Tyranny and administrative law*

Tirania e o direito administrativo

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ABSTRACT

The Federalist Papers define "tyranny" as "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many." This definition would seem to include the modern administrative agency, which exercises all three powers. To avoid tyrannical agencies and their illegitimate exercise of power, judges and academics look to administrative law. Its procedures and requirements, such as public comment, judicial review, agency reason-giving and deliberation, and executive oversight, saddle agencies with checks and balances and, therefore, legitimacy. Yet unease with the administrative state continues; indeed, it seems to be in a constant crisis of legitimacy, suggesting that administrative law's quest for legitimacy has not succeeded. This Article argues that this crisis of legitimacy stems from the inherent conflict between the assumptions underlying those of administrative law and the Constitution. These sets of assumptions differ profoundly over political actors' motivations and human nature, rationality in political and

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administrative decision-making, and the role of executive lawmaking in a democracy. This Article compares *The Federalist Papers* and administrative law and scholarship to uncover those differences. But this Article does not engage in an "originalist" critique of administrative law. Instead, it shows that administrative law's crisis of legitimacy inevitably proceeds from its jarring discontinuity with deep assumptions underlying our constitutional structure.

KEYWORDS

The Federalist Papers — legislative — administrative law — three powers — crisis of legitimacy — Constitution

RESUMO

A obra *O federalista* define "tirania" como "a acumulação de todos os poderes, legislativo, executivo e judiciário, nas mesmas mãos, seja na de um, alguns ou vários". Essa definição pareceria incluir a agência administrativa moderna, que exerce todos os três poderes. Para evitar agências tiranas e seu exercício ilegítimo do poder, juízes e acadêmicos procuram o direito administrativo. Seus procedimentos e requerimentos, como comentários públicos, revisão judicial, agência de razão e deliberação e supervisão executiva, selam agências com verificações e balanços e, portanto, legitimação. Ainda assim, o desconforto com o Estado administrativo continua; inclusive, parece ser uma constante crise de legitimidade, sugerindo que a busca do direito administrativo por legitimidade não prosperou. Este artigo argumenta que essa crise de legitimidade se origina do conflito inerente entre hipóteses subjacentes às do direito administrativo e a Constituição. Esse conjunto de hipóteses difere profundamente das motivações de atores políticos e da natureza humana, da racionalidade na tomada de decisões políticas e administrativas, e em toda a legislação executiva na democracia. Este artigo compara a obra *O federalista*, as leis administrativas e a escolaridade para revelar aquelas diferenças. Mas este artigo não se engaja em uma crítica "original" do direito administrativo. Pelo contrário, mostra que a crise de legitimidade do direito administrativo inevitavelmente provém de chocante descontinuidade com premissas subjacentes à estrutura constitucional.

PALAVRAS-CHAVE

O federalista — legislativo — direito administrativo — três poderes — crise de legitimidade — Constituição

Introduction

> *The natural progress of things is for liberty to yield, and government to gain ground.*[1]

The Federalist Papers define "tyranny" as "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many."[2] Under that definition, the modern administrative agency seems to qualify. Congress can delegate authority to agencies to write regulations and conduct adjudications with the vaguest of statutory directions.[3] Agencies have broad powers to determine their own jurisdiction.[4] They can choose to

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1 Letter from Thomas Jefferson to Edward Carrington (May 27, 1788), *in* 13 The Papers of Thomas Jefferson, at 208-09 (Julian P. Boyd et al. eds., 1950).

2 The Federalist No. 47, at 298 (James Madison) (Clinton Rossiter ed., 2003). The authors of *The Federalist Papers* accepted this political truth, attributed to Montesquieu:

> The oracle who is always consulted and cited on this subject, is the celebrated Montesquieu . . . . "When the legislative and executive powers are united in the same person or body," says [Montesquieu], "there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner."

Id. at 298, 300; *see also* Jacob E. Gersen, *Unbundled Powers*, 96 Va. L. Rev. 301, 329 (2010) (citing Thomas O. Sargentich, *The Contemporary Debate About Legislative-Executive Separation of Powers*, 72 Cornell L. Rev. 430, 449-54 (1987)) (ascribing to Montesquieu separation of powers); M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 Va. L. Rev. 1127, 1191-94 (2000) (also ascribing separation of powers to Montesquieu).

3 Mistretta v. United States, 488 U.S. 361, 372-73 (1989) (citing Am. Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946)) (explaining that a delegation is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority"); J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) (allowing broad delegation provided Congress legislates "an intelligible principle to which the person or body authorized to [act] is directed to conform").

4 City of Arlington v. FCC, 133 S. Ct. 1863, 1874 (2013) ("Those who assert that applying *Chevron* to 'jurisdictional' interpretations 'leaves the fox in charge of the henhouse' overlook the reality that a separate category of 'jurisdictional' interpretations does not exist . . . . [A] court need not pause to puzzle over whether the interpretive question presented is 'jurisdictional.'").

create law within that jurisdiction through rulemaking or adjudication,[5] often without public notice or input.[6] Judges review agency actions but do so under highly deferential standards—and only after administrative rules have been promulgated, enforced, or even used to impose penalties against individuals.[7]

The claim of administrative tyranny resonates today and explains why the administrative state continues to attract controversy.[8] Indeed, academic arguments about how agency decisions by unelected bureaucrats gain democratic legitimacy have a direct bearing on the controversies surrounding President Obama's exercise of administrative decision-making on immigration,[9] environment,[10] and sexual assault on campuses.[11]

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5 SEC v. Chenery Corp., 332 U.S. 194, 203 (1947) ("And the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.").

6 An agency is authorized to dispense with notice-and-comment procedures when it "for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B) (2012).

7 Empirical research shows that agencies' decisions are generally upheld. David Zaring, *Reasonable Agencies*, 96 Va. L. Rev. 135, 170 (2010) ("When the eleven studies are pooled, the overall agency validation rate is 69%."); Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. Chi. L. Rev. 761, 767 (2008) (calculating the overall rate of votes to validate agency decisions challenged as arbitrary is 64%); Claudia Tobler, *The Standard of Judicial Review of Administrative Agencies in the U.S. and EU: Accountability and Reasonable Agency Action*, 22 B.C. Int'l & Comp. L. Rev. 213, 221 (1999) ("The substantive review of administrative action is modest." (citation omitted)).

8 *See* Jeremy K. Kessler, *The Struggle for Administrative Legitimacy*, 129 Harv. L. Rev. 718, 718 (2016) (reviewing Daniel R. Ernst, *Tocqueville's Nightmare: The Administrative State Emerges in America*, 1900-1940 (2014)) (quoting Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 Ann. Rev. Psychol. 375, 376-77 (2006) ("[T]he American people remain perennially unconvinced that administrative decision-making is 'appropriate, proper, and just,' entitled to respect and obedience 'by virtue of who made the decision' (executive officials) and 'how it was made' (the administrative process).")).

9 *Texas v. United States* involved the U.S. Department of Homeland Security's Deferred Action for Parents of Americans and Lawful Permanent Residents program ("DAPA") in which the Department claimed it had the discretion under immigration law to not deport aliens with U.S.-citizen children. *See* 809 F.3d 134, 171-72 (5th Cir. 2015), *as revised* (Nov. 25, 2015), *aff'd mem.*, 136 S. Ct. 906 (2016), *reh'g denied*, 137 S. Ct. 285 (2016).

10 The U.S. Supreme Court stayed implementation of the EPA's Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (to be codified at 7 C.F.R. pt. 300). These rules were vital to the Obama Administration's climate-change agenda and limited carbon dioxide emissions from power plants. *See* Chamber of Commerce v. EPA, 136 S. Ct. 999 (2016).

11 Many have criticized the Department of Education's use of an informal letter, as opposed to notice-and-comment rulemaking, to issue its recent campus sexual assault guidelines. The reliance on administrative discretionary authority prompted statements from the law faculties of Harvard and the University of Pennsylvania. *See* Elizabeth Bartholet et al., *Rethink Harvard's Sexual Harassment Policy*, Boston Globe (Oct. 15, 2014), http://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html; Eugene Volokh, *Open Letter From 16 Penn Law School Professors About Title IX and Sexual Assault Complaints*, Wash. Post: Volokh Conspiracy (Feb.

Consider an example that critics of the administrative state both on the right[12] and left[13] often cite. George Norris, a 64-year-old grandfather of eight had a small, mail-order orchid business.[14] Because the United States is a signatory to the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"),[15] which is codified in the Endangered Species Act of 1973 ("ESA"),[16] importing certain plants and animals implicates a large regulatory regime. The ESA authorizes the Secretary of the Interior to enforce the CITES obligations,[17] including regulations for importing orchids listed in the CITES appendices.[18] These regulations require importers to obtain certain permits.[19] These regulations also require that orchids "plainly and correctly bear on the outer container or on a tag, invoice, packaging list, or other document accompanying the plant, [the] . . . . [g]enus and species, and quantity of each [plant]."[20]

George Norris arguably did not possess any illegally imported orchids.[21] Rather, he had failed to use the correct paperwork for several imported orchids he sold to undercover agents.[22] He also failed to properly label orchids and file appropriate permits.[23]

He and Kathy, his wife, were at home one day in Spring, Texas when armed U.S. Fish and Wildlife Service agents stormed in and ransacked their home.[24] Refusing to answer questions, agents emptied file cabinets, pulled books off shelves, rifled through drawers and closets, and threw the contents on the floor. Norris received 17 months in federal prison.[25] The sentencing

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19, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/02/19/open-letter-from-16-penn-law-school-professors-about-title-ix-and-sexual-assault-complaints/.

12 *See, e.g.*, Radley Balko, *Federal SWAT Raid Over . . . Orchids.,* reason.com: Hit & Run (Oct. 5, 2009, 8:57 AM), https://reason.com/blog/2009/10/05/federal-swat-raid-over-orchids.

13 *See, e.g.*, Chase Madar, *Everyone is a Criminal: On the Over-Policing of America*, Nation (Dec. 9, 2013), http://www.thenation.com/article/everyone-criminal-over- policing-america/.

14 Brian W. Walsh, *Criminalizing Everyone,* Wash. Times (Oct. 5, 2009), http://www.washingtontimes.com/news/2009/oct/05/criminalizing-everyone/?page=all.

15 Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, T.I.A.S. No. 8249 [hereinafter CITES].

16 *See* 16 U.S.C. § 1531(a)(4)(F) (2012).

17 *Id.* §§ 1538(c)(1), 1540(f).

18 *See* CITES, *supra* note 15.

19 50 C.F.R. §§ 23.12(a)(1)(i), 23.12(a)(2)(i) (2016).

20 7 C.F.R. § 355.20(a) (2016).

21 John Jessup, *Orchid Kingpin? Mistake Lands Elderly Gardener in Prison*, CBN News: US (Sept. 20, 2012), http://www.cbn.com/cbnnews/us/2012/september/orchid-kingpin-mistake-lands-elderly-gardener-in-prison/?mobile=false.

22 *Id.*

23 *Id.*

24 Walsh, *supra* note 14.

25 *Id.*

judge advised the Norrises that "[l]ife sometimes presents us with lemons."[26] According to press reports, the judge counseled that the Norrises' job was to "turn lemons into lemonade."[27]

The U.S. Fish and Wildlife Service enforced regulations that the Secretary of Interior promulgated without significant input from Congress or the President. Administrative warrants are not subject to the Fourth Amendment's probable cause standard but rather only the much lower "reasonable basis" standard.[28] Under the law set forth by several U.S. Courts of Appeal, agencies may use SWAT teams to execute these warrants, rifle through personal possessions, and even detain individuals with no solid evidence of criminality.[29]

Significantly, from an administrative law perspective, the Department of Interior created and enforced a legal mandate promulgated with minimal input from any other branch—physically invading a citizen's most private areas with only a suspicion that the citizen violated this mandate. The provisions of the CITES Treaty, which the Senate approved, were silent as to the how its general duties were to be implemented.[30] Further, the low evidentiary standard under which administrative warrants can be granted allows de facto "general warrants" or "writs of assistance" which once allowed the British to rifle through personal possessions without probable cause. This outrage was one "out of which our Revolution sprang," or so Justice Douglas says.[31] At some level, administrative law functions as if the Revolution never occurred.

Judges and legal scholars look to administrative law principles to provide checks and balances that mirror those of the Constitution and

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[26] *Id.*

[27] *Id.*

[28] Greg Knopp et al., *Warrantless Searches and Seizures*, 83 Geo. L.J. 692, 758-60 (1995) ("Administrative search warrants are generally required for nonconsensual fire, health, or safety inspections of residential or private commercial property . . . . Either specific evidence of an existing statutory or regulatory violation or a reasonable plan supported by a valid public interest will justify the issuance of a warrant to conduct an administrative search."); Camara v. Mun. Court, 387 U.S. 523, 538 (1967) ("Having concluded that the area inspection is a 'reasonable' search of private property within the meaning of the Fourth Amendment, it is obvious that 'probable cause' to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling.").

[29] *See* Ruttenberg v. Jones, 603 F. Supp. 2d 844, 865 (E.D. Va. 2009), *aff'd*, 375 F. App'x 298 (4th Cir. 2010) ("It was constitutionally reasonable [under a warrantless administrative search] for approximately thirty-eight officers to conduct a fifty-four minute operation that . . . involved little, if any, brandishing of weapons."); Crosby v. Paulk, 187 F.3d 1339, 1343 (11th Cir. 1999) (finding constitutional a warrantless search in which over 40 law enforcement officers searched "nightclubs . . . so that identifications of approximately 400 patrons could be checked.").

[30] *See* CITES, *supra* note 15.

[31] Berger v. New York, 388 U.S. 41, 64 (1967) (Douglas, J., concurring).

therefore give administrative law legitimacy.[32] Indeed, some call this effort "constitutionalized administrative law."[33] These "administrative" checks and balances include judicial review of agency action,[34] agency "reason-giving" to restrain its arbitrary use of power,[35] bureaucratic professionalism as ensuring wise policy,[36] and even the process of agency deliberation.[37] Despite this "mini-me" constitutional administrative law, many judges, academics, and

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[32] Emily S. Bremer, *The Unwritten Administrative Constitution*, 66 Fla. L. Rev. 1215, 1234-35 (2014) ("More specifically, administrative law rules often serve the four functions of constitutions. They create and map important government institutions, regulate the boundaries among those institutions, establish the relationship between agencies and citizens, and protect and promote commonly held core values."); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 Yale L.J. 2314, 2322 (2006) ("Bureaucracy can be reformed and celebrated (instead of purged and maligned), and neutral conflict-decision mechanisms can be introduced. Design choices such as these can help bring our government back in line with the principles envisioned by our Founders."); Gillian E. Metzger, *Embracing Administrative Common Law*, 80 Geo. Wash. L. Rev. 1293, 1299-1300 (2012); Tom Ginsburg, Written Constitutions and the Administrative State: On the Constitutional Character of Administrative Law, *in Comparative Administrative Law* 117, 118 (Susan Rose- Ackerman & Peter L. Lindseth eds., 2010); Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 Colum. L. Rev. 515, 534 (2015) ("These two counterweights, when placed alongside agency leaders, constitute a secondary, administrative system of checks and balances. It is a system that, once again, in many ways carries forward and breathes new life into the Framers' normative, constitutional, and functional commitment to limited, encumbered government.").

