)).

305. *E.g.*, Gwyn, *supra* note 298, at 503.

306. Magill, *supra* note 83, at 618-19 (footnote omitted) (quoting 16 U.S.C. § 797(e) (1994)).

307. Lawson has made this point using the example of a "goodness and niceness" commission. Lawson, *supra* note 70, at 340 ("Suppose now that Congress enacts a law

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Although the objectors charge separation of powers scholars with elevating form over substance,[308] it is the objectors' understanding that elevates a different kind of form over substance. It is formalistic to say that anytime the President is "implementing" the law, he is "executing" it, too. Once we recognize that the real question is the nature of the implementation, we can make real progress toward defining the separate powers. And this Article has tried to do just that for the most critical powers of the administrative state—determining primary rules of conduct through rulemaking, enforcing those rules, and adjudicating private rights.[309] Once we dissolve the two reigning fictions of administrative law, our objectors would be hard pressed to define those functions as anything but exercises of legislative, executive, and judicial power, respectively.

As noted at the very beginning of this Article, that does not mean that every administrative act will be easy to classify. There are undoubtedly some kinds of administrative acts that partake of more than one of the three powers. But there are at least some important classes of administrative acts that can be classified and over which it would be a substantial advance to return control to the corresponding branch of government. It would be a mistake to let the perfect be the enemy of the good. As Madison reminded the Second Congress in the first nondelegation debate of our history: "However difficult it may be to determine with precision the exact boundaries of the Legislative and Executive powers," arguments that this difficulty suggested the permissibility of delegating to the executive "were not well founded, for they admit of such construction as will lead to blending those powers so as to leave no line of separation whatever."[310]

B. A Fourth Power of Government?

Another objection might arise: If one is ready to accept unconstitutional delegation, should one not consider more seriously the possibility that the Founders' understanding of separation of powers is also inadequate? Perhaps we ought to accept both unconstitutional moves rather than just the first—that is, perhaps in addition to accepting delegation, we also ought to accept a

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forbidding 'all transactions in interstate commerce that fail to promote goodness and niceness,' with no further explanation or contextual clarification. These words are not literally gibberish, but they are so vacuous that any attempt to implement this law would amount to creation of a new law.").

308. *See, e.g.*, Magill, *supra* note 83, at 604 (arguing that one of two available strategies for distinguishing the powers rests "on formalistic rules that have no content").

309. *See supra* Parts II.A.4, II.B.3, II.C.4.

310. 3 ANNALS OF CONG. 238 (1791). The debate was over the constitutionality of delegating to the President the power to establish the post roads. *See id.*

blending of powers in the President and within individual agencies. This objection has some intuitive appeal. The Constitution enshrined, at the time of its writing, the state of separation of powers doctrine that had been evolving for hundreds of years.[311] Who is to say that at that exact moment the doctrine was at the apex of its evolution? Perhaps we have come to learn that there are better ways to achieve the ends of government. Perhaps, even, we have come to learn that securing liberty is not the primary end of government at all, and we are more concerned with, say, achieving social justice.

This objection is not fatal to constitutional administration, however, because to the extent "administration" is a fourth power of government, partaking somewhat in each of the other powers, constitutional administration accommodates it. Many administrative acts will fall outside the three classes of administrative acts described above as legislative, executive, or judicial, and the constitutional branches of government can continue reaching their own agreements respecting these exercises of hybrid administrative power. Moreover, even granting Congress a legislative veto power over agency rulemaking or the President a removal power over certain commissioners does not mean these powers will be exercised often. And even when these powers are exercised, nothing in the operation of the agencies themselves will really change; the agencies will still go about their business as usual. In other words, administrative power still has its place; constitutional administration merely tilts the pendulum slightly back toward the constitutional branches of government in certain important cases.

To be sure, agencies may have to take congressional views into account somewhat more than they already do. But surely that is a virtue for defenders of republican government. Those who believe political accountability is not a virtue and interferes with the proper role of agencies may disagree. As David Rosenbloom observed over thirty years ago, "federal managers have long complained that their effectiveness is hampered by the large congressional role in public administration and the need to consult continually with a variety of parties having a legitimate concern with their agencies' operations."[312] In any event, constitutional administration might mitigate this concern: agencies might be more insulated under this model, leaving Congress to deal with the citizen participation and interest groups with which it has always dealt as the representative body accountable to the people. Interest groups will of course have incentive to apply pressure at both the agency and congressional levels. But they will have more incentive to do so at the congressional level because the political questions with which they tend to be most interested—questions

311. VILE, *supra* note 27, at 23-57 (discussing the foundation of modern separation of powers doctrine in medieval writings and the English Civil War).

