

Constitutional Administration

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Administrative law rests on two fictions. The first, the non-delegation 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. For the sake of constitutional appearances, this formalist reading requires us to accept as a matter of practice not only unconstitutional delegation, but also an unconstitutional violation of separation of powers, while pretending that neither violation is occurring as a matter of doctrine.

This Article argues that we ought to accept the delegation of legislative power because doing so can help remedy the undermining of the separation of powers. It seeks to make one functionalist move in order to deploy formalist tools to restore some semblance of the original constitutional scheme of separate powers. Accepting delegation 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 properly conceived legislative veto is constitutional.

This Article seeks to take both formalism and functionalism more seriously. Modern formalism has merely served to mask the administrative state’s unconstitutional foundations by pretending they do not exist. Functionalism, for its part, has failed to offer limiting principles and has aimed largely at justifying modern administrative practices without much concern for constitutionalism at all. A functionalist approach to delegation allows us to deploy formalism—but an honest formalism—to the separation of powers, and to take both functionalism and formalism more seriously.

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I. 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 matter of formalism, assumes that Congress does not delegate legislative power to agencies because under Article I, § 1, only Congress may make law. The doctrine also assumes that when agencies are making rules (or adjudicating them), they are exercising “quasi-legislative” or “quasi-judicial,” but ultimately only executive, power because Article II, § 1, declares that the president and his administration may execute but not make or adjudicate the law.¹

One school of formalists, recognizing that this is what the Constitution requires, rejects the modern administrative state on the grounds that, although the doctrine pretends that Congress does not delegate legislative power to agencies, that is exactly what Congress routinely does. 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.²

Functionalists, on the other hand, are either entirely accepting of this state of affairs—arguing that other procedural mechanisms, such as those required by the Administrative Procedures Act (“APA”), may acceptably replace the constitutional separation of powers³—or advocate for unoriginalist

¹ U.S. CONST. Art. I, § 1; U.S. CONST. Art. II, § 1; *see infra* Part II.B.

² PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014) (answering “yes”); 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).

³ Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 448 (1987) (discussing the compromise on procedural protections in the Administrative Procedure Act); *id.* at 492 (arguing that the vast changes in the national government since the founding “call for an approach 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. Michael, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. __ (2015); *see also* Peter Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 577-78, 581-82, 597 (1984).

Strauss argues that all three branches must exercise control over administrative agencies such that no one branch gains too much control, but, he claims, “it is not terribly important to number or allocate the horses that pull the carriage of government.” Strauss, *supra* note 3, at 580; *see also id.* at 596 (explaining that constitutional separation of powers has little relevance to the administrative state). This Article argues that, on the contrary, it is very important how we do the allocation, if the goal is not just *some* kind of checks and balances and a functional separation of powers but a *constitutional* separation of powers. Strauss admits that his view of administration—which mostly accepts the modern administrative state as it is—is not reconcilable with the Constitution, *id.* at 580-81, in the same way that Gary Lawson,

practices to accommodate modern administrative practice but to give it more of an originalist spirit.⁴ Justice Byron White’s famous dissent in *INS v. Chadha* may be classed among these latter functionalists.⁵

This Article explores a new approach to resolving modern administrative law’s two core constitutional difficulties. I argue that we ought to accept, as a functionalist matter, the delegation of legislative power to agencies. It does us no good for our doctrine to mask an unconstitutional foundation of modern administration for the mere sake of constitutional appearances. I argue that much more can be accomplished if our doctrine recognizes the practical reality of legislative delegation. Indeed, if we make this one functionalist move—if we accept one unoriginalist precedent at the core of modern administrative government—that opens to us a panoply of formalist solutions to the problem of separation of powers, the combining of which the Framers understood to be a far worse constitutional violation and the very definition of tyranny.⁶ And, as we shall see, these formalist solutions 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, that allows us to acknowledge openly that the administrative state exercises not only executive, but also legislative and judicial, power.⁷ We can then delineate the legislative, executive, and judicial components of administration and empower each constitutional branch of government over the component corresponding to its own constitutional function. In this way—under what I call constitutional administration—administrative law can be made more consistent with the original constitutional text without sacrificing its engendering values. The only constitutional sacrifice we must make is one that has in any event been made in practice and that will not be undone. Delegation has become part of our constitutional order.⁸

who opposes the modern administrative state, thinks that one must choose either the administration state or the Constitution. See Gary Lawson, *supra* note 2.

⁴ 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, 1-4, 22, 37-39 (1994); Note, Emily S. McMahon, *Chadha and the Nondelegation Doctrine: Defining A Restricted Legislative Veto*, 94 YALE L.J. 1493, 1494 (1985).

⁵ *INS v. Chadha*, 462 U.S. 919, 967-1003 (1983) (White, J., dissenting).

⁶ See *infra* notes 19-20 and accompanying text.

⁷ Indeed, this is often recognized. See *infra* notes 60-62 and accompanying text. Some recognize it as a problem, whereas others see it as a virtue. See, e.g., Sunstein, *supra* note 3, at 446 (noting that some modern scholars argue that one of the problems “is that the New Deal agency combines executive, judicial, and legislative functions”); *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).

⁸ 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 (2015). Professor

The legislative veto is one example of the possibilities of this model of administration.⁹ The debate over the legislative veto normally consists in two positions: The overwhelming majority accepts that the legislative veto is unconstitutional. Some, however, accept its unconstitutionality but argue that we should permit it nevertheless because the administrative state as it exists is *also* unconstitutional.¹⁰ That is, the legislative veto is an otherwise unconstitutional mechanism that makes the unconstitutional administrative state somewhat more constitutional. This view embraces the two formalist fictions of non-delegation and separation of powers.

Constitutional administration breaks ground in this debate. With its 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. Once we recognize that in some instances—such as for rulemakings—agencies are in the throes of *making* a law, however, then there has not been a law yet made that requires such bicameralism and presentment.

New possibilities arise for executive power.¹¹ Constitutional administration posits that a presidential supervisory and removal authority ought to extend equally to executive branch agencies and to independent commissions—but only with respect to the executive functions of either. I suggest that presidential administration¹² 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.¹³

Watts' piece focuses on the implications of judicial review of rulemaking, *id.* at 1024-52, which I discuss only cursorily in Part III.C.2, and serves as an excellent complement to that section even though my analysis of *Chevron* deference differs rather substantially. The piece also confirms the view that modern non-delegation is a fiction and there is significant value in recognizing delegation as reality. *See id.* at 1005-07, 1010-24. Professor 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 non-delegation fiction.

⁹ *See infra* Part III.A.

¹⁰ McCutchen, *supra* note 4, at 37-39.

¹¹ *See infra* Part III.B.

¹² *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

¹³ As I explain further below, I do not take a position on the question of whether all of the non-legislative and non-judicial functions of agencies are "executive," or rather there exists another category of power called "administrative" over which Congress can assign control to officials other than the President. *Compare* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 5-42, 70-78 (1994), *with* Steven G.

But it ought also to please the traditional advocates of agency independence or congressional administration because the President will have non-unitary, perhaps even minimal, power over the administration's legislative and judicial functions.

The judicial possibilities comprise the final piece.¹⁴ First, this model justifies significantly limiting *Chevron* deference by drawing a parallel to the presumption of constitutionality when reviewing Congressional legislation.¹⁵ Second, this Article shows that constitutional administration actually better explains some doctrine. For example, the difference between judicial review of agency inaction in the rulemaking context versus the enforcement context coheres with this model.¹⁶

Third,¹⁷ the model agrees with others who have argued that the vast majority of administrative adjudications that currently exist—usually adjudications over benefits, such as social security or disability—would remain untouched because they are executive in nature. But it similarly proposes that adjudications that impose criminal penalties or civil fines or that otherwise affect life, liberty, or traditional property—the stuff of 1789 Westminster courts, to borrow a phrase from bankruptcy law—must receive *de novo* review by an Article III court. This is the one piece of the model that does not depend on a rejection of the non-delegation fiction. This Article adds to the literature, however, by pointing to an obvious precedent for the review proposed here: the method of magistrate and bankruptcy judges delivering reports and recommendations to Article III district judges. Constitutional administration requires administrative law judges, in any truly judicial adjudication and absent consent of the parties to the proceedings, similarly to deliver reports and recommendations to Article III judges.

To be sure, these insights may not apply to significant swaths of administrative activity that defy easy classification as legislative, executive, or judicial activity. As for those activities, Congress and the President can continue seeking compromises among themselves to establish the appropriate controls and structures. But at least for some important classes of cases—rulemaking, 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.

Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, passim (1994); see *infra* Part III.B.1. What I will argue—contra Lessig & Sunstein—is that *prosecution* is, at minimum, an executive and not an administrative power. 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.

¹⁴ *Infra* Part III.C.

¹⁵ *Infra* Part III.C.2.

¹⁶ *Infra* Part III.C.3.

¹⁷ *Infra* Part III.C.4.

This Article will show that to enact its model of constitutional administration, all that is required are three short, relatively uncomplicated Acts of Congress each with existing statutory precedent.¹⁸ Perhaps even 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 the Article proceeds as follows. Part II offers a brief discussion of the importance of separation of powers and the implications of the rise of administration and its two foundational fictions. Part III, the centerpiece, attempts to delineate the administrative state's different functions and demonstrate how each constitutional branch of government can assert more control over the administrative functions corresponding to its own constitutional function. It then explains the implications for the legislative veto, for presidential administration and unitary executive theory, and for judicial review. It proposes three short and uncomplicated statutes, each politically possible and with existing precedent, to bring these insights into effect. Part IV considers three objections and shows that administrative law values are retained. Part V concludes.

II. THE PROBLEM OF MODERN ADMINISTRATION

This Part establishes the problem constitutional administration seeks to redress. To do so, it must first convince the reader that the administrative state rests on two formalist fictions that mask its unconstitutional foundations. It must then persuade that we ought to accept as a functional matter one of these foundations 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 combination of powers in single bodies. This Part claims that that second foundation works a far greater and more dangerous violation to the constitutional order. The remainder of this Article will then show that by accepting the first we can reject the second.

A. The Power of Separation of Powers

James Madison declared that the combination of powers 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 the accumulation of power, or with a mixture of powers,

¹⁸ See *infra* Parts III.A.6, III.B.4, III.C.5.

having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system.”¹⁹ Many in the Founding generation repeated this refrain.²⁰

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,” which was a mixture of the various *classes* of men—Crown, lords, and commons—but not a regime in which existed a separation of *powers*.²¹ The competing classes of society, each with differing interests, could check one another and prevent one from gaining too much power over the others.²² The system depended on monarchical, aristocratic, and hereditary elements.

¹⁹ THE FEDERALIST NO. 47 (James Madison), at 298 (Clinton Rossiter ed., 1961).

²⁰ See, e.g., THOMAS JEFFERSON, *Notes on the State of Virginia* [need full cite]: “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.”; John Adams, Letter to Richard Henry Lee, Nov. 15, 1775, *quoted in* M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 146 (2d ed. 1998) (“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 (1998) (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 the executive, 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*, Book 11, ch. 6, at 157 (Cohler et al. eds., Cambridge 1989) (1748).