[33] *See* discussion *infra* Part II. *See generally* William N. Eskridge, Jr. & John Ferejohn, *A Republic of Statutes: The New American Constitution* 29-34 (2010) [hereinafter Republic of Statutes]; Bremer, *supra* note 32, at 1218; William N. Eskridge, Jr., *America's Statutory "Constitution"*, 41 U.C. Davis L. Rev. 1, 3-6 (2007); William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 Duke L.J. 1215, 1228-39 (2001); Gillian E. Metzger, *Ordinary Administrative Law As Constitutional Common Law*, 110 Colum. L. Rev. 479 (2010); Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 Yale L.J. 952, 954-56 (2007); Glen Staszewski, *Constitutional Dialogue in A Republic of Statutes*, 2010 Mich. St. L. Rev. 837 n.7 (2010); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 Stan. L. Rev. 29, 30-32 (1985).

[34] Metzger, *supra* note 33, at 491 ("Part of the explanation for this expansion of substantive judicial scrutiny of agency decision-making lies in constitutional concerns with broad delegations of power to agencies and the attendant risk of unaccountable and arbitrary exercises of administrative power.").

[35] *See* Jerry L. Mashaw, *Reasoned Administration: The European Union, the United States, and the Project of Democratic Governance*, 76 Geo. Wash. L. Rev. 99, 111 (2007) (noting constitutional basis of reasoned decision-making requirement); Richard W. Murphy, *The Limits of Legislative Control Over the "Hard-Look,"* 56 Admin. L. Rev. 1125, 1133 (2004) ("[A]n agency's action must stand or fall on the basis of the rationale on which the agency itself purports to base its decision.").

[36] *See* Eric Berger, Individual Rights, *Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. Rev. 2029, 2102 (2011) (discussing the threats of administrative bureaucracy); *id.* at 2068 (quoting Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 Mich. L. Rev. 399, 419-21 (2007) ("Arbitrary and capricious review, in particular, is often a means for courts to examine whether the agency made its decision with sufficient expertise.") (internal quotations omitted)); Cass R. Sunstein, *Factions, Self-interest and the APA: Four Lessons Since 1946*, 72 Va. L. Rev. 271, 281 (1986) ("The principal virtue of technical knowledge is that it informs regulatory decisions by shedding light on their potential effects.").

[37] *See* Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 Harv. L. Rev. 1511, 1515 (1992) (discussing the call for deliberative decision-making).

voters remain unconvinced.[38] in response, defenders of the administrative state say that the administrative state is here to stay; stop worrying about its legitimacy. It's time to move on.[39]

This Article takes a new look at this enduring debate by examining whether administrative law's checks and balances can successfully mimic the Constitution's checks and balances. In Part I, this Article explores how the Founders envisioned these checks and balances to work as set forth against the historical background of English administrative law.

In Part II, this Article argues that administrative law's assumptions about human psychology and political motivations conflict with the Founders' views. First, defenders of the legitimacy of the administrative state assume that agency heads and employees do the right thing—or at least that reason or deliberation will somehow lead agency actors to the right answer, regardless of personal interest or ambition. By contrast, *The Federalist Papers*—adopting a practical, realistic view—see politicians and judges as eager to expand their power and self-interested to promote their own careers and personal well-beings. Further, defenders of the administrative state seem markedly indifferent to information and transaction costs. They envision an Executive capable of exerting effective control over the hundreds of thousands of pages of regulations produced yearly, judges capable of evaluating these efforts, and voters capable of monitoring the entire process. In contrast, *The Federalist Papers* envision enumerated powers that keep a short leash on each branch's scope of activity. Last, administrative-state defenders argue

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[38] *See* Douglas H. Ginsburg, *Readings: Delegation Running Riot*, 18 Reg., no. 1, 1995, at 83-84 (book review); Phillip Hamburger, *Is Administrative Law Lawful* 2-17 (2014); Martin H. Redish, *The Constitution as Political Structure* 135-61 (1995); David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* 2-14 (1993); Brian Lipshutz, *Justice Thomas and the Originalist Turn in Administrative Law*, 125 Yale L.J. Forum 94, 103 (2015) (Justice Thomas "has taken the originalist critique of administrative law out of the academy and into the courts"); Michael B. Rappaport, *The Selective Nondelegation Doctrine and the Line item Veto: A New Approach to the Nondelegation Doctrine and its implications for Clinton v. City of New York*, 76 Tul. L. Rev. 265, 270-73 (2001). *See generally* Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* 3-17 (2004).

[39] Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. Chi. L. Rev. 393, 472-73 (2015) ("In recent decades, an extraordinary amount of academic energy has been devoted to the idea that the Constitution is in some sense 'lost' or 'in exile,' and that large-scale doctrinal change is necessary in order to assure its restoration . . . . [W]e believe that the underlying developments are at best in serious tension with both the underlying sources of law and the governing decisions of the Supreme Court."); Adrian Vermeule, *is Administrative Law Unlawful? By Philip Hamburger. Chicago, Illinois: The University of Chicago Press, 2014. 648 Pages. $55.00.*, 93 Tex. L. Rev. 1547, 1566 (2015) (book review) ("It's especially irresponsible to go around saying that the administrative state is 'unlawful,' whatever that may mean.").

that the administrative state is either inevitable or highly beneficial. By contrast, the authors of *The Federalist Papers* view government as a necessary evil, not a therapy to facilitate societal self-discovery.

In Part III, this Article examines mechanisms of the administrative state that its defenders argue provide similar checks and balances. These mechanisms, however, seem at odds with assumptions about human psychology and political motivations set forth in Part II. In short, the Constitution's assumptions about human psychology and political motivations contradict those of the administrative state. In that sense, the administrative state will always be at tension with the deep assumptions of the Constitution and, therefore, lack legitimacy.

I. Administrative Law and Tyranny

The "biggest change in the [constitutional] structure has been the creation of the modern administrative state."[40] Under its rule, "most national lawmaking . . . is no longer Article I, [§] 7[] of the Constitution, but is instead the Administrative Procedure Act of 1946."[41] This claim is no hyperbole. By number or length of rules, as shown in Tables 1 and 2, the bureaucracy's output of legal duties and obligations completely outpaces Congress's.[42]

Administrative Output in the Code of Federal Regulations		
Year	Final Rules	Page Length
2015	3,410	24,694
2014	3,554	24,861
2013	3,659	26,417
2012	3,708	24,690
2011	3,807	26,274
2010	3,573	24,914
2009	3,503	20,782

Table 1: Annual Administrative Output (2009-2016)

[40] Republic of Statues, *supra* note 33, at 11.
[41] Id.
[42] *See Previous Sessions of Congress Public Law Numbers*, Nat'l Archives (Jan. 25, 2017), http://www.archives.gov/federal-register/laws/past/index.html.

Year	Number of Statutes at Large Passed	Total Statute Pages
2016	329	—
2015		723
2014	296	4,075
2013		1,210
2012	284	1,631
2011		2,176
2010	385	4,777
2009		3,760

Table 2: Annual Legislative Output (2009-2016)

While the New Deal and the Administrative Procedure Act[43] ("APA"), played a pivotal role in the expansion of government by agency, this transformation is part of a greater historical story about the power struggles between the executive and the legislature (or judges) in a democratic society. This on-going story spans centuries, extending back to the Magna Carta and the barons' successful effort to retain the power to tax, as well as the efforts of the Tudor monarchs to defy Parliament.[44]

A. English Constitutional Precedent and the Administrative State

The current questions about the legitimacy of the administrative state trace their immediate origins to the seventeenth-century struggle between Parliament and the Stuart kings. Parliament, in the seventeenth century, argued that its lawmaking authority governed everyone, including the king.[45]

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[43] Pub. L. No. 79-404, 60 Stat. 237 (1946).

[44] *See* Roscoe Pound, *The Spirit of the Common Law* 25-26 (1921) (discussing early theories of duties of rulers).

[45] Colin Rhys Lovell, *English Constitutional and Legal History* 111-12 (1962); A.E. Dick Howard, *The Bridge at Jamestown: The Virginia Charter of 1606 and Constitutionalism in the Modern World*, 42 U. Rich. L. Rev. 9, 19 (2007) ("The first Stuart king, James I, (formerly James VI of Scotland), came to the throne in 1603. He and his successor, Charles I, often found themselves at cross-purposes with Parliament . . . . As a result, they resorted to various forms of prerogative taxation, such as forced loans. These and other actions, including illegal arrests and the application of martial

In reaction, the Stuart monarchs looked to continental Roman-based civil law over English common law to support their assertion of great executive powers to make law.[46] And, as some have powerfully argued, the administrative state represents a return to the Stuart concept of royal legislative privilege.[47]

In the seventeenth century, the English common lawyers won the argument.[48] The English rejected the King's claim of vast discretion in making law through proclamations,[49] legal interpretation,[50] suspending and dispensing with the law,[51] or creating special royal courts.[52] Rather, it became clear that the province of Parliament was to make the law, the courts to interpret it,

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law to civilians, provoked calls for action in Parliament. Sir Edward Coke, a leader of the parliamentary cause, insisted that the subjects' liberties were not acts of grace on the king's part, but matters of right. '[S]overeign power' is no parliamentary word,' Coke declared, 'Magna Carta is such a fellow, that he will have no sovereign.'"); Guy I. Seidman, *The Origins of Accountability: Everything I Know About the Sovereign's Immunity, I Learned from King Henry III*, 49 St. Louis U. L.J. 393, 460 (2005) ("The seventeenth-century dispute between Parliament and the monarch was not a purely idealistic struggle between supporters of democracy and a king's claim of a 'divine right' to rule. This was a power struggle. It was deeply personal. It was over money, fame, and glory.").

46 Pound, *supra* note 44, at 63; Seidman, *supra* note 45, at 460 ("The king could not impose taxes unilaterally; he had to ask the barons—later, Parliament—for any additional income.").

47 *See* Hamburger, *supra* note 38, at 493 ("Like the English Crown before the development of English constitutional law, the American executive seeks to exercise power outside the law and the adjudications of the courts."); Noga Morag-Levine, *Common Law, Civil Law, and the Administrative State: From Coke to Lochner*, 24 Const. Comment. 601, 622 (2007) ("From its likely inception in Fortescue's writings in early modern England the distinction between political and legal reasoning took hold within a larger project geared at deflecting continental—at that point primarily French—legal and political influences. Beginning with the teachings of Fortescue and Coke, these doctrines distinguished 'judicial reason' as defined by common law from universal conceptions of reason under civil law. Embedded within the respective constitutional frameworks were alternative conceptions of the administrative state. The first was rooted in the centralizing and reformist ambitions of mercantilist governance dating to early modern Europe; the second in countervailing regulatory models that favored both decentralization and limited regulatory intervention in economic relations.").

48 Alpheus Todd, II Parliamentary Government in England: Its Origin Development and Practical Operation 165 (Ebron Classics ed. 2005) (1892) ("It is a fundamental law of the English constitution, that the sovereign can neither alter, add to, nor dispense with, any existing law of the realm."); Pound, *supra* note 44, at 78-79 ("In France, where the treatises of the widest influence were written, there was coming to be something very like the Byzantine *princeps,* and in England if Tudor and Stuart had their way there would have been a like result . . . the common law . . . forced to a position which seemed in practice to assert that . . . there was law above and behind all sovereigns which they could not alter . . . .").

49 Hamburger, *supra* note 38, at 38 ("[T]he Act of Proclamations was promptly repealed in 1547—the first year of the next reign. It lived on, however, as a memorable warning against legal authorization for prerogative or administrative power.").

50 *Id.* at 55 (explaining that the "judges by virtue of their office could defer only to the law and their precedents, not . . . their monarch's").

51 *Id.* at 73 ("[T]he constitution placed the legislative power in Parliament, and on this basis [Parliament and judges] broadly condemned any executive power to diminish the obligation of laws.").

52 *Id.* at 133.

and the King to enforce it.[53] This basic understanding was reflected in the Bill of Rights of 1689, which William of Orange and Mary Stuart accepted after the Glorious Revolution in 1688 as a condition for succeeding to the crown.[54] While the English Constitution never developed the strict separation of powers found in the United States, the principle that the legislators create law, not the executive, became a bedrock principle in our Constitution.[55]

The common law's achievement, making legislatures and their laws primary, distinguishes the governments of English-speaking countries.[56] By contrast, nearly all other non-English speaking countries adopted civil law during the medieval and early modern period.[57] The Code of Justinian (*Corpus Juris Civilis*) had the greatest influence on European law.[58] This code was written as a tool of imperial administration in the sixth century under Justinian, a Byzantine emperor with absolute power over virtually all aspects of his subjects' lives.[59]

Civil law, of course, has rules to be applied—and these rules continue to serve most of the world well, as most legal systems are civil in origin.[60] But the prince and his administration always stood above these legal rules. As the civil law maxim says, "*quod principi placuit legis habet vigorem*."[61] This, of course, can lead to arbitrary decision-making by the executive.[62]

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53 *Id.* at 28 ("The English, especially English lawyers, had long been profoundly attached to government and under law . . . common lawyers became openly skeptical as to whether a king could lawfully exercise lawmaking power outside the law [as passed by Parliament] . . . . They therefore increasingly condemned the lawmaking and adjudicatory prerogatives as outside ordinary law.").

54 G.M. Trevelyan, *The English Revolution 1688-1689*, at 63 (1939).

55 Mistretta v. United States, 488 U.S. 361, 380 (1989) ("This Court consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty.").

56 A.V. Dicey, Introduction to the Study of the Law of the Constitution 111-12 (10th ed. 1961) (explaining that "[t]he singularity of England was . . . the legality of the English system of government" as compared to the "wayward arbitrariness" of continental government where the executive had much greater discretion in applying the law).

57 John Merryman, *The Civil Law Tradition* 10 (3d ed. 2007) ("But, by one means or another, the Roman civil law was received throughout a large part of Western Europe, in the nations that are now the home of the civil law tradition.").

58 *id.* at 10-11.

59 Warren T. Treadgold, *A History of the Byzantine State and Society* 20 (1997).

60 Merryman, *supra* note 57, at 18-29.

61 Chief Justice John Fortescue made one of the earliest and most famous rejections of this maxim of continental civil law. Stating that the English constitution "admit[s] of no such maxim, or anything like it" for no monarch can "at his pleasure, make any alterations in the laws of the land." Morag-Levine, *supra* note 47, at 618.