312. Rosenbloom, *supra* note 86, at 221.

of values, of what to do with the technical advice given by agencies—will tend to be answered in Congress. Put another way, perhaps the vast literature on how best to value agency expertise—for example, whether presidential administration interferes with it too much[313]—might become moot. There may be no need to debate which agency decisions are technical and scientific rather than political or whether agency decisionmaking is ever apolitical. None of that would matter because to the extent administrators are experts, their expertise will be taken into account in the same way that lobbyists' and interest groups' policy expertise is taken into account; and to the extent their decisions are political in nature, they will always be subject to the political branches.

C. Limitless Delegation?

There is one final, frequent objection: If we accept delegation, does that mean that *anything* goes? Can Congress delegate legislative power to private individuals, or can it delegate its impeachment power? No. The idea is rather to accept only what already exists as a matter of eighty years of historical practice—which courts have allowed to continue—and to bring constitutional doctrine in line with that reality. In the past eighty years, Congress has not delegated its powers to private individuals with the approbation of the courts,[314] it has not delegated its powers to enact laws to individual congressional committees, and it has not delegated any legislative powers beyond its lawmaking powers accompanied by, at least in theory, intelligible principles. To allow those other delegations would require not only amending the Constitution but also dramatically changing existing practice. Constitutional administration seeks to accept the reality of one departure from the constitutional text—that only Congress shall make law—so that the operations of each governmental branch as it relates to the administrative state may more closely resemble the original intended operation of that branch. It seeks not a

313. *See, e.g.*, Kagan, *supra* note 17, at 2352-58 (discussing the "difficult issue" of "the apparent tradeoff between politics and expertise as a basis for decisionmaking within the administrative system").

314. Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1237 (2015) (Alito, J., concurring); Ass'n of Am. R.Rs. v. U.S. Dep't of Transp., 721 F.3d 666, 670 (D.C. Cir. 2013) (stating that delegations to private parties are unconstitutional), *vacated on other grounds and remanded*, 135 S. Ct. 1225 (2015); *cf.* Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936) ("This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business."). *But see* Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 HARV. J.L. & PUB. POL'Y 931, 957 (2014) (arguing that delegations to private parties are supportable under modern doctrine).

wholesale rewriting of the constitutional text but a recovery of much of it that has been lost.

Conclusion: Formalism, Functionalism, and "Balance"

The modern-day problem of administration centers on the question of "balance." Many have observed that although the Framers feared the aggrandizement of the legislative branch, today we ought to fear the aggrandizement of the executive branch.[315] Thus, scholars like Martin Flaherty argue that modern separation of powers doctrine—advanced in *Chadha* and other cases—not only represents a triumph of formalism over functionalism but is also inconsistent with the Founding vision.[316] Flaherty argues that the Founders sought "balance" among the branches of government.[317] Indeed, when reading modern administrative law cases, formalists surely must feel somewhat conflicted. On the one hand, formalism tends to secure rule-of-law and certainty values and is more faithful to the constitutional text. On the other, there can be no doubt that the Framers would be aghast at the power of today's executive branch.[318] Thus, even those who recognize that certain functionalist tools might be unconstitutional as originally understood argue that such tools ought to be permitted to balance the accretion of power in the executive.[319] There is something incredibly compelling about Justice White's functionalist vision for administrative law in *Chadha*. It is not quite what the Constitution says, but it looks a lot more like what its authors may have envisioned.

Constitutional administration advances this debate between formalists and functionalists in the context of separation of powers and the administrative state. Formalism only requires an accretion of tremendous power in the

315. *See, e.g.*, NLRB v. Noel Canning, 134 S. Ct. 2550, 2606 (2014) (Scalia, J., concurring in the judgment) (noting on behalf of himself and three other Justices "the continuing aggrandizement of the Executive Branch"); Jessica Bulman-Pozen, *From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism*, 123 YALE L.J. 1920, 1938 (2014) ("The rise of the administrative state has long fueled concerns about the aggrandizement of executive power and the attendant demise of the separation of powers and checks and balances within the federal government."); Flaherty, *supra* note 28, at 1817.

316. Flaherty, *supra* note 28, at 1729-30 (arguing that the Founders sought "balance," which is more consistent with functionalism); *see also* Gwyn, *supra* note 298, at 474-75 (describing the debate between formalism and functionalism).

317. Flaherty, *supra* note 28, at 1729-30; *see also id.* at 1766-67.

318. *Cf.* City of Arlington v. FCC, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting) ("[T]he administrative state with its reams of regulations would leave them rubbing their eyes." (quoting Alden v. Maine, 527 U.S. 706, 807 (1999) (Souter, J., dissenting))).

319. Recall McCutchen's argument respecting the legislative veto. *See supra* note 6 and accompanying text.

executive branch if we accept the fiction that Congress does not delegate legislative power and that its agents in the executive branch are thus always exercising executive power. Once we recognize and permit delegation, we can apply formalist reasoning to achieve what were originally functionalist results in many separation of powers cases. A formalist, for example, would permit a legislative veto of agency rulemaking, thereby reserving significantly more power to Congress than it currently enjoys.

