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THE RISE AND RISE OF THE ADMINISTRATIVE STATE

Gary Lawson*

The post-New Deal administrative state is unconstitutional,¹ and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution.² The original New Dealers were aware, at least to some degree, that their vision of the national government's proper role and structure could not be squared with the written Constitution:³ *The Administrative Process*, James Landis's classic exposition of the New Deal model of administration, fairly drips with contempt for the idea of a limited national government subject to a formal, tripartite separation of powers.⁴ 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.

There is a perception among some observers, however, that this post-New Deal consensus has recently come under serious legal attack,

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¹ I use the word "unconstitutional" to mean "at variance with the Constitution's original public meaning." That is not the only way in which the word is used in contemporary legal discourse. On the contrary, it is commonly used to mean everything from "at variance with the private intentions of the Constitution's drafters" to "at variance with decisions of the United States Supreme Court" to "at variance with the current platform of the speaker's favorite political party." These other usages are wholly unobjectionable as long as they are clearly identified and used without equivocation. The usage I employ, however, is the only usage that fully ties the words "constitutional" and "unconstitutional" to the actual meaning of the written Constitution. A defense of this claim would require an extended essay on the philosophy of language, but I can offer some preliminary observations: consider a recipe that calls for "a dash of salt." If one were reading the recipe as a poem or an aspirational tract, one might seek that meaning of "dash" that is aesthetically or morally most pleasing. But if one is reading it *as a recipe*, one wants to know what "dash" meant to an informed public at the time the recipe was written (assuming that the recipe was written for public consumption rather than for the private use of the author). Of course, once the recipe is understood, one might conclude that it is a *bad* recipe, either because it is ambiguous or, more fundamentally, because the dish that it yields simply isn't very appealing. But deciding *whether to try to follow the recipe* and determining *what the recipe prescribes* are conceptually distinct enterprises. If the Constitution is best viewed as a recipe — and it certainly looks much more like a recipe than a poem or an aspirational tract — application of the methodology of original public meaning is the appropriate way to determine its meaning.

² Cf. Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 447–48 (1987) (noting that the New Deal "altered the constitutional system in ways so fundamental as to suggest that something akin to a constitutional amendment had taken place").

³ See 1 BRUCE ACKERMAN, *WE THE PEOPLE* 44 (1991); Sunstein, *supra* note 2, at 430.

⁴ See JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* *passim* (1938).

especially from the now-departed Reagan and Bush administrations.⁵ But though debate about structural constitutional issues has clearly grown more vibrant over the past few decades,⁶ the essential features of the modern administrative state have, for more than half a century, been taken as unchallengeable postulates by virtually all players in the legal and political worlds, including the Reagan and Bush administrations. The post-New Deal conception of the national government has not changed one iota, nor even been a serious subject of discussion, since the Revolution of 1937.⁷

Part I of this Article sketches, in purely descriptive fashion, some of the most important ways in which the modern administrative state, without serious opposition, contravenes the Constitution's design.⁸ Many elements of this design remain poorly understood even after more than two centuries, and my brief discussion here is unlikely to be satisfying. Nonetheless, my discussion at least touches on such important issues as the scope of Congress's legislative powers, the contours and constitutional source of the nondelegation doctrine, the character of the unitary executive created by Article II, and the extent to which administrative adjudication is inconsistent with Article III.

Part II briefly ponders some possible responses to the enormous gap between constitutional meaning and constitutional practice. For those of us for whom the written Constitution (as validly amended) is the only Constitution,⁹ the seemingly irrevocable entrenchment of the

⁵ This perception is evident more from the quantity and tone than from the specific content of recent discussions of the structural Constitution, but a few scholars have stated the point expressly. See Alfred C. Aman, Jr., *Introduction*, 77 CORNELL L. REV. 421, 427 (1987) (claiming that structural issues "of fundamental importance" "are again up for grabs"); Sunstein, *supra* note 2, at 509 (noting that "[t]he last three decades have seen a growing rejection of the New Deal conception of administration").

⁶ See Geoffrey P. Miller, *From Compromise to Confrontation: Separation of Powers in the Reagan Era*, 57 GEO. WASH. L. REV. 401, 401 (1989).

⁷ Modern debates about the scope and structure of the national government tend to concern such relatively peripheral matters as the removability of administrative officials, see, e.g., *Morrison v. Olson*, 487 U.S. 654, 682–83 (1988); *Bowsher v. Synar*, 478 U.S. 714, 721–34 (1986), or the national government's power directly to regulate state governments, see, e.g., *New York v. United States*, 112 S. Ct. 2408, 2419–32 (1992); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 537–47 (1985); *National League of Cities v. Usery*, 426 U.S. 833, 852–55 (1976), *overruled by Garcia*, 469 U.S. at 531 (1985).

⁸ Cynthia Farina has aptly described this explicitly non-normative project as an exercise in "legal archaeology."

⁹ It is possible to maintain that the phrase "the Constitution of the United States" refers not to the text of a specific document, but refers instead, in the fashion of England's unwritten constitution, to a set of practices and traditions that have evolved over time. As a matter of practical governance, such unwritten practices are surely more important than the instructions contained in the written Constitution, but this Article is concerned solely with the written texts that have been submitted to and ratified by the American electorate. Cf. Akhil Reed Amar, *Our Forgotten Constitution: A Bicentennial Comment*, 97 YALE L.J. 281, 282–85 (1987) (noting discrepancies between the document produced by the constitutional convention and the document ratified by the electorate).

post-New Deal structure of national governance raises serious doubts about the utility of constitutional discourse.

I. THE DEATH OF CONSTITUTIONAL GOVERNMENT

The United States Congress today effectively exercises general legislative powers, in contravention of the constitutional principle of limited powers. Moreover, Congress frequently delegates that general legislative authority to administrative agencies, in contravention of Article I. Furthermore, those agencies are not always subject to the direct control of the President, in contravention of Article II. In addition, those agencies sometimes exercise the judicial power, in contravention of Article III. Finally, those agencies typically concentrate legislative, executive, and judicial functions in the same institution, in simultaneous contravention of Articles I, II, and III.

In short, the modern administrative state openly flouts almost every important structural precept of the American constitutional order.

A. *The Death of Limited Government*

The advocates of the Constitution of 1789 were very clear about the kind of national government they sought to create. As James Madison put it: "The powers delegated by the proposed Constitution to the federal government are few and defined."¹⁰ Those national powers, Madison suggested, would be "exercised principally on external objects, as war, peace, negotiation, and foreign commerce,"¹¹ and the states would be the principal units of government for most internal matters.¹²

The expectations of founding-era figures such as James Madison are instructive but not controlling for purposes of determining the Constitution's original public meaning: the best laid schemes o' mice, men and framers gang aft a-gley. The Constitution, however, is well designed to limit the national government essentially to the functions described by Madison.

Article I of the Constitution vests in the national Congress "[a]ll legislative powers *herein granted*,"¹³ and thus clearly indicates that the national government can legislate only in accordance with enu-

¹⁰ THE FEDERALIST No. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961).

¹¹ *Id.*

¹² See *id.* at 292–93. In my favorite passage from *The Federalist*, Madison boldly proclaimed that the federal revenue collectors "will be principally on the seacoast, and not very numerous." *Id.* at 292.