62 Dicey, *supra* note 56, at 110 ("[A] study of European politics . . . [shows] that wherever there is discretion there is room for arbitrariness, and that in a republic no less than under a monarchy

After the various European revolutions got rid of the princes, the executive and its bureaucracy remained. And, under civil law, the executive and its bureaucracy simply inherited the prince's lawmaking powers.[63] Thus, civil law countries are, in general, far more comfortable allowing executive lawmaking authority.[64] If a European prince—or his successor republican government—willed a board of health or a special road building administration, so it was. Further, since the French Revolution, civil law countries tend to have special administrative courts, further empowering agencies to work independently from the legislature thereby giving them lawmaking, executive, and judicial powers.[65]

In contrast (and in theory at least), the English Constitution bound even the prince and his administration to Parliament's law. Without approval from Parliament, the King had no authority to institute a board of health or impose a road-building administration.[66] This difference between civil and administrative law underlies the ambiguous status of administrative legality in the United States.[67]

While this account—squeezing centuries of complex historical development into a few paragraphs—is, of course, simplistic, it provides an important nugget of truth for understanding administrative law. From Roman times, law served as the tool of government administration; the English common lawyers insisted administration become the tool of law.[68] Civil law assumes a supreme administrative power (the emperor or prince or, more recently, the "people") that is near absolute; common law postulates that the prince will only execute the laws the legislature makes.

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discretionary authority on the part of the government must mean insecurity for legal freedom on the part of its subjects.").

63 Merryman, *supra* note 57, at 22 ("[I]t was common in civil law notions for the prince to have lawmaking power.").

64 *id.* at 23.

65 *id.* at 87.

66 Morag-Levine, *supra* note 47, at 629.

67 A.V. Dicey, writing in the nineteenth century, stated that the French *droit administrative* had no counterpart in European law because it was law made by the executive. "This absence from our language of any satisfactory equivalent for the expression *droit administrative* is significant; the want of a name arises at bottom from our non-recognition of the think itself." Dicey, *supra* note 56, at 215.

68 *Id.* at 627-32 (2007) ("Early 17th-century England provided a crucial point of reference for participants in nineteenth-century constitutional debates, as the earlier analysis of Pound and Corwin's writings on this topic suggested. This sense of continuity built, in turn, on foundational eighteenth- and early nineteenth-century texts through which divisions over the legitimacy of continental models of administration in early modern England were reframed as a choice between continental police and nuisance-focused, common law regimes."); *see also* Gerald J. Postema, *Bentham and the Common Law Tradition* 3-4 (1986).

Following that tradition, Congress made most laws for most of our history. Agencies did not make law through "regulations, interpretation[s] or determinations."[69] The role of the agency-made federal law in everyday life was limited because the federal government had strictly limited roles, primarily in "traditional" areas, such as the customs office, post office,[70] patents,[71] land sales,[72] and, of course, the military. In sum, the federal government acted with little discretion—like clerks.[73] Alexis de Tocqueville, the great observer of nineteenth- century America, famously stated, "The nation . . . may almost be said to govern itself, so feeble and so restricted is the share left to the administration."[74] It was not until the late nineteenth century and the birth of the interstate Commerce Commission ("ICC") in 1877 that the federal government began taking its first steps towards large-scale regulation of the economy.[75]

Legal academics take strikingly different views about the power and legal role of the pre-ICC agencies; specifically, whether nineteenth-century agencies had the lawmaking power of contemporary agencies. one side argues that the nineteenth-century agencies did, in fact, engage in significant law-making and that agency power played a large role in the pre-Progressive Era and New Deal America.[76] Certainly the customs administration, treasury,

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[69] Hamburger, *supra* note 38, at 110 ("The executive . . . could make regulations and interpretations that merely directed executive officers and nonsubjects and could make determinations that merely discerned factors or the duties or subjects . . . . As a result executive regulations, interpretations, and determinations are not precedents for binding administrative legislation.").

[70] Daniel Carpenter, *The Forging of Bureaucratic Autonomy* 65 (2001).

[71] Andrew P. Morriss & Craig Allen Nard, *Institutional Choice & Interest Groups in the Development of American Patent Law: 1790-1865*, 19 Sup. Ct. Econ. Rev. 143, 144 (2011) ("Through a series of common law developments, the adoption of the 1836 Patent Act, and an assortment of smaller statutory changes through 1865, much of the modern patent system was put into place.").

[72] Hamburger, *supra* note 38, at 197.

[73] Carpenter, *supra* note 70, at 38 ("American bureaucracy in the 1800s was a regime of clerkship. In law and in practice, federal agencies existed only to carry out with a minimum of forethought the laws the Congress had passed.").

[74] 2 Alexis de Tocqueville, Democracy In America 23 (Henry Reeve trans., London, Saunders & Otley, 1835).

[75] Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated industries Law*, 98 Colum. L. Rev. 1323, 1325 (1998) ("The original paradigm was established over 100 years ago with the enactment in 1887 of the Interstate Commerce Act. That paradigm was characterized by legislative creation of an administrative agency whose task was to oversee an industry providing common carrier or public utility services.").

[76] *See* Jerry L. Mashaw, *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law* (2012); Jerry L. Mashaw, *Administration and "The Democracy": Administrative Law From Jackson to Lincoln*, 1829-1861, 117 Yale L.J. 1568, 1668 (2008) ("Perhaps the most important general development in administrative-congressional relations in this

steamboat regulators, post office, and patent office did produce rules and practices to govern their work.[77]

But, as others have pointed out, the rules nineteenth-century agencies promulgated were not binding law.[78] Courts were not obligated to defer to them—and apparently did not. Further, until well into the nineteenth century, erring bureaucrats could be held personally liable to aggrieved citizens in court.[79] This mechanism alone must have been a powerful incentive for bureaucrats to stay close to the letter of the law and refrain from claims of power based on statutory discretion.

This debate, however, is largely about balance. While the nineteenth-century federal administration has been described as "clerical,"[80] no administration of law can be robotic. Just as judges cannot "apply the law" without "making" the law under circumstances that the legislature cannot foresee, administrators must fill in the gaps legislation creates. on the other hand, the scholarly debate about nineteenth-century administration turns on how many gaps in the law such agencies filled—and that is part of much older, enduring questions of how many gaps they should fill.

B. Administration and the New Deal

Regardless of the precise legal status of administrative promulgations in the nineteenth century,[81] strong constitutional doctrines, discussed *infra*, limited the role of regulatory rulemaking before the New Deal.[82] These limits made the impact of regulation on most transactions in everyday life negligible

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period was the growing recognition that the knowledge necessary for effective policymaking now resided with the administrators of the various governmental departments.").

77 Mashaw, *supra* note 76, at 19, 91, 119, 187.

78 Hamburger, *supra* note 38, at 62.

79 Mashaw, *supra* note 76, at 1-2.

80 Carpenter, *supra* note 70, at 37.

81 Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 Harv. L. Rev. 467, 493 (2002) ("Although grants of authority allowing agencies to adopt 'rules and regulations' appear to be facially ambiguous concerning whether they authorize rules having the force of law, the history of rulemaking during the Progressive and New Deal eras reveals that key participants in the legislative process did not regard such grants as ambiguous. Starting around World War I, Congress began following a convention for indicating whether an agency had the power to promulgate legislative rules.").

82 Carpenter, *supra* note 70, at 64 ("The nineteenth-century American . . . bureaucracy was assigned and delegated distributive tasks fit only or organizations of mediocre talent and routinized duties.").

and hardly shifted the balance of power from Congress to the Executive. During the New Deal, the Supreme Court changed these doctrines.[83] Thus, regardless of the legal status of administrative pronouncements, constitutional law largely limited the nineteenth-century administrative state to the post office, the Department of Agriculture (which during that time did not engage in much rulemaking, but instead functioned to disseminate good farming practices), the Patent office, land sales and management, and the military.[84]

The Progressive Era brought the first federal efforts to regulate the economy, starting with the ICC in 1887[85] and later the Federal Trade Commission ("FTC") in 1914.[86] These agencies departed from previous administrative practice. But, constitutional limits on the federal government's power to regulate limited their impact and scope. And, indeed, neither had rulemaking authority—at least originally.[87] The ICC primarily set rates for interstate railroads pursuant to the ancient common carriage authority, which permitted government regulation of transportation as well as other utilities and industries "affected with the public interest."[88]

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[83] *See Bruce Ackerman, We the People: Transformations (1998); Barry Cushman, Rethinking the New Deal Court (1998); Richard D. Friedman, Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation, 142 U. Pa. L. Rev. 1891 (1994).*

[84] Carpenter, *supra* note 70, at 30-32; Mashaw, *supra* note 76, at 19-22.

[85] "The original paradigm was established over 100 years ago with the enactment in 1887 of the Interstate Commerce Act. That paradigm was characterized by legislative creation of an administrative agency whose task was to oversee an industry providing common carrier or public utility services." Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 Colum. L. Rev. 1323. 1325 (1998). Bernard Schwartz, *The Economic Regulation of Business and Industry*: A Legislative History of U.S. Regulatory Agencies 17 (1973); Samuel P. Huntington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, 61 Yale L.J. 467, 470 (1952) ("The Commission was created in 1887 after the Supreme Court invalidated state attempts to regulate the railroads' abuse of their monopoly power.").

[86] Carpenter, *supra* note 70, at 8.

[87] *Mark E. Budnitz, The FTC's Consumer Protection Program During the Miller Years: Lessons for Administrative Agency Structure and Operation, 46 Cath. U.L.* Rev. *371, 413 (1997) ("Until 1962, the FTC did not engage in substantive rulemaking."); Merrill & Watts, supra note 81, at 506 ("In subsequent years, the courts, Congress, the agency, and knowledgeable commentators all shared the understanding that section 6(g) did not confer legislative rulemaking power on the FTC.").*

[88] Adam Candeub, *Network Interconnection and Takings*, 54 Syracuse L. Rev. 369, 381-82 (2004) ("The authority of state (or federal) government to engage in common carrier-type regulation and regulation of industries affected with the public interest were established in cases such as Munn v. Illinois, 94 U.S. 113 (1877); Traditionally, the most important of these regulations was the standard of care to which they were held. In addition, they cannot discriminate in service, but must charge, as a general rule, everyone the same rate and receive business from all. Finally, and most important, from a historical perspective, common carriers, as the Supreme Court recognized in the famous Munn v. Illinois case, were subject to rate regulation, ruling that the state could regulate the rates charged by certain grain elevators used in loading grain to railroads.").

The New Deal exploded the number of regulatory agencies. This explosion was coincident to, if not caused by, the Supreme Court's lifting of the constitutional limits on federal regulatory power.[89] The New Deal is commonly viewed as the birthplace, or at least the coming of age, of the administrative state.[90]

The New Deal judicial revolution took place on many fronts. First, the Supreme Court overturned the *Lochner* decision, which had barred government regulation of health, safety, and employment conditions that interfered with the right to contract.[91] Under *Lochner*, the Court held that the substantive due process clause guaranteed individuals the right to contract over the terms of their employment.[92] Undermining this precedent, the New Deal Court, starting with the famous *Carolene Products*[93] case, began to apply a rational basis test to economic regulation without regard to any common law or substantive due process concerns.[94] With *Lochner* effectively overturned, the federal government was free to regulate the terms of employment as with the National Labor Relations Act and the Fair Labor Standards Act.[95]

Second, the Supreme Court for a brief period used nondelegation doctrine against the New Deal executive expansion but quickly retreated. under the nondelegation doctrine, the Court accepts delegation to the executive, provided Congress sets forth an "intelligible principle."[96] The doctrine's

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89 G. Edward White, *The Constitution and the New Deal* 13-14 (2000).

90 Many point to earlier progenitors of the administrative state in the nineteenth and early twentieth centuries. "To be sure, the origins of the modern administrative state predate the New Deal. But it was during the New Deal that its defining features were famously defended and cemented." David S. Rubenstein, *The Paradox of Administrative Preemption*, 38 Harv. J.L. & Pub. Pol'y 267, 298 n.157 (2015).

91 198 U.S. 45, 50-54 (1905).

92 David E. Bernstein, *Lochner's Legacy's Legacy*, 82 Tex. L. Rev. 1, 15 (2003).

93 United States v. Carolene Products Co., 304 U.S. 144 (1938).

94 "President Franklin Roosevelt sealed Lochner's fate by appointing a series of New Dealers and other political allies to the Court, who soon declared that economic legislation was subject only to the most minimal constitutional scrutiny." David E. Bernstein, *Lochner v. New York: A Centennial Retrospective*, 83 Wash. U.L.Q. 1469, 1510-11 (2005).

95 "[T]he guardians of individual liberty in the *Lochner* era turned the equalizing guarantees of Reconstruction on their head to maintain the retrograde employment conditions of the antebellum era . . . ." Raja Raghunath, *A Founding Failure of Enforcement: Freedmen, Day Laborers, and the Perils of an Ineffectual State*, 18 CUNY L. Rev. 47, 76 (2014).

96 J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928) (broad delegation that was allowed provided Congress legislates "an intelligible principle to which the person or body authorized to [act] is directed to conform"); Mistretta v. United States, 488 U.S. 361, 372-73 (1989) (a statute is, under the nondelegation doctrine, "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority") (quoting Am. Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946)).

development remained sparse until the twentieth century.[97] Several cases decided between 1892 and 1936 did provide judicial validation for increasingly expansive congressional grants of legislative authority.[98]

But it was during the New Deal—in 1935 in the high-profile cases of *Panama Refining Co. v. Ryan*[99] and *A.L.A. Schechter Poultry Corp. v. United States*100—that the Court—for a brief period—used the doctrine to limit executive power; despite this brief reliance on nondelegation, however, the Court quickly retreated from the nondelegation doctrine. Since the 1936 *Carter v. Carter Coal* case,[101] the last case to rely upon the nondelegation doctrine, almost any statutory mandate is sufficient to provide an intelligible principle. As Gary Lawson points out, the Supreme Court would probably consider the principle of goodness and niceness sufficient to uphold delegating rulemaking authority to the Goodness and Niceness Commission.[102] Indeed,

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97 Andrew J. Ziaja, *Hot Oil and Hot Air: The Development of the Nondelegation Doctrine Through the New Deal, A History, 1813-1944*, 35 Hastings Const. L.Q. 921, 924 (2008) ("Starting in 1813 and throughout Nineteenth Century, the doctrine lurked on the periphery of the Supreme Court's jurisprudence, only half-heartedly gaining recognition. It existed more as a nebulous idea about separation of powers than a cogent doctrine and never struck down a statute. Then, in the early Twentieth Century, the separation of powers theory coalesced and gained the test that has endured ever since: the 'intelligible principle' test set forth in *Hampton* in 1922.").

98 Peter H. Aranson et. al., *A Theory of Legislative Delegation*, 68 Cornell L. Rev. 1, 5 (1982).

99 293 U.S. 388, 430 (1935).

100 295 U.S. 495 (1935); Evan J. Criddle, *When Delegation Begets Domination: Due Process of Administrative Lawmaking*, 46 Ga. L. Rev. 117, 138 (2011); C. Boyden Gray, *The Nondelegation Canon's Neglected History and Underestimated Legacy*, 22 Geo. Mason L. Rev. 619, 646 (2015) ("In *American Trucking*, the Supreme Court declined to strike down a statute under the nondelegation doctrine. But the Court did not renounce the nondelegation doctrine altogether—it remains a crucial canon of construction, empowering courts to rein in agency overreach through limiting constructions of broad statutes.").