²¹ THE FEDERALIST NO. 47 (James Madison), *supra* note 19, at 299 (discussing blended powers in the British constitution); Martin S. Flaherty, *The Most Dangerous Branch*, 105 *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, *AS FAR AS REPUBLICAN PRINCIPLES WILL AMIT: ESSAYS BY MARTIN DIAMOND* 61 (William A. Shambra ed., 1992). For a discussion of the “balanced constitution,” see VILE, *supra* note 20, at 58-82. 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.*

²² For a discussion of this understanding of the mixed regime, see DIAMOND, *supra* note 21, at 60-61, and VILE, *supra* note 20, at 25, and for a discussion of its developments

What was to be done in the democratic and revolutionary fervor of 1776? As M.C.J. Vile describes, Americans understood the separation of powers to be the natural replacement of the mixed regime. Functional separation had begun to exist in the English constitutional system before the American Revolution.²³ That background and the evolution of the doctrine in Montesquieu provided the Americans the intellectual foundation for such an adaptation. Once the non-democratic elements of government are eliminated, all that is left from 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.”²⁴

At first such developments demonstrated an “antipathy towards checks and balances,”²⁵ but very quickly the revolutionaries understood that a complete separation of powers, where the executive had no check on the legislature, could be as tyrannical as no separation at all. “[I]t was the problem of placing limits on the legislative power that made this extreme doctrine unworkable.”²⁶ Thus the Americans began looking toward “their experience of the balanced constitution for the solution to their problems.”²⁷ By the time the Federal Constitution was framed, the doctrine had evolved to incorporate checks and balances as the only safeguard for separation of powers and for liberty itself.

Hence the Constitution enshrined the separation of powers by “vesting” legislative power in Congress, “vesting” executive power in the President, and “vesting” judicial power in the courts.²⁸ But these powers would not be entirely separate, a point made famous by Madison: “[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.”²⁹ 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 other branch, thereby

under the balanced constitution, see VILE, *supra* note 20, at 58-82 (and particularly at 81 for a summary).

²³ VILE, *supra* note 20, at 58-82; *id.* at 81 (“Here then, set out with great clarity, is the English mid-eighteenth-century amalgam of mixed government, legislative supremacy, and the separation of powers.”).

²⁴ *Id.* at 146.

²⁵ *Id.* at 155.

²⁶ *Id.* at 158.

²⁷ *Id.* at 161.

²⁸ Calabresi & Prakash, *supra* note 13, at 567, 569, 588.

²⁹ THE FEDERALIST NO. 51 (James Madison), *supra* note 19, at 318-19.

allowing its own ambitions and institutional interests to serve as checks on the ambitions and institutional interests of the others.³⁰

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. The British government had not been republican; but it was still thought to be, at least in its uncorrupted form, constitutional. (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; rather, he was unfit to rule such a people because he was an unjust king.³¹) 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.³² And separation of powers with checks and balances—where each branch has some overlap with another—ensures that at each stage of that process abuse is less likely. 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.”³³

The separation of powers was also understood to enhance democracy and help solve the problem of faction. Separation of powers was in part a response to the republican experiments in the time of the Articles of Confederation, in which state legislatures often exercised the whole power of government.³⁴ Perhaps it would be more accurate to say that checks and balances was a response to a pure separation of powers (in which the legislative branch happened to predominate).³⁵ Either way, factions more easily gain control over one body of men than three. This may be another way

³⁰ 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.* at ART. II, § 2, cl. 2; and both the legislative and judicial branches have a role in impeachments, *id.* at 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 “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 19, at 299.

³¹ Martin Diamond had made this point. DIAMOND, *supra* note 21, at 214. For the relevant passage in the Declaration, see DECLARATION OF INDEPENDENCE, para. 30 (“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.”).

³² I take this to be Montesquieu’s argument in the quotation cited in *supra* note 20.

³³ VILE, *supra* note 20, at 133.

³⁴ Flaherty, *supra* note 21, at 1763-68.

³⁵ See *supra* note 26 and accompanying text.

of saying the same thing—that separation of powers preserves liberty—because faction undermines liberty. Still, separation of powers was understood to be not only necessary 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, for example, was a lack of an executive. Congress foundered time and again as it tried to take on an executive role, finally ceding much of that role to various secretaries.³⁶ Separation of powers would create a specialized division of labor. Not only that, but as Martin Diamond has argued, pride and self-interest would lead the officers of each competing branch to seek to do their jobs well.³⁷ Or, as M.C. Vile has said in his interpretation of Montesquieu, the personnel of each branch require a different sort of temperament, whether the passion and energy of executive officials or the “sang-froid” or indifference of judges.³⁸ And a government well administered is less likely to fall into the anarchy and illiberalism of the first decade after independence.³⁹

I have sought to show in this quick historical overview that the very essence of American constitutionalism 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. And a *free* government need not have been a *republican* 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 could serve as an effective check on the ambition, interest, and pride of all the others.

B. The Rise of Administration: The Birth of Two Fictions

The core of American constitutionalism has withered as administrative government has risen. Unwilling to accept the anti-republican premises of the administrative state (extolled explicitly by its progressive founders), American administrative law doctrine has provided cover for both an anti-republican and an anti-constitutional regime. This Part explains how this has occurred.⁴⁰ It then claims that we ought to accept to at least some degree the anti-

³⁶ Flaherty, *supra* note 21, at 1771-74; Sunstein, *supra* note 3, at 432.

³⁷ DIAMOND, *supra* note 21, at 67.

³⁸ VILE, *supra* note 20, at 100.

³⁹ We might recall the words of Alexander Pope, quoted by Alexander Hamilton in *The Federalist*: “For forms of government let fools contest—That which is best administered is best.” *FEDERALIST NO. 68* (Alexander Hamilton), *supra* note 19, at 413.

⁴⁰ For another account of the rise of the delegation doctrine (and its fictional nature), see Watts, *supra* note 8, at 1010-18.

republicanism of modern administration. In so accepting, 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 1887,⁴¹ “but it was not until the New Deal that the modern agency became a pervasive feature of American government.”⁴² Before then, the Supreme Court never really tackled the question of legislative delegation, “uph[olding] 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.”⁴³ In *J.W. Hampton, Jr. & Co. v. United States*, however, the Court confronted the President’s power (delegated from Congress) to set tariff rates.⁴⁴ Article I, section 8 of the Constitution grants Congress, not the President, the power to lay and collect taxes and duties.⁴⁵ The Court 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.”⁴⁶

In no fewer than three of the leading state and federal cases on this question the Court cited, an intelligible principle suggested that Congress was not delegating legislative power at all, and that 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.⁴⁷

Then a railway rate case from Minnesota:

⁴¹ 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).

⁴² Sunstein, *supra* note 3, at 510 n.9.

⁴³ Peter H. Aranson et. al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 7 (1982) (citing *Cargo of The Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382, 386 (1813); *United States v. Grimaud*, 220 U.S. 506, 517 (1911)).

⁴⁴ 276 U.S. 394, 404 (1928).

⁴⁵ U.S. CONST. ART. 1, § 8.

⁴⁶ *J.W. Hampton*, 276 U.S. at 409.

⁴⁷ *Cincinnati, W. & Z.R. Co. v. Clinton Cnty. Comm’rs*, 1 Ohio St. 77, 88-89 (1852) (emphasis added), *quoted in id.* at 407.

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. It can neither make or unmake a single provision of law. *It is merely charged with the administration of the law*, and with no other power.⁴⁸

Finally, citing another tariff case the Court confronted nearly forty years earlier, Chief Justice Taft summarized:

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.⁴⁹

It becomes clear, then, that the birth of the administrative state was deemed constitutional on the understanding that Congress was not delegating legislative power and that the executive branch thus only executed the law. Modern administrative agencies could not be constitutional *unless* this was 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 conditions. Thus the president or the commission does not really exercise much discretion in the “the application of such rules to particular situations and the investigation of facts.”⁵⁰

⁴⁸ State ex rel. R.R. & Warehouse Comm’n v. Chicago, M. & St. P. Ry. Co., 37 N.W. 782, 788 (Minn. 1888), *rev’d sub nom.*, Chicago, M. & St. P. Ry. Co. v. State of Minn. ex rel. R.R. & Warehouse Comm’n, 134 U.S. 418 (1890) (emphasis added), *quoted in J.W. Hampton*, 276 U.S. at 408-09.

⁴⁹ *J.W. Hampton*, 276 U.S. at 410-11 (emphasis added).

⁵⁰ *J.W. Hampton*, 276 U.S. at 408 (quoting Interstate Commerce Comm’n v. Goodrich Transit Co., 224 U.S. 194, 214 (1912)).

Even if true, such a narrow reading of the delegation doctrine⁵¹ did not last long. Many commentators have observed that it provides little if any 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. Thus the President or independent agencies routinely exercise “discretion” in rulemaking and are pivotal in determining “expediency of the law, and what it shall be.” Professor Lawson has described the problem: “The Supreme Court has not invalidated a congressional statute on nondelegation grounds since 1935. This has not been for lack of opportunity.”⁵² Many commissions exist with extraordinarily broad discretion and lawmaking powers.

For example, as Lawson highlights, 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.”⁵³ The Federal Communications Commission has the power to grant broadcast licenses to applicants “if public convenience, interest, or necessity will be served thereby.”⁵⁴ To these we might add the commissions in the United States Code with power to set “just and reasonable” rates,⁵⁵ or the recent Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) which, 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.”⁵⁶

Even though congressional delegations have become so broad as to be, for all intents and purposes, lawmaking, the fiction that they are not legislative delegations remains unimpeded in the case law.⁵⁷ We see the strength of this fiction in *INS v. Chadha*, which we shall encounter in our discussion of the legislative veto:

⁵¹ I use the term interchangeably with “non-delegation” because, as I argue here, non-delegation is a fiction, and, as others have argued, the non-delegation doctrine was never very constraining. *See, e.g.*, Peter H. Aranson et. al., *supra* note 43, at 7.

⁵² Lawson, *supra* note 2, at 1240.

⁵³ 15 U.S.C. § 78j(b).

⁵⁴ 47 U.S.C. § 307(a).

⁵⁵ *See, e.g.*, 16 U.S.C. § 824d, 824e (Federal Energy Regulatory Commission).

⁵⁶ 12 U.S.C. §§ 5384, 5386.

⁵⁷ *See, e.g.*, *Whitman v. Am. Trucking Associations*, 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 [documents of § 108] and allowing an adequate margin of safety, are requisite to protect the public health” was not a delegation of legislative power).

To be sure, some administrative agency action—rule making, 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.”⁵⁸

This fiction, alive and well in our jurisprudence, was given its most blunt expression in the recent case *City of Arlington v. FCC*. 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.’”⁵⁹

What is the consequence of this formalist fiction? Even though our jurisprudence pretends that the executive 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.” The scholars who recognize that the administrative state combines all three powers are legion.⁶⁰ And even Supreme Court justices, when speaking in dicta, recognize it:

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

⁵⁸ *I.N.S. v. Chadha*, 462 U.S. 919, 954 n.16 (1983) (internal citations omitted).

⁵⁹ 133 S.Ct. 1863, 1873 n.4 (2013). Many scholars also recognize this fiction. *See, e.g.*, Flaherty, *supra* note 21, at 1728 (describing the administrative state as “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 Environmental Protection Agency under the Clean Air Act to be executive in nature; such delegation are “legitimate only if they [do] not represent legislation”); *see generally* Watts, *supra* note 8, at 1005-07, 1024-52.