¹³ U.S. CONST. art. I, § 1 (emphasis added).

merations of power.¹⁴ Article I then spells out seventeen specific subjects to which the federal legislative power extends: such matters as taxing and borrowing, interstate and foreign commerce, naturalization and bankruptcy, currency and counterfeiting, post offices and post roads, patents and copyrights, national courts, piracy and offenses against the law of nations, the military, and the governance of the nation's capital and certain federal enclaves.¹⁵ Article IV further grants to Congress power to enforce interstate full-faith-and-credit requirements, to admit new states, and to manage federal territories and property.¹⁶ Article V grants Congress power to propose constitutional amendments.¹⁷

This is not the stuff of which Leviathan is made. None of these powers, alone or in combination, grants the federal government anything remotely resembling a general jurisdiction over citizens' affairs. The Commerce Clause, for example, is a grant of power to regulate "Commerce . . . among the several States,"¹⁸ not to regulate "all Activities affecting, or affected by, Commerce . . . among the several States." The Commerce Clause clearly leaves outside the national government's jurisdiction such important matters as manufacturing (which is an activity distinct from commerce),¹⁹ the terms, formation, and execution of contracts that cover subjects other than the interstate shipment of goods, and commerce within a state's boundaries.

Nor does the Necessary and Proper Clause,²⁰ which the founding generation called the Sweeping Clause, grant general legislative powers to the national government. This clause contains two significant internal limitations. First, it only validates laws that "carry[] into Execution" other granted powers. To carry a law or power "into Execution" means to provide the administrative machinery for its enforcement; it does *not* mean to regulate unenumerated subjects in order to make the exercise of enumerated powers more effective.²¹ Second, and more fundamentally, laws enacted pursuant to the Sweeping Clause must be both "necessary and proper" for carrying into

¹⁴ This understanding is expressly confirmed by the Tenth Amendment, which declares that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Id.* amend. X.

¹⁵ See *id.* art. I, § 8, cls. 1-17.

¹⁶ See *id.* art. IV, §§ 1, 3.

¹⁷ See *id.* art. V.

¹⁸ See *id.* art. I, § 8, cl. 3.

¹⁹ See Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1388-89, 1393-95 (1987).

²⁰ U.S. CONST. art. I, § 8, cl. 18 (providing that Congress shall have the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof").

²¹ See Epstein, *supra* note 19, at 1397-98.

execution enumerated powers. As Patty Granger and I have elsewhere demonstrated at length, the word “proper” in this context requires executory laws to be distinctively and peculiarly within the jurisdictional competence of the national government — that is, consistent with background principles of separation of powers, federalism, and individual rights.²² Thus, the Sweeping Clause does not grant Congress power to regulate unenumerated subjects as a means of regulating subjects within its constitutional scope.²³

Nor does the power of the purse give Congress unlimited authority, though here the limits are a bit fuzzy. The Constitution contains a Taxing Clause,²⁴ but it does not contain a “spending clause” as such.²⁵ Nevertheless, Congress acquires the power to spend from two sources. First, the Sweeping Clause permits Congress to pass appropriations laws — provided that such laws “carry[] into Execution” an enumerated power and are “necessary and proper” for doing so. Second, as David Engdahl has pointed out, Congress’s power “to *dispose of* and make all needful Rules and Regulations respecting the Territory or *other Property* belonging to the United States”²⁶ seems to provide a general spending power.²⁷ But a general power to spend is not a general power to regulate. Even if Congress can impose whatever conditions it pleases on the receipt of federal funds, those conditions are contractual in nature, a fact that limits both their enforceability and their scope.²⁸ Moreover, it is not obvious that the Property Clause gives Congress wholly unlimited power to enact spending conditions, though identifying any limits on such power would require careful consideration of the meaning of the phrase “dispose of,” the relationship between the Property Clause and the Sweeping Clause, and the viability of a general doctrine of unconstitutional conditions.

Admittedly, some post-1789 amendments to the Constitution expand Congress’s powers beyond their original limits. For example, the Thirteenth and Fifteenth Amendments authorize Congress to enforce prohibitions against, respectively, involuntary servitude²⁹ and racially discriminatory voting practices;³⁰ the Fourteenth Amendment

²² See Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 335–36 (1993).

²³ See *id.* at 331–32. But see DAVID E. ENGDahl, CONSTITUTIONAL FEDERALISM IN A NUTSHELL 18–19 (2d ed. 1987) (arguing that Congress may regulate unenumerated subjects in the course of implementing enumerated powers); David E. Engdahl, *The Spending Power* 9–14 (April 14, 1993) (unpublished manuscript, on file with the Harvard Law School Library) (same).

²⁴ See U.S. CONST. art. I, § 8, cl. 1.

²⁵ See Engdahl, *supra* note 23, at 29–32 (demonstrating that the Taxing Clause is not a proper source of a federal spending power).

²⁶ U.S. CONST. art. IV, § 3, cl. 2 (emphasis added).

²⁷ See Engdahl, *supra* note 23, at 30–31.

²⁸ See *id.* at 37–63.

²⁹ See U.S. CONST. amend. XIII, § 2.

³⁰ See *id.* amend. XV, § 2.

gives Congress power to enforce that Amendment's numerous substantive constraints on states,³¹ and the Sixteenth Amendment permits Congress to impose direct taxes without an apportionment requirement.³² These are important powers, to be sure, but they do not fundamentally alter the limited scope of Congress's power over private conduct.

Of course, in this day and age, discussing the doctrine of enumerated powers is like discussing the redemption of Imperial Chinese bonds. There is now virtually no significant aspect of life that is not in some way regulated by the federal government. This situation is not about to change. Only twice since 1937 has the Supreme Court held that a congressional statute exceeded the national government's enumerated powers,³³ and one of those holdings was overruled nine years later.³⁴ Furthermore, both cases involved the direct regulation of state governments in their sovereign capacities. To the best of my knowledge, the post-New Deal Supreme Court has never invalidated a congressional intrusion into private affairs on *ultra vires* grounds; instead the Court has effectively acquiesced in Congress's assumption of general legislative powers.³⁵

The courts, of course, are not the only, or even the principal, interpreters of the Constitution. Under the Constitution, it is emphatically the province and duty of the President to say what the law

³¹ See *id.* amend. XIV, § 5.

³² See *id.* amend. XVI. Other amendments also grant power to Congress. See *id.* amend. XIX, cl. 2 (giving Congress the power to enforce a prohibition on gender-based discriminatory voting practices); *id.* amend. XXIII, § 2 (giving Congress the power to enforce the District of Columbia's participation in the electoral college); *id.* amend. XXIV, § 2 (giving Congress the power to enforce a prohibition against poll taxes); *id.* amend. XXVI, § 2 (giving Congress the power to enforce a prohibition against denying eighteen-year-old people the vote on account of age).

³³ See *New York v. United States*, 112 S. Ct. 2408, 2428–29 (1992); *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976).

³⁴ See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985) (overruling *Usery*).