101 298 U.S. 238, 311 (1936) ("The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question.").

102 Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1240 (1994) ("The Supreme Court has not invalidated a congressional statute on nondelegation grounds since 1935. This has not been for lack of opportunity. The United States Code is filled with statutes that create little Goodness and Niceness Commissions—each confined to a limited subject area such as securities, broadcast licenses, or (my personal favorite) imported tea."); *see also* Harold J. Krent, *Delegation and its Discontents*, 94 Colum. L. Rev. 710, 710-11 (1994) (reviewing David Schoenbrad, Power Without Responsibility (1993)) (arguing that a judicially enforced nondelegation doctrine is defunct); Ziaja, *supra* note 97, at 922-23 ("Despite having been argued before the Court at least twenty-two times from 1813 to 1944 alone, however, the doctrine only ever succeeded in three cases, all of which were challenges to statutory components of Franklin D. Roosevelt's New Deal: *Panama Refining v. Ryan* in 1935, which is known famously as the 'hot oil' case since it involved illicit oil sales, *A.L.A. Schechter Poultry Corp. v. United States* also in 1935, and *Carter v. Carter Coal* in 1936.").

most contemporary commentators regard the doctrine as dead, even though the Court refuses to perform the final obsequies.[103]

Third, in addition to increasing the scope of regulatory subject matter, the Supreme Court also increased the power of agencies, making clear their statuses as mini-courts and mini-legislatures and establishing their power to shift between these lawmaking modes. In *SEC v. Chenery II* ("*Chenery* II"),[104] the Court established the principle that an agency has discretion to implement its legislative mandate either through adjudications or rulemaking. This seemingly abstruse legal point gives agencies much greater power to modify or control the development of their mandate.

Finally, the Supreme Court greatly expanded federal regulatory jurisdiction under the Commerce Clause. In the New Deal, the famous *Wickard* case established the principle that an activity can be regulated even if it has a *de minimis* impact on commerce.[105] In *Wickard,* the Court held that the federal government had jurisdiction over wheat produced solely for personal consumption because "[h]ome-grown wheat . . . competes with wheat in commerce. The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon."[106]

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[103] "Courts shouldn't enforce a nondelegation doctrine for the simple reason that there is no constitutional warrant for that doctrine." Eric A. Posner & Adrian Vermeule, *interring the Nondelegation Doctrine*, 69 U. Chi. L. Rev. 1721, 1723 (2002); Criddle, *supra* note 100, at 120 (2011) ("Whatever the nondelegation doctrine's merits may have been as a matter of constitutional theory, the doctrine lost its luster by the middle of the twentieth century. in case after case, the Court upheld statutes empowering the Executive Branch to make law subject only to the most nebulous of statutory standards.").

[104] Russell L. Weaver, *Chenery II: A Forty-Year Retrospective*, 40 Admin. L. Rev. 161, 163 (1988) ("*Chenery II* failed to specify whether courts could preclude agencies from using adjudicatory procedures, and force them instead to use informal rulemaking procedures. Later cases, especially lower court cases, have allowed agencies to exercise broad discretion in deciding whether to create rules adjudicatively or legislatively."). *See generally* Glen O. Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. Pa. L. Rev. 485 (1970) (discussing the adjudicative and rulemaking powers in regard to administrative procedure); David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 Harv. L. Rev. 921 (1965) (discussing the rulemaking and adjudicative powers of agencies regarding administrative law policy).

[105] *See* Wickard v. Filburn, 317 U.S. 111 (1942); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 Va. L. Rev. 1387, 1396 (1987) ("To say that Congress may regulate *X* because of its price effects upon any goods in interstate commerce, or because of its effects upon the quantity of goods so shipped, is to say that Congress can regulate whatever it pleases, a theory that cases such as *Wickard v. Filburn* have so eagerly inferred."); Barry Friedman et al., *"To Regulate," Not "To Prohibit": Limiting the Commerce Power*, 2012 Sup. Ct. Rev. 255, 284 (2012) ("[C]ases like *Wickard* made clear that Congress no longer needed to rely upon interstate movement to justify its regulation of the national economy, but could regulate activities that were themselves not interstate commerce so long as they had a substantial effect on interstate commerce . . . .").

[106] *Wickard*, 317 U.S. at 128.

While federal jurisdiction under the Commerce Clause has had some small setbacks in recent years in cases such as *Lopez*, federal authority continues its expansion sometimes under new guises[107]. The landmark *NFIB*[108] court that upheld the Affordable Care Act ("Obamacare"), although it stated that the Commerce Clause could not compel behavior, at the same time expanded prior understandings of federal taxation powers. Under *NFIB*, the Commerce Clause does not empower the federal government to make you eat spinach, but the Taxation Clause empowers the federal government to tax you if you do not.[109]

The APA formalized the shift to regulatory power, establishing the principle that executive functions must receive minimal review from the courts.[110] It set forth two major procedures for agency promulgation or rules: informal "notice-and-comment" rulemaking[111] and formal rulemaking.[112] Informal rulemaking, which has become the dominant form of regulation-creating, requires an agency to publish a proposed rule, receive comment from the public, consider those comments, and then write a rule with the force of law.[113] Within those procedural boundaries and the broad legal parameters described above, an agency is free to do as it wishes.[114]

The Supreme Court followed in the decades to come with numerous decisions that enshrined a highly deferential approach for review of agency action under the APA. The most prominent is no doubt the *Chevron* test, which sets forth the standards for court review of agency interpretation of statutes.[115] Under *Chevron*, agency interpretations of ambiguous statutes

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[107] United States v. Lopez, 514 U.S. 549, 567 (1995) ("To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.").

[108] NFIB v. Sebelius, 132 S. Ct. 2566, 2570-72 (2012); *Lopez*, 514 U.S. at 567.

[109] *NFIB*, 132 S. Ct. at 2595 ("The same analysis here suggests that the shared responsibility payment may for constitutional purposes be considered a tax, not a penalty . . . .").

[110] Pub. L. No. 79-404, 60 Stat. 237 (1946); *see also* 5 U.S.C. § 706 (2012); Kessler, *supra* note 8, at 722-23 ("[T]he APA's passage marked a constitutionally momentous settlement of the legitimacy crisis that shook the American administrative state in the first four decades of the twentieth century.").

[111] 5 U.S.C. § 553 (2012).

[112] *Id.* §§ 556-57.

[113] *Id.* § 553(c).

[114] *Id.* § 706 (setting forth standards of judicial review of agency action).

[115] Gary Lawson & Stephen Kam, *Making Law Out of Nothing at All: The Origins of the Chevron Doctrine*, 65 Admin. L. Rev. 1, 2 (2013) ("Love it or hate it, Chevron virtually defines modern administrative law." (citations omitted)).

receive deference if they are "reasonable."[116] The *Chevron* test "was viewed by commentators and courts to be particularly deferential, giving agencies wide room to interpret statutes," even when using informal rulemaking.[117] Similarly, the "arbitrary and capricious review" that the APA specifies for judicial review of agency action is highly deferential. Even in its most rigorous gloss, the so-called "hard look" review, the arbitrary and capricious review is "searching and careful, [but] the ultimate standard of review is . . . narrow . . . [and] [t]he court is not empowered to substitute its judgment for that of the agency."[118]

In summary, the shift to administrative lawmaking occurred on many fronts. First, the New Deal, presaged by Progressive Era reform, created agencies with powers to make, enforce, and adjudicate the law. The Supreme Court weakened constitutional restraints on executive power, abolishing limits such as substantive due process, the nondelegation doctrine, and the Commerce Clause's limits on federal jurisdiction. The next Part turns to how this expanded administrative lawmaking authority conflicts with deep constitutional principles.

II. The Assumptions of the Framers: Checks and Balances and Separation of Powers

The authors of *The Federalist Papers* considered separation of powers as axiomatic for nontyrannical government, and they looked to checks and balances to maintain separation.[119] As Part Ill later examines, administrative-law scholars identify certain checks and balances in administrative law as giving legitimacy to agency action.

This Article's primary argument is that agency legitimacy does not rest on whether administrative law provides some conceivable check on arbitrary exercises of discretion. Rather, in order to determine whether administrative law's checks and balances are adequate, one must understand the set of

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[116] Chevron U.S.A. v. Nat. Res. Def. Council, 467 U.S. 837, 844 (1984) ("[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.").

[117] *Eric R. Womack, Into the Third Era of Administrative Law: An Empirical Study of the Supreme Court's Retreat from Chevron Principles in United States v. Mead, 107 Dick. L. Rev. 289, 332 (2002).*

[118] Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402, 416 (1971).

[119] *See supra* Part I.

assumptions under which the Framers designed the constitutional system of checks and balances. Agency legitimacy depends on whether these checks are consistent with the assumptions that underlie our constitutional structure or operate with the same vigor.

Section II.A argues that separation of powers rests upon two main psychological assumptions. First, man is at his root willful and desirous. To the degree he can be coaxed into non-selfish or reason-based behavior, there must be personal incentives and disincentives—i.e., checks and balances that function on his well-being. Second, as a corollary, reason or deliberation alone cannot do this job—particularly under the information constraints that political actors and voters function.

Section II.B argues that *The Federalist Papers*' view of human psychology can illuminate the theory of separation of powers, which is remarkably under-defended in the constitutional record. The specific types of checks and balances found in the Constitution can be understood as designed, through proper institutional incentives and disincentives, to make willful and selfish people identify institutional excellence with their own ambition. This is different from the typical analysis which sees *The Federalist Papers* as proposing that political actors identify with the ambition of their own branch.

In Part III, this Article examines whether the checks and balances upon which administrative law rely are consistent with *The Federalist Papers*' assumptions about human psychology and excellence.

A. Checks and Balances and Human Psychology

The Framers built their checks and balances on two important assumptions. First, many Framers, marinated in their Puritan heritage, thought political actors, indeed all humanity, tended to be selfish, self-serving, and even "depraved."[120] At the same time, the Framers believed that political

[120] The Federalist No. 55, at 291 (James Madison) (Clinton Rossiter ed., 2003) ("As there is a degree of depravity in mankind, which requires a certain degree of circumspection and distrust."); The Federalist No. 78, at 313 (Alexander Hamilton) (Clinton Rossiter ed., 2003) ("[T]he variety of controversies which grow out of the folly and wickedness of mankind" require "the proper deductions for the ordinary depravity of human nature."); Benjamin F. Wright, *The Federalist on the Nature of Political Man*, 59 Ethics (Supplement) 1, 3-4 (1949) ("The most striking and possibly most important element in the theory of human nature expressed in The Federalist is that men are not to be trusted with power because they are selfish, passionate, full of whims, caprices, and prejudices. Man is not, and cannot be expected to become, entirely rational,

actors could perform well, perhaps even better, under the proper incentives.[121] These incentives, if well designed, could bring out particular personal and institutional excellences. in this sense, those who advocate a functionalist approach to separation of powers—that is, those who argue that there is something essential to each of the branches' functions—follow *The Federalist Papers*.

However, *The Federalist Papers*, again returning to a quite realistic view of man, believed that the set of incentives had to be very personal and based on narrow self-interest to coax man out of his depravity into legislative, executive, or judicial excellence.[122] *The Federalist Papers*' checks and balances work on individuals' ambition and desire for well-being—an ambition particular to the branches' function. For example, representatives should be close and responsive to the people. The Constitution makes them face frequent elections so that representatives' ambition for re-election makes them responsive to the voters—i.e., incentives lead to good, responsive legislators. Judicial excellence requires detached, impartial judgment. Thus, judges have job and salary security for life and a two-thirds vote of the Senate is necessary to remove them. Executive excellence requires power and control. Presidents are commanders in chief of the military and they have the power to take care that the laws are faithfully executed. Their power, however, must be limited to prevent tyranny. Thus, the President needs the advice and consent of the Senate for major personnel decisions and must depend upon Congress to provide jurisdiction to do anything not specified in the Constitution.

In short, despite man's fallen state, political actors can act well enough when institutional structures marshal their ambitions and desires to pursue excellence in a particular function, whether legislative, judicial, or executive.

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calm, or dispassionate."); Steven G. Calabresi & Gary Lawson, *Foreword: Two Visions of the Nature of Man*, 16 Harv. J.L. & Pub. Pol'y 1, 2 (1993) ("James Madison was more guarded in his view of human nature.

He too believed that a central problem facing any constitution writer stemmed from narrow, self-regarding human behavior . . . .").

121 The Federalist No. 76, at 395 (James Madison) (Clinton Rossiter ed., 2003) ("The supposition of universal venality in human nature, is little less an error in political reasoning, than that of universal rectitude. The institution of delegated power implies, that there is a portion of virtue and [honor] among mankind, which may be a reasonable foundation of confidence: and experience justifies the theory. It has been found to exist in the most corrupt periods of the most corrupt governments.").

122 Victoria Nourse, *Toward a New Constitutional Anatomy*, 56 Stan. L. Rev. 835, 846-49 (2004) (discussing the Founders' checks and balances as based on balancing personal incentives); Victoria Nourse, *The Vertical Separation of Powers,* 49 Duke L.J. 749, 759-60 (1999) (explaining that the Founders recognized the importance of personal incentives in checks and balances).

At the same time, there must be a nasty and personal disincentive for bad performance. Under this account, the problem with tyranny—and the administrative state—is not simply that it produces arbitrary results, but that it allows too broad a potential for unchecked, unmoderated political will.

Second, unlike defenders of the administrative state discussed in the following Part, the authors of *The Federalist Papers* did not see "reason" or "rationality" as a strong guide to decision-making.[123] Therefore, they did not see reason or the desire to be reasoned as an effective check on human willfulness. Rather, they saw reason as essential to good government—but an imperfect tool in the hands of man—[124] The authors of *The Federalist Papers* understood the fundamental insight that passions use reasons for their ends, and we often cannot tell whether reason or passion truly guides us.[125] People may speak in terms of reason or public good, but their true motives are selfish. As a corollary, the Founders believed that reason simply does not offer clear

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[123] The Federalist No. 17, at 80 (Alexander Hamilton) (Clinton Rossiter ed., 2003) ("It is a known fact in human nature, that its affections are commonly weak in proportion to the distance or diffusiveness of the object. Upon the same principle that a man is more attached to his family than to his [neighborhood], to his [neighborhood] than to the community at large, the people of each state would be apt to feel a stronger bias towards their local governments, than towards the government of the union, unless the force of that principle should be destroyed by a much better administration of the latter. This strong propensity of the human heart, would find powerful auxiliaries in the objects of state regulation. The variety of more minute interests, which will necessarily fall under the superintendence of the local administrations, and which will form so many rivulets of influence, running through every part of the society, cannot be particularized, without involving a detail too tedious and uninteresting, to compensate for the instruction it might afford."); The Federalist No. 10, at 46 (James Madison) (Clinton Rossiter ed., 2003) ("Theoretic politicians, who have [patronized] this species of government, have erroneously supposed, that, by reducing mankind to a perfect equality in their political rights, they would, at the same time, be perfectly equalized and assimilated in their possessions, their opinions, and their passions."); The Federalist No. 15, at 73 (Alexander Hamilton) (Clinton Rossiter ed., 2003) ("Why has government been instituted at all? Because the passions of men will not conform to the dictates of reason and justice, without constraint. Has it been found that bodies of men act with more rectitude or greater disinterestedness than individuals? The contrary of this has been inferred by all accurate observers of the conduct of mankind.").