If modern administrative law doctrine reflected these insights, many constitutional formalists might breathe more easily when contemplating the administrative state. Functionalists who seek more ability to create new or different accommodations between Congress and the President than current doctrine allows also ought to breathe more easily. The administrative state, if it looks unconstitutional at all, would suddenly look a lot less unconstitutional. The activities and powers of each branch of government would be closer to their originally intended operation. Congress would have more power over legislative matters, the President over executive matters, and the courts over judicial matters. Progress can be made. We need only accept a de facto precedent that we have refused to acknowledge for several decades. We need only reorient our thinking on delegation.

Appendix
Proposed Administrative Procedure Reform Act

§ 1. Agency Rulemaking.

(a) Any agency of the United States, as defined by Chapter 5 of the Administrative Procedure Act, shall transmit to the Congress not later than May 1 of the year in which a rule prescribed under section 553 of that chapter is to become effective a copy of the proposed rule. Such rule shall take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law.

(b) All independent commissions, which engage in the making of prospective rules generally applicable in nature, shall, notwithstanding anything to the contrary in governing statutes existing at the time of this statute's enactment, transmit to the Congress not later than May 1 of the year in which such a rule is to become effective a copy of the proposed rule. Such rule shall take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law.

(c) If the Congress enacts such rule, or an amended version of it, the rule, or the amended version, shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives. If any rule shall not be returned by the President within ten days after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it.

(d) If Congress takes no action in the allotted time, such inaction shall be construed as assent to the rule, but such rule must still be presented to the President and, before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives. If any such rule shall not be returned by the President within ten days after it shall have been presented to him, the same shall be a law.

(e) If either house of Congress takes action on the rule but no final bill is enacted by the allotted time, Congress shall be construed to have taken no action and the rule shall become law. But if the full Congress enacts a resolution of disapproval, the rule shall not become law.

§ 2. Chief Commissioners.

(a) The President shall appoint, by and with the advice and consent of the Senate, a chief commissioner for each independent commission with enforcement authority organized under the laws of the United States.

(b) Each chief commissioner shall be appointed for a term of four years. On the expiration of his term, a chief commissioner shall continue to perform the duties of his office until his successor is appointed and qualifies.

(c) Each chief commissioner is subject to removal by the President.

(d) Except as otherwise provided by law, each chief commissioner shall prosecute all offenses against the United States and all civil actions, suits, or proceedings in which the United States is concerned, to the extent permitted by each commission's governing statute.

(e) Each chief commissioner appointed under section 2(a) of this Act, before taking office, shall take an oath to execute faithfully his duties.

(f) Subject to sections 5315 through 5317 of title 5, the Attorney General shall fix the annual salaries of the chief commissioners, appointed under section 2(a) of this Act, at rates of compensation not in excess of the rate of basic compensation provided for Executive Level IV of the Executive Schedule set forth in section 5315 of title 5, United States Code.

(g) The chief commissioners may employ clerical assistants, messengers, and private process servers on approval of the Attorney General.

(h) Except as provided in subsection (i), the Attorney General may appoint a chief commissioner for an independent commission if the office is vacant.

(i) The Attorney General shall not appoint as chief commissioner a person to whose appointment by the President to that office the Senate refused to give advice and consent.

(j) A person appointed as chief commissioner under this section may serve until the earlier of—

(1) the qualification of a chief commissioner for such commission appointed by the President under section 2(a) of this Act; or

(2) the expiration of 120 days after appointment by the Attorney General under this section.

(k) If an appointment expires under subsection (j)(2), the Attorney General may appoint another otherwise eligible chief commissioner to serve until the vacancy is filled.

§ 3. Administrative Adjudications.

(a) (1) Report and recommendation. After a hearing required by section 554 of the Administrative Procedure Act, the agency, officer thereof, or administrative law judge presiding pursuant to section 556(b) shall submit proposed findings of fact and recommendations for the disposition, by a judge of a federal court having jurisdiction, for any matter which may determine the private rights of any party to the proceeding. If an agency that does not preside over the hearing requires the entire record to be certified to it for decision, as permitted by section 557(b), the agency may follow the procedures of that section, except that its final decision must also be a report of proposed findings of fact and recommendations for the disposition of a judge of a federal court having jurisdiction over such matters.

(2) Objections. Within fourteen days after being served with a copy of the report described in section 3(a)(1) of this Act, any party may serve and file

written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the agency. The judge may also receive further evidence or recommit the matter to the agency with instructions.

(3) Consent of parties. Upon the consent of the parties, pursuant to their specific written requests, the agency may forgo these procedures and enter final orders it otherwise has authority to enter by law.

(b) The procedures of section 3(a)(1) shall apply to any adjudication of private rights conducted by any independent agency, notwithstanding anything to the contrary in existing governing statutes. Private rights include those that would be determined by traditional actions at common law, and include the right to be free of deprivation of property by fine.

(c) In the cases governed by this section, and in any criminal case, the federal courts shall defer to agency interpretations of their governing statutes only to the extent the courts believe such interpretations are correct.