⁶⁰ *See, e.g.*, Lawson, *supra* note 2, at 1233 (“agencies typically concentrate legislative, executive, and judicial functions in the same institution, in simultaneous contravention of Articles I, II, and III”); Strauss, *supra* note 3, at 583 (noting that the functions agencies perform “believe simple classification as ‘legislative,’ ‘executive,’ or ‘judicial,’ but partake of all three characteristics”); Sunstein, *supra* note 3, at 446 (noting that some modern scholars argue that one of the problems “is that the New Deal agency combines executive, judicial, and legislative functions”).

is not an occasional or isolated exception to the constitutional plan; it is a central feature of modern American government.⁶¹

In the words of David Rosenbloom: “In essence, all three governmental functions have been collapsed into the administrative branch. Thus, public administrations make rules (legislation), implement those 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.”⁶² Except that 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. Modern formalism—which we now see is really a *fictitious* formalism—forecloses remedies such as a legislative veto because it pretends that all administrative power is executive power.⁶³ Constitutional administration offers a formalist solution to the problem of formalist jurisprudence. We need only reject the fictitious formalism of non-delegation. Let us recognize that Congress delegates legislative power. Let us recognize that agencies exercise not only executive, but also legislative and judicial, power. Formalism can then help rein in the administrative state by recognizing that, depending on the particular administrative function at hand, the corresponding constitutional branches of government can reassert controls 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 not accepting a violation of the separation of powers? That question requires significant theoretical treatment for which we have not the space. I thus leave the reader with a few observations. First, what I am not arguing: that legislative delegation is constitutional as an original matter. Other scholars have made this argument, or have at least argued that delegation is within the realm of possible original meanings of Article I, Section One’s Vesting Clause.⁶⁴ Common sense defies that proposition. First, the language of Article I states that the legislative power therein granted “shall” be vested in Congress.⁶⁵ I can think of no clearer way of expressing the

⁶¹ *City of Arlington*, 133 S. Ct. at 1877-78 (Roberts, C.J., joined by Kennedy and Alito, JJ., dissenting).

⁶² David H. Rosenbloom, *Public Administrative Theory and the Separation of Powers*, 43 PUB. ADMIN. REV. 219, May-Jun. 1983, at 225.

⁶³ See *infra* Part III.A.1 (discussing *INS v. Chadha*); see also *infra* Part III.B.5 (discussing *Bowsher v. Synar*).

⁶⁴ 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); Watts, *supra* note 8, at 1021-24; see also *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 489 (2001) (Stevens, J., concurring).

⁶⁵ U.S. CONST. ART. I, § 1.

point without bordering on redundancy.⁶⁶ Even more fundamentally, if Congress can delegate to whomever it wishes, republican government as we know it could cease to exist without any recurrence to the people in a constitutional convention. But the very nature and core of our regime cannot be changed except by such a recurrence.

I argue rather that delegation ought to be accepted even if originally unconstitutional, for a few reasons. First, few can deny that the separation of powers is far more critical to the survival of liberty than a firm non-delegation principle. I have tried to show this above.⁶⁷ To be sure, the Framers expected that a republican legislature would best secure liberal and public-minded legislation; thus, lawmakers had to be elected by the people. But they 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 exercised by a plurality of hands, and not by a single one.* 173 despots would surely be as oppressive as one."⁶⁸ Having republican 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 were a just king—if he preserved the liberty of the people.⁶⁹ Thus, that unelected agencies "make law" matters little in comparison to the great danger arising from the combination of all powers of government in them.

Second, even if we accept delegation, that does not mean that Congress has no role in supervising the lawmaking of agencies. Congress still makes law to a large degree and otherwise can ensure that agencies make law according to its wishes. I do 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.⁷⁰ Moreover, as we shall see, accepting the reality of delegation

⁶⁶ Professor Merrill's intricate arguments notwithstanding. *See* Merrill, *supra* note 64, at 2114-39. His argument boils down to the text's—and the historical record's—silence on delegation. But it strikes me as plainly the better reading to consider 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, e.g., 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?

⁶⁷ Part II.A *supra*.

⁶⁸ THOMAS JEFFERSON, *Notes on the State of Virginia* (source).

⁶⁹ *See supra* note 31 and accompanying text.

⁷⁰ Hence Professors Merrill and Watts argue that because delegation of legislative power is constitutional, it makes no sense to require an intelligible principle. Merrill, *supra* note 64, at 2165 ; Watts, *supra* note 8, at 1021 n.109, 1022 n.117. By recognizing delegation as unconstitutional, we at least have some semblance of a guarantee of republican rule.

allows Congress to assert *more* control over agency rulemaking—by, for example, exercising a properly conceptualized legislative veto.⁷¹ By thus accepting delegation we actually mitigate its harms under current jurisprudence.

Lastly, surely there is great truth in the observation that delegation has become a part of our constitutional order. The administrative state simply could not exist without it.⁷² Moreover, delegation has to some extent always been with us, as far back as the First Congress.⁷³ Prudence thus demands that we accept it to a large degree. In contrast, the concentration of all powers of government in the hands of agencies has not become embedded in our constitutional order. We see this by all the efforts to ensure checks and balances and some replacement for separation of powers within agency processes.⁷⁴ Although the progressive founders of modern administration saw the concentration of power as a virtue,⁷⁵ 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 we shall ensure those checks. Constitutional administration permits us to use the separation of powers at the core of our constitutional system.

III. A TRIPARTITE THEORY OF ADMINISTRATIVE LAW

We are now ready to reject both fictions and accept the first unconstitutional foundation of administrative law. But we need not accept the second. The remainder of this Article seeks to redress that second, greater constitutional violation and show how each constitutional branch of

⁷¹ See *infra* Parts III.A.1-3.

⁷² *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 Power 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 delegation doctrine is what has allowed it).

⁷³ One of the earliest statutes provided for the payment of previously granted pensions “under such regulations as the President of the United States may direct.” *Watts*, *supra* note 8, at 1014 (quoting Act of Sept. 29, 1789, ch. 24, 1 Stat. 95, 95). Interestingly, this may be some evidence that delegation was understood to be constitutional. But Professor Watts explains that these early delegations “ran directly to the President and touched upon fairly narrowly defined topics, such as military, tax, and internal government affairs . . .” *Id.*

⁷⁴ See sources cited *supra* note 3.

⁷⁵ JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938); Lawson, *supra* note 2, 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 62, at 225 (“[I]n this country [the administrative state] represents an effort to reduce the inertial qualities of the system of separation of power.”).

government can assert control over the functions of the administrative state corresponding to its own constitutional function. I submit that these demonstrations can be put into effect in the modern day; reform is possible. I suggest that three short, uncomplicated Acts of Congress, addressing each constitutional branch of government and each with existing statutory precedent, are all that is required. There are no obvious political hurdles to enacting these changes. Although these three acts would work a significant constitutional reform of the administrative state, none creates a tectonic shift in the everyday workings of agencies.

For the sake of ease, I summarize what is to come. First, under constitutional administration, a properly conceived legislative veto is constitutional. Under administrative law's reigning formalist fictions, the Supreme Court in *INS v. Chadha* and subsequent commentators distinguished between the nature of the act of vetoing, which was considered a legislative act, with the nature of the vetoed act, which was considered executive. Once we accept, however, that certain administrative acts are legislative, a legislative veto of *those* acts becomes constitutional. I then use the Rules Enabling Act as a model for a proposed Rulemaking Enabling Act. 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. Congress could take no action and the rulemaking would then become law; it could amend the rulemaking in enacting it as a statute, as with the Rules Enabling Act; or it could veto the rules.

Once Congress asserts control over the lawmaking functions of the administrative state, far less risk inheres in modern presidential administration. Although the President will continue to have a role in the rulemaking process just as he has a role in the legislative process itself, opponents of a unitary executive will have much less to fear from a chief executive under this model. 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 and the executive-branch Environmental Protection Agency; but correspondingly, the President must have renewed authority over the executive functions of both. The debate over the status of independent agencies must therefore be reconsidered, but very little existing doctrine must change. Indeed, if Congress were to enact the modest reform of independent agencies proposed here, modern constitutional doctrine would create no obstacles.

Finally, constitutional administration requires a simple reform, again with statutory precedents, to the judiciary's role in reviewing administrative actions. As previously suggested, and as this Part explores further, most administrative adjudications by commissions or ALJs would remain undisturbed because they are arguably executive in nature. When, however, it comes to the stuff of 1789 Westminster—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. Although I believe this process is required as a constitutional matter, Congress can enact it quite easily by following the models of bankruptcy and magistrate judges.

Constitutional administration retains 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 thus most of the time administrative rules would become law much as they already do today. Administrative agencies would still be respected for their technical expertise in the relevant areas; but insofar as what must be done with that expertise is a political question, the political branches of government now become truly responsible. This model, in other words, retains the values of expertise and efficiency that commended administrative law to its progressive founders—but it retains 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.⁷⁶ The first such veto provision was enacted in 1932 and, by the time it was struck down, 295 legislative veto provisions existed in 196 statutes.⁷⁷ Congress only issued vetoes 230 times, and nearly half of the time—on 111 occasions—Congress vetoed suspensions of deportation.⁷⁸ On one of those occasions, the House of Representatives vetoed the suspension of deportation issued by the Attorney General to a British citizen of East Indian decent, Chadha, and five other aliens.⁷⁹

The Attorney General had acted under § 244 of the Immigration and Nationality Act, authorizing him to suspend deportation proceedings to any alien who met the requirements for deportation but who could show good

⁷⁶ *INS v. Chadha*, 462 U.S. at 968-74 (White, J., dissenting).

⁷⁷ *INS v. Chadha*, 462 U.S. at 944.

⁷⁸ Kagan, *supra* note 12, at 2257.

⁷⁹ *Chadha*, 462 U.S. at 923-26.

moral character and that deportation would result in extreme hardship.⁸⁰ 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 provided in the legislative veto provision of § 244.⁸¹ Waiting until the last possible moment for action, 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 aliens did not meet the statutory requirements.⁸²

The Supreme Court held that because the legislative veto was a legislative act—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”⁸³—it could not be constitutional without undergoing the requirements of bicameralism and presentment in Article I, sections 1 and 7 of the Constitution.⁸⁴ That is, it would have to be signed by both the other legislative chamber and the President of the United States. Because one House of Congress could not legislate on its own without the Senate (and without the President), the legislative veto of Chadha’s suspension was unconstitutional. Six Justices adopted this approach, while Justice Powell would have held the veto an unconstitutional act of judicial power.⁸⁵

The Court 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.”⁸⁶ 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.”⁸⁷ But it held, on the other hand, that the House’s veto was legislative.⁸⁸ 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

⁸⁰ *Id.* at 924-25.

⁸¹ *Id.*

⁸² *Id.* at 926.

⁸³ *Id.* at 952.

⁸⁴ *Id.* at 946-51, 954-55.

⁸⁵ 462 U.S. at 963-67 (Powell, J., concurring in the judgment).

⁸⁶ 462 U.S. at 951-52.

⁸⁷ *Id.* at 953 n.16.

⁸⁸ *Id.* at 952

Executive only executes.⁸⁹ Put in layman’s terms, the Court said that to change an execution of the law that Congress does not like, it must amend or repeal the law. That requires bicameralism and presentment.

It becomes clear, however, that once we accept the reality of legislative delegation and recognize the administrative state’s different functions, at least under some circumstances a legislative veto should be constitutional—specifically, legislative veto of *legislative* acts should be constitutional. In the simplest terms, if Congress delegates its legislative power, then we can recognize that when agencies are, for example, promulgating rules, they are not executing the law; they are in the throes of making a new law. In which case, there is no law yet made that requires a new law to repeal or amend. If an agency is in the throes of making a new law and Congress steps in and withdraws its consent—that is, it withdraws its delegation—then the proposed law (the rulemaking) cannot 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.