[124] The Federalist No. 31, at 151 (Alexander Hamilton) (Clinton Rossiter ed., 2003) ("But in the sciences of morals and politics, men are found far less tractable. To a certain degree, it is right and useful that this should be the case. Caution and investigation are a necessary armour against error and imposition. But this untractableness may be carried too far, and may degenerate into obstinancy, perverseness, or disingenuity. Though it cannot be pretended, that the principles of moral and political knowledge have, in general, the same degree of certainty with those of the mathematics; yet they have much better claims in this respect, than, to judge from the conduct of men in particular situations, we should be disposed to allow them. The obscurity is much oftener in the passions and prejudices of the reasoner, than in the subject. Men, upon too many occasions, do not give their own understandings fair play; but yielding to some untoward bias, they entangle themselves in words, and confound themselves in subtleties.").

[125] *Id.*

blueprints to solve political problems, which involve practical tradeoffs between various interests.

B. The Soul and the Mechanism of Separation of Powers

The Federalist Papers are vague about why separated government is so important, let alone why government should be separated into the executive, legislative, and judicial branches. This Section argues that *The Federalist Papers*' view of human psychology illuminates why the Founders valued separation of powers as a bulwark against tyranny.

As Jeremy Waldron points out, Madison, in arguing for separation of powers, makes reference to Montesquieu and "just falls in with Montesquieu's practice of abbreviated argumentation."[126] For Montesquieu, "[w]hen the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty."[127] Commentators generally conclude that for the authors of *The Federalist Papers*, "the exact reasons for a prohibition on the accumulation of government functions is surprisingly difficult to pin down. Other than declaring that the accumulation of functions is the 'very definition of tyranny.'"[128] Further, "the historical record . . . reveals no one baseline for inferring what a reasonable constitution maker would have understood 'the separation of powers' to mean in the abstract . . . ."[129] In short, for the authors of *The Federalist Papers*, separation of powers was axiomatic, not needing a defense.[130]

And, this is a problem as there are numerous obvious objections to separation of powers. Even if we were to recognize that divided government

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[126] Jeremy Waldron, *Separation of Powers in Thought and Practice?*, 54 B.C. L. Rev. 433, 455 (2013).

[127] Charles-Louis de Secondat Montesquieu, *The Spirit of the Laws* 151 (T. Nugent trans., 1949).

[128] Magill, *supra* note 2, at 1156.

[129] John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 Harv. L. Rev. 1939, 1944-45 (2011).

[130] Martin H. Redish, *"If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 Duke L.J. 449, 462 (1991) ("[T]here was little debate about whether Montesquieu was correct about how government should be designed. Instead, much of the argument over the proposed Constitution concerned whether it was faithful to his theories."); Wright, *supra* note 120, at 8 ("It is clear that the Fathers were only applying a truth believed at that day to be self-evident. Why was it so widely accepted at the time? Parrington suggests that the responsibility lies, if not with selfish economic interests, then with Montesquieu."); Waldron, *supra* note 126, at 455 ("[F]ear that Montesquieu's failure to spell out the arguments infected James Madison as well.").

is good, there is no particular reason for the three particular branches that the United States has. There is no a priori reason that compels that the Executive and the Judicial must be split. After all, they are combined in administrative agencies, and other countries, like Great Britain, do not observe such strict separations.[131]

However, regardless of the desirability of separation of powers or its ideal form, the Founders' views about the reasons and assumptions behind separation of powers stem from their shared pessimistic views of human nature. First, the Founders thought, as an almost axiomatic truth, that the concentration of power in one unrestrained individual or entity was bad—largely because under their pessimistic view of humanity, any one person or entity was too susceptible to abuse that power.[132] Rather "framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."[133] Not surprisingly, as Jeremy Rabkin points out, the most tyrannical government to the eighteenth-century mind was the "cadi," the likely legendary, all-powerful Turkish official acting as legislator, judge, and executive.[134]

But, it is not clear why separation of powers avoids the supposed tyranny of the Turkish judge. After all, three branches could be despotic all at once or separately. Many point to Locke's justification for separation of powers: one cannot be a judge in one's own matter—or execute the laws one passes.[135] Waldron argues that one person could not be trusted to keep these functions separate. In other words, an individual who was executing the law would too easily be tempted to legislate.[136]

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131 M.J.C. Ville, *Constitutionalism and the Separation of Powers* 107-10 (1967).

132 *See supra* notes 116-17.

133 The Federalist No. 51, at 322 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

134 Waldron, *supra* note 126, at 451 n.61 (citing Jeremy Bentham, Of Laws in General 153 (H.L.A. Hart ed., 1970) ("A Cadi comes by a baker's shop, and finds the bread short of weight: the baker is hanged in consequence. This, if it be part of the design that other bakers should take notice of it, is a sort of law forbidding the selling of bread short of weight under the pain of hanging.").

135 John Locke, Second Treatise on Government § 143 (1965), http://press-pubs.uchicago.edu/founders/documents/v1ch10s3.html ("[I]t may be too great a temptation to human frailty . . . for the same Persons who have the power of making Laws, to have also in their hands the power to execute them, whereby they may exempt themselves from Obedience to the Laws they make, and suit the Law, both in its making and execution, to their own private advantage.").

136 Waldron, *supra* note 126, at 446.

But, the Founders' idea is broader. It embraces a somber, but realistic, view of political actors: in the execution of power, people like to execute power— and often cannot constrain themselves. Power excites the desire for more power. People who have power, if not challenged, will acquire more power and destroy all opposition. In short, they will become tyrants. This is precisely where their view of human weakness comes to play. Human beings are willful and passionate. They cannot always be trusted to do the right thing—to willingly constrain themselves by law. Thus any person—or even institution—cannot be trusted to perform a public function unfettered by law or another power. *The Federalist No. 51* famously states, "It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary."[137]

Only the selfishness of the other branches can counter this willfulness to power. *The Federalist Papers* do not rely on humanity's ability to reason or willingly follow law to curb power-lust. Rather, institutions must be built to use human selfishness and self-regard. This "ambition" gives them the incentive to accrue more power—or at least fight efforts that would diminish the functions of their office and their rightful power. And this is *The Federalist Papers*' famous reference to "ambition made to counteract ambition," checking the encroachment of one branch onto another.[138]

Critics of the separation of powers argue that for the branches' "ambition against ambition" to effectively check and balance power, the individuals within each branch must identify with that branch.[139] Some argue that this would not, in fact, occur because people do not identify with the branch. Their party or personal interests are stronger.[140] Similarly, collective-action problems would make individuals less inclined to sacrifice for the good of his or her branch. Any branch *esprit de corps* faces collective-action problems so that the President could easily buy off a legislator. Loyalty to branch prerogatives seems to bring few, immediate personal benefits—and thus is not likely to last. Taken as a whole, these factors, in turn, would allow dissent

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137 The Federalist No. 51, *supra* note 133, at 322.
138 *id*.
139 Eric A. Posner & Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* 21-28 (2010).
140 *id*.

within a branch to essentially minimize its ability to counter the effect of any other branch.

These critiques misconstrue the nature of "ambition" in *The Federalist Papers.* The ambition is not solely about the branch; it is personal. Legislators survive by pleasing electors and getting re-elected. They do not have to identify with the legislative branch to realize that their survival depends, in large part, on their ability to accede to the wishes of the electorate and bring home goodies. This requires power to do so. Thus, individual legislators have the personal incentive to maintain the prerogatives of their branch independent of any branch identification. Similarly, judges have an incentive to maximize their status and prestige. This requires independence from other branches, as they do not want to seem to be mere partisan pawns. Presidents worry about their legacies. Naturally, they seek more power to better create and cement those legacies.

Viewing branch ambition as a form of personal ambition dovetails with literature on the functionalist separation of powers.[141] The Founders assumed that each function has a certain functional "integrity,"[142] and this integrity gives individuals the motive and ambition to do that function well—and to keep that function free from interference from other branches.[143] In other words, there is something inherent in judging, executing, and representing that has its own virtue. Judges want to be good judges—i.e., to become known for advancing the law and writing insightful and important opinions. They have personal incentives to magnify their own power. To get re-elected, legislators must have the power to bring home the goodies to their constituents. Again, each legislator's personal ambition for power relates to his personal ambition to magnify his own legislative power. Presidents want to be good leaders and executors of the law—and get re-elected and bequeath the nation a

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[141] Samuel W. Cooper, *Considering "Power" in Separation of Powers*, 46 Stan. L. Rev. 361, 368 (1994) ("A contrasting theory for resolving separation of powers issues, functionalism, contends that separation of powers problems cannot be resolved solely by examining textual constraints in the Constitution. Functionalists are concerned with whether one branch's action disturbs the balance of power among the branches. If the action of one branch does not interfere with another's core functions, functionalists will generally find no separation of powers violation.").

[142] Waldron, *supra* note 126, at 459-60.

[143] Rabkin builds another notion—that it is required by the rule of law. Waldron, *supra* note 126, at 459 ("Even if the exercise of power has been legitimated democratically . . . [i]t must be housed in and channeled through these procedural and institutional forms, successively one after the other. That is what the rule of law requires, and I believe that is what is maintained too by Separation of Powers.").

great "legacy." Naturally, they fight with all branches to expand their power because it makes them more powerful and better at the job they seek to do.

These incentives are not only personal but also finely calibrated. Judges should exercise judgment independent from political influence or the promises of litigants who could give them a job.[144] Thus, judges have life tenure with protected salaries. Legislative "excellence" responds to the people. However, the people have both shorter- and longer-term interests, and bicameral legislatures respond to different interests. Thus, representatives have short two-year terms so as to be close to the desires and wishes of those they represent. At the same time, senators, originally elected for six-year terms by the state legislators, achieve excellence through a different type of responsiveness. They respond to longer-term interests of the nation, as well as the interests of the state legislators who select them. Finally, the President is given broad, almost unfettered power in certain areas, such as foreign relations and the military. The executive excellence is, therefore, efficient and vigorous government action within constrained spheres.

Also as part of this calibration, the Founders did not think that this "carrot" of performing one's job well and reaping personal rewards for this service was sufficient to control government actors. Suffused with Christian notions of man's fallen nature, they also looked to the "stick" of checks and balances. Like the carrots, the sticks are also quite personal. They affect individual financial, career, and egotistical self-interests.

Consider the check for legislative misconduct: not getting re-elected—or, if the legislator is engaging in clearly unethical behavior, expulsion.[145] The Executive can be impeached—or have his favorite projects defunded or his nominees rejected.[146] Judges, intended to be free from personal or political influence, are insulated by this tit-for-tat; their persons—their jobs and salaries—are quite secure.[147] It is also worth remembering that until well

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[144] The Federalist No. 79, at 473 (Alexander Hamilton) (Clinton Rossiter ed., 2003) ("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.").

[145] U.S. Const. art. II, § 4 ("Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two-thirds, expel a Member.").

[146] *Id.* ("The President, Vice President, and all civil Officers of the United States shall be removed from office on Impeachment for, and Conviction of, Treason, Bribery, or other High Crimes and Misdemeanors.").

[147] 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.

into the nineteenth century, members of the Executive could be held directly accountable to aggrieved individuals under the common law.[148] Thus, a citizen who believed that a bureaucrat treated him or her wrongly could bring an action (usually trespass) for an illegal seizure of property. The bureaucrat would be answerable to a judge, often a state judge, for monetary damages.[149] Once again, we have a personal check and balance that affects government actors' self-interest.

This discussion from *The Federalist No. 76* is typical of this system of calibrated personal sticks and carrots:

> To this reasoning it has been objected, that the president, by the influence of the power of nomination, may secure the complaisance of the senate to his views. The supposition of universal venality in human nature, is little less an error in political reasoning, than that of universal rectitude. The institution of delegated power implies, that there is a portion of virtue and [honor] among mankind, which may be a reasonable foundation of confidence: and experience justifies the theory. . . . A man disposed to view human nature as it is, without either flattering its virtues, or exaggerating its vices, will see sufficient ground of confidence in the probity of the senate, to rest satisfied, not only that it will be impracticable to the executive to corrupt or seduce a majority of its members, but that the necessity of its co-operation, in the business of appointments, will be a considerable and salutary restraint upon the conduct of that magistrate. Nor is the integrity of the senate the only reliance. The constitution has provided some important guards against the danger of executive influence upon the legislative body: it declares, "that no senator or representative shall, during the time for which he was elected, be appointed to any civil office under the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States, shall be a member of either house during his continuance in office.[150]

The Judges, both of the supreme and inferior Courts, shall hold their offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in office.").

148 Mashaw, *supra* note 76, at 3.

149 *See id.* at 4-6.

150 The Federalist No. 76, *supra* note 121, at 395.

This passage responds to the concern that the President will corrupt or co- opt the Senate. Given that there were only 26 senators in the first Congress, this fear was quite understandable. The Senate might form a cabal with the President and dominate the government. At the very least, the President could cooperate with the Senate to counter the more democratically responsive House of Representatives.

In rejecting this possibility, *The Federalist No. 76* employs a mode of argument found throughout *The Federalist Papers.* It concedes that human beings are frail but not wholly corruptible—somewhere in between "universal venality" and "universal rectitude." *The Federalist No. 76* states that there is "sufficient ground of confidence in the probity of the senate." To support this argument, *The Federalist No. 76* then points to the Senate's practical restrictions and limits on the Executive. Specifically, the Senate must cooperate on appointments and thus will have considerable power over the President. Further, the President cannot offer Senators the bribes he most easily could offer—public appointments—due to separation of powers. And this feature of separation of powers was novel to the U.S. Constitution. Members of the English Parliament typically serve as high- ranking ministers of the government, positions that the Prime Minister distributes. Thus, the U.S. Constitution uses separation of powers to lead political actors from self-interest to "probity" and, in turn, appropriate institutional ends.

III. Constitutional and Administrative Separation of Powers and Checks and Balances

Unless one wishes to abandon separation of powers, administrative-state defenders must show how administrative law provides adequate checks and balances. "The task of the administrative constitution is to legitimate institutional designs that appropriately balance the simultaneous demands of political responsiveness, efficient administration, and respect for legal rights."[151] Administrative law must further "government efficiency, preserv[e] . . . individual rights, force the administration . . . to keep before it always the fact that it is not a law unto itself," and allow for "presidential and congressional oversight."[152]

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[151] Mashaw, *supra* note 76, at 8.

