

# PREFERENCE AND ADMINISTRATIVE LAW

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*Several Supreme Court Justices have expressed a willingness to reconsider the nondelegation doctrine. This constitutional principle has allowed Congress to hand over vast amounts of its lawmaking power to agencies, which, in turn, has fueled the administrative state's explosive growth in the twentieth century. These Justices' openness to change, combined with their citation to legal academics who argue that the administrative state violates the Constitution and deep principles of common law governance, has renewed a vociferous academic debate over delegation's legitimacy.*

*This Article takes a new perspective by recognizing that the nondelegation debate goes to the central tension in the separation of powers theory identified since at least the time of John Locke: any legislative grant to the Executive involves some discretion and thus arguably "lawmaking" power. Delegation is a matter of degree, not categorical difference. The academic debate becomes intractable because it attempts to draw absolute lines based either on history or caselaw. These rigid categories lead to extreme views that either Congress is merely an advisory board pointing out areas in which agencies should impose legal duties or the entire administrative state is unconstitutional.*

*If delegation is a matter of degree, then the nondelegation doctrine should require Congress to make big decisions while the Executive makes smaller, implementing decisions. Economic impact, which executive order already mandates agencies estimate, could serve as a metric for decision "size," with regulations having economic impact above a certain threshold reserved for Congress. Legislation, such as the currently pending "REINS" Act, or judicial rulings, could draw a flexible line to ensure Congress's preferences predominate while allowing the discretion that executing the laws requires.*

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## INTRODUCTION

The Constitution gives lawmaking authority to Congress, not the Executive or any of its agencies.<sup>1</sup> In seeming contradiction to this scheme, today’s federal administrative agencies, not Congress, produce most of the rules that bind American citizens.<sup>2</sup> The Supreme Court’s nondelegation doctrine permits Congress to give away its lawmaking power, but it must provide an “intelligible principle” to the implementing administrative agency.<sup>3</sup> The Court’s forgiving understanding of what constitutes an “intelligible principle” has allowed an enormous transfer of lawmaking power from Congress to the agencies.<sup>4</sup>

Several Supreme Court Justices recently have signaled a possible retreat from the three generations-long acceptance of an expansive nondelegation doctrine, sending shivers down the spines of administrative state defenders.<sup>5</sup> In fact, Justices Gorsuch and Thomas have cited recent legal scholarship suggesting that the nondelegation doctrine conflicts with basic constitutional and common law principles found deep within American and English history.<sup>6</sup> These citations poured fuel on the fire of an intense academic debate on the legitimacy of the administrative state and delegation.<sup>7</sup>

1. U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”).

2. See *infra* Section I.C.

3. *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

4. Laura E. Dolbow, *Agency Adherence to Legislative History*, 70 ADMIN. L. REV. 569, 612 (2018) (“[T]he Supreme Court has expansively interpreted ‘intelligible principle,’ permitting broad delegations of authority to the administrative state.”).

5. Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 3 (2017) (“Led by Justice Thomas, with Chief Justice Roberts, Justice Alito, and now Justice Gorsuch sounding similar complaints, they have attacked the modern administrative state as a threat to liberty and democracy and suggested that its central features may be unconstitutional.”); Cass R. Sunstein & Adrian Vermeule, *The New Coke: On the Plural Aims of Administrative Law*, 2015 SUP. CT. REV. 41, 41–43 (2015).

6. *Dep’t of Transp. v. Ass’n of Am. R.R.s.*, 135 S. Ct. 1225, 1242–43 (2015) (Thomas, J., concurring); *United States v. Nichols*, 784 F.3d 666, 670 (10th Cir. 2015) (Gorsuch, J., dissenting from the denial of rehearing en banc).

7. See, e.g., Adrian Vermeule, *No*, 93 TEX. L. REV. 1547, 1547–48 (2015) (reviewing PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014)).

From one perspective, the historical debate cannot definitively determine the legitimacy of delegation. Scholars examine the discretion the Executive in England and America enjoyed in the seventeenth through nineteenth centuries in applying the law and, arguably, making the law. From this historical research, scholars debate whether today's administrative state is, or is not, consistent with the original apportionment of power between the executive, i.e., King or President, and legislature, i.e., Parliament or Congress.<sup>8</sup> But, complicating definitive conclusions from legal history, all legislative grants of power to the Executive involve discretion and thus lawmaking authority in some sense. The legitimacy of delegation to an agency with legislative power—or if one prefers, the grant of discretionary executive authority—turns on quantitative difference in discretion, not qualitative legal category. The debate will not be resolved by arguments as to whether Congress delegated rulemaking authority under the 1946 Administrative Procedure Act (APA) to draft prospective laws of general application legally binding on all citizens when it gave the Postmaster General the authority to set up a national postal system in the Post Office Act of 1792.<sup>9</sup>

Instead, the federal administrative state's legitimacy turns on what it has become, i.e., the main source of all rules we obey, untethered from the pre-New Deal restrictions of substantive due process and the Commerce Clause, let alone the nondelegation doctrine.<sup>10</sup> If the administrative state strays from the Constitution's democratic guarantees, either through an originalist, structuralist, or more broadly normative lens, its defenders must offer sufficient justification.

This Article examines the two main justifications for the administrative state: principal–agency and reason-based approaches. The principal–agency approach argues that the other branches of government—the President, Congress, or Judiciary—exercise sufficient control over the agencies to legitimize agencies' actions, rendering them sufficiently responsive to democratic preferences, and fit them into the constitutional regime.<sup>11</sup>

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8. Philip Hamburger, *Early Prerogative and Administrative Power: A Response to Paul Craig*, 81 MO. L. REV. 939, 939, 981 (2016); Paul Craig, *English Foundations of US Administrative Law: Four Central Errors* (Oxford Legal Stud., Research Paper No. 3/2017, 2016) [hereinafter Craig First Response], <https://ssrn.com/abstract=2852835>.

9. See 5 U.S.C. §§ 553, 556–57 (setting forth procedure for formal and informal rulemaking).

10. Clyde Wayne Crews Jr., *How Many Rules and Regulations Do Federal Agencies Issue?* FORBES (Aug. 15, 2017, 12:48 PM) <https://www.forbes.com/sites/waynecrews/2017/08/15/how-many-rules-and-regulations-do-federal-agencies-issue/#76ef3ddc1e64> (“The bottom line is that in today's America, most binding rules comes [sic] from agencies (unelected) rather than elected lawmakers.”). See Section I.C for empirical data on this point.

11. See *infra* Section II.

However, a growing area of empirical administrative law has examined this claim, and its results suggest that any efforts to determine how effective an agency is in a robust way are not likely to emerge soon. Without that transparency, democracies can never determine if the agent has acted as a good agent to a principal.<sup>12</sup> Further, if the electorate can never verify that an agency follows elected officials, effective delegation remains opaque.

Others, looking to theories of deliberative democracy, argue that reasoned decisionmaking legitimates administration decisions.<sup>13</sup> Reason-giving fails because law reflects the preferences of legislators and administrators, not their reason. Carefully analyzed, arguments that “reason-giving” legitimizes agency rulemaking dissolve into arguments that simply give the preferences of agencies the dressing of “reason.”

While agency theory cannot legitimate the administrative state, seeing delegation in terms of preference points to a theory for nondelegation from a constitutional structural perspective. Article I requires Congress to make big decisions that reflect the electorate’s major ranking of preferences, and agencies should make little, implementing decisions implicating small preferences.<sup>14</sup> As argued below, the nineteenth-century Supreme Court largely followed this approach.<sup>15</sup> But, to be effective, this standard needs a metric to distinguish between big and little decisions, reflecting big and little preferences.

Fortunately, there is money. A reform of the nondelegation doctrine would forbid delegation of agency decisions above a certain economic impact threshold. Agencies already estimate and analyze the economic impact of their decisions pursuant to Executive Order 12,866 (EO 12,866).<sup>16</sup> While these estimates are susceptible to manipulation, they provide a fuzzy, but useful, limit on agency preference and make democratic preferences the most salient.

The Article proceeds by (i) examining the current nondelegation debate, concluding that while it may not definitively decide legitimacy questions, the historical record establishes that the Progressive Era and New Deal marked a shift in existing constitutional practice; (ii) finding both agency-based and reason-based approaches to justify this shift lacking; and (iii) forwarding a

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12. F.E. Dowrick, *The Relationship of Principal and Agent*, 17 MOD. L. REV. 24, 28 (1954) (noting that the relationship between a principal and an agent is typically characterized as a fiduciary duty).