Let us see how a legislative veto of an act legislative in nature can meet constitutional requirements by taking a straightforward statute as a model and modifying it somewhat. The Rules Enabling 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.⁹⁰ Once the Supreme Court promulgates the rules or amendments to the rules, it delivers them to Congress, which has seven months to take action on them. If Congress does not act, these rules become the law—they will govern in federal court proceedings. Routinely, however, Congress takes action by modifying and amending certain rules and then enacting its version of the rules, which the President then signs.

Let us insert into this statute a provision for a legislative veto and conduct a thought experiment. 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 particular results, that would meet the requirements of bicameralism and presentment:

First, Congress approves or amends the rulemaking, as in the Rules Enabling Act, and the President signs. The proposed rulemaking or the

⁸⁹ 133 S.Ct. 1863, 1873 n.4 (2013). *See* note 59 and accompanying text.

⁹⁰ 28 U.S.C. §§ 2072-74.

amended rulemaking meets the requirements of bicameralism and presentment and thus becomes law.

Second, Congress approves or amends but the President, for whatever reason, rejects Congress's enactment (the rulemaking either in its original or its amended proposal). In that case, *neither* the original rule nor the amended rule becomes law because the President has refused to sign. If the President refused to sign the amended rulemaking because he preferred the original rulemaking, that rulemaking would have the President's approval but not Congress's because Congress's enactment nullified its implied consent in our imagined provision—and thus only presentment would be met. The original rulemaking cannot be the law.

Third, Congress might veto 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 rules now became law, *those* rules would violate bicameralism and presentment because, although they might have the President's support, they would not have been approved by an explicit or tacit act of Congress.

Fourth, Congress takes no action at all, thus assenting to the rules as they do under the real Rules Enabling Act—and as they presumably would do regularly if they 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 it⁹¹) or does nothing at all. In either case no signature of his is required and the rule becomes law. It becomes law after the tacit assent of both the Congress and the President.

Fifth, Congress takes no action at all, thus assenting to the rules as under modern doctrine, *but the President does not like the rules*. He, then, under a model of constitutional administration, has the constitutional authority to veto the rulemaking (it would not be a stretch to say he should have ten days to do so). This is the executive version of the legislative veto; because the President already has a legislative veto power, perhaps we must call this the executive-administrative veto. If the President truly disapproved of the rulemaking, even if Congress assented to it by taking no action or by actually voting approval—then there is no law because there has been no presentment.

These five permutations are the only combination of events that would satisfy constitutional requirements. These include a legislative veto.

It bears repeating that this insight does not extend to underlying administrative acts that are executive or judicial in nature. The underlying act in *Chadha* was executive (granting, for now, that withholding of removal is an executive decision), so the outcome of the case would be the same: If Congress were to veto the executive decision to withhold removal it would be deciding

⁹¹ Kagan, *supra* note 12, at 2299-2303.

for itself how the law was to be applied. It would be exercising an executive power it did not possess. 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.⁹² Not only, then, would its enactment not be a law in the true sense of the word because it would not be prospective or general, but it would violate a clear textual prohibition in the Constitution. What Congress and the President cannot do together, Congress, or one House or one committee of Congress, cannot do alone.⁹³

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, certain legislative vetoes are unconstitutional but others are not. Once we discard our fictions, we can understand that the nature of the act of vetoing takes on the nature of the vetoed act. Thus, a legislative veto of an

⁹² 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 also* *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (“By retroactively commanding the federal courts to reopen final judgments, Congress has violated this fundamental principle” that the judiciary, not the Congress, says what the law is).

⁹³ 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 (1983). 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 in common-law countries judges 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. 15 U.S.C. §§ 1–7; *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 385-86 (1956); *SmithKline Corp. v. Eli Lilly & Co.*, 427 F. Supp. 1089, 1120 (E.D. Pa. 1976), *aff'd*, 575 F.2d 1056 (3d Cir. 1978) (“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.”). It is an interesting question whether Congress could veto a judicial opinion that lays down new law, in the same manner the House of Lords historically served as a court of final appeal in England. But no matter how much of this common-law judicial lawmaking survives in the United States at the federal level—recall that most common-law judicial lawmaking occurs at the state level, and *Erie's* rejection of a federal common law, *Erie 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 19, at 464. Or in Justice Marshall's still more famous formulation, “It 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). The rule already exists; it is merely to be *applied*.

executive or judicial act can 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*. Most of the time, for most rules, 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 new rulemakings. Either way, that is what happens routinely in the modern administrative state. This model is consistent with much modern practice. It accepts that Congress can consent by taking no action. That is, this model accepts the constitutionality of delegation. It does not seek to reinvigorate the non-delegation doctrine and thereby undo the entire administrative state.

When Congress *does*, however, take some action indicating disapproval—by passing its own version or by vetoing—that is enough to nullify the rulemaking. The President’s signature, currently required in the Congressional Review Act,⁹⁴ would not be constitutionally necessary. Under a proper understanding of constitutional administration, in other words, it is the Congressional Review Act, not a properly *legislative* legislative veto, that is unconstitutional.

One might counter that agency rulemakings are only “quasi-legislative,” that they are somewhat executive too because the agencies are exercising powers delegated to them by a particular statute (the Food, Drug, & Cosmetics Act or the Clean Water Act, for example) that has gone through bicameralism and presentment. Once we reject the non-delegation fiction, however, 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 rule *without* affording Congress an opportunity to object. In other words, it is not Congress that would be exceeding its constitutional authority in vetoing the proposed rule, 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, 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

⁹⁴ 5 U.S.C. § 801-808; Note, *The Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162, 2162-63 (2009).

new presidential administration.⁹⁵ As a general rule, this power would remain largely unused because presidents still take significant ownership over administrative rules.⁹⁶ There also would be tremendous costs to 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 has approved the rule or assented through inaction.

But more importantly, although the executive-administrative veto might seem a new idea, its *principles* are as old as the Constitution itself—indeed, older. The executive-administrative veto, I have strived to show, is *required* by the Constitution’s Presentment Clause. For any legislative rule to become the 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 Chief Executive 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, it delegates to the Supreme Court and the Judicial Conference. The experts use their expertise to come up with a proposal. Then whether and how to *use* that expertise, which is invariably a political question, becomes a matter for Congress and the President to determine. And practically, 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.

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. 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 the Congress and signed by the President before they became law. This avoids the legislative veto problem altogether because the default rule is that the rulemakings do not become law without congressional action. The REINS Act, in other words, which must accept the non-delegation universe and the limitations on legislative vetoes created in *Chadha*, can only give Congress authority over agencies by essentially halting the traditional operation of the administrative state—by which agency rules have the force of

⁹⁵ In the same way that the CRA was successfully used only once—when President Bush and Congress voted down a regulation originating in the Clinton era but becoming final just as the new president took office. *The Mysteries of the Congressional Review Act*, *supra* note 94, at 2162-63.

⁹⁶ Kagan, *supra* note 12, at 2299-2303.

law without congressional activity. One can imagine that 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 thus agency rules by default become law. It is only when Congress affirmatively acts that those rules may not become law. One can instantly see the significance of these differences. The Rulemaking Enabling Act is far more politically practicable than the REINS Act; but it is more *doctrinally* challenging under modern administrative law.

3. The Possibility—But Not Inevitability—of One-House Vetoes

We must consider the constitutionality of a one-House veto under this approach. If both 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 one House passes a resolution of disapproval but the other takes no action, or perhaps even approves of the rulemaking? It seems that to let the proposed rule become law would violate bicameralism. Both House and Senate must approve under the Constitution's separation of powers scheme.

But I do not advocate a one-House veto. What I have tried to show is that it would be entirely constitutional (once we accept delegation) for the whole Congress to nullify the legal effect of a proposed legislative rule. It just so happens that it *also* would be constitutional if that outcome followed a one-House veto, just as it would if the President exercised his administrative veto. Congress and the President can, however, enact one constitutional measure without enacting the other when they choose what legislative powers to reserve for themselves in their delegation to the agencies.

4. 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.⁹⁷) The legislative reform proposed here poses a more difficult problem: Would a veto exercised under the Rulemaking Enabling Act violate the holding in *Chadha*? If yes, why should Congress take a chance on this statute? I think 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 meaning of the

⁹⁷ See *infra* Part III.B.4; Part III.C.5.

Constitution. That is, the Supreme Court has become an agent of judicial *supremacy* rather than judicial *review*.⁹⁸ But historically that was not the case. James Madison wrote in 1834: “As the Legislative, Executive, and Judicial department 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[.]”⁹⁹ Others in the Founding Era and early Republic agreed.¹⁰⁰ I suspect also that the presumption of constitutionality rests on this old view that Congress has authority to interpret the Constitution.¹⁰¹

Congress can therefore engage in an act of interpretation by enacting the Rulemaking Enabling Act. Even if the Court disagrees that Congress can interpret the Constitution for itself, at a minimum enacting the Rulemaking Enabling Act would give the Supreme Court serious reason to revisit the

⁹⁸ Brian M. Feldman, Note, *Evaluating Public Endorsement of the Weak and Strong Forms of Judicial Supremacy*, 89 VA. L. REV. 979, 986-87 (2003).

⁹⁹ James Madison, Letter to [Unknown], Dec. 1834, *quoted in* LARRY D. KRAMER: THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 145 (2004).

¹⁰⁰ 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 20, 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 Thomas Jefferson, Letter 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, Bank Veto Message of July 10, 1833)).

For an excellent discussion of the rejection of judicial supremacy in the early Republic, from an author writing almost a century ago concerned even at the time with the rise of judicial supremacy, see WILLIAM M. MEIGS, THE RELATION OF THE JUDICIARY TO THE CONSTITUTION 215-40 (1919) (collecting several more quotations from past U.S. presidents and jurists). The strongest claim against judicial supremacy was made by Lincoln in relation to the Dred Scott decision: “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 decision 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. . . , if 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.” *Id.* at 232 (emphasis added). This strong claim maintains that the Court only binds the parties—in our case, Congress and Chadha in that particular case.

¹⁰¹ *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 354-55 (1936). Take for example two of the quotations Justice Brandeis used 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) (Washington, J.). “Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger.” *Union Pac. R. Co. v. United States*, 99 U.S. 700, 718 (1878).

breadth of its holding in *Chadha*, and to rethink the non-delegation doctrine at the core of modern administrative law.

5. Proposed Text of a Rulemaking Enabling Act

I have endeavored to show that a Rulemaking Enabling Act of the kind described, which requires all rulemaking legislative in character to be considered by Congress, which can take action or approve by taking no action at all, would be constitutionally permissible were the Court to accept the reality of delegation. I thus offer the following 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 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.

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 enact a resolution of disapproval, the rule shall not become law.*

The law is not only simple, but also politically practicable. Not only would it leave much of the administrative state undisturbed, but both Congress and the President with their respective veto powers would have an incentive to enact this law. Each would get a new power over the administrative state.

6. Rulemaking as Lawmaking

There is a vast literature on what constitutes “legislative” power.¹⁰² The problem is distinguishing between policy discretion executive in nature—such as the decision not to expend resources enforcing particular laws—and policy discretion that is legislative in nature. Some circularly, but nevertheless legitimately, claim that policy discretion important enough to justify congressional action requires congressional action,¹⁰³ or that rulemakings “that affect private rights to such a degree, and that so traditionally have been done by the legislature, and that so thoroughly partake of general rulemaking,” require congressional action.¹⁰⁴

I think the answer is still more intuitive: An act of legislative power defines the boundary between permitted and forbidden conduct.¹⁰⁵ Without that act, an individual does not know what is lawful or unlawful to do. This

* This last provision may be replaced with the optional one-House veto: “If the full Congress, or either the House or the Senate, enact 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, 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.