[152] *Id.* (quoting Frank Goodnow, The Principles of the Administration Law of the United States 371-72 (1905)).

Most administrative law scholars would reject the claim that agencies fit *The Federalist Papers*' definition of tyranny. While they recognize that the significant lawmaking power of agencies creates a problem for democratic accountability or "legitimacy,"[153] the literature on how and why agency decisions are nonetheless "legitimate" is enormous.[154] This literature points to, or proposes, features of the administrative process or judicial review that somehow make agency decision-making seem democratic, reasoned, and non-arbitrary—i.e., not tyrannical.

In general, the administrative state is seen to gain legitimacy in two primary ways: extra procedure beyond the legislative and judicial process and extra deliberation.[155] The extra procedures include internal agency deliberation and public comment, judicial review of agency action, and, to a lesser degree, congressional oversight. Deliberation typically involves the process of reason- giving and analysis of public comment. This Part does not necessarily critique these mechanisms. Rather, it aims to show that their assumptions radically differ from those found in *The Federalist Papers.* Administrative law, therefore, stands at odds with deep assumptions and principles inherent in our constitutional structure.

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[153] *See infra* note 156.

[154] "From the birth of the administrative state, we have struggled to describe our regulatory government as the legitimate child of a constitutional democracy." Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. Rev. 461, 462 (2003) [hereinafter *Beyond Accountability*]. "As a general matter, the Court often fails to view administrative law and constitutional law as continuous and addressed to the same project of promoting agency legitimacy." Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. Rev. 1657, 1662 n.11 (2004). "Federal regulatory agencies do not fit comfortably within the constitutional framework or legal culture of the United States, and concerns about their legitimacy arose shortly after Congress began to establish large federal agencies to regulate the economy in the late nineteenth and early twentieth centuries." David J. Arkush, *Direct Republicanism in the Administrative Process*, 81 Geo. Wash. L. Rev. 1458, 1464-65 (2013); Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 Tex. L. Rev. 1321, 1430 (2001). "Recognizing the interrelationship between constitutional law and ordinary administrative law is important both for the ongoing debate over the legitimacy of constitutional common law and for the proper appreciation of the role administrative agencies can play in our constitutional order." Metzger, *supra* note 33, at 484-85.

[155] Michaels, *supra* note 32, at 553 ("Scholars and jurists generally anchor administrative legitimacy in theories of process or substance.").

A. Legitimacy and Administrative Procedures

Many point to the additional legal procedures of administrative law: public comment and agency consideration and reconsideration,[156] and judicial review of agency action as preventing tyrannical or arbitrary agency decision-making.[157] None of these mechanisms provide checks and balances in either the same way or with the same effectiveness as those envisioned in *The Federalist Papers*. Rather, for these legal administrative procedures to be effective checks and balances, one would have to believe things about political actors at odds with the groundwork assumptions of *The Federalist Papers*.

1. Public Comment, Internal Agency Review, and Reconsideration

One purported check on agency action, particularly rulemaking, is the process of input through public comments in notice-and-comment rulemaking pursuant to § 552 of the APA.[158] Because the processes for an agency to write—and reconsider—its own rule or adjudication vary significantly from agency to agency, it is difficult to generalize about the precise procedures.[159] The APA

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[156] David Fontana, *Reforming the Administrative Procedure Act: Democracy index Rulemaking*, 74 Fordham L. Rev. 81, 82 (2005) ("[W]e would encourage, but not require, agencies to invite broad discussion and public participation about their proposed rules, certainly a virtue, by promising them more lenient judicial review. This potential participation would supply agencies with a degree of legitimacy and a reservoir of information that would help them with their responsibilities."); Stephen M. Johnson, *The internet Changes Everything: Revolutionizing Public Participation and Access to Government information Through the internet*, 50 Admin. L. Rev. 277, 289 (1998) ("Public participation is essential to sound agency decision-making because . . . it instills a sense of legitimacy in the public for the agency's decisions."); Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 Geo. Wash. L. Rev. 1343, 1343 (2011) ("An agency's public proposal of a rule and acceptance of public comment prior to issuing the final rule can help us view the agency decision as democratic and thus essentially self-legitimating.").

[157] *See, e.g.*, Brietta R. Clark, *APA Deference After independent Living Center: Why informal Adjudicatory Action Needs A Hard Look*, 102 Ky. L.J. 211, 229 (2014) ("Judicial review serves as an external check on agency legitimacy: in the case of rulemaking and formal adjudication, it helps to ensure that agencies comply with the APA procedures that enhance agency decision-making; and in all cases, judicial review helps guard against abuse of power and arbitrariness."); Bruce Ackerman, *The New Separation of Powers*, 113 Harv. L. Rev. 633, 696 (2000); Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 Yale L.J. 1032, 1038-41 (2011); Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 Emory L.J. 423, 427-37 (2009).

[158] *See supra* note 156 and accompanying text.

[159] Daniel Bress, *Administrative Reconsideration*, 91 Va. L. Rev. 1737, 1739 (2005) ("While there has been no systematic study of the frequency with which petitions for reconsideration are filed or

sets forth general rules for informal, "notice-and-comment" rulemaking,[160] but agencies still have latitude within that framework.[161]

Further, power in an agency is divided between the political appointees—for example, the Secretary of Health and Human Services—and the career bureaucrats.[162] While the political appointees are usually the final decision-maker, the nature and process of review varies significantly between rulemaking and adjudication and among the various agencies. Moreover, the sheer mass of regulation makes effective political control impossible, or at least renders the process a negotiation between presidential appointees and career bureaucrats.[163]

As far as checks and balances, the notion that an agency would reverse itself by changing its own non-democratically responsive, incorrect, or overarching conclusion in rulemaking in light of comments seems at odds with the expectations for political actors set out in *The Federalist Papers*.[164] The Framers argued that when shared by more people, passionate opinions cement into objective reasons.[165] Certainly, agency bureaucrats are susceptible

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granted in federal agencies, the large number of reconsideration provisions in federal statutes and agency rules suggests that reconsideration is by no means a rare occurrence."); Richard E. Levy & Sidney A. Shapiro, *Administrative Procedure and the Decline of the Trial*, 51 U. Kan. L. Rev. 473, 494 (2003) ("Regulations must be enforced, licenses and permits must be granted or denied, and benefit eligibility must be determined. The range of agency adjudicatory actions is immense, both in terms of the subject matters addressed and in terms of the kinds of interests and policies at stake.").

160 5 U.S.C. § 553 (2012); *see also supra* note 156.

161 *See* 5 U.S.C. § 553.

162 David E. Lewis & Jennifer L. Selin, *Political Control and the Forms of Agency Independence*, 83 Geo. Wash. L. Rev. 1487, 1497-98 (2015) ("[T]he number of political appointees has increased significantly since the mid-twentieth century, almost doubling both in raw counts and as a percentage of federal employees . . . . The increasing depth and penetration of political appointees into agency hierarchies provide opportunities for presidents to secure control over the policymaking apparatus inside agencies.").

163 Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 Geo. Wash. L. Rev. 533, 560-61 (1989) ("OMB can play on the allegiance to the administration of senior political appointees in the agency in an effort to sway them from positions generated by career staff.").

164 The Federalist No. 10, *supra* note 123, at 43 ("As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. As long as the connection subsists between his reason and his self-love, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves."); The Federalist No. 31, *supra* note 124, at 151 ("The obscurity is much oftener in the passions and prejudices of the reasoner, than in the subject. Men, upon too many occasions, do not give their own understandings fair play; but yielding to some untoward bias, they entangle themselves in words, and confound themselves in subtleties.").

165 The Federalist No. 51, *supra* note 133, at 266 ("Every unbiased observer may infer, without danger of mistake, and at the same time without meaning to reflect on either party, or any individuals of either party, that unfortunately passion, not reason, must have presided over their decisions. When men exercise their reason coolly and freely on a variety of distinct

to such feelings and passions that would make reversal—or even critical self-reflection—difficult.

More importantly, the notion that an agency would correct itself either in response to public comments or on a motion to reconsider runs contrary to the personal nature of checks and balances found in *The Federalist Papers*. If the political head of an agency wants something, she has the means to convince the bureaucrats in her agency that it is the "right" reason.[166] One might say that the professional civil service, with its job protections, offers a balance to agency error or political overreach and may even "speak truth to power."[167] But this seems unlikely. While hard to fire, career bureaucrats can be won over with many other enticements beyond the fear of losing one's job. The political heads of agencies can offer promotions, cushy work assignments, and assistance in obtaining work outside the agency (the revolving door of regulators and regulated industries).[168] Beyond pressures from political appointees, reconsideration means more work. And, given the rigid pay scales of civil servants, reconsideration simply means more work for no more pay.

Some argue that bureaucratic professional pride would push back against political appointees; because federal civil servants enjoy job protection against politically motivated job termination, this "professional, politically insulated civil service" acts as a "sub-constitutional counterweight" to executive power.[169] This argument assumes that bureaucrats gain something by defending these right answers. In the end, the political appointees run the agencies and have ultimate power in dispensing goodies.[170] It would seem that the way to get ahead as a bureaucrat is to suck up to the political appointees—not to develop a reputation for speaking truth to power. or, at least, the authors of *The Federalist Papers* would counsel that conclusion given their view that checks and balances are aimed at personal benefit.[171]

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questions, they inevitably fall into different opinions on some of them. When they are governed by a common passion, their opinions, if they are so to be called, will be the same.").

166 *See id.*

167 "Three factors explain the civil service's potential effectiveness as an institutional rival. First, as suggested, its members are capable of speaking truth to power without fear of serious reprisal." Michaels, *supra* note 32, at 541 (citing Katyal, *supra* note 32, at 2331).

168 "Hierarchical controls therefore align the behavior of agency employees with the policy preferences of the political appointees who run the agency." Sidney A. Shapiro & Ronald F. Wright, *The Future of the Administrative Presidency: Turning Administrative Law Inside-Out*, 65 U. Miami L. Rev. 577, 590 (2011).

169 "Three factors explain the civil service's potential effectiveness as an institutional rival. First, as suggested, its members are capable of speaking truth to power without fear of serious reprisal." Michaels, *supra* note 32, at 541.

170 Shapiro & Wright, *supra* note 168, at 591.

171 *Nourse, Toward a New Constitutional Anatomy, supra note 122, at 846-49.*

The Federalist Papers authors would also further another, more subtle argument against bureaucrats "fighting" for the right answer. *The Federalist Papers* seem distinctly aware that the political actors in groups tend to be less concerned about reputation. *The Federalist No. 15* asks:

> Has it been found that bodies of men act with more rectitude or greater disinterestedness than individuals? The contrary of this has been inferred by all accurate observers of the conduct of mankind; and the inference is founded upon obvious reasons. Regard to reputation, has a less active influence, when the infamy of a bad action is to be divided among a number, than when it is to fall singly upon one.[172]

2. Administrative Procedures Facilitating Political Oversight

Some argue that political appointees would be more receptive to democratic concerns and, therefore, they would insist upon responsiveness to public comments.[173] Thus, the public input would balance executive power and make the administrative process democratic. And, indeed, there is an entire line of thought arguing for the legitimacy of the administrative state based upon the accountability which the elected President provides.[174] This position argues that the President and her bureaucracy are accountable to the people and would follow their direction.[175] If a political appointee made a

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[172] The Federalist No . 15, *supra* note 123, at 110.

[173] *See, e.g.*, Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. Econ. & Org. 81, 91-95 (1985) (agencies are politically accountable "through their connection with the chief executive").

[174] Cary Coglianese, *Presidential Control of Administrative Agencies: A Debate over Law or Politics?*, 12 U. Pa. J. Const. L. 637, 645 (2010) ("Recent debates over presidential involvement in administrative policymaking undoubtedly have been influenced by, if not infused with, political ideology. The question arises, then, whether the 'oldest debate in constitutional law' is really a debate about law at all."); *Beyond Accountability*, *supra* note 154, at 490 ("[Presidential control model. That model purports to legitimate the administrative state by bringing its decisions (or a large many of them) under political—and therefore popular—control. Submit to popular control, the model says to the administrative state, and shed your constitutional troubles."); Cynthia R. Farina, *The "Chief Executive" and the Quiet Constitutional Revolution*, 49 Admin. L. Rev. 179, 180 (1997).

[175] Aziz Z. Huq, *Removal as a Political Question*, 65 Stan. L. Rev. 1, 53 (2013) (citing Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3155 (2010)) ("In the Court's eyes, White House control exercised via the removal power fosters 'a clear and effective chain of command' over administrative agencies. Absent presidential control, the Court warned, 'the public [cannot] pass judgment on [the President's] efforts' or federal policy consistent with the Constitution's command of democratic accountability.").

wildly unpopular decision contrary to opinions found in the public comments, that decision might hurt the President. Her unpopularity would hurt her with the voters, and that would be a check abuse. Many scholars argue that the President should have exclusive control over the executive branch precisely because she is accountable to the people in this fashion.[176]

But, again, for this to work, one would have to believe that voters carefully sift through the 100,000 pages of regulatory output to evaluate presidential decisions and effective political monitoring of the entire panoply of specific and complex regulatory matters can be done on a massive national scale. Certainly many doubt whether this is at all possible.[177] In short, this position argues for an incredibly sophisticated, engaged, arguably nerdy electorate that eagerly awaits each new edition of the Federal Register.

As to the first matter, *The Federalist Papers* assume that voters would only be able to engage in limited political monitoring of the federal government because its concerns were limited—limited to taxation, commerce, and the militia. *The Federalist No. 59* explicitly states that the objects of the federal government must be limited so that citizens' information-monitoring abilities are not overtaxed:

> In determining the extent of information required in the exercise of a particular authority, recourse then must be had to the objects within the purview of that authority. What are to be the objects of federal

[176] "once Congress relinquishes the power to determine the details of regulatory policy, the President should assume it . . . . [U]nitary executive theory responded powerfully to the accountability concerns raised by the administrative state. it promised a government run by the one official who speaks for all the people." *Beyond Accountability*, *supra* note 154, at 489; Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 Ark. L. Rev. 23, 67 (1995); Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2246 (2001) ("We live today in an era of presidential administration."); Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 Tex. L. Rev. 469, 508 (1985). *See generally* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 Yale L.J. 541 (1994); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 Harv. L. Rev. 1153 (1992).

[177] Cynthia R. Farina, *False Comfort and impossible Promises: Uncertainty, information Overload, and the Unitary Executive*, 12 U. Pa. J. Const. L. 357, 423 (2010) ("[T]he essential point is that no one institution of government is authorized, or able, to speak for the people and to manage singlehandedly the enterprise of contemporary regulatory government. We must expect and challenge all the institutions of government— Congress, the President, the courts, and agencies themselves—to be part of an ongoing process through which democratic legitimacy is created and effective policy discovered, a process that must seek new and more effective ways to inform and engage citizens.").