13. *See infra* Section IV.

14. U.S. CONST., art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”).

15. *See infra* Section I.C.

16. Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,735 (Oct. 4, 1993).

“preference-based” approach to nondelegation, a sort of constitutionalized “Regulations from the Executive in Need of Scrutiny (REINS) Act,”<sup>17</sup> based upon verifiable, economic impact as a workable limit on the delegation of legislative authority.

## I. THE NONDELEGATION DOCTRINE AND ITS ANTAGONISTS

Nearly three generations after the Supreme Court’s embrace of the nondelegation doctrine, it remains controversial, and many see its reinvigoration as necessary to limit what they perceive as the excesses of the administrative state.<sup>18</sup> Conversely, defenders of the status quo see arguments against the doctrine as a recurring “bad penny.”<sup>19</sup>

Bad penny or not, nondelegation seems to be returning to the Supreme Court’s agenda. For instance, in *Ass’n of American Railroads v. U.S. Department of Transportation*,<sup>20</sup> the D.C. Circuit determined that the Passenger Rail Investment and Improvement Act of 2008 (PRIIA) violated the nondelegation doctrine.<sup>21</sup> The statute delegated the authority to the Federal Railroad Administration (FRA) 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.”<sup>22</sup>

On appeal to the Supreme Court, the 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.”<sup>23</sup> Writing in concurrence, Justice Thomas has expressed concern about delegation, actually citing Phillip Hamburger, the most noteworthy historian leading the charge that delegation contradicts

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17. Regulations from the Executive in Need of Scrutiny (REINS) Act of 2017, H.R. 26, 115th Cong. § 3 (2017).

18. See Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 333 (2002) (noting the question posed by Justices Thomas and Stevens, “whether the Constitution actually contains a nondelegation principle that is measurably more stringent than the modern Court’s case law reflects”); D.A. Candeb, *Tyranny and Administrative Law*, 59 ARIZ. L. REV. 49, 49 (2017); DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 8–9, 12 (1993).

19. Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. (forthcoming 2021) (manuscript at 2) (on file with the University of Michigan Law School).

20. 821 F.3d 19, 23 (D.C. Cir. 2016).

21. *Id.* (“We conclude PRIIA . . . violates the Appointments Clause for delegating regulatory power to an improperly appointed arbitrator.”).

22. H.R. REP. NO. 110-690, at 7 (2008).

23. U.S. Dep’t of Transp. v. Ass’n of Am. R.R.s, 135 S. Ct. 1225, 1233 (2015).

basic principles of Anglo-American constitutional law.<sup>24</sup> Similarly, Chief Justice Roberts and Justice Alito have also expressed concern about the administrative state's power.<sup>25</sup>

Most recently, Justice Gorsuch specifically signaled an explicit interest in revisiting nondelegation. In *Gundy v. United States*,<sup>26</sup> the Court approved the delegation to the Attorney General of the authority to create a regime of punishment for sex offenders. Also citing *Hamburger* in his opinion,<sup>27</sup> Justice Gorsuch dissented, stating:

In a future case with a full panel, I remain hopeful that the Court may yet recognize that, while Congress can enlist considerable assistance from the executive branch in filling up details and finding facts, it may never hand off to the nation's chief prosecutor the power to write his own criminal code. That "is delegation running riot."<sup>28</sup>

As Gorsuch's dissent in *Gundy* states, the nondelegation doctrine looms as the linchpin of the administrative state's power and focus of its critics. This is so because the "features of the administrative state that anti-administrativists condemn—the combination of legislative, executive, and judicial powers; administrative adjudication of private rights; and judicial deference to administrative statutory interpretations—arguably follow simply from the phenomenon of delegation."<sup>29</sup>

The Supreme Court's recent rumblings suggesting a rethinking of the nondelegation doctrine have relied upon scholarly works, particularly those of

24. *Id.* at 1243–44 (Thomas, J., concurring) ("Thus, although Blackstone viewed Parliament as sovereign and capable of changing the constitution, he thought a delegation of lawmaking power to be 'disgrace[ful].'" ).

25. *See, e.g.*, *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 499 (2010) (Roberts, C.J.) ("The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive's control, and thus from that of the people."); *Ass'n of Am. R.R.s*, 135 S. Ct. at 1237 (Alito, J., concurring) (writing that "[t]he principle that Congress cannot delegate away its vested powers exists to protect liberty" and that "the inherent difficulty of line-drawing is no excuse for not enforcing the Constitution." ).

26. 139 S. Ct. 2116 (2019).

27. *Id.* at 2140 (Gorsuch, J., dissenting).

28. *Id.* at 2148.

29. Metzger, *supra* note 5, at 92; *see also id.* at 95 ("[I]n the world of broad delegations in which we live, core features of the administrative state are now constitutionally required. Few anti-administrativists are willing to seriously challenge delegation, and judicial anti-administrativism in particular has a notably rhetorical air, seemingly unwilling to follow through on the radical implications of its constitutional complaints." ).

Philip Hamburger, as well as Gary Lawson<sup>30</sup> and David Schoenbrod,<sup>31</sup> who in turn draw on a long line of legal theorists extending back to Roscoe Pound,<sup>32</sup> A.V. Dicey,<sup>33</sup> and the seventeenth-century common lawyers establishing parliamentary authority against the Stuart kings. They all shared the belief that the Legislature, not the Executive, must make the important laws in a democracy. It follows that nondelegation as currently defined cannot be squared with the Constitution or historical common law understandings of the separation of powers between Legislative and Executive branches.

Given Hamburger's prominence in Supreme Court decisions and his likely continuing importance in upcoming debates, his arguments and the responses they have received are a good place to begin to understand current delegation debates. Critics raise three main claims against Hamburger: (i) he is wrong on the English history—the English constitution is fine with the types of delegation in today's American administrative law; (ii) he is wrong on American law—in that either the Constitution allows Congress to delegate the power or its grants of power are not really delegation regardless of English antecedents; or (iii) a good testing place to see whether the Founders would have accepted the lawmaking power of the administrative state is eighteenth- and nineteenth-century practice—and that shows lots of delegation.

Just as many arrows aimed against Hamburger fail to hit their target; much of this debate misses the point. As mentioned in the Introduction, all delegations of authority involve giving some discretion to the Executive and consequently “lawmaking” authority in some sense.<sup>34</sup> Delegation of legislative power to an agency is a matter of quantitative difference in

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30. Lawson, *supra* note 18, at 330 (2002); *see generally* F. H. BUCKLEY, *THE ONCE AND FUTURE KING: THE RISE OF CROWN GOVERNMENT IN AMERICA* (2015) (providing a scholarly discussion of the historical roots of America's rejection of a powerful Executive, and arguing that in the American system, where executive authority derives legitimacy from democratic elections rather than hereditary rule, a system where the Executive wields greater power than nondelegation doctrine has typically allowed may be appropriate).

31. SCHOENBROD, *supra* note 18.

32. *See* ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW* 63 (1921).

33. *See* A.V. DICEY, *LECTURES INTRODUCTORY TO THE STUDY OF THE LAW OF THE CONSTITUTION* 179–91 (MacMillan and Co. 2d ed., 1886) (discussing how the idea of legal equality to one law administered by the ordinary courts has been pushed to its utmost limits); *see also* Sunstein & Vermeule, *supra* note 5, at 43 (“We have said that the heroic opponent of Stuart despotism is the common-law judge, symbolized by Edward Coke.”); Noga Morag-Levine, *Agency Statutory Interpretation and the Rule of Common Law*, 2009 MICH. ST. L. REV. 51, 53 (“England, rather than the United States, must serve as the starting point for this inquiry because the framing of agency action through the lens of statutory interpretation is a distinctive feature of the common law world, in contra distinction from continental civil law.”).

34. *See supra* notes 1–4 and accompanying text.

discretion, not qualitative legal category. Indeed, Madison in Federalist 37 recognized this reality.<sup>35</sup> And, the few Supreme Court pronouncements on the matter in the nineteenth century echoed Madison. In other words, arguments as to whether the authority Congress gave the Postmaster General in 1792<sup>36</sup> to set up a national postal system is the legal equivalent to the power the Department of Education making armed, early morning home raids to enforce violations of its student loan program will not resolve the issue.