¹⁰² *E.g.*, Steven G. Calabresi, *The Vesting Clauses As Power Grants*, 88 NW. U. L. REV. 1377, 1391-92 (1994); Lawson, *supra* note 2, at 1238-41; David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1252-60 (1985).

¹⁰³ *See, e.g.*, Lawson, *supra* note 2, at 1239.

¹⁰⁴ Calabresi, *supra* note 102, at 1391. Elizabeth Magill cites similar definitions of legislative power from Professor Redish and Professor Currie. Magill, *supra* note 59, at 622 n.54.

¹⁰⁵ And, of course, some kinds of judicial decisions, such as those interpreting the Sherman Act, are also legislative. *See supra* note 93. Common-law judicial lawmaking is also just that—legislation by a different method.

definition 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).¹⁰⁶ Under this definition, even the issuing of individual licenses would be legislative if the only prior guidance as to entitlement to such 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.

The effort to demarcate the boundaries of the separate powers is, to be sure, disputed by those who claim it is impossible to differentiate meaningfully among legislative, executive, and judicial power. We shall revisit that criticism in Part IV, 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 the important and contested cases. 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 executive is executive power. Thus what to most people would intuitively be “legislative” is often described as only “quasi-legislative,” but ultimately executive. Hence the confusion—and the criticism.

¹⁰⁶ In the Second Treatise, he 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 Laws*,” by which “every one may know what is his.” JOHN LOCKE, THE SECOND TREATISE ON GOVERNMENT, para. 136, in TWO TREATISES OF GOVERNMENT 358-59 (Peter Laslett ed., 1988) (1689). If before a rulemaking a man does not know what is his, or what he may do, and after 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, at 449 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see also* Merrill, *supra* note 64, at 2124 (discussing these definitions); Larry Alexander and Saikrishna Prakash, Reports of the Nondelegation Doctrine’s Death are Greatly Exaggerated, 70 U. CHI. L. REV. 1297, 1310-17 (2003) (discussing Locke, Montesquieu, Blackstone, and Founding-era sources to support a similar definition of legislative power).

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 102, 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 59, at 613 n.25. Even then, however, an individual in advance knows 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.

In any event, a full defense of my 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.¹⁰⁷

It may be that some rulemakings are truly administrative only; perhaps they are made only for convenience. That may be so; but in that case Congress would rarely exercise its legislative veto authority. It would be absurd to let a trivial possibility (a congressional veto of a merely administrative rule) undermine the value of what is otherwise a workable and mostly accurate rule. Rulemakings may not always be legislative, but most of the time they will be, and we can assume with little consequence that the rest of the time they will be as well. If Congress does veto a rulemaking that is not legislative in nature, the Supreme Court can take it upon itself to define the contours of what constitutes legislative versus non-legislative rulemaking if a case or controversy arises. This rule also has the virtue that it would prevent agencies from circumventing the congressional role under this model by claiming that their rules are not significant enough to be legislative.

Agencies could, however, circumvent the 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*¹⁰⁸ and *Bell Aerospace*.¹⁰⁹ In those instances, the line between legislative functions and what appear to be judicial functions blurs. Nevertheless, as discussed in Part III.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.¹¹⁰ Insofar as an adjudication establishes “new principles”¹¹¹ to be applied prospectively, it can be considered legislative and subject to the veto of Congress.¹¹² Certainly, Congress should not permit adjudications to replace rulemakings for the purpose of avoiding the congressional veto power.

¹⁰⁷ This excludes rulemakings directed toward official behavior, though such rulemakings might be considered legislative as well.

¹⁰⁸ *Sec. & Exch. Comm’n v. Chenery Corp.* (“*Chenery II*”), 332 U.S. 194, 202-03 (1947).

¹⁰⁹ *N.L.R.B. v. Bell Aerospace Co. Div. of Textron*, 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.”).

¹¹⁰ See Part III.C.4 *infra*.

¹¹¹ *Chenery II*, 332 U.S. at 207.

¹¹² This same principle could be applied to judicial lawmaking under, for example, the Sherman Act. See discussion *supra* notes 93, 105.

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. If the Attorney General’s immigration-related discretion is extraordinarily broad, 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 marginally overinclusive, and more surely it is underinclusive; but its adoption would be a substantial advance over modern practice.

B. Presidential Administration and a Modified Unitary Executive

Formalists find themselves in quandary when it comes to executive power. Many believe that a unitary executive is constitutionally required. Thus, the President should have full control not only over the rulemakings and other activities of executive branch agencies, but also the activities of independent commissions over which he currently has far less control.¹¹³ On the other hand, they lament the tremendous growth of power in the hands of our chief executive with the advent of the administrative state.¹¹⁴ The combination of an unconstitutional state of affairs—a toothless non-delegation doctrine, i.e., the very existence of the administrative state—with a constitutional unitary executive would seem a frightening prospect indeed. 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, 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.¹¹⁵ But on the other, they wistfully recall the dream of apolitical bureaucrats applying technical expertise to social problems.¹¹⁶

¹¹³ Lawson, *supra* note 2, at 1241-46; Calabresi & Prakash, *supra* note 13, at 588-89; *cf. Morrison v. Olson*, 487 U.S. 654, 724-26 (1988) (Scalia, J., dissenting).

¹¹⁴ *Cf.* Lawson, *supra* note 2, at 1248-49 (lamenting the combination of legislative, executive, and judicial power in administrative agencies—which, he claimed earlier, must be under the President’s control); Sunstein, *supra* note 3, at 446-47 (noting this general criticism of the administrative state).

¹¹⁵ Kagan, *supra* note 12, at 2331-46.

¹¹⁶ 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

Constitutional administration creates a compromise among these competing positions. It ought to 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 all legislative, judicial, and executive powers combined. Functionalists, too, would 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 who would be largely independent of the President, but whose enforcement activities would nevertheless be under his control.

Here is the sketch of the argument, beginning with what I am *not* seeking to resolve. There is a debate among scholars of executive power over whether the President is a unitary executive or rather there is a class of functions, which we might call “administrative,” of which the Constitution left Congress authority to structure administration as it saw fit.¹¹⁷ I do not seek to resolve this debate, which is unnecessary to resolve for our purposes. What I do seek to show is that *prosecution* is an executive function over which the President must have ultimate control. Once that is acknowledged, we can recognize that whatever “administrative” power is, it does not include prosecution, and so the President must have control over the enforcement authority of independent commissions.

Neither does the argument depend on who is right for purposes of the administration’s rulemaking and adjudication functions. Whether we have a unitary executive or a system in which some “administrative” power can be

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”).

For a general statement of this tension in liberal thought, see Sunstein, *supra* note 3, 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.”).

¹¹⁷ Compare Lessig & Sunstein, *supra* note 13, with Calabresi & Prakash, *supra* note 13.

structured by Congress, everyone agrees that under the original understanding, whatever was this non-executive “administrative” power, it at minimum did *not* include judicial or legislative power. That means the President should have no special power over the administrative state’s legislative or judicial functions. In other words, to whatever extent he must be unitary, we know that that extent does not reach legislative or rulemaking powers. Independent Commissions, in other words, should be free to engage in rulemaking without fear of presidential control (or removal), but their enforcement activities must be subject to such control.¹¹⁸ But whatever *other* functions such commissions might exercise, I leave it at this point 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: I first elaborate upon the debate over the unitary executive and then briefly discuss Elena Kagan’s model of presidential administration. I then explain where constitutional administration fits. I will argue that it requires that the President have control and authority over the enforcement authority of all agencies, including independent commissions, and explore some doctrinal consequences for *Humphrey’s Executor* and *Morrison*. I then propose a short statutory reform, 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 official’s delegated discretion.”¹¹⁹ 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.”¹²⁰ Lessig and Sunstein offer the examples of the early Postmaster General, the structure of the early Treasury Department, and the battle over the Bank of the United States to show how Congress seems to have had the authority to structure the executive such that some officials were not directly controllable

¹¹⁸ Although if the Rulemaking Enabling Act were fully adopted, it would include an executive veto option over administrative rulemakings. *Supra* text accompanying notes 95-96.

¹¹⁹ Kagan, *supra* note 12, at 2320, 2323; *id.* at 2323-35; *see also* Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U. L. REV. 443, 443-45, 465-72 (1987); 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).

¹²⁰ Lawson, *supra* note 2, at 1242.

by the President.¹²¹ Attorney Generals in the nineteenth century divided over the question of direct presidential control of administrative officials.¹²²

Lessig and Sunstein nicely sum up the conventional view, arguing 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 having ‘quasi-legislative’ and ‘quasi-judicial’ functions.”¹²³ That, indeed, is the line drawn by *Humphrey’s Executor v. United States*,¹²⁴ which held that President Roosevelt could not remove a commissioner of the Federal Trade Commission except for the causes permitted by the governing statute.¹²⁵ The Court explained: “The commission is to be nonpartisan; 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.”¹²⁶ The conventional view appears to be that there is something about “law-administration” or “administrative power” that is distinct from “law-execution” or “executive power.”¹²⁷

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.¹²⁸ The Constitution explicitly establishes a trinity of powers, and says nothing at all about this so-called “administrative” power.¹²⁹ And all of the “executive” power, which is the power to execute the law, is vested in the President of the United States alone.¹³⁰ These theorists find the administrative state unconstitutional so long as the President does not have authority to control it.

¹²¹ Lessig & Sunstein, *supra* note 13, at 22-42; *see also* Strauss, *supra* note 3, 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.”).

¹²² Kagan, *supra* note 12, at 2323-24 n.308 (citing two such Attorney General opinions denying directive authority over administrative officials and two affirming such authority).

¹²³ Lessig & Sunstein, *supra* note 13, at 5.

¹²⁴ 95 U.S. 602 (1935).

¹²⁵ *Id.* at 618-20.

¹²⁶ *Id.* at 624.

¹²⁷ Strauss, *supra* note 3, at 600; Lessig & Sunstein, *supra* note 13, at 42.

¹²⁸ Calabresi & Prakash, *supra* note 13, at 614-15.

¹²⁹ *Id.* at 559-70.

¹³⁰ Calabresi & Prakash, *supra* note 13, at 570-99.

There are several methods of control. Some argue that the President should have directory control over all discretionary agency decisions.¹³¹ Although not all unitarians agree that the President must necessarily have directory control over the entire administrative apparatus, all do agree that, at a minimum, the President must be able to remove the heads of agencies. Thus, unitarians are particularly vexed at the independence of many independent commissions, whose officials cannot be removed at the President's will.¹³²

2. Presidential Administration

Elena Kagan's model of presidential administration takes a slightly different approach. She accepts the conventional view of agency independence—she accepts the power of Congress to structure agencies to be independent of the President.¹³³ But she argues that as a matter of statutory interpretation, it would be more sound to interpret Congressional 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.”¹³⁴ Kagan would have us choose one of two interpretive principles in the absence of explicit congressional instruction. 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.” Therefore, we ought to assume that when Congress delegates to an executive branch official, it intends to give the President *directive power* over that official too.¹³⁵ On the other hand, “[w]hen the delegation in question runs to the members of an independent agency,” Congress consciously acts to limit the control of those agencies by the President.¹³⁶ 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.¹³⁷

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.¹³⁸ But her model certainly advocates a powerful executive. Not only would the President have directive authority over executive activity, but also over the rulemaking activity of the

¹³¹ Lawson, *supra* note 2, at 1242.