³⁵ See, e.g., *Perez v. United States*, 402 U.S. 146, 156–57 (1971) (holding the Consumer Credit Protection Act to be within Congress's power to regulate interstate commerce); *Wickard v. Filburn*, 317 U.S. 111, 128–29 (1942) (holding regulation of the production of wheat grown for personal consumption to be within Congress's power to regulate interstate commerce). The lower federal courts have basically followed suit, though there has been a modest counterrevolution in the past two years. See *Hoffman Homes, Inc. v. Administrator, United States EPA*, 961 F.2d 1310, 1311 (7th Cir.) (stating that the EPA could not regulate, as "wetlands" subject to the Clean Water Act, a small depression that occasionally filled with rainwater), *vacated*, 975 F.2d 1554 (7th Cir. 1992); *United States v. Cortner*, 834 F. Supp. 242, 244 (M.D. Tenn. 1993) (holding that Congress could not make carjacking a federal criminal offense, because the activity "lacks any rational nexus to interstate commerce"); *cf.* *United States v. Lopez*, 2 F.3d 1342, 1366–68 (5th Cir. 1993) (holding that Congress could not, in the absence of explicit legislative findings of an effect on interstate commerce, prohibit knowing possession of a firearm within one thousand feet of a school).

is³⁶ — and hence to veto bills that contravene constitutional limits. During their twelve years in office, however, the Reagan and Bush administrations made no serious attempt to resuscitate the doctrine of enumerated powers. I do not know of a single instance in which President Reagan or President Bush vetoed or even opposed legislation on the ground that it exceeded Congress's enumerated powers. Furthermore, I am aware of only one instance in the Reagan-Bush era in which the Justice Department formally opposed legislation on such grounds; a 1986 opinion from the Office of Legal Counsel stated that Congress did not have the enumerated power to enact a national lottery.³⁷

Thus, the demise of the doctrine of enumerated powers, which made possible the growth of the modern regulatory state, has encountered no serious real-world legal or political challenges, and none are on the horizon.

B. The Death of the Nondelegation Doctrine

The Constitution both confines the national government to certain enumerated powers and defines the institutions of the national government that can permissibly exercise those powers. Article I of the Constitution provides that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”³⁸ Article II provides that “[t]he executive Power shall be vested in a President of the United States of America.”³⁹ Article III specifies that “[t]he 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.”⁴⁰ The Constitution thus divides the powers of the national government into three categories — legislative, executive, and judicial — and vests such powers in three separate institutions. To be sure, the Constitution expressly prescribes some deviations from a pure tripartite scheme of separation,⁴¹ but this only underscores the role of

³⁶ See Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905 (1989-1990).

³⁷ 10 Op. Off. Legal Counsel 40, 40-42 (1986).

³⁸ U.S. CONST. art. I, § 1.

³⁹ *Id.* art. II, § 1.

⁴⁰ *Id.* art. III, § 1.

⁴¹ The President, through the presentment and veto provisions, see *id.* art. I, § 7, cls. 2-3, is given a sui generis role in the legislative process that defies classification along tripartite lines. See Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CAL. L. REV. 853, 858 n.19 (1990). The Vice President is made an officer of the Senate and is given the power to break ties in that body. See U.S. CONST. art. I, § 3, cl. 4. The Senate is given the seemingly judicial power to try impeachments. See *id.* art. I, § 3, cl. 6. Certain other powers, such as the power to make treaties and to appoint national officers, are shared among the various departments. See *id.* art. II, § 2, cl. 2.

the three Vesting Clauses in assigning responsibility for governmental functions that are not specifically allocated by the constitutional text.

Although the Constitution does not contain an express provision declaring that the Vesting Clauses' allocations of power are exclusive,⁴² it is a mistake in principle to look for such an express declaration.⁴³ The institutions of the national government are creatures of the Constitution and must find constitutional authorization for any action. Congress is constitutionally authorized to exercise "[a]ll legislative Powers herein granted," the President is authorized to exercise "[t]he executive Power," and the federal courts are authorized to exercise "[t]he judicial Power of the United States." Congress thus cannot exercise the federal executive or judicial powers for the simple reason that the Constitution *does not vest* such power in Congress. Similarly, the President and the federal courts can exercise only those powers vested in them by the Constitution: the general executive and judicial powers, respectively, plus a small number of specific powers outside those descriptions. Thus, any law that attempts to vest legislative power in the President or in the courts is not "necessary and proper for carrying into Execution" constitutionally vested federal powers and is therefore unconstitutional.⁴⁴

Although the Constitution does not tell us how to distinguish the legislative, executive, and judicial powers from each other,⁴⁵ there is

⁴² A number of state constitutions of the founding era did contain such express separation of powers provisions. The most famous example is the Massachusetts Constitution of 1780:

In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them; The judicial shall never exercise the legislative and executive powers, or either of them: To the end it may be a government of laws and not of men.

MASS. CONST. of 1780, pt. I, art. 30; *see also* VA. CONST. of 1776 ¶ 2 ("The legislative, executive, and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other.").

⁴³ I am profoundly indebted to Marty Redish for this important insight.

⁴⁴ U.S. CONST. art I, § 8, cl. 18 (emphasis added). The word "proper" in the Sweeping Clause provides the textual vehicle for enforcement of the Constitution's nondelegation principle. *See* Lawson & Granger, *supra* note 22, at 333-34.

⁴⁵ *See* Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 256 ("[T]he Constitution makes no effort to define the 'legislative,' 'executive,' and 'judicial' powers."). The framers harbored no illusions that these powers were self-defining. Madison, for example, observed in *The Federalist*:

Experience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces — the legislative, executive, and judiciary Questions daily occur in the course of practice which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science.

THE FEDERALIST NO. 37, at 228 (James Madison) (Clinton Rossiter ed., 1961). The problem of distinguishing the three functions of government has long been, and continues to be, one of the most intractable puzzles in constitutional law. *See* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 46 (1825) ("[T]he maker of the law may commit something to the discretion of the

clearly some differentiation among the three governmental functions, which at least generates some easy cases. Consider, for example, a statute creating the Goodness and Niceness Commission and giving it power "to promulgate rules for the promotion of goodness and niceness in all areas within the power of Congress under the Constitution." If the "executive power" means simply the power to carry out legislative commands regardless of their substance, then the Goodness and Niceness Commission's rulemaking authority is executive rather than legislative power and is therefore valid. But if that is true, then there never was and never could be such a thing as a constitutional principle of nondelegation — a proposition that is belied by all available evidence about the meaning of the Constitution. Accordingly, the nondelegation principle, which is textually embodied in the command that all executive laws be "necessary and proper," constrains the substance of congressional enactments. Certain powers simply cannot be given to executive (or judicial) officials, because those powers are *legislative* in character.

A governmental function is not legislative, however, merely because it involves some element of policymaking discretion: it has long been understood that some such exercises of discretion can fall within the definition of the executive power.⁴⁶ The task is therefore to determine when a statute that vests discretionary authority in an executive (or judicial) officer has crossed the line from a necessary and proper implementing statute to an unnecessary and/or improper delegation of distinctively legislative power. While I cannot complete that task here, the core of the Constitution's nondelegation principle can be expressed as follows: Congress must make whatever policy decisions are sufficiently important to the statutory scheme at issue so that Congress must make them. Although this circular formulation may seem farcical,⁴⁷ it recognizes that a statute's required degree of specificity depends on context, takes seriously the well-recognized distinction between legislating and gap-filling, and corresponds reasonably well to judicial application of the nondelegation principle in the first 150 years of the nation's history.⁴⁸ If it does not precisely capture

other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry"). See generally William B. Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474, 503 (1989).

⁴⁶ See Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 264 (1990).

⁴⁷ Circularity of this kind is neither fatal nor unprecedented. For example, under relevant (and correct) case law, a federal employee is an officer subject to the Appointments Clause, U.S. CONST. art. II, § 2, cl. 2, if he or she is sufficiently important to be subject to the Appointments Clause. See Lawson, *supra* note 41, at 865 n.63.