But whether it is a reasonable interpretation of the historical record that there has been a shift from the “classical” pattern developed in the nineteenth century of Congress making big decisions and agencies making little decisions, courts have recognized this shift in its standards of review developed in the twentieth century to deal with greater agency power. The following examines the historical debate, not so much with the intention of resolving its many points of contention, but to show that the shift definitely occurred. There was, in fact, a “classical model” of American administration within the separation of powers: Congress makes big, important decisions; the agencies make small, implementing decisions. This classical model transformed into the current administrative state, which, at least by some metrics, makes most decisions.

#### A. *American Administrative Law and English Antecedents*

The scholarly debates ignore that delegation is a matter of degrees, not absolutes. Just as a judge “[m]ake[s] [l]aw” whenever he or she applies the law to a novel fact pattern,<sup>37</sup> administration of the law inevitably involves some discretion which, in turn, involves “making law.” Locke and Montesquieu, two political philosophers who greatly influenced the Founders, recognized this tension in the seventeenth and eighteenth centuries in their concept of “prerogative.”<sup>38</sup> In contrast to our tripartite division, Locke recognized four powers of government—because the “ruler” had two aspects to his power: execute laws that stated clear and unambiguous duties as well as

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35. THE FEDERALIST NO. 37, at 182–83 (James Madison) (Robert B. Luce ed., 1976) (“Experience has instructed us, that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces, the legislative, executive, and judiciary; or even the privileges and powers of the different legislative branches. Questions daily occur in the course of practice, which prove the obscurity which reins in these subjects, and which puzzle the greatest adepts in political science.”).

36. See An Act to Establish the Post-Office and Post Roads Within the United States, ch. 7, 1 Stat. 232 (1792) (giving the Postmaster general the power to prescribe regulations to carry out the business of the postal system).

37. Stephen E. Sachs, *Finding Law*, 107 CAL. L. REV. 527, 529 (2019) (“[L]aw is always made by somebody: written law is made by legislators, and unwritten law is made by judges.”).

38. JOHN LOCKE, SECOND TREATISE ON GOVERNMENT § 158 (1980).



act in areas where he had near complete discretion, i.e., “prerogative.”<sup>39</sup> For Locke, that was primarily foreign affairs, but not exclusively.<sup>40</sup>

Locke stated that prerogative is nothing but a “power in the hands of the Prince to provide for the public[] good, in such [c]ases, which depending upon unforeseen and uncertain [o]ccurrences, certain and unalterable laws could not safely direct.”<sup>41</sup> Later, Locke spoke of “[t]his power to act according to discretion, for the public[] good, without the prescription of the law, and sometimes even against it . . . .”<sup>42</sup>

At the same time, while recognizing prerogative, Locke clearly put the Legislature in charge with the Executive as mere administrator. “Locke construct[ed] a theory which reflects the Whig vision of the constitution, one where the king forfeits his legislative prerogatives while retaining the right to administer the realm, [P]arliament becomes supreme legislator[,] and independent judges police the arrangement.”<sup>43</sup>

Montesquieu elided these powers, creating the three branches of government that form the basis of our Constitution.<sup>44</sup> Echoing Locke, however, his vision of the Executive is one that would be “stripped of its prerogatives” by the Legislature.<sup>45</sup> But, whatever one feels about the theoretical soundness of this move, it has proven difficult in practice.

The tension in defining where Executive prerogative in administering the law starts and Legislative lawmaking ends was a flashpoint in the development of the representative democracy in England. The seventeenth century saw tremendous conflict in England between Parliament and the Stuart kings over the extent of royal prerogative,<sup>46</sup> which led in part to the English civil war and the Glorious Revolution. Parliament believed its law

39. *Id.* § 160.

40. Pasquale Pasquino, *Locke on King’s Prerogative*, 26 POL. THEORY 198, 199–202 (1998); Suri Ratnapala, *John Locke’s Doctrine of the Separation of Powers: A Re-Evaluation*, 38 AM. J. JURIS. 189, 218 (1993).

41. LOCKE, *supra* note 38, at § 158.

42. *Id.* § 160.

43. Ratnapala, *supra* note 40, at 218.

44. Gary J. Schmitt, *Separation of Powers: Introduction to the Study of Executive Agreements*, 27 AM. J. JURIS. 114, 121 (1982).

45. *Id.* at 121.

46. Morag-Levine, *supra* note 33, at 53 (“English monarchs and their supporters made claim to prerogative regulatory authority parallel to that of rulers in France and elsewhere in Europe. Their opponents brought a countervailing legal ideology geared at limiting the scope of the prerogative under common law principles. The history of English constitutionalism is one of a struggle between supporters of the royal prerogative and the expansive regulatory authority it conferred on the one hand, and those who invoked common law principles as a constraint on the Crown’s authority, on the other.”)

governed everyone, including the King, who they claimed had limited discretion in carrying out the laws.<sup>47</sup> 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 and discretion to enforce.<sup>48</sup> The Stuart kings claimed royal prerogative to impose all sorts of regulations akin to those of the modern regulatory state.<sup>49</sup>

The legal debates had a distinctly modern cast to them, tracking the current debate about the Executive's power to make regulations. Morag-Levine describes an exchange between Thomas Coke and the Lord Chancellor about royal proclamations prohibiting the building of new structures in London and regulating the processing of wheat starch.<sup>50</sup> The Lord Chancellor claimed that reasonable urban planning and health regulations were within "power and prerogative of the King" whose actions are "according to his wisdom and for the good of his subjects."<sup>51</sup> Invoking Fortescue, Coke responded that "the King by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm."<sup>52</sup>

Phillip Hamburger picks up on these themes in his book, *Is Administrative Law Unlawful?*,<sup>53</sup> arguing that the powers exercised by the modern administrative state are essentially those that the Stuart kings sought in royal prerogative: the ability to make law without the consent of the legislature and adjudicate outside of common law courts. In the seventeenth century, the English common lawyers, in theory, rejected claims of the executive over the legislature.<sup>54</sup> The English rejected the King's claim of vast discretion in

47. See 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[s] . . . resorted to various forms of prerogative taxation, such as forced loans . . . 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.'"); COLIN RHYS LOVELL, *ENGLISH CONSTITUTIONAL AND LEGAL HISTORY* 111–12 (1962).

48. LOVELL, *supra* note 47, at 45–69 (discussing the roots of English monarchs' power).

49. Noga Morag-Levine, *Common Law, Civil Law, and the Administrative State: From Coke to Lochner*, 24 CONST. COMMENT. 601, 611 (2007) ("Common law limitations on the scope of prerogative authority served in this connection to stem the incursion of economic and social regulation along the absolutist French model . . . the claim that the king may use the prerogative only to prevent dangers, and not to change the law.").

50. Morag-Levine, *supra* note 33, at 58.

51. Morag-Levine, *supra* note 49, at 626.

52. *Id.*

53. PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014).

54. 1 ALPHEUS TODD, *PARLIAMENTARY GOVERNMENT IN ENGLAND: ITS ORIGIN DEVELOPMENT AND PRACTICAL OPERATION* 265 (1867) ("It is a fundamental law of the

making law through proclamations,<sup>55</sup> legal interpretation,<sup>56</sup> suspending and dispensing with the law,<sup>57</sup> or creating special royal courts.<sup>58</sup> But, as Hamburger sees it, the modern administrative state now enjoys the power which the Stuart kings literally lost their heads over.

The reaction to his book has been doctrinal, historical, and at times hysterical. The two most prominent attacks have been made by Harvard Professor Adrian Vermeule in his book review purporting to answer the question Hamburger's book poses, entitled "*No*,"<sup>59</sup> and Oxford Law Professor Paul Craig in a series of two unpublished papers.<sup>60</sup> Both lambast the book, castigating Hamburger in the severest, and at times, ad hominem terms.

Much of the negative reaction stems from Hamburger's term "extralegal." He described the power as "administrative power . . . [that] imposes rules and adjudications in addition to those of the law, and even where these extralegal constraints have statutory authorization, they interfere with the extent of the liberty enjoyed under the law."<sup>61</sup> Thus, following the common lawyers, such as Thomas Coke, he sees only legislation as true law—rejecting the Executive's authority to make law.

Vermeule and Craig elide "extralegal" with "unauthorized" or even "illegal" and have a field day showing that agency action authorized by statute is perfectly authorized and, by most accounts, perfectly legal.<sup>62</sup> But,

English constitution, that the sovereign can neither alter, add to, nor dispense with, any existing law of the realm."); POUND, *supra* note 32, 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 . . .").