¹³² See sources cited *supra* note 113.

¹³³ Kagan, *supra* note 12, at 2326.

¹³⁴ *Id.*

¹³⁵ *Id.* at 2327-28.

¹³⁶ *Id.* at 2327.

¹³⁷ *Id.*

¹³⁸ *Id.* at 2326.

administrative state. Indeed, Kagan’s whole 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 Labor to propose regulations using state unemployment insurance systems to support parents with newborns.¹³⁹

Presidential administration, Kagan argues, offers an improvement in political accountability.¹⁴⁰ For the same reasons that Hamilton favored a unitary executive, presidential control over administration would also be efficient—the President can give energy and “dynamism” to the administration.¹⁴¹

I summarize the relevant points: 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 activities versus rulemaking. Indeed, the entire model centers on presidential direction of rulemakings. The model accepts the reigning two fictions of administrative law.

3. Constitutional Administration: The Enforcement Power

A theory of constitutional administration, which rejects our two reigning fictions, recognizes that the administrative state does not merely exercise executive power. The question then becomes which functions are executive and which are non-executive. We do not have to settle this question for each and every exercise of administrative power. We already know the answer for the most important activities of the administrative state. Rulemakings regulating private conduct are legislative—or they almost always are, and so we ought to treat all of them as such.¹⁴² Adjudications which, as we will discuss shortly, affect our common-law rights and liberties are judicial. The rest is either “executive,” over which the President must have control, or “administrative,” over which the President may or may not have directive control depending on what theory one adopts. But whatever else the independent commissions might do, their *enforcement* powers are executive in nature.

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

¹³⁹ *Id.* at 2281-84. *See generally id.* at 2284-2303 (discussion of presidential administration entirely related to administrative rulemakings).

¹⁴⁰ *Id.* at 2331-39.

¹⁴¹ *Id.* at 2339-46.

¹⁴² *Supra* Part III.A.7.

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 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.¹⁴³

At what stage of this operation must the President 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 the U.S. Attorneys—he may order them to prosecute or not to 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 only requires us to recognize that this enforcement activity is executive. As part of their historical evidence that the Framers considered some power “administrative” and not purely “executive,” however, Lessig and Sunstein 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 prosecuted federal actions, as did private parties (which still do to this day in *qui tam* actions), and the President

¹⁴³ Lawson, *supra* note 2, at 1248-49.

had no control over these actors.¹⁴⁴ Lessig and Sunstein thus conclude that prosecution may not have been considered a fully “executive” power, and that the Framers did not intend a unitary executive.

Their evidence on this point, however, does not seem persuasive. Their first argument ignores the critical issue: whether the President himself could have issued orders or countermanded actions of the original district attorneys. Indeed, Lessig and Sunstein note 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.”¹⁴⁵ Calabresi and Prakash show that George Washington also instructed his attorneys: he “‘instructed’ the attorney for the Pennsylvania district to nol-pros an indictment against the two individuals who had been accused of rioting; he also 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.’”¹⁴⁶

As for Treasury suits, Calabresi and Prakash show that there is no evidence that the President did not have control over the Comptroller; nothing in the statute withheld the removal power from the President.¹⁴⁷ My sympathies here are with Calabresi and Prakash, though the evidence is certainly mixed. Even if matters of revenue collection are “administrative,” however, it does not follow that the criminal prosecutions (including those for civil fines) or other kinds of civil actions are also administrative and not executive.

As for state executives enforcing federal law, that speaks more to Lessig and Sunstein’s point about the unitariness of the executive; but there is no doubt that it was state *executives*, not some other bodies, that were helping to enforce federal law. That does not undermine the notion that prosecution is executive. Nor does it address the question of the President’s role when the federal government is responsible for this executive function. Consider the parallel to the federal courts. All federal judicial power is vested in the Supreme Court and any inferior courts Congress may establish.¹⁴⁸ But it is well understood that the Framers expected state courts to hear federal cases; their jurisdiction over federal matters would be concurrent with that of the federal courts, although perhaps subject to the possibility of ultimate review by the

¹⁴⁴ Lessig & Sunstein, *supra* note 13, at 16-22.

¹⁴⁵ *Id.* at 18 n.75 (citing Letter from Thomas Jefferson to Wilson C. Nicholas (June 13, 1809), in 12 THE WRITINGS OF THOMAS JEFFERSON 288 (Andrew A. Lipscomb ed., 1905); Letter from Thomas Jefferson to Edwin Livingston (Nov. 1, 1801), in 8 THE WRITINGS OF THOMAS JEFFERSON 57-58 n.1 (Paul L. Ford ed., New York, G.P. Putnam’s Sons 1897)).

¹⁴⁶ Calabresi & Prakash, *supra* note 13, at 659 (citing 32 WRITINGS OF GEORGE WASHINGTON 386, 455 n.35 (John C. Fitzpatrick ed., 1939)).

¹⁴⁷ *Id.* at 653.

¹⁴⁸ U.S. CONST. Art. III, § 1.

Supreme Court (or other federal court) over any federal question.¹⁴⁹ But no one has suggested that because state courts exercise some federal judicial power, that is a justification for a non-Article III federal tribunal's exercise of the federal judicial power.¹⁵⁰ One might similarly argue that inferior federal officers in whom the executive power is not vested cannot exercise executive power merely because states can exercise the federal executive power.

Finally, Calabresi and Prakash argue that the King historically had the power to pardon pre-emptively defendants in *qui tam* actions.¹⁵¹ But in any event, *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 development of the separation of powers doctrine.¹⁵² A vestigial exception surely does not disprove the rule.

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.¹⁵³ But how can the President control the enforcement activities of the independent commissions without the removal power? Even if we were to grant the

¹⁴⁹ Haywood v. Drown, 556 U.S. 729, 743-50 (2009) (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).

¹⁵⁰ There have been numerous *other* arguments explaining when non-Article III tribunals may exercise adjudicative power, and whether that power is judicial power. *See infra* Part III.C.4.

¹⁵¹ Calabresi & Prakash, *supra* note 13, at 660-61,

¹⁵² Richard A. Bales, *A Constitutional Defense of Qui Tam*, 2001 WIS. L. REV. 381, 385-86 (2001).

¹⁵³ Professor 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. But what the penalties shall be for crimes are 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 directory control over such inferior officers. He thirdly points to Congress’s power of appropriation as “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 that power says nothing at all about what is or is not executive power. Professor Krent otherwise depends on the same points covered subsequently by Calabresi & Prakash.

President the removal power over commissioners, how could we ensure that he does 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 on enforcement-related, but not other, causes. We could leave it up to the courts to discern whether a President's reasons for removal are pretextual. That does not seem plausible. 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 must authorize any enforcement action and be removable by the President while the other commissioners are not. Many commissions already have directors of enforcement¹⁵⁴; 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 law would not violate any existing doctrine. *Humphrey's Executor v. United States*¹⁵⁵ held that Congress could protect FTC commissioners from presidential removal through the use of for-cause provisions. The rationale was that the independent commission was not executive, but rather its “duties [were] neither political nor executive, but predominantly quasi judicial and quasi legislative.”¹⁵⁶ The FTC “exercises no part of the executive power,” but rather performs “duties as a legislative or as a judicial aid”;¹⁵⁷ 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.”¹⁵⁸ But when it comes to the properly executive functions, the holding of *Myers v. United States*¹⁵⁹ governs and the President must have plenary removal power. The *Humphrey's* 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.”¹⁶⁰ That observation would apply equally to the enforcement commissioners.¹⁶¹ Indeed, constitutional

¹⁵⁴

See,

e.g.,

<http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171514832> (describing the promotion of two individuals to co-directors of the SEC's enforcement division).

¹⁵⁵ 95 U.S. 602 (1935).

¹⁵⁶ *Id.* at 624.

¹⁵⁷ *Id.* at 628.

¹⁵⁸ *Id.* at 630.

¹⁵⁹ 272 U.S. 52 (1926).

¹⁶⁰ 95 U.S. at 627.

¹⁶¹ 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

administration buttresses the reasoning of *Humphrey's*. To the extent the commissions are legislative aids—to the extent they exercise delegated legislative power—Congress can insulate them from presidential control. Insofar as the commissions exercise the executive power, however, such as the power at issue in *Myers*, 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, however. Congress can 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 draft and pass a bill; here he could similarly work with the agencies.

Because Congress would retain the power to review rulemakings, moreover, presidential administration would no longer be necessary for political accountability. More still, constitutional administration may *enhance* the technocratic values of the administrative state when it comes to rulemaking because Congress and the President have the opportunity to mark-up and debate rulemakings *after* the expert agency gives its recommendation. This model may maximize the efficiency, technocratic, 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—28 U.S.C. §§ 542-550—can be adapted to cover their 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

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. 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 authority of the temporary independent counsels with narrow jurisdiction. Of course, if one accepts unitary executive theory and that prosecution is an executive act, then *Morrison v. Olson* must be reversed.

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):

(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.

Now, 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 administrative law judges presiding. 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.

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. This Article will build on that literature and offer a specific legislative solution with existing statutory precedent to permit Article III courts to re-assert 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—to all private-rights cases decided by administrative law judges. This proposal is the only piece of the model that does not depend on its rejection of the non-delegation fiction.

This Part will also show that existing doctrine to a large measure justifies constitutional administration. Even though the courts have had to invent our two fictions to justify the constitutionality of the administrative state, they have also adopted different modes of review of different agency functions, implicitly recognizing the tripartite combination of powers that agencies exercise. The argument here serves also in large measure, then, to justify these doctrines of judicial review that have evolved, but also to clarify and modify these doctrines in important ways. Let us 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 explicitly differentiating the nature of review depending on the kind of power exercised by agencies (though differentiation often occurs implicitly). Agency rulemakings are subject to deferential review under *Chevron* when matters of statutory interpretation are at issue.¹⁶² When matters of fact and policy are at issue, especially technical policy, courts tend also to defer to an agency’s expertise.¹⁶³ To be sure, courts also sometimes employ the “hard look” test to determine if an agency’s actions are arbitrary or capricious,¹⁶⁴ but this hard-look test has been explained as a *spur* to agency use of expertise over impermissible factors.¹⁶⁵ Thus, not only is 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.

Nor is de novo review available even in what appear to be cases judicial in nature. The traditional narrative¹⁶⁶ begins with *Crowell v.*

¹⁶² *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

¹⁶³ See, e.g., *Baltimore Gas & Electric Co. v. Natural Resources Defense 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.”).

¹⁶⁴ See, e.g., *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43-44 (1983); Kagan, *supra* note 12, at 2270-71 & nn. 89-90; Sunstein, *supra* note 3, at 469-71.

¹⁶⁵ Kagan, *supra* note 12, at 2270; Sunstein, *supra* note 3, at 470-71.

¹⁶⁶ 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). Though Merrill has argued that the origins of the appellate review model of administrative law predates *Crowell* by about twenty years. *Id.* at 953-65.

Benson,¹⁶⁷ in which the Supreme Court held that an administrative body may make factual determinations without de novo review by an Article III court even in private-rights cases.¹⁶⁸ Those cases had traditionally been heard by Article III courts that reviewed an entire case de novo, as seems to be required by Article III, which vests the judicial power of the United States in the federal courts.¹⁶⁹ Perhaps the greatest encroachment on Article III has been *Atlas Roofing*,¹⁷⁰ which held that OSHA administrators could assess monetary fines even based on agency adjudications whose factual determinations would not receive de novo review in the courts.¹⁷¹

Whatever the origins of this appellate model, what seems clear is that judicial review of administrative action is not de novo, and even may not be for actions that determine private, common-law rights that 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.¹⁷² 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. As we shall see, it is helpful to differentiate explicitly the functions to understand better how the nature of review should correspond to the review of the constitutional branches of government engaging in those same functions.