> legislation? Those which are of most importance, and which seem most to require local knowledge, are commerce, taxation, and the militia.[178]

As to the second, *The Federalist Papers* realize that the best monitoring occurs through local social networks—as it describes the House members as being "closest" to the people. *The Federalist Papers* speak of the House as incapable of making any:

> [l]aw which will not have its full operation on themselves [house members] and their friends . . . . This has always been deemed one of the strongest bonds by which human policy can connect the rulers and the people together. It creates between them that communion of interest, and sympathy of sentiments.[179]

The first House districts were quite small—around 30,000 people, as opposed to the over 700,000 in current districts.[180] The Framers would find alien the type of political accountability that consists of reviewing the Federal Register for exciting new notices of proposed rulemaking issued by the Rural Utility Service. Those who believe presidential accountability renders the agencies accountable rely on the notion of political accountability alien to the authors of *The Federalist Papers*.

Finally, *The Federalist Papers* see re-election as a chief incentive for restraining anti-democratic behavior.[181] This type of incentive would work only for a President's first term. A second-term President can be much freer in her executive actions.

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[178] The Federalist No. 56, at 291 (James Madison) (Clinton Rossiter ed., 2003).

[179] The Federalist No. 57, at 297 (James Madison) (Clinton Rossiter ed., 2003).

[180] *See* 2 The Records of the Federal Convention of 1787, at 643-44 (Max Farrand ed., 1966) (describing motion to lower to 30,000 from 40,000 the size of house districts); U.S. House of Representatives: History, Art & Archives, *Proportional Representation*, http://history.house.gov/Institution/Origins-Development/Proportional-Representation/ (current size of house district is over 700,000) (last visited Jan. 8, 2017).

[181] "All these securities, however, would be found very insufficient without the restraint of frequent elections." The Federalist No. 57, *supra* note 179, at 297.

3. Judicial Review or Legislative Oversight

Defenders of the potential of judicial review and, to some degree, legislative oversight see them as effective for making agency decision-making legitimate and democratic.[182] Yet, the potential for judicial oversight relies on a set of assumptions alien, even opposite, to those of *The Federalist Papers*. As discussed below, the Founders envisioned hard, personal incentives to check power. Judicial review's checks are the opposite.

First, in contrast to the "hard" checks of *The Federalist Papers*, judicial review is remarkably soft. If a court rejects an agency interpretation of a rule, the frequent judicial "remedy" is remand.[183] The rule remains in effect but the agency must write a new justification.[184]

It is a mystery how this type of check could deter overreaching by either the political appointees or bureaucrats. As for the political appointees, there is little, often no obstacle, to promulgating unlawful regulations. Even if a review were to vacate a rule, this could occur years after the rules are first challenged— and after the political benefit from promulgating the rule is already extracted. Certainly, given the vast number of regulations, there is very little loss to personal reputation for a rejected administrative decision. Who can really keep track of political appointees or bureaucrats, let alone pin individual responsibility? Even if that were possible, who would care? It is not as if the D.C. Circuit gives out Oscars for best (or worst) regulation of the year.

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[182] Gillian E. Metzger, *Administrative Constitutionalism*, 91 Tex. L. Rev. 1897, 1908-09 (2013) ("The basic doctrines governing judicial review of administrative action are yet another manifestation of administrative constitutionalism, though the main progenitors here are judges rather than agency officials. As I have argued elsewhere, these administrative law doctrines were developed by judges to address constitutional concerns raised by broad administrative delegations and the attendant risk of arbitrary and unaccountable administrative decision[-] making. In turn, this constitutionally inspired administrative law has a profound effect on how agencies operate and frames our understandings of appropriate agency action.").

[183] Daniel B. Rodriguez, *Of Gift Horses and Great Expectations: Remands Without Vacatur in Administrative Law*, 36 Ariz. St. L.J. 599, 600 (2004) ("Remand without vacatur is a mechanism by which courts remand back to an agency a decision in circumstances in which the court believes the agency rationale is flawed, yet declines to vacate the agency decision. Thus, the agency decision stands during the period in which the agency scrambles to develop a rationale for the rule that will survive judicial scrutiny.").

[184] Boris Bershteyn, *An Article I, Section 7 Perspective on Administrative Law Remedies*, 114 Yale L.J. 359, 362 (2004) ("When a court finds a legal defect in an agency's decision, two remedial options are available: It can either vacate the defective rule or remand it back to the agency without vacatur (that is, leave the rule in place for the time being).").

For the career bureaucrats, there is even less of a check. They have no personal stake in the political appointee's political agenda. A remand just means working on the same order or adjudication again. There is no decrease in salary or reputation. And, a remand may save the bureaucrat extra effort as a remand order may have less work than an order in a new topic area.

Further, even if it is timely, the vacating of the rule may not help the aggrieved party because the rule represents an *ex ante* imposition of a new legal rule without any checks and balances. The Founders assumed that most legal checks and balances (bicameralism, presentment) would function before the creation of a new legal duty. This is particularly important because individuals must bear the costs to challenge agency action in court.

To take Norris's SWAT-team example, administrative agencies can impose new legal duties without any *ex ante* checks and balances from the courts. While depriving someone of his or her property or liberty with agency oversight, not judicial oversight, might seem like an abstract injury, we must not forget how the rule of law was understood from the eighteenth to the twentieth century. Writing in 1889, W.C. Dicey, the preeminent legal scholar of administrative law, defined the "rule of law" as: "in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law and established in the ordinary legal manner before the ordinary courts of the land."[185] Steeped in Blackstone and the common-law rejection of executive lawmaking authority in the seventeenth century, the authors of *The Federalist Papers* would likely agree with Dicey.[186]

Finally, until well into the nineteenth century, individuals aggrieved by unlawful government action could sue the actual government official in a standard common-law action.[187] In order to obtain money for damages

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[185] Dicey, *supra* note 56, at 187-88.

[186] Donald S. Lutz, *A Preface to American Political Theory* 122-23 (1992) ("Coke's position that the Crown was limited by an 'ancient constitution' comprised of custom 'beyond the memory of man,' and the common law built upon such custom . . . . [B]etween 1765 and 1769[,] Sir William Blackstone . . . summarized and extended the common law position of Coke and his supporters among the legal historians . . . .Blackstone became the primary, although indirect, means for injecting Locke's ideas into the debate on the Constitution. After Montesquieu, the Federalists cited Blackstone most frequently . . . .").

[187] Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 Yale L.J. 1256, 1321 (2006) ("Common law actions had the capacity to provide substantial relief with respect to the activities of the most numerous federal agents—tax collectors and postal officials. Any seizure or impoundment of property by revenue officers under the tax statutes could be tested by one of a number of common law writs—trover, detinue, assumpsit, and so on.").

directly from government officials, an aggrieved citizen must only have demonstrated that the government official violated the law.[188] There was no deference to agency interpretation of its own statute or mandate.[189] Thus, the threat of common-law action kept government actors within obvious statutory boundaries. In short, the Founders assumed that government executive actors would face a strong, personal check.

But, perhaps the most basic reason why judicial review acts as a weak check is that it has become, since the New Deal, so deferential. Courts, recognizing the complexity of administrative decision-making, have developed numerous doctrines that ensure that agency decisions satisfy only minimal levels of reasonableness. As discussed above,[190] under the APA, courts review rulemaking under the arbitrary and capricious standard, the precise meaning of which is still up in the air. The Supreme Court's three main cases for evaluating agency action, rulemaking, and statutory interpretation[191] create a relatively low bar. Some have termed these standards as "rational basis with bite."[192]

One of the most common justifications for judicial deference to agencies is that the Executive is accountable to the people, not the Judiciary.[193] And this position has been reaffirmed in one of the Supreme Court's recent statement on agency deference, *FCC v. Fox Television Stations, Inc.*[194] There, the Court ruled that agency departures from prior practice need to be justified only at the same level of rationality as the original decision.

On the other hand, most people realize that full—or even partial—presidential accountability for the 100,000 pages per annum of administrative

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188 *Id.*

189 Hamburger, *supra* note 38, at 30-35.

190 *See supra* notes 110-15.

191 Chevron U.S.A. v. Nat. Res. Def. Council, 467 U.S. 837 (1984); Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins., 463 U.S. 29 (1983); Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, 435 U.S. 519 (1978).

192 *E.g., Scott A. Keller, Depoliticizing Judicial Review of Agency Rulemaking, 84 Wash. L. Rev. 419, 425 (2009).*

193 Evan J. Criddle, *Chevron's Consensus*, 88 B.U. L. Rev. 1271, 1288 (2008) (quoting *Chevron*, 467 U.S. at 866)) ("While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities. Since the interpretation of ambiguous statutes under agency administration 'really centers on the wisdom of the agency's policy, . . . federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.'").

194 556 U.S. 502, 504-10 (2009).

output is absurd. They do not really hold the President accountable, realizing that he cannot possibly make all the decisions that fill the pages of regulations in the Federal Register each year.195 *The Federalist Papers* predicted this result. *The Federalist No. 80* states:

> [P]lurality in the executive . . . tends to conceal faults, and destroy responsibility . . . . Men in public trust will much oftener act in such a manner as to render them unworthy of being any longer trusted, than in such a manner as to make them obnoxious to legal punishment . . . . in either case . . . [i]t often becomes impossible, amidst mutual accusations, to determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures, ought really to fall. It is shifted from one to another with so much dexterity, and under such plausible appearances, that the public opinion is left in suspense about the real author.[196]

Finally, some argue that congressional oversight offers a meaningful balance to agency action. After all, Congress can rewrite a law to change or overturn a regulation. Congress could limit delegation, reduce an agency's budget, hold hearings, or even legislatively veto an agency action. As an empirical question, the matter is far from clear: "Political scientists who are concerned about the relationship between Congress and the bureaucracy have debated which party in that crucial relationship really exercises control."[197]

The authors of *The Federalist Papers*, however, would not believe possible the notion of a vigorous and effective oversight. it would be a full-time job to review 100,000 pages of yearly regulatory output. Congress simply does not have time or knowledge. Recall that *The Federalist No. 56*, responding to concerns that House members would lack sufficient background and education, stated, "What are to be the objects of federal legislation? Those which are of most

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[195] Michael A. Fitts, *The Paradox of Power in the Modern State: Why a Unitary, Centralized Presidency May Not Exhibit Effective or Legitimate Leadership*, 144 U. Pa. L. Rev. 827, 835 (1996) ("The reasons are complicated but straightforward: the individuality, centrality, and visibility of the 'personal unitary presidency,' which is seen as an advantage in terms of collective choice and public debate, can be a disadvantage when it comes to conflict resolution and public assessment.").

[196] The Federalist No. 70, at 425 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

[197] Cornelius M. Kerwin & Scott R. Furlong, *Rulemaking: How Government Agencies Write Law and Make Policy* 222 (4th ed. 2011).

importance, and which seem most to require local knowledge, are commerce, taxation, and the militia."[198]

B. Agency Deliberation and Expertise

Many point to the deliberative process and agency expertise as offering the checks and balances necessary to prevent arbitrary decision-making.[199] The decision-making process is supposed to regulate arbitrary behavior —i.e., the process of justifying rules through publicly stated reasons renders agencies accountable. in other words, "The deliberative promise of the administrative state stems from the fact that agency decision-making can be inclusive, knowledgeable, reasoned, and transformative."[200] Or, as others have stated, "The promise of the administrative state was to bring competence to politics. it is the institutional embodiment of the enlightenment project to substitute reason for the dark forces of culture, tradition, and myth. It is a competence to be demonstrated by cogent reason-giving."[201] In short, the act of reason-giving somehow engages government actors in deliberation that will point agency actors to the "right answers," which will limit arbitrary or politicized decision-making. Supposedly, this deliberative process will be above politics, yet responsive to them.

This argument has two main assumptions. First, reason is quite robust. Rational deliberation can find "right" answers to political, administrative, and managerial problems. These "right" answers are not political—not simple reflections of mere political preference or self-interest. Because these answers

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198 The Federalist No. 56, *supra* note 178, at 291.

199 *See supra* note 193 and accompanying text.

200 *Mark Seidenfeld, The Role of Politics in a Deliberative Model of the Administrative State, 81 Geo. Wash. L. Rev. 1397, 1426 (2013).*

201 Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 Fordham L. Rev. 17, 26 (2001) (citations omitted); Seidenfeld, *supra* note 200, at 1445-46 ("Members of the agency rulemaking team are professionals. They are well-educated in fields relevant to agency policymaking. Given the need for an agency to explain the factual predicates for its rules, rulemaking teams have to include professionals from different relevant disciplines. often these disciplines approach a particular policy question with different perspectives and attitudes. Thus, properly structured, administrative law can encourage rulemaking teams to reflect many of the values and perspectives of the various stakeholders affected by a regulatory matter and to gain valuable understanding from consideration of those various perspectives. Recognizing the agency staff as the locus of deliberation illuminates how that staff should fit into the rulemaking process.").

are the product of reason, all rational beings must agree. Rationality makes administrative decisions "legitimate" because they stand outside the rough and tumble of the democratic contest of differing value and ideologies.

Second, supporters of the administrative state assume that agency officials are tractable students to reason's sweet teachings and will use them in rules and orders. Not only is the spirit willing, the flesh is too. But, as Matthew might counter, it is one thing to say that reason provides answers to questions in administration law; it is another to say that agencies provide the proper institutional incentives that will lead bureaucrats and agency heads to reason. This pair of assumptions, in turn, suggests that administrative problems are fundamentally amenable to technocratic solutions—and administration, therefore, can stand beyond mere political preference and remain significantly immune to democratic input yet remain "legitimate."

These arguments seem a bit far-fetched and, compared to *The Federalist Papers*, jarringly Panglossian. And certainly, in its more naive forms, this faith in deliberation and administrative expertise stands at odds with democracy itself.[202] If reason were so robust and reason-giving were such a limit on human behavior, there would be little need for democracy, let alone separation of powers. Sweet reason would guide a bevy of wonderfully deliberating Platonic regulators to impose, with justice and legitimacy, their visions upon the hapless hoi polloi. Indeed, even advocates of a deliberative model express misgivings when confronted with the full-throated expressions of their theories.[203]

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[202] Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 Tex. L. Rev. 441, 473 (2010) ("Popular representation under the fiduciary model does not depend upon electoral authorization or accountability, nor does it seek to guarantee that public officials satisfy the will of the people. Instead, fiduciary representation acknowledges that the will of the people is usually an abstraction without a reliable referent in the real world. As such, the fiduciary model focuses on public officers' fidelity to their legal mandates and the public welfare, as well as satisfaction of the basic duties of care and loyalty."); Robert B. Reich, *Public Administration and Public Deliberation: An Interpretive Essay*, 94 Yale L.J. 1617, 163132 (1985) ("[D]eliberation can lead individuals to revise opinions (about both facts and values), alter premises, and discover common interests . . . . [P]ublic deliberation helps transform individual valuations into social values . . . ."); Glen Staszewski, *Reason-Giving and Accountability*, 93 Minn. L. Rev. 1253, 1267 (2009) ("If citizens do not know about the existence of a policy issue, they will probably not have formed any meaningful preferences on its most desirable resolution.").