55. HAMBURGER, *supra* note 53, 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.").

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

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

58. *Id.* at 133.

59. Vermeule, *supra* note 7.

60. Paul P. Craig, *The Legitimacy of US Administrative Law and the Foundations of English Administrative Law: Setting the Historical Record Straight* 13 (Oxford Legal Stud., Research Paper No. 44/2016, 2016) [hereinafter Craig Second Response], <http://ssrn.com/abstract=2802784>; see also Craig First Response, *supra* note 8 (outlining four errors in Hamburger's thesis).

61. HAMBURGER, *supra* note 53, at 7–8.

62. Vermeule, *supra* note 7, at 1548 (2015) ("Hamburger is impenetrably obscure about what he means by 'lawful' and 'unlawful.'").

that is not really the point. The question is whether the Executive, when it “binds through edicts other than law,”<sup>63</sup> is doing something inconsistent with the constitutional structure. Hamburger, citing the seventeenth-century struggles for parliamentary supremacy against royal prerogative, says they are inconsistent. There certainly is a common law tradition demanding that only legislative enactments are truly law.

Vermeule, in his review, assumes Hamburger is right that Parliament forbade “delegation” and then asks “whether American administrative law violates those principles.”<sup>64</sup> He says not.<sup>65</sup> Most of his review consists of claiming that the “true issue in controversy is not whether legislative power can be delegated (all concerned agree that it cannot); the issue is whether administrative issuance of “binding” commands under statutory authority always and necessarily counts as an exercise of “legislative power.”<sup>66</sup> Hamburger would have to say that it does; the main line of American administrative law says that it doesn’t.<sup>67</sup> However, Vermeule concludes, “Where is the positive evidence, in American legal sources, for the view that Hamburger wants to describe as a deep constitutional principle—the view that any and all binding administrative regulations promulgated under statutory authority count as forbidden exercises of legislative power? There is none.”<sup>68</sup>

That does not seem to be a fair point. Hamburger argues that the principle was deeply implicit in the constitutional scheme. He points to the constitutional text and the original, Classical model of separation of powers

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63. Philip Hamburger, Response, *Vermeule Unbound*, 94 TEX. L. REV. ONLINE 205, 208 (2016).

64. Vermeule, *supra* note 7, at 1554.

65. *Id.*

66. *Id.* at 1555–56.

67. *Id.* at 1547. And, it is far from clear whether all in the debate would agree with this characterization. For instance, Mortinson & Bagley take issue with Hamburger and the dissent in *Gundy* to argue that delegation is perfectly fine under seventeenth- and eighteenth-century political theory and originalist understanding. “From the founders’ perspective, nothing in the Constitution prohibited delegations of rulemaking power—no matter how broad, vague, or consequential—so long as the exercise of that power ultimately remained subject to congressional oversight and control.” Mortenson & Bagley, *supra* note 19, at 4. They argue that delegation of political power would be an acceptable principle under political theory of the time and therefore “[t]he nondelegation doctrine thus has nothing to do with the Constitution as it was originally understood.” *Id.* at 6. So, Hamburger is wrong because Congress never delegates (Vermeule) and Hamburger is wrong because there is no limit on Congress’s delegation authority. *See id.* Mutatis mutandis, the Supreme Court throughout the nineteenth century was wrong that the nondelegation doctrine existed and that, even if it did, the doctrine allows the power the administrative state currently wields contra Hamburger.

68. Vermeule, *supra* note 7, at 1562.

as well as the seventeenth-century debates.<sup>69</sup> His point is that contrary to this constitutional principle, lawmaking authority, under “statutory authori[ty]” or not, must be exercised by the Legislature.<sup>70</sup>

In a way, Vermeule’s response seems semantical. The question is not whether an agency is making law when promulgating rules or simply making lawful regulations pursuant to statutory guidelines Congress sets forth. The question is who is exercising real legislative power and making substantive economic and value choices—agencies or Congress. Vermeule would say that agencies working under the broadest and most minimal of intelligible principles are not delegated lawmaking authority. Please ignore the 100,000 pages of final rules per annum and tens of thousands of criminal penalties and regulatory fines found in the Code of Federal Regulations.

Showing that legislatures do not really “delegate” but simply direct agencies with guiding principles is not responsive to Hamburger’s position.<sup>71</sup> His point is that seventeenth-century English common lawyers seized on the moral–political principle that legislatures must make the important choices in a democracy, not the Executive.<sup>72</sup> Agencies are now doing this in the United States. That is the fundamental inconsistency. It does not matter if agencies are working through delegated authority or laughably broad statutory authority made permissible by the nondelegation doctrine.

Unlike Vermeule, who attacks Hamburger’s understanding of American law, Craig attacks Hamburger’s account of English law.<sup>73</sup> Much is made over a concept alien to Americans—royal prerogative. The King had certain powers independent from Parliament, like making treaties, and other prerogatives given by statute. From the latter type sprung most English administrative law. Hamburger argues both types are “unlawful” in his technical meaning, and that administrative law, which largely emerged from the latter types of prerogative, is therefore suspect from a constitutional perspective.<sup>74</sup>

Craig responds that administrative law is perfectly lawful because it involves no prerogative, but rather proceeds from statute.<sup>75</sup> He claims that Hamburger elides the royal prerogative with authority granted by statute to the King, with the former being problematic but the latter entirely acceptable:

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69. HAMBURGER, *supra* note 53, at 8.

70. *Id.* at 73.

71. Vermeule, *supra* note 7, at 1559.

72. HAMBURGER, *supra* note 53, at 8.

73. Vermeule, *supra* note 7, at 1547; Craig Second Response, *supra* note 60.

74. HAMBURGER, *supra* note 53, at 8.

75. Craig Second Response, *supra* note 60, at 13 (“The first constraint concerned the prerogative, which is a species of executive power that exists independent of statute, such as the power to conclude a treaty.”).

When Parliament decided in a particular statute to accord rulemaking authority to the administration it was accepted that the rules thus made were bounded by the terms of the statute, that they were hierarchically inferior to the primary legislation pursuant to which they were made, and that they could be subject to judicial review.<sup>76</sup>

In contrast, it is royal prerogative untethered from statute that the seventeenth-century common lawyers fought against.<sup>77</sup>

Responding to Hamburger's response, Craig seems to have backtracked in his second critique, conceding statutory prerogative.<sup>78</sup> Like Vermeule, he claims that regardless of the similarity of statutory prerogative to administrative regulations, the validity of administrative law delegations of authority to the executive is made clear in the numerous regulatory and administrative schemes that Parliament approved.<sup>79</sup>

The great majority of administration during the seventeenth and eighteenth centuries took the form of individualized determinations made by the body charged with administering that particular regime, whether that was the excise, sewers, inclosures, the poor law, trade regulation[,] or police power . . . . The very great majority of this administration, circa 95%, was carried out pursuant to express statutory authority, whereby Parliament invested bodies such as commissioners or justices of the peace with the power and duty to apply the law in their designated area. The exercise of such power had nothing whatsoever to do with the prerogative . . . .<sup>80</sup>

Again, this is not responsive. Hamburger admits that there were vast amounts of administrative actions—which were accepted and perfectly legal and normal—particularly in local and decentralized administrative decisions.<sup>81</sup> Their continued existence is a tension in English law, but that does not undermine the point that, if legislatures make law, this type of power is extralegal.<sup>82</sup>

It seems that the arguments became orthogonal to each other. If the claim is that the English constitution forbids any delegation of discretionary authority to administrative bodies, then that is false. If the argument is that the seventeenth-century Parliament saw itself as the primary source of law and that the executive had, in theory at least, only minimal discretionary authority, or at least many parliamentary leaders believed that, then that claim seems plausible. Indeed, it seems quite likely that seventeenth- or

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76. *Id.* at 17, 43 (“[C]ontrary to Hamburger’s thesis, nothing to indicate over a period of three hundred years that exercise of this power was regarded as ‘extralegal’ or ‘constitutionally illegitimate.’ Parliament repeatedly sanctioned intervention, fine-tuning the regulatory schema and adding to the Commissioners’ powers.”).

77. *Id.* at 14–17.

78. Craig First Response, *supra* note 8, at 5–7.

79. *Id.* at 6–7.

80. *Id.* at 6.