2. Judicial Review of Rulemaking: *Chevron*

Chevron deference is by now well engrained in administrative law. When an agency promulgates a rule that depends on the interpretation of its statutory authority, courts first ask whether Congress has spoken on the specific issue in question. If it has not and the statute is ambiguous, they defer

¹⁶⁷ 285 U.S. 22 (1932).

¹⁶⁸ “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.” 285 U.S. at 46.

¹⁶⁹ See *infra* Part III.C.4.

¹⁷⁰ *Atlas Roofing Co. v. Occupational Safety & Health Review Comm’n*, 430 U.S. 442 (1977).

¹⁷¹ *Id.* at 450.

¹⁷² For discussions of judicial review generally that do not take these distinctions into account, see Fallon, *supra* note 166, *passim*, and in particular at 975-91; Merrill, *supra* note 166, at 979-97; Sunstein, *supra* note 3, at 463-78.

to an agency's interpretation of its governing statute.¹⁷³ *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.¹⁷⁴ Constitutional administration advances the debate over whether, and what kind, of deference to give agencies. When we understand that agencies are not merely interpreting governing statutes but are rather *making law themselves*, that might give us an entirely different intuition as to what interpretive approach to adopt. If agencies are making law, ought not courts to engage in interpretation as if they were interpreting a congressional enactment? It has been observed before that “the relationship of the Constitution to Congress parallels the relationship of governing statutes to agencies.”¹⁷⁵ Constitutional administration makes this parallel all the stronger because it recognizes that agencies are in fact exercising the same power as Congress.

Just as the courts make sure Congress is acting within *its own* delegated discretion—within the legislative power granted to it by the Constitution—when reviewing acts of Congress, they ought to make sure the agencies are acting within their delegated discretion. So long as it is within the bounds of the delegation, the agency has discretion to make policy choices—just as Congress freely makes policy choices within its legislative power. Indeed, *Chevron* deference has a specific parallel in the interpretation of congressional statutes under questions of constitutional delegation. I speak, of course, of the presumption of constitutionality. When the constitutional question is not clear, the courts “defer” to Congress’s interpretation of the Constitution.¹⁷⁶

But the presumption of constitutionality is not so easily deployed. 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. No Justice, as far as I can discover, has ever argued that merely leaving the constitutional text ambiguous on its face is sufficient to confer interpretive authority to Congress. Rather, the courts must look at text, context, intent, purpose, historical background, general background principles of law, conventions, and so on. Usually, only when “traditional tools of statutory construction”¹⁷⁷ run out, do courts deploy the presumption of constitutionality.¹⁷⁸ Because agencies are making law and not merely

¹⁷³ *Chevron*, 467 U.S. at 842-43.

¹⁷⁴ See *City of Arlington v. FCC* 133 S. Ct. 1863 (2013).

¹⁷⁵ Sunstein, *supra* note 3, at 467 & n. 211.

¹⁷⁶ See *supra* note 101 and accompanying text.

¹⁷⁷ *City of Arlington*, 133 S. Ct. at 1876 (Breyer, J., concurring in part and in the judgment).

¹⁷⁸ John McGinnis has summarized early practice using the presumption of constitutionality: “The 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. A restrained jurist does not simply defer to any plausible meaning of the text, considered in isolation from the rest of the text of the Constitution or clarifying legal methods. Only if these kinds of analyses fail to

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.

Because they cases are parallel, the exact same constitutional values are served by adopting the same method of interpretation in both contexts. Recall also that delegation is, as an original matter, unconstitutional. Thus, surely the courts should permit only as much delegation as has truly been granted, or otherwise limit the delegation as much as possible. Deploying all the tools of statutory construction to determine what Congress actually intended to delegate serves a great constitutional purpose, just as it serves that purpose when used to determine whether Congress has transgressed the limits of the powers we the people delegated to Congress in the Constitution.¹⁷⁹

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. That is because a review of the president's actions via the administrative state is no different than 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 his commission. The Court held that because Marbury's right had vested and the law conferred no discretion on Madison, the law required him to deliver the commission to Marbury.¹⁸⁰ That is still the law applied today to ministerial actions of administrative officials.¹⁸¹ Matters of administrative discretion, however, are generally unreviewable,¹⁸²

clarify whether the legislation is based on the correct meaning of the constitution, should the judiciary defer to the legislature.” John O. McGinnis, *Is Judicial Restraint Part of the Originalist Method?* 40-41 (unpublished manuscript) (on file with author).

¹⁷⁹ An interesting wrinkle is whether Congress, which now assents to administrative “laws” through silence, could be construed as having thus also agreed with an agency that its rule is consistent with the delegation of authority. In other words, is *more* deference required now that we imagine Congress to be assenting 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.

¹⁸⁰ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 156-62 (1803).

¹⁸¹ *Kendall v. U.S. ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838); *see also* Lessig & Sunstein, *supra* note 13, at 58.

¹⁸² 5 U.S.C. § 701(a)(2) (precluding review where a decision “committed to agency discretion by law”); *Heckler v. Chaney*, 470 U.S. 821 (1985); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971).

much as the political question doctrine prevents review of actions committed to the political wisdom of the President.¹⁸³

Constitutional administration, however, does help 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 of *Massachusetts v. EPA*,¹⁸⁴ where it ordered the EPA to treat carbon dioxide emissions as air pollutants under the Clean Air 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."¹⁸⁵

Constitutional administration supports this distinction. Enforcement actions are executive in nature and the refusal to enforce is a political question committed to the discretion of the President, who is conferred with the duty (and hence power) to take care that the laws be faithfully executed.¹⁸⁶

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 discussed in the prior section, a court should deploy all the tools of statutory interpretation and then as a last resort defer to an agency's own decision or interpretation.

¹⁸³ *Marbury*, 5 U.S. (1 Cranch) at 165-67.

¹⁸⁴ 549 U.S. 497 (2007).

¹⁸⁵ *Id.* at 527-28 (internal citations omitted).

¹⁸⁶ U.S. CONST. ART. II, § 3, cl. 5.

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.¹⁸⁷ 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 enjoyed these protections.¹⁸⁸ And yet, today, administrative agencies often adjudicate facts and law relevant to such rights without de novo review by Article III courts.¹⁸⁹ For example, in *Atlas Roofing*, discussed above, the Court permitted OSHA administrators to assess monetary fines even based on agency adjudications whose factual determinations would not receive de novo review in the courts.¹⁹⁰ The National Labor Relations Act permits the National Labor Relations Board to institute enforcement proceedings and, if it finds the employer liable, to order back pay to a

¹⁸⁷ U.S. CONST. ART. III, § 1. For the importance of these protections, consider Hamilton’s argument in *The Federalist*: “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 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 19, at 469-70.

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), *id.* at 471.

¹⁸⁸ 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 deprived without an exercise of “judicial power” in Article III courts). On traditional property deriving from the fruits of one’s own labor rather than on “new property” deriving from government largess, see *id.* at 623. For a discussion of public rights, see Fallon, *supra* note 166, at 951-70. Although Professor Merrill disputes that the 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 166, 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.

¹⁸⁹ Lawson, *supra* note 2, 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.”).

¹⁹⁰ *See supra* notes 170-171 and accompanying text.

wrongfully terminated employee.¹⁹¹ The reviewing courts must accept the board’s findings if “supported by evidence.” The Supreme Court approved the statute on the ground that the remedies were for statutory rights unknown at common law—even though the penalty deprived an individual of traditional property.¹⁹²

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. 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 delegates 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.”¹⁹³

Sure enough, no case has yet permitted an agency to adjudicate the *facts* where life or liberty are at stake; but Congress’s “delegates in the executive branch” *have* authoritatively determined the *law* to be applied in criminal actions. In *United States v. Whitman*,¹⁹⁴ the Second Circuit just last year upheld a jury instruction based on the SEC’s interpretation of section 10(b) of the Securities Exchange Act of 1934. The Court upheld liability on 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 be a “significant” factor.¹⁹⁵ The authority for the “at least a factor” standard was adopted in another case that had deferred to the SEC’s interpretation of the statute.¹⁹⁶ In other words, the agency determined 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,¹⁹⁷ without Article III’s full constitutional protection.¹⁹⁸

¹⁹¹ Nelson, *supra* note 188, at 601-02; 29 U.S.C. § 160.

¹⁹² Nelson, *supra* note 188, at 602 (citing and quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48-49 (1937)).

¹⁹³ *Id.* at 610.

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

¹⁹⁵ *Id.* at 107.

¹⁹⁶ *Id.* (citing *United States v. Royer*, 549 F.3d 886, 899 (2d Cir. 2008)).

¹⁹⁷ *Id.* at 100.

¹⁹⁸ Accompanying the denial of certiorari, Justices Scalia and Thomas expressed concern over this problem. It is, apparently widespread: “Other Courts of Appeals have deferred to executive interpretations of a variety of laws that have both criminal and administrative applications.” *Whitman v. United States*, 135 S. Ct. 352, 353 (2014) (Scalia, J., statement respecting the denial of certiorari) (citing *United States v. Flores*, 404 F.3d 320, 326-327 (5th Cir. 2005); *United States v. Atandi*, 376 F.3d 1186, 1189 (10th Cir. 2004); *NLRB v. Oklahoma Fixture Co.*, 332 F.3d 1284, 1286-87 (10th Cir. 2003); *In re Sealed Case*,

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) and Article III district judges must review those reports and recommendations *de novo*. The key, well-known cases, *Northern Pipeline*¹⁹⁹ and *Stern v. Marshall*,²⁰⁰ involved state-law claims by one individual party against another individual party.²⁰¹ The rights involved were the “stuff of Westminster” that cannot be denied except by adjudication in a federal court.²⁰²

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—in fact, most are not adjudications of private rights at all, or at least private rights in the traditional sense. As Caleb Nelson has explained (as have others), there is a distinction between private rights, public rights, and “privileges.” Private rights are the traditional Lockean rights to life and personal security, liberty (freedom from restraint or imprisonment), and private property.²⁰³ Public rights belong to the public as a whole and there need be no judicial review of how the government handles such rights. So, for example, the courts have no authority (absent congressional authorization) to review how a federal land office assigns public federal land; but it *can* review a private dispute between two parties claiming that their private rights in that land have vested.²⁰⁴ Finally, privileges might operate like private rights, but they are “entitlements” for the purpose of carrying out public ends.²⁰⁵

Not all “private property,” then, is a private right—entitlements can become private property, but they exist at the grace of government. The distinction is usually made between “new property,” such as social security

223 F.3d 775, 779 (D.C. Cir. 2000); *United States v. Kanchanalak*, 192 F.3d 1037, 1047, and n. 17 (D.C. Cir. 1999); *National Rifle Ass’n. v. Brady*, 914 F.2d 475, 479, n. 3 (4th Cir. 1990)).

¹⁹⁹ 458 U.S. 50 (1982).

²⁰⁰ 131 S.Ct. 2594 (2011).

²⁰¹ 458 U.S. at 71; 131 S.Ct. at 2611. The Court recently held that when confronted with a *Stern* problem—questions over 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 may simply submit reports and recommendations to district judges. *Executive Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165, 2175 (2014).

²⁰² “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.” *Stern*, 131 S. Ct. at 2609 (2011) (quoting *Northern Pipeline*, 458 U.S. at 90 (Rehnquist, J., concurring in judgment)).