⁴⁸ For a description and analysis of the case law on nondelegation, see Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 478–88 (1989).

the true constitutional rule of nondelegation, it is a plausible first approximation.⁴⁹

In any event, it is a much better approximation of the true constitutional rule than is the post-New Deal positive law. The Supreme Court has not invalidated a congressional statute on nondelegation grounds since 1935.⁵⁰ This has not been for lack of opportunity. The United States Code is filled with statutes that create little Goodness and Niceness Commissions — each confined to a limited subject area such as securities,⁵¹ broadcast licenses,⁵² or (my personal favorite) imported tea.⁵³ These statutes are easy kills under any plausible interpretation of the Constitution's nondelegation principle. The Supreme Court, however, has rejected so many delegation challenges to so many utterly vacuous statutes that modern nondelegation decisions now simply recite these past holdings and wearily move on.⁵⁴ Anything short of the Goodness and Niceness Commission, it seems, is permissible.⁵⁵

⁴⁹ Marty Redish has independently formulated a very similar principle for distinguishing the legislative and executive powers, which he calls the "political commitment principle." See MARTIN H. REDISH, *THE CONSTITUTION AS POLITICAL STRUCTURE* (forthcoming 1994) (manuscript ch. 5, at 2–4, on file with author). This principle requires of valid legislation "some meaningful level of normative political commitment by the enacting legislators, thus enabling the electorate to judge its representatives." *Id.* ch. 5, at 4; see also David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1252–58 (1985) (distinguishing between statutes that prescribe rules of conduct and invalid statutes that merely state legislative goals).

⁵⁰ See *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541–42 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 430 (1935). The Court does occasionally invoke delegation concerns in the course of statutory interpretation. See, e.g., *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst. (Benzene)*, 448 U.S. 607, 646 (1980) (plurality opinion) (holding that an OSHA statute, if interpreted broadly, would be a sweeping and unconstitutional delegation of power).

⁵¹ See 15 U.S.C. § 78j(b) (1988) (proscribing 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 [Securities and Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors").

⁵² See 47 U.S.C. § 307(a) (1988) (prescribing that the Federal Communications Commission shall grant broadcast licenses to applicants "if public convenience, interest, or necessity will be served thereby").

⁵³ See 21 U.S.C. § 41 (1988) (forbidding the importation of "any merchandise as tea which is inferior in purity, quality, and fitness for consumption to the standards" set by the Secretary of Health and Human Services).

⁵⁴ See, e.g., *Touby v. United States*, 111 S. Ct. 1752, 1756 (1991); *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 218–24 (1989); *Mistretta v. United States*, 488 U.S. 361, 378–79 (1989).

⁵⁵ The problem with the Goodness and Niceness Commission under current law (if indeed there is a problem) would be that it had been delegated *too much* of Congress's power in one fell swoop. Modern law, in other words, will permit Congress to create a set of miniature Goodness and Niceness Commissions, no one of which has authority over all aspects of life, but would likely balk at a single agency exercising unconstrained legislative authority over too broad

The rationale for this virtually complete abandonment of the non-delegation principle is simple: the Court believes — possibly correctly — that the modern administrative state could not function if Congress were actually required to make a significant percentage of the fundamental policy decisions. Judicial opinions candidly acknowledge this rationale for permitting delegations. For example, the majority in *Mistretta v. United States*⁵⁶ declared that “our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”⁵⁷ When faced with a choice between the Constitution and the structure of modern governance, the Court has had no difficulty making the choice.

Contrary to conventional wisdom, neither did the Reagan and Bush administrations. Neither President Reagan nor President Bush ever vetoed or opposed legislation on the express ground that it violated the nondelegation doctrine. Nor, to my knowledge, did the Reagan-Bush Justice Departments ever formally make such an objection to proposed or actual legislation.⁵⁸

Thus, the demise of the nondelegation doctrine, which allows the national government’s now-general legislative powers to be exercised by administrative agencies, has encountered no serious real-world legal or political challenges, and none are on the horizon.

C. *The Death of the Unitary Executive*

Article II states that “[t]he executive Power shall be vested in a President of the United States of America.”⁵⁹ Although the precise contours of this “executive Power” are not entirely clear,⁶⁰ at a minimum it includes the power to execute the laws of the United States.

a range of subjects. See *Industrial Union Dep’t, AFL-CIO v. American Petroleum Inst. (Benzene)*, 448 U.S. 607, 646 (1980) (plurality opinion) (narrowly construing the Occupational Safety and Health Act because a broad construction would give the Secretary of Labor “unprecedented power over American industry” and would thus constitute “such a ‘sweeping delegation of legislative power’ that it might be unconstitutional”) (quoting *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 539 (1935)).

⁵⁶ 488 U.S. 361 (1989).

⁵⁷ *Id.* at 372.

⁵⁸ David Schoenbrod has documented that President Reagan never vetoed a bill on nondelegation grounds nor did his Justice Department ever oppose such legislation. See David Schoenbrod, *How the Reagan Administration Trivialized Separation of Powers (and Shot Itself in the Foot)*, 57 GEO. WASH. L. REV. 459, 464–65 (1989). I have confirmed that this same fact is true of the Bush administration through my own recollections and those of several Bush administration officials and by consulting published opinions of the Office of Legal Counsel.

⁵⁹ U.S. CONST. art. II, § 1, cl. 1.

⁶⁰ See Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1177 n.119 (1992).

Other clauses of the Constitution, such as the requirement that the President "take Care that the Laws be faithfully executed,"⁶¹ assume and constrain this power to execute the laws,⁶² but the Article II Vesting Clause is the constitutional source of this power — just as the Article III Vesting Clause is the constitutional source of the federal judiciary's power to decide cases.⁶³

Significantly, that power to execute the laws is vested, not in the executive department of the national government, but in "a President of the United States of America."⁶⁴ The Constitution thus creates a *unitary executive*. Any plausible theory of the federal executive power must acknowledge and account for this vesting of the executive power in the person of the President.

Of course, the President cannot be expected personally to execute all laws. Congress, pursuant to its power to make all laws "necessary and proper for carrying into Execution" the national government's powers, can create administrative machinery to assist the President in carrying out legislatively prescribed tasks. But if a statute vests discretionary authority directly in an agency official (as do most regulatory statutes) rather than in the President, the Article II Vesting Clause seems to require that such discretionary authority be subject to the President's control.⁶⁵

This model of presidential power is not without its critics. Indeed, most contemporary scholars believe that Congress may vest discretionary authority in subordinate officers free from direct presidential control,⁶⁶ and early American history and practice reflect this view to a considerable extent.⁶⁷ Nonetheless, the Vesting Clause inescapably

⁶¹ U.S. CONST. art. II, § 3, cl. 3.

⁶² See Calabresi & Rhodes, *supra* note 60, at 1198 n.221.

⁶³ See Steven G. Calabresi, *The Vesting Clauses As Power Grants*, 88 NW. U. L. REV. (forthcoming 1994) (manuscript at 2, on file with the Harvard Law School Library).

⁶⁴ U.S. CONST. art. I, § 1, cl. 1.

⁶⁵ The qualifier "discretionary" is important. If a statute requires a *ministerial* act, such that a writ of mandamus would properly lie to compel its performance, it does not matter in whom the statute vests power. See *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 610–13 (1838).

⁶⁶ See, e.g., Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U. L. REV. 443, 465–72 (1987) (arguing that Congress "may provide that the President may not substitute his judgment . . . for that of the official to whom Congress has delegated decisionmaking power"); cf. Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 55 (1994) (claiming that, under an originalist interpretation of the Constitution, "Congress has wide discretion to vest . . . [administrative powers] in officers operating under or beyond the plenary power of the President").