[203] Seidenfeld, *supra* note 200, at 1441 ("Staszewski's belief that agencies can resolve policy questions by purely objective reasoning seems unduly optimistic."); *id.* at 1442 ("Criddle's argument fails to acknowledge that the ultimate choice between rulemaking outcomes to a large extent reflects choices of values that are unlikely to be resolved by consensus.").

This view of administrative problems was probably first strongly associated with President Woodrow Wilson and the Progressive Era.[204] To President Wilson (and his prior academic self, Professor Wilson) government problems became issues of administration, requiring expertise. The crude political process designed for the hapless hoi polloi was incapable of dealing with the complexity of regulating modern society.[205]

Not surprisingly, President Wilson, in scholarly writings, advocated against the separation of powers, arguing that the English system of a unified Executive and Legislature was superior to our own.[206] Later, he argued for an administration in which experts would essentially resolve political problems.[207] The logical outgrowth of faith in the administrative process is disgust with and eventual rejection of separation of powers—leading to government by one great leader: an elected dictator. Interestingly, many describe the British Prime Minister as an elected dictator.[208] And, indeed, that is precisely what some administrative- law scholars, following Woodrow Wilson, recently have called for.[209]

The Federalist Papers had a different view of reason and the nature of political problems that led to the desirability of separation of powers. First, *The Federalist Papers* generally see political problems as not susceptible to perfect solutions. In comparison to geometry and the natural science, *The Federalist No. 31* states, "it cannot be pretended, that the principles of moral

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[204] Woodrow Wilson, *The Study of Administration*, 2 Pol. Sci. Q. 197, 197-222 (1887) ("There is scarcely a single duty of government which was once simple which is not now complex; government once had but a few masters; it now has scores of masters. Majorities formerly only underwent government; they now conduct government. Where government once might follow the whims of a court, it must now follow the views of a nation. And those views are steadily widening to new conceptions of state duty; so that, at the same time that the functions of government are every day becoming more complex and difficult . . . . Most important to be observed is the truth already so much and so fortunately insisted upon by our civil service reformers; namely, that administration lies outside the proper sphere of politics. Administrative questions are not political questions.").

[205] *Id.*

[206] Ronald J. Pestritto, *Woodrow Wilson: The Essential Political Writings* 15 (2005) ("Wilson became disillusioned with Congress and looked instead to popular leadership under a strong presidency . . . . Wilson's admiration of the British parliamentary system is evident in a number of his writings.").

[207] Wilson, *supra* note 204, at 197-222.

[208] Graham P. Thomas, Prime Minister and Cabinet Today 75 (1998) (explaining that political developments over the last several generations "have allowed successive Prime Ministers to act as an elected dictator").

[209] *See* Posner & Vermeule, *supra* note 139, at 208.

and political knowledge have, in general, the same degree of certainty with those of the mathematics."[210]

Second, even assuming that reason had answers to political problems, the authors of *The Federalist Papers* would question whether human beings in political environments could arrive at these answers. The authors of *The Federalist Papers* believed that "[n]o man will subject himse[l]f to the ridicule of pretending that any natural connexion subsists between the sun or the seasons, and the period within which human virtue can bear the temptations of power."[211] For the writers of *The Federalist Papers*, reason was often too weak a medicine for the fallen human soul—and would too often become a tool for the passions. Even if there were correct answers to political questions—and *The Federalist Papers* would say certainly sometimes there are—it is far from clear that human beings can reliably find them.

> [T]he obscurity is much oftener in the passions and prejudices of the reasoner, than in the subject. Men, upon too many occasions, do not give their own understandings fair play; but yielding to some untoward bias, they entangle themselves in words, and confound themselves in subtleties.[212]

If reason is too often a tool of the passions or susceptible to the desires for personal advancement or enrichment, then how can agencies, which are political, offer an environment for reason to flourish?

Finally, some argue that expertise makes agency decisions legitimate.[213] *The Federalist Papers* would likely disagree. its checks and balances are calculated to come forward with the "right" answers. *The Federalist Papers* instead sought governmental structures that provide the *democratic answer.* Constitutions exist because human beings are flawed. We don't fully trust

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[210] The Federalist No. 31, *supra* note 124, at 151.

[211] The Federalist No. 53, at 190 (James Madison) (Clinton Rossiter ed., 2003).

[212] The Federalist No. 31, *supra* note 124, at 151.

[213] Seidenfeld, *supra* note 200, at 1445-46 ("Members of the agency rulemaking team are professionals. They are well-educated in fields relevant to agency policymaking. Given the need for an agency to explain the factual predicates for its rules, rulemaking teams have to include professionals from different relevant disciplines. often these disciplines approach a particular policy question with different perspectives and attitudes. Thus, properly structured, administrative law can encourage rulemaking teams to reflect many of the values and perspectives of the various stakeholders affected by a regulatory matter and to gain valuable understanding from consideration of those various perspectives.").

our unfettered selves—neither as citizens, government actors, nor experts. To quote *The Federalist No. 51* one more time, "If angels were to govern men, neither external nor internal controls on government would be necessary."[214]

In response, President Wilson and his modern confrere legal scholars no doubt would point to the added complexity of modern society.[215] The capitalist industrial economy, with its threats to the environment, worker safety, and other matters, requires national regulations and experts to write and administer them. Further, national regulation of healthcare, education, food, and drugs, as well as a host of other matters are essential for well-being, and the people demand it.[216] *The Federalist Papers* cannot respond to this argument, as they simply assumed a small national government with few defined duties—and, consequently, low information costs and high democratic responsiveness. In this sense, the importance of *The Federalist Papers*' critique of the administrative state turns upon whether one believes it is inevitable.

C. Tyranny and Separation of Powers

Finally, some would argue that the separation of powers envisioned by *The Federalist Papers* is simply ineffectual. If this argument were true, it would weaken this Article's position that the administrative state's departure from *The Federalist Papers*' view of separation of powers represents an important disjoint in our constitutional structure. After all, why lament a feature that fails to deliver as promised?

Dismissing the argument that separation of powers is necessary to prevent tyranny has a long history in American scholarship, going back to at least Professor Woodrow Wilson as discussed above.[217] Following in this tradition, Posner and Vermeule recently have argued that "tyrannophobia," the fallacious fear that equates a "legally unconstrained executive" with an

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[214] The Federalist No. 51, *supra* note 133, at 332.

[215] Wilson, *supra* note 204, at 201 ("Administration is everywhere putting its hands to new undertakings. The success of the government's postal service, for instance, point towards the early establishment of governmental control of the telegraph system . . . . Whatever hold of authority . . . federal governments are to take upon corporations, there must follow cares and responsibilities . . . . Seeing every day new things which the state ought to do, the next thing is to see clearly how it ought to do them.").

[216] *Id.*

[217] *See supra* notes 204-06 and accompanying text.

unconstrained executive "tout court," has haunted the American political imagination.[218] As did Wilson, they argue that public opinion can adequately check the executive and would dispense with the "Madisonian separation of legislative and executive powers" in favor of a parliamentary system.[219]

To support this point empirically, Posner and Vermeule argue that if tyrannophobia "helps to prevent dictatorship," then those countries with large amounts of tyrannophobia should have less tyranny.[220] They collect a cross-sectional dataset using countries found in the World values survey, which collects data about political views, and the Polity Iv score, an effort by political scientists to quantify levels of democracy achieved by countries.[221] Posner and Vermeule select 22 countries from 1950 to the present. They find no relationship between tyrannophobia and tyranny. They argue that "the most robust cross-country empirical work on dictatorship is that the best safeguard for democracy is wealth"—not separation of powers.[222]

This argument presents difficulties. First, it seems misstated. Separation of powers prevents tyranny, or so the authors of *The Federalist Papers* would argue. They did not argue that tyrannophobia, the psychological state of fearing an unrestrained Executive, prevents tyranny. Second, tyranny as understood by the authors of *The Federalist Papers* did not simply include brown shirts, strongman dictators, or juntas; such tyrannies would be alien to them.[223] Rather, the Founders likely would include the smaller tyrannies of the British customs officials with their general warrants or mandatory quartering of soldiers. It is these smaller outrages against freedom that formed the complaints found in the Declaration of Independence and supported its conclusion that George Ill was a "tyrant."[224] Posner and Vermeule's binary tyranny measurement (dictatorship or not) misses these smaller diminishments in freedom. Third, their selection of 22 countries from 1950 seems arbitrary and misses major

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[218] Posner & Vermeule, *supra* note 139, at 176.
[219] *Id.* at 210.
[220] *Id.* at 214.
[221] *Id.*
[222] *Id.* at 189.
[223] They usually envisioned tyrannies in the terms of the classical tyrant or European king. *See*, *e.g.*, The Federalist No. 18 (James Madison); *id.* No. 20, *supra* note 133, at 122-23, 132.
[224] The Declaration of Independence paras. 13, 14, 30 (U.S. 1776) ("He has combined with others to subject us to a jurisdiction foreign to our Constitution and unacknowledged by our laws, giving his assent to their acts of pretended legislation . . . . For quartering large bodies of armed troops among us . . . . 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").

collapses of democracies in the twentieth century, notably Fascist Italy, Nazi Germany, and Pinochet's Chile.[225]

The identification of wealth as the safeguard of democracy is also tendentious. First, as Posner and Vermeule only present correlation, it could be that democracy is causing wealth, not the other way round. In other words, democracies make people wealthy; wealth does not protect democracy. Second, the collapse of wealthy, powerful democracies can be far more costly than the collapse of poorer countries. For instance, in the 1930s, the cost was incalculable both to the world and itself when Germany, one of the world's richest as well as technologically, culturally, and scientifically advanced countries at the time, turned from to democracy to dictatorship.[226] Thus, even if wealth correlates with democracy, extra safeguards against tyranny may be appropriate for wealthy democracies.

Conclusion

One of the justifications for the administrative state, regardless of whether it is tyrannical, is that it is inevitable. Modern society is simply too complex; it requires the efficiency of unfettered executive action.[227] President Wilson made this argument over a century ago, and many in today's legal scholarship take Wilson's lead and urge abolition of the pretense of separation of powers.[228] Essentially, they argue for an elected dictator, as in the British system in which the legislative branch assumed control over the Executive.[229] And perhaps, comparing those who support the Rube Goldberg structures of constitutionalized administrative law with those who would abandon separation of powers, the best lack all conviction, while the worst are full of passionate intensity.

This Article argues that the administrative state's assumptions about democracy, political accountability, and human nature conflict with deep

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[225] Jean Gruge & Matthew Louis Bishop, *Democratization: A Critical Introduction* 55-57 (2nd ed. 2014).

[226] Robert H. Nelson, *Economics as Religion: From Samuelson to Chicago and Beyond* 307 (2001).

[227] Edward L. Rubin, *Getting Past Democracy*, 149 U. Pa. L. Rev. 711 (2001).

[228] Pestritto *supra* note 206, at 15 ("Wilson became disillusioned with Congress and looked instead to popular leadership under a strong presidency . . . . Wilson's admiration of the British parliamentary system is evident in a number of his writings.").

[229] *See* Posner & Vermeule, *supra* note 138, at 208.

constitutional legal and political assumptions—as expressed in *The Federalist Papers*. The administrative state presents those attached to these constitutional principles with an unresolvable cognitive dissonance.

This enduring and inevitable unease with the administrative state stems from its inability to adhere to constitutional protections from abusive power—and this unease is inevitable. Administrative law simply does not provide the check on power that the Constitution envisioned. As this Article has labored to show, those who believe administrative law can must accept notions about human nature and the behavior of political actors that neither our Founders in the eighteenth century nor many of us today can accept. This ineluctable truth about the administrative state remains even though the Supreme Court has expressed no interest in reviewing those precedents that have created and allowed it to grow.

This inevitable and persistent discomfort has led to several recent efforts by the D.C. Circuit to limit the doctrines that undergird the administrative state. For instance, in *Business Roundtable v. SEC*,[230] the D.C. Circuit reasoned that under APA arbitrary and capricious review a quantified cost/benefit analysis should be included in any SEC regulation—or, at least, the SEC must explain why quantification is impossible.

The D.C. Circuit's position is not unreasonable as regulation that has more cost than benefit is not reasonable. It does, however, make the arbitrary and capricious review a bit less deferential. And, of course, as in most regulatory matters, the devil's in the details. The question of whether a regulation helps or harms quickly dissolves into battles of dueling economists and experts—and allows a reviewing court more leeway to find an agency's reasoning suspect.

In *Association of American Railroads v. United States Department of Transportation*,[231] the D.C. Circuit determined that the Passenger Rail Investment and improvement Act of 2008 violated the nondelegation doctrine. The statute delegated the authority to the Federal Railroad Administration and Amtrak to jointly "develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations."[232]

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[230] 647 F.3d 1144 (D.C. Cir. 2011).

[231] 721 F.3d 666, 671-73 (D.C. Cir. 2013), *vacated and remanded sub nom*. Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225 (2015).

[232] Passenger Rail Investment and Improvement Act of 2008, Pub. L. No. 100432, § 207, 122 Stat. 4848, 4916 (2008).

The court reasoned that the federal government could not delegate authority to a private entity and concluded Amtrak was a private entity.[233233] The Supreme Court avoided the nondelegation issue and reversed the opinion, holding that "Amtrak is a governmental entity, not a private one, for purposes of determining the constitutional issues presented in this case."[234234]

But, even these modest efforts to cut back at the administrative state have elicited bitter academic reactions. Some called these efforts "libertarian administrative law" that ignore settled New Deal Supreme Court precedent. Critics of these decisions say they are an effort to import "libertarian" values into administrative law—an effort simply to cut back government and limit its interference in private life, property, and contract rights. They "see the D.C. Circuit in [these decisions] as a kind of junior varsity Warren Court, enlisting principles of administrative law to protect preferred rights."[235235]

Undoubtedly, libertarians, who believe in limited government to maximize human freedom, are no fans of the administrative state. But, it does not follow that all those who would rein in the administrative state are libertarians. To the contrary, the history outlined in Part ii and, indeed, this Article's entire argument suggests that this enduring discomfort with the administrative state is part of a greater story that precedes the New Deal precedents and has little to do with libertarianism.

The modern administrative state has reintroduced an unfettered Executive. Courts and most administrative law scholarship have acquiesced to this radical change. But inevitable doubts persist three generations after the New Deal—perhaps because the administrative state continues to grow. Administrative law's purported checks and balances on agency actions make assumptions alien to those undergirding our Constitution as *The Federalist Papers* explained the document. Administrative law will continue to sit uneasily with our legal and constitutional traditions and remain, in the Framers' eyes, tyrannical and illegitimate.

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233 233 *Ass'n of Am. R.Rs.*, 721 F.3d at 674-77.
234 234 *Ass'n of Am. R.Rs.*, 135 S. Ct. at 1233.
235 235 Sunstein & Vermeule, *supra* note 39, at 395.

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