81. HAMBURGER, *supra* note 53, at 494.

82. Craig First Response, *supra* note 8, at 6–7.

eighteenth-century English lawyers would view the modern administrative state with horror—not because granting authority to executive or agencies is per se objectionable, but because the sheer amount of discretionary power they wield undermines Parliament’s power. At the same time, there would be disagreement at the point where this power became intolerable, given that Parliament routinely delegated administrative power.<sup>83</sup>

In the seventeenth century, the Parliament became sovereign—directly running administration to a large degree—in distinction to the American presidential system with its branches of government. Parliament was, therefore, delegating power *to itself*.<sup>84</sup> The question for American constitutional law remains what, if anything, this common law heritage means for interpreting the validity of delegation today, particularly if seventeenth-century lawyers and parliamentarians likely would have a variety of views. Unlike England, American delegation still requires delegation to another branch of government.

Turning to the historical record—both written and oral—it is reasonable to look at actual practice to see if the eighteenth- and nineteenth-century Congress adhered to a Classical model, adumbrated by the English common lawyers, such as Coke, and celebrated by Hamburger: Congress makes prospective laws of general application affecting private rights and the Executive enforces them without much discretion. If the early period of American administration followed this pattern, then that historical practice would help Hamburger’s position. The Framers would not have seen the administrative state’s exercise of lawful authority but something akin to prerogative. To the early nineteenth century we now go.

### B. *Practice for Theory*

The classical pattern of the administrative agency that arguably functioned in the nineteenth century has clear lines of accountability. Congress only passed laws that gave the Executive limited discretion; though, the Executive had almost absolute discretion over its limited decisions, as courts rarely questioned them.<sup>85</sup> This arrangement was transparent. Voters could evaluate laws passed by particular Congresses and hold the body accountable for its decisions.<sup>86</sup> It was only the Progressive Era and the New Deal, or so the story goes, that changed this model, giving much greater discretion and explicit lawmaking authority

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83. *Id.*

84. *Id.* at 10.

85. Christopher DeMuth, *Can the Administrative State Be Tamed?*, 8 J. LEGAL ANALYSIS 121, 129 (2016).

86. *Id.* at 135.

to agencies. Indeed, this is the mainstream understanding accepted by historians and legal academics.<sup>87</sup>

Against this position, several historians, political scientists, and law professors have argued that the nineteenth-century agencies had great discretion and, indeed, lawmaking authority so that administrative law and practice through the nineteenth and twentieth centuries reflect continuity, not abrupt transformation.<sup>88</sup> “The implications of this argument are clear. If it [the broad delegation of lawmaking authority] was constitutional in the minds of antebellum legislators, then surely the tension between modern regulatory agencies and the Constitution must be an invention of modern scholarship.”<sup>89</sup>

However, assessing the evidence, there is at least a *prima facie* case that the classical model of administration likely has some historical basis and that claims to the contrary are exaggerated. Rather, delegation to administrative agencies in the nineteenth century usually involved rules for self-regulation of agencies that did not bind private parties or courts and typically limited agency discretion in significant ways. Until well into the nineteenth century, members of the Executive could be held directly accountable to aggrieved individuals under common law.<sup>90</sup> Thus, a citizen who believed that a bureaucrat treated him or her wrongly could bring an action (usually trespass) for an illegal seizure

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87. JOSEPH POSTELL, *BUREAUCRACY IN AMERICA: THE ADMINISTRATIVE STATE'S CHALLENGE TO THE CONSTITUTIONAL GOVERNMENT* 99–123 (2017); ALFRED C. AMAN, JR. ET AL., *ADMINISTRATIVE LAW* 2–4 (3d ed. 2014) (identifying the New Deal as the point where the administrative state grew and assumed its present powers); 1 KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 1:7, at 17–24 (2d ed. 1978); RICHARD HOFSTADTER, *THE AGE OF REFORM: FROM BRYAN TO F.D.R.* 300–26 (1963); Reuel E. Schiller, *The Administrative State, Front and Center: Studying Law and Administration in Postwar America*, 26 *LAW & HIST. REV.* 415, 423 (2008) (“[T]he rapid growth of the administrative state during the New Deal and the postwar period gives legal historians an ample opportunity to tell the story of twentieth-century extra-judicial constitutionalism.”); Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 *HARV. L. REV.* 467, 496 (2002) (“Whereas early rulemaking grants were largely confined to military, foreign affairs, tax, and internal government matters, Congress in the late nineteenth century began to legislate over a wider range of activities, including the control and disposition of federal lands and the regulation of interstate commerce.”); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 *STAN. L. REV.* 1189 (1986) (tracing the rise of the modern regulatory state from its beginning in the early twentieth century).

88. JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION* 6 (2012) (“[T]here has been no precipitous fall from a historical position of separation-of-powers grace to a position of compromise.”).

89. POSTELL, *supra* note 87, at 98.

90. MASHAW, *supra* note 88, at 4.



of property. The bureaucrat would be answerable to a judge, often a state judge, for monetary damages.<sup>91</sup>

For example, steamboat safety regulation is often cited as an example of nineteenth-century antebellum rulemaking authority.<sup>92</sup> Unsurprisingly, given antebellum America's reliance on river traffic, exploding boilers were a safety issue on steamships. Congress responded with several statutes and created a regulatory body, "The Board of Supervising Inspectors."<sup>93</sup> Many claim that this agency had powers analogous to the environmental regulators, like the Environmental Protection Agency (EPA) or National Highway Traffic Safety Administration (NHTSA), suggesting that delegation of tremendous lawmaking authority.<sup>94</sup> That is not clear as more recent scholarship indicates. The rulemaking authority these agencies had involved "their own conduct" and did not involve rules applicable to the general public, i.e., legislative rulemaking. For instance, § 18 of one authority states "supervising inspectors 'shall assemble together . . . once in each year at least, for joint consultation and the establishment of rules and regulations for their own conduct and that of the several boards of inspectors within the districts.'"<sup>95</sup> "The language of this section clearly states that the

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91. See Craig First Response, *supra* note 73, at 6–7.

92. Jerry L. Mashaw, *Administration and "The Democracy": Administrative Law from Jackson to Lincoln, 1829–1861*, 117 YALE L.J. 1568, 1629 (2008); Jerry L. Mashaw & Avi Perry, *Administrative Statutory Interpretation in the Antebellum Republic*, 2009 MICH. ST. L. REV. 7, 27; Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 YALE L.J. 1538, 1553 (2018) ("Across his hundred-year survey, Mashaw offers a number of case studies, including the first Board of Patents, the land claims system, steamboat regulation, and Civil War pensions."); Richard J. Pierce, Jr., Response, *Rulemaking Ossification is Real: A Response to Testing the Ossification Thesis*, 80 GEO. WASH. L. REV. 1493, 1501 (2012) ("Fortunately, Mashaw's comprehensive history of administrative law in the nineteenth century is a fertile source of that type of comparative data. His account of the implementation of the Steamboat Safety Act of 1852 illustrates the potential efficiency and efficacy of rulemaking in the absence of judicially enforced procedural requirements."); William J. Novak, *The Progressive Idea of Democratic Administration* 167 U. PA. L. REV. 1823, 1825 (2019) ("Contravening theories of American exceptionalism, this early modernization of national administration did not bypass the early United States. Rather, Jerry Mashaw has now definitively established the long and deep historical origins of American administrative law and a national administrative state.").

93. McKinley, *supra* note 92, at 1598 ("Most importantly, the 1852 amendment [to the Steamboat Act] created a Board of Supervising Inspectors to not only regulate steamboat safety, but also facilitate public engagement in that regulation through the petition process.").