⁶⁷ Several legal scholars have compiled impressive lists of historical materials suggesting that many early legal actors and writers did not contemplate any wide-ranging presidential power of supervision. See Lessig & Sunstein, *supra* note 66, at 15–17; Morton Rosenberg, *Presidential Control of Agency Rulemaking: An Analysis of Constitutional Issues That May Be Raised by Executive Order 12,291*, 23 ARIZ. L. REV. 1199, 1205–10 (1981).

vests "the executive Power" directly and solely in the person of the President. Accordingly, scholars sometimes deny that the Article II Vesting Clause is a grant of power to the President to execute the laws,⁶⁸ but none has yet adequately rebutted the compelling textual and structural arguments for reading the Vesting Clause as a grant of power⁶⁹ — a grant of power specifically and exclusively to "a President of the United States."

Thus, the important question is what form the President's power of control over subordinates must take in order to ensure a constitutionally unitary executive. There are two evident possibilities. First, the President might be thought to have the power personally to make all discretionary decisions involving the execution of the laws. On this understanding, the President can step into the shoes of any subordinate and directly exercise that subordinate's statutory powers.⁷⁰ Second, one might think that, although the President cannot directly exercise power vested by statute in another official, any action by that subordinate contrary to presidential instructions is void.⁷¹ Either alternative is plausible, though the latter is perhaps more consistent with Congress's power under the Sweeping Clause to structure the executive department.⁷²

⁶⁸ See Lessig & Sunstein, *supra* note 66, at 46–52; McGarity, *supra* note 66, at 466; Rosenberg, *supra* note 67, at 1209.

⁶⁹ Steve Calabresi has recently formulated and marshalled these arguments. See Calabresi, *supra* note 63, at 4–22; Steven G. Calabresi, *The Trinity of Powers and the Lessig/Sunstein Heresy passim* (March 6, 1994) (unpublished manuscript, on file with the Harvard Law School Library). I can here summarize only a few of Professor Calabresi's arguments. First, the Sweeping Clause gives Congress power to carry into execution "all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8, cl. 18 (emphasis added). In view of this language, it is very hard to argue that the Article II Vesting Clause does not vest powers. Second, a close textual and structural comparison of Articles II and III demonstrates that the Vesting Clauses in each Article serve the same function. Inasmuch as the Article III Vesting Clause must be read as a grant of power to courts to decide cases rather than as merely a designation of office, the Article II Vesting Clause must also be a grant of power. Third, the Article II Vesting Clause is the only plausible source of a constitutional power to execute the laws. The only other conceivable source of such a power — the Take Care Clause, U.S. CONST. art II, § 2, cl. 3 (declaring that the President "shall take Care that the Laws be faithfully executed") — is worded as a duty of faithful execution rather than as a grant of power.

⁷⁰ See Calabresi & Rhodes, *supra* note 60, at 1166.

⁷¹ See *id.*; Lee S. Liberman, *Morrison v. Olson: A Formalist Perspective on Why the Court Was Wrong*, 38 AM. U. L. REV. 313, 353–54 (1989).

⁷² The executive power, unlike the legislative and judicial powers, has always been understood to be delegable by the President. See *Mistretta v. United States*, 488 U.S. 361, 424–25 (1989) (Scalia, J., dissenting); 2 ANNALS OF CONG. 712 (1792) ("[I]t is of the nature of Executive power to be transferrable to subordinate officers; but Legislative authority is incommunicable, and cannot be transferred.") (statement of Representative Findley). Accordingly, if the President can directly exercise all powers vested by statute in executive officials, the President can presumably designate any subordinate official to exercise that power. Thus, if a statute vests authority to promulgate standards for workplace safety in the Secretary of Labor, the President

Congress and the President have fought hard in recent years over control of the federal administrative machinery, and the courts have adjudicated such disputes in some high-profile cases.⁷³ Significantly, however, neither of the two possible constitutional mechanisms of presidential control has played a role in those battles. No modern judicial decision specifically addresses the President's power either directly to make all discretionary decisions within the executive department or to nullify the actions of insubordinate subordinates. Instead, debate has focused almost exclusively on whether and when the President must have unlimited power to *remove* subordinate executive officials. That is an interesting and important question, but it does not address the central issue concerning the executive power. Even if the President has a constitutionally unlimited power to remove certain executive officials, that power alone does not satisfy the Article II Vesting Clause. If an official exercises power contrary to the President's directives and is then removed, one must still determine whether the official's exercise of power is legally valid. If the answer is "no," then the President necessarily has the power to nullify discretionary actions of subordinates, and removal is therefore not the President's sole power of control. If the answer is "yes," then the insubordinate ex-official will have effectively exercised executive power contrary to the President's wishes, which contravenes the vesting of that power in the President. A presidential removal power, even an unlimited removal power, is thus either constitutionally superfluous or constitutionally inadequate.⁷⁴ Congress, the President, and the courts

could, on this understanding, personally assume that power and then delegate it to the Secretary of Defense. Perhaps this is the correct view of the President's power, but it seems more plausible to suppose that Congress can at least determine *which subordinate officials, if any*, are permitted to exercise delegated executive powers. See Geoffrey P. Miller, *The Unitary Executive in a Unified Theory of Constitutional Law: The Problem of Interpretation*, 15 CARDOZO L. REV. 201, 205 (1993). On this supposition, if a statute vests power to promulgate workplace standards in the Secretary of Labor, the President cannot personally promulgate safety standards nor designate anyone other than the Secretary of Labor to perform that task, although the President can issue instructions — including instructions so detailed that they take the form of regulations — with which the Secretary of Labor must comply if he or she is to act at all.

⁷³ See, e.g., *Morrison v. Olson*, 487 U.S. 654, 696–97 (1988) (upholding the constitutionality of the independent counsel provisions of the Ethics in Government Act); *Bowsher v. Synar*, 478 U.S. 714, 721–27 (1986) (striking down a provision of the Gramm-Rudman-Hollings Act that gave the Comptroller General a role in the appropriations process).

⁷⁴ It is therefore constitutionally nonexistent as well. The only mode of removal specifically mentioned in the Constitution is impeachment. See U.S. CONST. art. II, § 4. Accordingly, one could reasonably believe: that impeachment is the only permissible form of removal, that Congress's power to create offices carries with it the power to prescribe the form of removal, or that the power of removal follows the power of appointment, so that if the Senate must consent to an officer's appointment, it must also consent to that officer's removal. See Lawson, *supra* note 41, at 883 n.172. One can infer a presidential removal power only by assuming that such a power is necessary in order to ensure a unitary executive. See *Myers v. United States*, 272 U.S. 52, 132–35 (1926) (making such an inference). Inasmuch as even the strongest removal

have accordingly been spending a great deal of energy arguing about something of relatively little constitutional significance.

The death of the unitary executive cannot be traced to the New Deal revolution. The First Congress, in the so-called Decision of 1789, engaged in one of the most spirited and sophisticated debates on executive power in the nation's history, but did not once focus on a presidential power to make discretionary decisions or to veto actions by subordinates.⁷⁵ Moreover, many Attorneys General in the nineteenth century affirmatively denied that the President must always have the power to review decisions by subordinates.⁷⁶ The absence of a functioning unitary executive principle, however, may well have made the Revolution of 1937 possible. Judging from the political conflict that is often generated by disputes between Congress and the President, it is at least arguable that Congress would never have granted agencies their current, almost-limitless powers if Congress recognized that such power had to be directly under the control of the President.⁷⁷

Although the Reagan and Bush administrations often fought hard to defend their views of the proper role of the President, they did not directly assert their power to invalidate discretionary actions of subordinates or to make discretionary executive decisions when statutes confer power directly on subordinates. Opinions of the Office of Legal Counsel from the Reagan-Bush era have sometimes insisted that congressional attempts to place executive authority beyond presidential supervision are unconstitutional,⁷⁸ but neither President Reagan nor President Bush ever made either of the two plausible conceptions of

power does not ensure compliance with the Article II Vesting Clause, any such inference of a constitutionally based presidential removal power seems hard to justify.