²⁰³ *Id.*

²⁰⁴ Nelson, *supra* note 188, at 577-78.

²⁰⁵ *Id.* at 567.

benefits, government employment, or other property earned through government largess,²⁰⁶ and traditional property deriving from the fruits of one's own labor in a free enterprise system.²⁰⁷ Blackstone defined the 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 men[] merely as individuals" and are not "incident to them as members of society."²⁰⁸

Many modern legal scholars and theorists, however, claim there ought not to be a distinction between "new property" and traditional property.²⁰⁹ It is also clear that if the federal courts were required to adjudicate all claims involving this new property, they would be overwhelmed.²¹⁰ 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.²¹¹

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 arise from sources other than traditional property, or whose welfare require[s] nontraditional government regulation."²¹² But those livelihoods can be protected by appellate review. (To be sure, under the traditional understanding, no judicial review would be required at all.²¹³) That does not mean there is no value in providing the full protection of Article III to those private rights that would have required that protection.

²⁰⁶ Fallon, *supra* note 166, at 964.

²⁰⁷ Nelson, *supra* note 188, at 566-74, 623.

²⁰⁸ 1 WILLIAM BLACKSTONE, COMMENTARIES 138, 123 (Forgotten Books 2012) (1809) (1765), *quoted in* Nelson, *supra* note 188, at 567.

²⁰⁹ Fallon, *supra* note 166, at 967 (arguing that the distinction is unworkable in an era where livelihoods often depend on this new property). Thomas Merrill challenges the distinction among private rights, public rights, and private privileges, arguing that there is no support in contemporary sources for such a view. Merrill, *supra* note 166, 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 "contaminate" its proceedings with executive functions. *Id.* at 987-92. But the distinction between what is "executive" and what is "judicial" tracks almost perfectly on the public rights private rights distinction.

²¹⁰ Fallon, *supra* note 166, at 952-53.

²¹¹ *Id.* at 974-91; and see especially *id.* at 988 (stating, for example, "Private rights do not merit treatment sharply distinct from public rights. There is no reason to assume that separation-of-power values will be substantially more involved in private than in public rights cases.").

²¹² *Id.* at 967.

²¹³ Nelson, *supra* note 188, at 613, 619. Nelson argues that even Fallon's view recognizes that some private rights do not get any judicial review. *Id.* at 619.

There may also be normative reasons to distinguish 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 government largess. Thus, if we normatively seek “individual independence from the state,” traditional property has special value.²¹⁴ That has been understood by theorists of political economy for decades or centuries: As soon as economic livelihood is dependent on political favor, political freedom can vanish.²¹⁵

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 must be de novo. That means review of the *law*, not just the facts, must be de novo as well. Although the Supreme Court may well take up an appropriate case in the future that deals with the *Whitman* issue head on, Congress can, in the meantime, declare that federal courts shall not defer to an agency interpretation of any statute if the matter in question leads to criminal penalties. Second, when traditional private rights are at stake, Article III adjudication is necessary. Therefore, all findings of fact as well as of law must be reviewed de novo by an Article III court.

5. Proposed Text for an Administrative Adjudications Act

There is a precedent for such review. Congress can borrow from the existing bankruptcy statute and Federal Magistrate Act, which provide the textual precedent for requiring reports and recommendations subject to de novo Article III review. The statute can be simple. It must do just three things: provide for the report and recommendation structure; define the adjudications at stake; and lastly provide a solution to the problem of *Chevron* deference in hybrid criminal-administrative statutes. Taking the federal magistrate statute²¹⁶ as a baseline, here is a proposed statute:

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

²¹⁴ *Id.* at 623 (quoting Stephen F. Williams, *Liberty and Property: The Problem of Government Benefits*, 12 J. LEGAL STUD. 3, 13 (1983)).

²¹⁵ A point made famously in the twentieth century by Milton Friedman. MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 7-21 (2002) (1962).

²¹⁶ 28 U.S.C. § 636.

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.

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

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.

These procedures 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 includes the right to be free of deprivation of property by fine.

In these cases 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.

IV. THREE OBJECTIONS

A. The Indeterminacy of Separation of Powers

There is one commonly raised objection to any effort to treat separation of powers with some seriousness. There is a vast literature arguing that it is impossible to define and differentiate legislative, executive, and judicial

power.²¹⁷ If these scholars are right, then constitutional administration might be subject to this fatal objection. It turns out, however, that constitutional administration advances this debate as well.

Much of the objection is rooted in the idea that it is impossible to differentiate the functions in the most contested cases. 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.”²¹⁸ For the latter proposition Magill cites authorities discussing Supreme Court doctrine and cites *Chadha* and *Whitman v. American Trucking*.²¹⁹ In the latter case, 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 [of § 108] and allowing an adequate margin of safety, are requisite to protect the public health,” was not a delegation of legislative power.²²⁰ Other scholars have discussed these and other key separation-of-powers cases in making the same argument.²²¹

Elsewhere Magill discusses the 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 applications should obtain a license, the FERC would be implementing the 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].²²²

²¹⁷ 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 59, at 603-23.

²¹⁸ Magill, *supra* note 59, at 612.

²¹⁹ 531 U.S. 457 (2001).

²²⁰ *Id.* at 472-76.

²²¹ E.g., Gwyn, *supra* note 217, at 503.

²²² Magill, *supra* note 59, at 618-19.

Constitutional administration equips us to rebut this longstanding objection to formalism in separation of powers jurisprudence. Why has the Court had so much difficulty in differentiating these functions? I submit that the Court has had so much trouble only because it is living in the fictional universe of current administrative doctrine. To sustain delegations to agencies, the Court *must* make it look like the exercise of delegated authority is mere execution of the law. Thus what appear to be obvious delegations of legislative power are described as executive. Certainly that is confusing; but it is confusing because the Court has bent over backwards to describe legislative power as executive power. If the Court were to revisit its key separation of powers cases having rejected the fiction of non-delegation and accepted the reality of delegation, one suspects there will be much more coherence to the definitions of legislative, executive, and judicial power.

To be sure, “implementing” broad laws, in Magill’s terminology, appears both executive and legislative. There is no doubt that the EPA in *Whitman v. American Trucking* and FERC when it grants licenses are “implementing” the law passed by Congress. But they are implementing that law *through legislative acts of their 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, it would be “implementing” the act of Congress, but in no way is it “executing” the law. Rather, it is implementing the act by making laws of its own, and then executing *those* laws.

Although the objectors charge scholars of separation of powers with elevating form over substance, 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 the real question to be what is the nature of the implementation, we can make real progress toward defining the separate powers. And I have tried to do just that for the most critical powers of the administrative state—rulemaking, enforcement, and adjudication of private rights. Upon dissolving 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.

As I said at the very beginning, however, I do not mean to suggest 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. All I mean to say is that there are at least some classes of administrative acts—and important ones at that—that are easy enough to classify and over which it would be a substantial advance to return control back to the appropriate constitutional branch of government.

B. A Fourth Power of Government?

Another objection might arise. If I am ready to accept unconstitutional delegation, should I not consider more seriously the possibility that the founding generation's understanding of separation of powers is also inadequate? Perhaps we ought to accept both unconstitutional moves rather than just the first. This objection has some intuitive appeal. The Constitution enshrined, at the particular time of its writing, the state of a doctrine that had been evolving for hundreds of years. 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.

We are in a position to punt on this question. Or perhaps the answer is not punting at all, but rather an accommodation of traditional constitutional separation of powers to that objection: constitutional administration retains the values sought by administrative government. That is, even if "administration" were a fourth function and branch of government (or ought to be one) apart from the other three but partaking somewhat in each, constitutional administration leaves this fourth branch, for the most part, entirely unimpeded. For example, although Congress would have legislative veto power over agency rulemaking, it is hard to imagine such power being exercised often. And surely when it is exercised, nothing in the operation of the agencies themselves has really changed. They still go about their business as usual. To be sure, agencies may have to take congressional views into account somewhat more than they already do. But surely that is a virtue.

Unless, of course, one believes that political accountability is not a virtue, that it interferes with the proper role of agencies. 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."²²³ But the premise of that objection is of course contested (for those of us who believe our republican form of government is a virtue); and in any event constitutional administration might mitigate this concern. Perhaps agencies will be more insulated under this model. Congress can deal with the citizen participation and interest groups—which it has *always* dealt with—as a representative body accountable to the people. Interest groups may have incentive to apply pressures at both the agency and congressional level, but at least constitutional

²²³ Rosenbloom, *supra* note 62, at 221.

administration can allow us to reconceptualize administration so that agencies are respected for their technical advice, but the political branches are always responsible for political questions (i.e., what to do with that technical advice).

Put another way, perhaps the vast literature on how best to value agency expertise—e.g., whether presidential administration interferes with it too much²²⁴—becomes entirely moot. There may be no need to debate over which agency decisions are technical and scientific rather than political, or whether any agency decision is ever apolitical. None of that matters 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?

I am often pressed with one final 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, and which the courts have allowed to exist, and to bring constitutional doctrine into line with that reality. Congress in the past eighty years and more has not delegated its powers to private individuals with the approbation of the courts; 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. To allow those 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—the only Congress shall make law—so that we may bring the operations of each government branch as it relates to the administrative state closer to the original intended operation of that branch. It seeks not a wholesale rewriting of the constitutional text, but on the contrary a recovery of much of it that has been lost.

V. CONCLUSION: FORMALISM, FUNCTIONALISM, AND “BALANCE”

We should take stock of where we have arrived. 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

²²⁴ See, e.g., Kagan, *supra* note 12, at 2352-58 (discussing the “difficult issue” of “the apparent tradeoff between politics and expertise as a basis for decisionmaking within the administrative system”).

executive.²²⁵ Thus, scholars like Martin Flaherty argue that modern separation of powers doctrine, advanced in *Chadha*, *Bowsher*, and other cases, not only represents a triumph of formalism over functionalism, but is inconsistent with the founding vision.²²⁶ Flaherty argues that the Founders sought “balance” among the branches of government.²²⁷ I confess that, when reading modern administrative law cases, I often feel myself torn—surely an experience others have had. On the one hand, formalism tends to ensure rule of law values and certainty, and is more faithful to the constitutional text. On the other, there can be no doubt that had the Framers conceived of the modern administrative state, they would be aghast at the power of the executive branch. Thus, even those who have recognized 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.²²⁸ There is something incredibly compelling about Justice White’s functionalist vision for administrative law. It is not quite what the constitutional text says, but it looks a lot more like what the text may have been intended to create.

Constitutional administration may advance 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 executive branch if we accept the fiction that Congress does not delegate legislative power and thus that its agents in the executive are 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 doctrine reflected these insights, many constitutional formalists ought to breathe more easily when contemplating the administrative state. Functionalists who seek more accommodation among 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

²²⁵ See, e.g., *N.L.R.B. v. Noel Canning*, 134 S. Ct. 2550, 2606 (2014) (Scalia, J., dissenting) (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 21, at 1817.

²²⁶ Flaherty, *supra* note 21, at 1729-30 (arguing that the Founders sought “balance,” which is more consistent with functionalism); Gwyn, *supra* note 217, at 474-75 (describing the debate between formalism and functionalism).

²²⁷ Flaherty, *supra* note 21, at 1729-30; see also *id.* at 1741, 1766-67

²²⁸ Recall McCutchen’s argument respecting the legislative veto, *supra* note 4 and accompanying text.

lot less unconstitutional. The activities and powers of each branch of government would be closer to their intended original 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.