94. MASHAW, *supra* note 88, at 1641.

95. POSTELL, *supra* note 87, at 98 (citing Act of Aug. 30, 1852, ch. 106, § 18, 10 Stat. 61, 70).

supervising inspectors' rulemaking power is for governing their own conduct rather than binding those subject to their jurisdiction."<sup>96</sup>

Now, if this "conduct" involved setting standards and rules that governed inspectors' relationships with regulated entities, that would be rulemaking in the post-New Deal sense. That was not the case. Congress carefully specified the powers of inspectors; for instance, it limited the Board's rulemaking powers for creating regulations on how ships were to pass at night in narrow channels.<sup>97</sup> These tiny grants of authority were made against a highly detailed inspection regime that minutely regulated what inspectors could do.<sup>98</sup> In short, in antebellum America, "administrators were typically limited by specific statutory provisions and legislative power was not transferred to administrative bodies."<sup>99</sup> This pattern continued from the "Civil War to the early 1880s"<sup>100</sup> during which "administrative power remained largely on the same trajectory of antebellum administration. Courts reviewed administrative action in accordance with the principles laid down prior to the Civil War [deferring to the Executive under separation of powers] and Congress refrained from delegating its powers widely."<sup>101</sup>

Given the historical backdrop of the congressional tendency not to delegate, the Supreme Court spoke little of the topic of delegation throughout the nineteenth century. When it did, it repeated the principle that Congress may not delegate legislative authority as discussed below. Consistent with this Article's thesis, the nineteenth-century court characterized rulemaking as subsidiary and "gap-filling" or defined the Executive's action as nondiscretionary.<sup>102</sup> Neither understanding comports with modern rulemaking authority.

The first time the Court addressed nondelegation, *Brig Aurora v. United States*,<sup>103</sup> involved a challenge to the Non-Intercourse Act, a statute intended to keep America out of the Napoleonic wars and that empowered the President to lift the embargo against France and England—and criminal penalties for its violation—if certain relations calmed with either country.<sup>104</sup> The court correctly saw this as a very limited grant of discretion.<sup>105</sup>

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96. *Id.*

97. *Id.* at 99.

98. *Id.* at 98.

99. *Id.* at 102.

100. *Id.*

101. *Id.*

102. Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1233–34 (1994).

103. 11 U.S. (1 Cranch) 382 (1813).

104. *Id.* at 383–84.

105. *Id.* at 388 ("On the second point, we can see no sufficient reason, why the legislature

In a more expansive decision dealing with Congress's authorization to the judiciary to make procedural rules, the Court in *Wayman v. Southard*,<sup>106</sup> states that "[i]t will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative."<sup>107</sup> Echoing Madison in Federalist 37,<sup>108</sup> the Court recognizes the fuzzy line that separates the powers, but makes clear that the Legislature must dominate:

The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the [L]egislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.<sup>109</sup>

The Court in a similar case, *Bank of U.S. v. Halstead*,<sup>110</sup> characterized the power given to the courts for procedural rules as nonlegislative, nondiscretionary, and ministerial.<sup>111</sup>

Again, in *Marshall Field & Co. v. Clark*,<sup>112</sup> the Court repeated "[t]hat Congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."<sup>113</sup> It characterized the tariff-setting power of the Executive as nondiscretionary upon the occurrence of certain events and thus not implicating lawmaking.<sup>114</sup>

Therefore, throughout the nineteenth century, the Supreme Court never backtracked on the principle that Congress may not delegate lawmaking power. Rather, the Court faced the problem Locke and Montesquieu identified—how to make prerogative power, the inevitable byproduct of the Executive exercising non-robotic authority, reasonable within the Constitution. The Court, therefore, required that Congress make the

should not exercise its discretion in reviving the act of March 1st, 1809, either expressly or conditionally, as their judgment should direct.").

106. 23 U.S. (1 Wheat.) 1 (1825).

107. *Id.* at 42–43.

108. See THE FEDERALIST NO. 37, *supra* note 35.

109. *Wayman*, 23 U.S. at 43.

110. 23 U.S. (1 Wheat.) 51 (1825).

111. *Id.* at 61–62 ("[I]t never has occurred to any one that it was a delegation of legislative power. The power given to the Courts over their process is no more than authorizing them to regulate and direct the conduct of the Marshal, in the execution of the process. It relates, therefore, to the ministerial duty of the officer; and partakes no more of legislative power, than that discretionary authority in trusted to every department of the government in a variety of cases.").

112. 143 U.S. 649 (1891).

113. *Id.* at 692.

114. *Id.* at 659.

important decisions. “As the nineteenth century drew to a close, the Supreme Court could uncontroversially assert: ‘That [C]ongress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the [C]onstitution.’”<sup>115</sup>

Comparing *United States v. Eaton*<sup>116</sup> with the more famous *United States v. Grimaud*<sup>117</sup> further illustrates the principles of delegation. In *Eaton*, plaintiffs challenged the Oleomargarine Act, a law meant to protect the dairy industry from competition from oleomargarine.<sup>118</sup> The law required oleomargarine producers to keep certain ledgers and records, criminalized the failure of any oleomargarine producers to do anything “required by law in the carrying on or conducting of his business,” and empowered the Internal Revenue Service (IRS) to make “all needful regulations” for carrying out the Act’s provisions.<sup>119</sup> Because Congress did not specify the criminal violations, the Court ruled the IRS simply lacked the authority to criminalize any violation. Simply put, it was not a violation of the law until Congress specified explicitly—agencies could not make up criminal offenses. The Court said:

Regulations prescribed by the [P]resident and by the heads of departments, under authority granted by [C]ongress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offen[s]e.<sup>120</sup>

In contrast, we see the famous 1911 case, *United States v. Grimaud*, twenty years later and well into the Progressive Era.<sup>121</sup> The case examined whether the Department of Interior could prescribe criminal sanctions for unlawful grazing on public lands.<sup>122</sup> The Court realized it was dealing with the same problem that bedeviled Locke, Montesquieu, and Madison in Federalist 33: “It must be admitted that it is difficult to define the line [that] separates legislative power to make laws, from administrative authority to make regulations. This difficulty has often been recognized, and was referred to

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115. Matthew Cavedon & Jonathan Skrmetti, *Party Like It’s 1935?: Gundy v. United States and the Future of the Non-Delegation Doctrine*, 19 FEDERALIST SOC’Y REV. 42 (2018).

116. 144 U.S. 677 (1892).

117. 220 U.S. 506 (1911).

118. *Eaton*, 144 U.S. at 678–79.

119. *Id.* at 685.

120. *Id.* at 688.

121. *Grimaud*, 220 U.S. at 506.

122. *Id.* at 514.

by Chief Justice Marshall in *Wayman v. Southard*.<sup>123</sup> And, again, the Supreme Court quoted the *Wayman* language that administrative rules may only “fill up the details.”<sup>124</sup>

However, this time, the statute set forth the criminal offense in explicit enough terms, specifically stating that the Department would have the power to create criminal statutes within a certain conscribed area.<sup>125</sup> As a result, *Wayman* is often considered as a case of statutory construction, setting forth the language Congress must use to empower agencies to make rules.<sup>126</sup>

On the other hand, *Wayman* can also be seen as standing for the proposition that in small, discrete areas involving government property or its own administration where Congress provides adequate specificity, agency rulemaking is acceptable. There is a big difference between empowering an agency to specify punishments for unlawful sheep grazing on its own property and, say, the EPA mandating emission controls over private parties or the Department of Education writing rules mandating transgender bathrooms in every institution that receives federal funding.

Some look at this nineteenth century history and see that the nondelegation doctrine never existed because most decisions came out on the side of delegation.<sup>127</sup> They are in a sense correct that “[j]udges never developed the sort of doctrinal tools that would allow them to meaningfully distinguish between inappropriate abdication of legislative power and necessary delegation of administrative details.”<sup>128</sup> That is the point. The distinction is highly contextual and difficult to distinguish. The difference between “filling up the details” and legislative power is fuzzy, but that does not mean the distinction does not exist or certainly not that the Court abandoned it. In *Eaton*, Congress went too far.

Some claim that the nondelegation doctrine never existed because Congress constantly delegated authority to agencies—from the first Congress on.<sup>129</sup> If one looks at these arguments, however, they fail to distinguish between rules governing the working of agencies and rules governing the rights, duties, and obligations of private parties. The First Congress did indeed delegate rulemaking to the Patent Office and the Post Office to create their own rules operations, not rights and duties of private parties. This delegation, in the

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123. *Id.* at 517.

124. *Wayman v. Southard*, 23 U.S. (1 Wheat.) 1, 43 (1825).

125. *Grimuad*, 220 U.S. at 517.

126. Merrill & Tongue Watts, *supra* note 87, at 469.

127. Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 430 (2017).

128. *Id.*

129. See Mortenson & Bagley, *supra* note 19, at 3–4.

words of *Bank of U.S. v. Halstead*, “relates, therefore, to the ministerial duty of the officer; and partakes no more of legislative power, than that discretionary authority intrusted to every department of the government in a variety of cases.”<sup>130</sup> The eighteenth- and nineteenth-century courts had no problem with delegating power to agencies to create their own rules; however, as *Eaton* points out, Congress had to explicitly state and specify criminal sanctions on private parties.<sup>131</sup> While the *Eaton* requirement became a formality of construction as Congress gave more and more power to agencies, the point is that in the nineteenth century, the Supreme Court recognized the difference between general lawmaking and ministerial duties—and that the minimal delegation during the nineteenth century reflects that recognition.