⁷⁵ See 1 ANNALS OF CONG. 384-412, 473-608, 614-31, 635-39 (1789). Should this fact give pause to advocates of the unitary executive? Probably, although the framers' silence is not decisive in the face of compelling textual and structural arguments for presidential control of execution. In order to establish that something is the original meaning of a constitutional provision, one needs to show that the general public would have acknowledged that meaning as correct if all relevant arguments and information had been brought to its attention. Actual instances of usage (or non-usage) are therefore probative but not dispositive.

⁷⁶ See, e.g., 18 Op. Att'y Gen. 31, 32 (1884); 11 Op. Att'y Gen. 14, 15-19 (1864); 1 Op. Att'y Gen. 624, 625-29 (1823). *But see* 6 Op. Att'y Gen. 326, 339-46 (1854) (disavowing the reasoning and conclusions of these opinions).

⁷⁷ See Merrill, *supra* note 45, at 253-54. Nor is it obvious that courts would have validated limitless delegations directly to the President rather than to "expert, non-political" agencies.

⁷⁸ See 15 Op. Off. Legal Counsel 8, 16-17 (1991) (construing a statute to permit the Secretary of Education to review decisions of administrative law judges on the ground, *inter alia*, that foreclosure of review would be unconstitutional); 13 Op. Off. Legal Counsel 299, 306-07 (1989) (objecting generally to concurrent reporting requirements that allow agencies to transmit budget requests or legislative proposals to Congress without presidential review); 12 Op. Off. Legal Counsel 58, 60-71 (1988) (asserting the unconstitutionality of a congressional resolution requiring the Centers for Disease Control to mail AIDS information free from executive supervision).

the unitary executive the focal point of a separation of powers dispute. The unitary executive has met its fate almost as meekly as have the principles of enumerated powers and nondelegation.

D. The Death of the Independent Judiciary

Article III provides that “[t]he 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.”⁷⁹ The judges of all such federal courts are constitutionally guaranteed tenure during good behavior as well as assurance that their salaries will not be diminished during their time in office.⁸⁰ One of the principal functions of administrative agencies is to adjudicate disputes, yet “administrative adjudicators plainly lack the essential attributes that Article III requires of any decisionmaker invested with ‘the judicial Power of the United States.’”⁸¹ Is adjudication by administrative agencies therefore another instance of abandonment of a fundamental constitutional principle?

Maybe. Administrative adjudication is problematic only if it must be considered an exercise of judicial power. But an activity is not exclusively judicial merely because it is adjudicative — that is, because it involves the application of legal standards to particular facts. Much adjudicative activity by executive officials — such as granting or denying benefits under entitlement statutes — is *execution* of the laws by any rational standard,⁸² though it also fits comfortably within the concept of the judicial power if conducted by judicial officers.⁸³ This overlap between the executive and judicial functions is not surprising; under many pre-American conceptions of separation of powers, the judicial power was treated as an aspect of the executive power.⁸⁴

Agency adjudication is therefore constitutionally permissible under Article III as long as the activity in question can fairly fit the definition of executive power, even if it also fairly fits the definition of judicial power. Some forms of adjudication, however, are quintessentially judicial. The conviction of a defendant under the criminal laws, for

⁷⁹ U.S. CONST. art. III, § 1.

⁸⁰ *See id.*

⁸¹ Joshua I. Schwartz, *Nonacquiescence, Crowell v. Benson, and Administrative Adjudication*, 77 GEO. L.J. 1815, 1835 (1989).

⁸² *See Freytag v. Commissioner*, 111 S. Ct. 2631, 2654–56 (1991) (Scalia, J., concurring in part and concurring in the judgment); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 280 (1855); Frank H. Easterbrook, “*Success*” and the Judicial Power, 65 IND. L.J. 277, 280–81 (1990).

⁸³ *See Freytag*, 111 S. Ct. at 2655; *Murray's Lessee*, 59 U.S. at 284.

⁸⁴ *See REDISH, supra* note 49, ch. 5, at 9–11 (discussing Locke and Montesquieu).

example, is surely something that requires the exercise of judicial rather than executive power. Although it is difficult to identify those activities that are strictly judicial in the constitutional sense, perhaps Justice Curtis had the right answer in *Murray's Lessee v. Hoboken Land & Improvement Co.*⁸⁵ when he suggested that the Article III inquiry merges with questions of due process: if the government is depriving a citizen of "life, liberty, or property,"⁸⁶ it generally must do so by *judicial* process, which in the federal system requires an Article III court,⁸⁷ but if it is denying a citizen (to use discredited but useful language) a mere privilege, it can do so by purely executive action. Wherever the line is drawn, however, at least some modern administrative adjudication undoubtedly falls squarely on the judicial side. Most notably, the imposition of a civil penalty or fine is very hard to distinguish from the imposition of a criminal sentence (especially when the criminal sentence is itself a fine). If the latter is judicial, it is difficult to see why the former is not as well.

Some scholars believe that administrative adjudication is constitutionally permissible as long as the administrative decisions are subject to Article III appellate court review that is "adequately searching"⁸⁸ and "meaningful."⁸⁹ And there's the rub. An agency's interpretation of a statute that it administers receives considerable deference under current law.⁹⁰ More fundamentally, agency *fact-finding* is generally subject to deferential review under numerous statutes that expressly require courts to affirm agency factual conclusions that are supported by "substantial evidence."⁹¹ This kind of deferential review arguably fails to satisfy Article III. Article III certainly would not be satisfied if Congress provided for judicial review but ordered the courts to affirm the agency no matter what. That would effectively vest the judicial power either in the agency or in Congress. There is no reason to think that it is any different if Congress instead simply orders courts to put a thumb (or perhaps two forearms) on the

⁸⁵ 59 U.S. (18 How.) 272 (1855).

⁸⁶ U.S. CONST. amend. V.

⁸⁷ Legislation that does not require executive and judicial adherence to principles of due process is not "proper" under the Sweeping Clause and thus would have been unconstitutional even before ratification of the Fifth Amendment in 1791. See Lawson & Granger, *supra* note 22, at 329-30.

⁸⁸ Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 916, 918 (1988).

⁸⁹ Martin H. Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 DUKE L.J. 197, 227.

⁹⁰ See *Chevron U.S.A. Inc. v. National Resources Defense Counsel, Inc.*, 467 U.S. 837, 842-43 (1984).

⁹¹ See, e.g., 5 U.S.C. § 706(2)(E) (1988) (specifying the substantial evidence test); 29 U.S.C. § 660(a) (1988) (same).

agency's side of the scale. I do not make this claim with full confidence (and thus do not emphasize the Reagan and Bush administrations' failure to advance it), but it 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.

E. The Death of Separation of Powers

The constitutional separation of powers is a means to safeguard the liberty of the people.⁹² In Madison's famous words, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."⁹³ The destruction of this principle of separation of powers is perhaps the crowning jewel of the modern administrative revolution. Administrative agencies routinely combine all three governmental functions in the same body, and even in the same people within that body.⁹⁴

Consider the typical enforcement activities of a typical federal agency — for example, of the Federal Trade Commission.⁹⁵ The Commission promulgates substantive rules of conduct. The Commission then considers whether to 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.⁹⁶ But the agency decision, even before the *bona fide* Article III tribunal,

⁹² See Calabresi & Rhodes, *supra* note 60, at 1155–56.

⁹³ THE FEDERALIST No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

⁹⁴ See Sunstein, *supra* note 2, at 446–47.