### C. *The Classical Model and the Modern Administrative State*

It is hardly controversial to claim that the New Deal, bringing to fruition a seed planted in the Progressive Era, dispensed with the classical separations of powers. “The biggest change in the [c]onstitutional structure has been the creation of the modern administrative state.”<sup>132</sup> “Most national lawmaking . . . is no longer Article I, Section 7[] of the Constitution, but is instead the [APA].” This claim is no hyperbole. By number of rules or their length, the bureaucracy’s output of legal duties and obligations buries Congress’s:

	Number of Public Laws*	Number of Statute Pages**	Number of Final Rules	Federal Register Pages
2015	115	1311	N/A	82035
2014	221	1799	3554	79066
2013	74	1909	3659	80462
2012	192	1862	3708	77249
2011	90	2175	3807	82419
2010	248	2257	3573	82589
2009	133	3759	3503	69676
2008	269	5422	3830	80700
2007	180	2820	3595	74408
2006	312	3926	3718	78724
2005	169	3844	3943	77752

TABLE I<sup>133</sup>

130. *Bank of U.S. v. Halstead*, 23 U.S. (1 Wheat.) 51, 61–62 (1825).

131. *United States v. Eaton*, 144 U.S. 677, 688 (1892).

132. WILLIAM N. ESKRIDGE, JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 10 (2010).

133. MAEVE P. CAREY, CONG. RSCH. SERV., R43056, *COUNTING REGULATIONS: AN OVERVIEW OF RULEMAKING, TYPES OF FEDERAL REGULATIONS, AND PAGES IN THE FEDERAL REGISTER* 22–23, 27–28 (2019). The final two columns, while not appearing in full, are found

This story is again told by data taken from the Unified Agenda of Federal Regulations, which provides a more granular categorization of rules:

<b>Public Laws vs Agency Rules by Category</b>						
<b>Year</b>	<b>Public Laws</b>	<b>Total Rules</b>	<b>Econ Signif Rules</b>	<b>Major Rules (GAO)</b>	<b>Signif Rules (Fed Register)</b>	<b>Other Signif Rules (Unified Agenda)</b>
1995	88	4,713				
1996	246	4,973		42	308	325
1997	153	4,584		46	268	246
1998	241	4,899	27	76	242	294
1999	170	4,684	41	51	231	346
2000	410	4,313	35	77	288	324
2001	108	4,132	75	70	295	339
2002	269	4,167	38	51	284	322
2003	198	4,148	38	50	336	427
2004	299	4,101	40	66	321	337
2005	161	3,975	48	56	258	344
2006	321	3,718	48	56	163	485
2007	188	3,595	41	61	180	362
2008	285	3,830	62	95	427	354
2009	125	3,503	70	84	371	351
2010	217	3,573	81	100	420	346
2011	81	3,807	79	80	444	528
2012	127	3,708	57	68	347	345
2013	72	3,659	51	81	331	254
2014	224	3,554	69	81	290	221
2015	115	3,410	61	76	302	220
2016	214	3,853	83	105	315	266
<b>Totals</b>	<b>4,312</b>	<b>88,899</b>	<b>1,044</b>	<b>1,472</b>	<b>6,421</b>	<b>7,036</b>

*Sources* : Public Laws: Government Printing Office; Total Rules and Significant Rules: author search on FederalRegister.gov advanced search function. Economically significant rules and other significant rules: Unified Agenda of Federal Regulations search on RegInfo.gov. Major Rules: Government Accountability Office. Figures updated at [www.tenthousandcommandments.com](http://www.tenthousandcommandments.com)

TABLE 2<sup>134</sup>

As the Supreme Court states: “Before the 1930s, federal statutes granting authority to the [E]xecutive were comparatively modest and usually easily

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in this CRS’s report. *Id.* See generally *Previous Sessions of Congress Public Law Numbers*, NAT’L ARCHIVES, <http://www.archives.gov/federal-register/laws/past/index.html> (last visited Nov. 21, 2020) (deducing the data in the second and third columns from the information listed within each session of Congress).

134. Crews, *supra* note 10 (Clyde Wayne Crews Jr. compiled this chart).

upheld. But then the federal government began to grow explosively. And with the proliferation of new executive programs came new questions about the scope of congressional delegations.”<sup>135</sup>

It was during the New Deal that the Supreme Court settled on the current answer of how much lawmaking authority Congress can delegate to agencies, the nondelegation doctrine—abandoning the gap-filling rule of the nineteenth century. The doctrine does not have much teeth. The New Deal Court, relying on the doctrine, only overturned statutes in two cases: *A.L.A. Schechter Poultry Corp. v. United States*<sup>136</sup> and *Panama Refining Co. v. Ryan*.<sup>137</sup>

Under the nondelegation doctrine, Congress may delegate lawmaking authority to an agency if pursuant to an intelligible principle. If Congress, in “lay[ing] down by legislative act an intelligible principle to which the [executive official] is directed to conform,” Congress satisfies the separation of powers requirements.<sup>138</sup> As virtually every law has some “intelligible principle,” the Supreme Court has not applied the doctrine since *Schechter Poultry* and *Panama Refining Co.*, thereby allowing expansive delegation.<sup>139</sup>

Notice the nature of the shift from the nineteenth to the twentieth century. First, the nineteenth-century courts relied on a “filling in the gaps” justification while insisting Congress keep control of major decisions, which for the most part it did. The adoption of the “intelligible principle” test makes no real distinction between big and little decisions.

Supporters of the administrative state admit the shift. Indeed, there are only three positions reasonably available to explain the shift. One must believe either that “(A) the administrative state was unconstitutional as an original matter and still is; (B) the administrative state was unconstitutional as an original matter, yet no longer is; [or] (C) the administrative state was constitutional as an original matter and continues to be so.”<sup>140</sup> For instance, Gary Lawson, who comes from the more originalist position, i.e., position “A,” believes that the “modern administrative state openly flouts almost every important structural precept of the American constitutional order.”<sup>141</sup>

135. *Gundy v. United States*, 139 S. Ct. 2116, 2137 (2019).

136. 295 U.S. 495 (1935).

137. 293 U.S. 388 (1935).

138. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928).

139. Jenny Neeley, *Over the Line: Homeland Security’s Unconstitutional Authority to Waive All Legal Requirements for the Purpose of Building Border Infrastructure*, 1 ARIZ. J. ENV’T. L. & POL’Y 139, 153 (2011) (“The Court has twice found [c]ongressional delegations unconstitutional.”).

140. Adrian Vermeule, *The Administrative State: Law, Democracy, and Knowledge*, in THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION 259, 261 (Mark Tushnet et al. eds., 2015).

141. Lawson, *supra* note 102, at 1233, 1239 (“Congress must make whatever policy decisions are sufficiently important to the statutory scheme at issue so that Congress must make them . . . a statute’s required degree of specificity depends on context, takes seriously the well-



Some respond to the challenge by taking position (C)—that the administrative state was always constitutional—and look to early nineteenth-century agencies as proof as discussed above.

It is position B that has seems to have won the day. It accepts that the modern administrative state has strayed from the original vision, thereby responding to Lawson, but it sees the development in administrative law as compensating for its abandonment of original constitutional vision. For this group, “[t]he principal concern of administrative law since the New Deal . . . has been to develop surrogate safeguards for the original protection afforded by separation of powers and electoral accountability.”<sup>142</sup>

Thus, defenders of the administrative state must defend delegation’s legitimacy on extra-constitutional grounds. The argument is that, if the administrative state can be shown to be politically legitimate, it must have sufficient “surrogate safeguards” to be constitutional.<sup>143</sup> In short, recognizing the unfettered power of post-New Deal agencies, Congress and the courts felt obligated to step in with “surrogate standards” to stand-in for the older, originalist separation of powers that they felt was not binding or perhaps antiquated in the modern world. This arguably is the telltale heart of constitutional bad faith.<sup>144</sup> A radical change in the constitutional structure should come by amendment. This is especially true, as this transformation resulted in a huge shift of power away from Congress—the most democratically responsive branch—towards unelected bureaucrats and judges.<sup>145</sup> The significance of this shift in terms of class dynamics and presidential politics should not be underestimated.