⁹⁵ See OFFICE OF THE FED. REGISTER, NATIONAL ARCHIVES & RECORD ADMIN., UNITED STATES GOVERNMENT MANUAL 1993/1994, at 612–17 (1993).

⁹⁶ See *FTC v. Standard Oil Co.*, 449 U.S. 232, 245 (1980) (refusing to permit judicial review of the filing of an administrative complaint on the ground that such agency action is nonfinal).

possesses a very strong presumption of correctness on matters both of fact and of law.

This is probably the most jarring way in which the administrative state departs from the Constitution, and it typically does not even raise eyebrows. The post-New Deal Supreme Court has never seriously questioned the constitutionality of this combination of functions in agencies.⁹⁷ Nor, to the best of my knowledge, did Presidents Reagan or Bush ever veto or object to legislation on this ground.

II. WHAT IS TO BE DONE?

The actual structure and operation of the national government today has virtually nothing to do with the Constitution. There is no reasonable prospect that this circumstance will significantly improve in the foreseeable future. If one is not prepared (as I am) to hold fast to the Constitution though the heavens may fall, what is one supposed to do with that knowledge?

One option, of course, is to argue directly that the Constitution, properly interpreted in accordance with its original public meaning, is actually flexible enough to accommodate the modern administrative state. But although some of the claims I make in Part I with respect to Articles II and III may ultimately prove to be wrong in some important respects, the most fundamental constitutional problems with modern administrative governance — unlimited federal power, rampant delegations of legislative authority, and the combination of functions in administrators — are not even remotely close cases. The Commerce Clause does not give Congress jurisdiction over all human activity,⁹⁸ and the Sweeping Clause does not give Congress *carte blanche* to structure the government any way it chooses.⁹⁹

⁹⁷ See Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1556 (1991).

⁹⁸ See *supra* p. 1234.

⁹⁹ Although, as Lawrence Lessig and Cass Sunstein point out, the Sweeping Clause gives Congress substantial power to control the manner in which the executive department executes the laws, see Lessig & Sunstein, *supra* note 66, at 66–69, that power is limited by the Sweeping Clause's terms. Congress is permitted to create a particular governmental structure if, but only if, other constitutional provisions or background understandings establish that such a structure conforms to a "proper" conception of separation of powers. See Lawson & Granger, *supra* note 22, at 333–34; see also Lessig & Sunstein, *supra* note 66, at 67 n.278, 69 (noting that there are constitutional limits on Congress's power under the Sweeping Clause). Thus, the scope of Congress's power to structure the national government depends largely on the extent to which the Vesting Clauses of Articles II and III do or do not grant power to the President and the federal courts, respectively — and thus do not or do leave governmental powers unallocated by the constitutional text. Accordingly, Professors Lessig and Sunstein's conclusion that "the framers wanted to constitutionalize just some of the array of power a constitution-maker must allocate, and as for the rest, the framers intended Congress (and posterity) to control as it saw fit," *id.*

A second option is to insist that the administrative state can be reconciled with the Constitution if only we reject the methodology of original public meaning. I cannot enter here into a discussion of interpretative theory, but for those of us who believe that “a dash of salt” refers to some identifiable, real-world quantity of salt,¹⁰⁰ originalist interpretivism is not simply one method of interpretation among many — it is the only method that is suited to discovering the actual meaning of the relevant text.¹⁰¹

A third option, pursued at length by Bruce Ackerman, is to argue that the Constitution has been validly amended, through means other than the formal process of Article V, in a fashion that constitution-alizes the administrative state.¹⁰² Professor Ackerman claims that the

at 41, ultimately rests, as a textual matter, on their argument that the Article II and Article III Vesting Clauses are not grants of power, *see id.* at 46–52 — an argument that is very difficult to sustain either textually or structurally. *See supra* note 69.

(Patty Granger and I are grateful to Professors Lessig and Sunstein for their generous use of our article on the Sweeping Clause in their recent work on the presidency. *See* Lessig & Sunstein, *supra* note 66, at 41 n.178, 67 n.278. At the risk of appearing to quibble in the name of clarification, however: Professors Lessig and Sunstein cite our article, under a “*see also*” signal, in support of the conclusion that the framers left the allocation of some important governmental powers to “Congress (and posterity) to control as it saw fit.” *See id.* at 41 n.178. Our article neither directly supports nor directly rebuts such a claim of congressional power. It demonstrates that Congress can structure the government only through laws that are objectively necessary and proper, *see* Lawson & Granger, *supra* note 22, at 276, but whether a particular governmental structure is “proper” depends on constitutional norms external to the Sweeping Clause. Thus, as noted above, the soundness of Professors Lessig and Sunstein’s conclusion concerning congressional power depends largely on the soundness of their interpretation of the Article II and Article III Vesting Clauses. The phrase “necessary and proper” in the Sweeping Clause is a neutral player in that dispute — although the Sweeping Clause’s use of the phrase “powers vested” supports a power-granting construction of the Vesting Clauses. *See supra* note 69. By way of further clarification: Professors Lessig and Sunstein cite — and endorse — our conclusion that the word “proper” in the Sweeping Clause constrains Congress’s power, but with the proviso that they “do not agree that the clause is a limitation on Congress’s power (rather than a grant of power).” Lessig & Sunstein, *supra* note 66, at 67 n.278. In fact, on this point (as on many others), there is no disagreement among us. Ms. Granger and I emphatically maintain that the Sweeping Clause is a grant of power to Congress, *see, e.g.*, Lawson & Granger, *supra* note 22, at 270, 276, 328, but insist that it is a grant of limited rather than unlimited power.)

¹⁰⁰ *See supra* note 1.

¹⁰¹ I suspect that this claim is controversial only because of a failure to distinguish between theories of *interpretation* and theories of *adjudication*. Imagine, for example, that a second American revolution openly discards the Constitution, so that there is no chance that any conclusions about the Constitution’s meaning could have any significant effects on the real world. In the absence of any plausible concern about the practical consequences of constitutional interpretation (and putting aside for the moment the interpretative significance of precedent), it seems inconceivable that one would even think to apply anything other than originalist interpretivism when interpreting the Constitution — just as no one would today think of interpreting the Articles of Confederation by any other method. In other words, I suspect that originalist interpretivism is controversial only because its *descriptive* interpretative conclusions are widely thought to have *prescriptive* adjudicative consequences.

¹⁰² *See* ACKERMAN, *supra* note 3, at 34–57; Bruce Ackerman, *Constitutional Politics/Con-*

ratifications of the original Constitution and the Reconstruction Amendments were knowingly "illegal" under then-governing formal norms for the ratification of fundamental law.¹⁰³ The New Deal, he contends, reflected a similarly self-conscious rejection of the formal mechanisms for constitutional change. According to Professor Ackerman, if the formally deficient "ratifications" of the Constitution and the Reconstruction Amendments are legally valid, it is difficult to see why the same cannot be true of the formally deficient "ratification" of the New Deal structure of governance via the 1936 election and the concomitant Revolution of 1937.

I cannot here do justice to Professor Ackerman's elegant and still-growing edifice, so I will content myself with some preliminary thoughts. For purposes of constitutional interpretation, the creation of the Constitution is the legal equivalent of the Big Bang; the Constitution, whatever its normative significance may be, is an irreducible fact from which constitutional interpretation proceeds. Accordingly, from an *interpretative*, as opposed to a *justificatory*, standpoint, irregularities in the Constitution's ratification validate further irregularities only if the original irregularity reflects a background principle that was then incorporated into the Constitution and the subsequent irregularity conforms to that principle. Professor Ackerman's proposed method of constitutional amendment does not follow the *form* of the background principle employed by the original ratifiers/usurpers.¹⁰⁴ Furthermore, if Professor Ackerman is correct that the Reconstruction Amendments were invalid under formal constitutional rules of ratification, the obvious conclusion seems to be that *both* the Reconstruction Amendments *and* the modern administrative state are unconstitutional.

Professor Ackerman's response is that the formally deficient ratifications of the Reconstruction Amendments, which occurred under the regime of the Constitution of 1789, "provide us with 'historic

stitutional Law, 99 YALE L.J. 453, 510-15 (1989) [hereinafter Ackerman, *Constitutional Politics*]; Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1051-57 (1984).

¹⁰³ The Constitution was ratified in a manner inconsistent both with the amendment process specified in the Articles of Confederation and with the ratification procedures of a number of state constitutions. The ratification of the Reconstruction Amendments involved something very close to vote fraud. See Ackerman, *Constitutional Politics*, *supra* note 102, at 500-07.

¹⁰⁴ Akhil Amar has argued that the ratification of the original Constitution was valid because it was consistent with an accepted background norm for the ratification of fundamental law: ratification by direct majority vote of "We the People." That norm, he argues, is carried forward in the existing Constitution as an unenumerated right of the people, so an amendment ratified by direct majority vote would be constitutionally valid. See Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1044 (1988). This analysis, however, cannot save the administrative state, because no such amendment has ever been so ratified.

precedents[] [for such ratifications] which we are no more justified in ignoring than *Marbury v. Madison*.¹⁰⁵ But if precedent is a validating concept under the Constitution, why not invoke precedent more straightforwardly? This suggests a fourth option for dealing with the modern administrative state: conclude, with Henry Monaghan, that because “[p]recedent is, of course, part of our understanding of what *law is*,”¹⁰⁶ the administrative state’s firm entrenchment through precedent constitutes legal validation. I have elsewhere argued, however, that the use of horizontal precedent in federal constitutional interpretation is itself forbidden by the Constitution.¹⁰⁷

Those who believe in some form of precedent have the fifth option, ingeniously advanced in a recent manuscript by Peter McCutchen,¹⁰⁸ of seeking “a form of constitutional damage control.”¹⁰⁹ According to McCutchen, the administrative state is here to stay, and even a very weak theory of precedent ratifies this result.¹¹⁰ But our goal, his theory continues, should be to approximate the “first-best” world as nearly as we can from within a state of constitutional disequilibrium. As McCutchen puts it:

Where unconstitutional institutions are allowed to stand based on a theory of precedent, the Court should allow (or even require) the creation of compensating institutions that seek to move back toward the constitutional equilibrium. The Court should allow such institutions even where the compensating institutions themselves would have been unconstitutional if considered standing alone.¹¹¹

For example, the legislative veto, standing alone, is plainly unconstitutional because it violates the Article I presentment requirement.¹¹² But the legislative veto helps compensate for widespread, unconstitutional delegations to agencies. A first-best world would have neither delegations nor legislative vetoes, but a world with both delegations

¹⁰⁵ Ackerman, *Constitutional Politics*, *supra* note 102, at 508 (paraphrasing *Coleman v. Miller*, 307 U.S. 433, 449 (1939)).

¹⁰⁶ Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 748 (1988) (emphasis added).

¹⁰⁷ See Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL’Y 23, 25–33 (1994). It is perhaps a bit arrogant to toss off a proposition of this magnitude so casually, but the *prima facie* case against precedent is undeceptively simple: if interpreters have the power and duty to prefer the Constitution to statutes or executive acts because the Constitution is supreme law, they *a fortiori* have the same power and duty to prefer the Constitution to prior judicial decisions.

¹⁰⁸ Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best* (October 20, 1993) (unpublished manuscript, on file with the Harvard Law School Library).

¹⁰⁹ *Id.* at 3.

¹¹⁰ See *id.* at 26–32.

¹¹¹ *Id.* at 3, 4.

¹¹² U.S. CONST. art. I, § 7, cls. 2–3.

and legislative vetoes is closer to the correct constitutional “baseline” than is a world with only delegations.¹¹³

If there is any proper role for precedent in constitutional theory, McCutchen is probably right: if an incorrect precedent creates a constitutional disequilibrium, it is foolish to proceed as though one were still in an equilibrium state. As discussed above, however, I do not believe that there is any proper role for horizontal precedent in constitutional theory.¹¹⁴

There remains a sixth option: acknowledge openly and honestly, as did some of the architects of the New Deal, that one cannot have allegiance both to the administrative state and to the Constitution. If, however, one then further follows the New Deal architects in choosing the administrative state over the Constitution, one must also acknowledge that all constitutional discourse is thereby rendered problematic. The Constitution was a carefully integrated document, which contains no severability clause. It makes no sense to agonize over the correct application of, for example, the Appointments Clause, the Exceptions Clause, or even the First Amendment when principles as basic to the Constitution as enumerated powers and nondelegation are no longer considered part of the interpretative order. What is left of the Constitution after excision of its structural provisions, however interesting it may be as a matter of normative political theory, simply is not the Constitution. One can certainly take bits and pieces of the Constitution and incorporate them into a new, hypothetical document, but nothing is fostered other than intellectual confusion by calling that new document the Constitution.¹¹⁵

Modern champions of the administrative state, however, seem loathe to abandon the sheltering language of constitutionalism. But tactical considerations aside, it is not at all clear why this is so. Perhaps instead of *assuming* that the label “unconstitutional” should carry normative weight, the constitutional problems of the administrative state can lead us to ask *whether* it should carry any weight — with judges or anyone else. After all, the moral relevance of the Constitution is hardly self-evident.¹¹⁶

¹¹³ See McCutchen, *supra* note 108, at 62–65.

¹¹⁴ See *supra* note 107.

¹¹⁵ See Suzanna Sherry, *An Originalist Understanding of Minimalism*, 88 NW. U. L. REV. 175, 182 (1993). Of course, there may be *tactical* reasons for casting normative political arguments in the (often unaccommodating) language of constitutionalism. If official actors or the public believe, or act as though they believe, that the Constitution matters, effective rhetorical strategy requires that one couch arguments in constitutional language — and perhaps even that one lie about one’s goals and methods. But truth-seekers have no interest in such rhetorical games.

¹¹⁶ See Gary S. Lawson, *An Interpretivist Agenda*, 15 HARV. J.L. & PUB. POL’Y 157, 160–61 (1992); Larry Simon, *The Authority of the Constitution and Its Meaning: A Preface to a Theory of Constitutional Interpretation*, 58 S. CAL. L. REV. 603, 606–07, 613–19 (1985).

And at that point, the humble lawyer must plead incompetence. Questions about the Constitution's normative significance, as with all questions about how people ought to behave, are distinctively within the domain of moral theory. A legal scholar *qua* legal scholar can tell us, as a factual matter, that one must choose between the Constitution and the administrative state. He or she can tell us that the architects of the New Deal chose the administrative state and that that choice has been accepted by all institutions of government and by the electorate.¹¹⁷ But only the best of moral philosophers can tell us which choice is correct.¹¹⁸

¹¹⁷ Political candidates seeking office typically do not call for abolishing administrative government in the name of the Constitution, which suggests that such a platform probably would not garner a large percentage of the popular vote.

¹¹⁸ See Gary S. Lawson, *The Ethics of Insider Trading*, 11 HARV. J.L. & PUB. POL'Y 727, 778 (1988) ("It is conceivable that the ethical, epistemological, and metaphysical problems of the ages will be solved by an article in a twentieth-century, English-language law journal. But I rather doubt it.").