As mentioned in the Introduction, there are two camps, broadly speaking, of “surrogate standards.” The first camp argues that principal-agent principles in which Congress (or the President) is the principal and the agency, the agent, work to fit agencies within the Constitution’s structure.

recognized distinction between legislating and gap-filling, and corresponds reasonably well to judicial application of the nondelegation principle in the first 150 years of the nation’s history.”).

142. Vermeule, *supra* note 140, at 262 (citing Cass R. Sunstein, *Participation, Public Law, and Venue Reform*, 49 U. CHI. L. REV. 976, 987 (1982)).

143. Jessica Mantel, *Procedural Safeguards for Agency Guidance: A Source of Legitimacy for the Administrative State*, 61 ADMIN. L. REV. 343, 359 (2009) (“The debate over the legitimacy of agencies’ exercise of their legislative powers is really three debates—one constitutional, one normative, and one descriptive.”)

144. THEODORE J. LOWI, *THE END OF LIBERALISM* 93 (2d ed. 1979) (“Delegation of power provides the legal basis for rendering a statute tentative enough to keep the political process in good working order all the way down . . .”).

145. See J. Skelly Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575, 579 (1972) (book review); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 132 (1980); see also SCHOENBROD, *supra* note 18, at 14.

The idea is simple: Congress can carry out its constitutional duty to make law by supervising and controlling their agent agencies or, at least, the President—a democratically elected entity—can supervise and control agencies. Thus, the legitimacy of the delegation turns on effective and efficient agency, i.e., the agent easily follows the principal’s direction.

The second camp strays from the notion of strict constitutional legitimacy. Its adherents typically reject “the legitimacy of judgments made by popular majorities and the presumptive illegitimacy of nonmajoritarian judgments.”<sup>146</sup> Rather, “constitutionalist theorists have started to move away from the idea of majoritarianism as the linchpin of legitimacy.”<sup>147</sup> They look to broader, extra-constitutional principles of legitimacy, found in the theories of “deliberative democracy” based in the philosophies of John Rawls and the Jürgen Habermas. It is to these camps that we now turn.

## II. AGENTS AND AGENCIES

One way to justify delegation is an appeal to agency theory. The Executive, as a faithful servant of Congress, must carry out its wishes as expressed in statute. Thus, delegation to the Executive is consistent with democratic principles and separation of powers. Although the Constitution does not provide for delegation of legislative authority, it does not forbid it either.

If the current administrative state reflects a departure from the original plan, there are several normative questions of when delegation should be appropriate. First, excessive delegation seems to violate the Constitution; it certainly appears to violate deep constitutional norms requiring a close agency relationship between voters and Congress. Most basically, “[m]embers of Congress . . . bear personal responsibility for the exercise of these legislative powers, and the governed could withhold consent by refusing to reelect these legislators.”<sup>148</sup> This idea is expressed in a phrase that Madison and Hamilton repeat throughout *The Federalist Papers*: democratic power must be executed by the people’s “immediate representatives.”<sup>149</sup> With expansive delegation, Congress ceases to have such an immediate representation in the creation of laws.

Second, delegation must be transparent. Consider a hypothetical statute that gave rulemaking authority to an agency to promulgate regulations by

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146. Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 465 (2003).

147. *Id.* at 493.

148. David Schoenbrod, *Consent of the Governed: A Constitutional Norm that the Court Should Substantially Enforce*, 43 HARV. J.L. & PUB. POL’Y 213, 214 (2020).

149. THE FEDERALIST NOS. 57–58, 63 (James Madison) (Gideon ed., 2001); THE FEDERALIST NO. 84, *supra* (Alexander Hamilton); *see also* POSTELL, *supra* note 87, at 43.

Ouija board or seance. There would be an “intelligible” standard by which to make regulations, but certainly such a move would be unlawful. There would be no true way to determine how decisions were made. If one believes in democratic accountability to the voters, then transparency is necessary.

Congress, the courts, and academics did respond, developing ways to “democratize” the new delegation authority and the new agency relationships it entailed.<sup>150</sup> In the aftermath of the New Deal, Congress passed the APA to ensure that agencies respond to public input and receive greater court scrutiny.<sup>151</sup> It established the principle that executive functions must receive minimal review from the courts.<sup>152</sup> It set forth two major procedures for agency promulgation of rules: informal, “notice-and-comment” rulemaking,<sup>153</sup> and formal rulemaking.<sup>154</sup> Informal rulemaking, which has become the dominant form of creating regulations,<sup>155</sup> requires an agency to publish a proposed rule, receive comments, consider those comments, and then write a rule with the force of law.<sup>156</sup>

And the courts have developed ever more elaborate forms of review that would have been largely unknown to the nineteenth-century, post-Taney Court’s generally highly deferential standard to executive actions.<sup>157</sup> While the “arbitrary and capricious review”<sup>158</sup> that the APA specifies is certainly deferential, it is probably less deferential than the nineteenth-century Taney

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150. 5 U.S.C. §§ 551–59, 561–570a, 701–706.

151. See *id.*; Jeremy K. Kessler, *The Struggle for Administrative Legitimacy*, 129 HARV. L. REV. 718, 722–23 (2016) (reviewing DANIEL R. ERNST, *TOCQUEVILLE’S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940* (2014)) (“Sunstein and Vermeule argue that the 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, a crisis that culminated in the New Deal.”).

152. 5 U.S.C. § 706.

153. *Id.* § 553.

154. *Id.* §§ 556–57.

155. Richard A. Nagareda, Comment, *Ex Parte Contacts and Institutional Roles: Lessons from the OMB Experience*, 55 U. CHI. L. REV. 591, 618 (1988) (“The shift to informal rulemaking as the dominant method of policy making thus offers a plausible ground for courts to transfer the participatory norms of due process to this latter procedure.”).

156. 5 U.S.C. § 553(c).

157. Ann Woolhandler, *Judicial Deference to Administrative Action—A Revisionist History*, 43 ADMIN. L. REV. 197, 216 (1991) (“[T]he judicially activist de novo method of review was at its height during the Marshall years, whereas the deferential res judicata model of review was at its height during the Taney years.”).

158. 5 U.S.C. § 706(1)(A).

approach, at least as it has evolved. Courts have developed a more rigorous gloss, the so-called “hard look” review that is “searching and careful.”<sup>159</sup>

Political scientists and law professors have studied this agency relationship and, finding a bewildering diversity of empirical and theoretical results, have argued for either congressional or executive domination—and various combinations thereof. Some have examined how Congress can influence agencies. They can do so by budgets and hearings, and Congress’s committee oversight has been shown to control regulatory actors and outcomes.<sup>160</sup> Congress has power, through the nomination and selection process over the upper echelon of agency leaders, which can lead, as theoretical models have shown, to congressional control.<sup>161</sup> In addition, empirical analyses have documented that Congress can influence agencies through various types of so-called “fire alarms” triggered by constituents or special interests that purportedly rouse oversight committees to action.<sup>162</sup>

More recently, scholars have looked to the President as providing democratic legitimacy to agency action.<sup>163</sup> Through selection of agency heads, the President can control implementation of policy. This control is enhanced by coordinating mechanisms like EO 12,866, which allow for better presidential control over the sprawling bureaucracy. However, the presidential Executive function can only provide so much democratic legitimacy. First, it is not the job of the President to make law as the Chief Executive. Second, as an empirical matter, neither the President nor his White House staff can review the 100,000 pages per annum the federal bureaucracy churns out, even with such centralizing mechanisms such as EO 12,866, which requires the Office of Management and Budget (OMB) to review regulations with serious economic impact and analyze the costs and benefits of major regulations.<sup>164</sup>

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159. See Woolhandler, *supra* note 157, at 215–16; Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

160. Jason A MacDonald & Robert J. McGrath, *Retrospective Congressional Oversight and the Dynamics of Legislative Influence over the Bureaucracy*, 41 LEGIS. STUD. Q. 899, 899 (2016); Charles R. Shipan, *Regulatory Regimes, Agency Actions, and the Conditional Nature of Congressional Influence*, 98 AM. POL. SCI. REV. 467 (2004).

161. Matthew D McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 432 (1989).

162. Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 165–68 (1984).

163. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2369 (2001); Eric A. Posner, *Controlling Agencies with Cost-Benefit Analysis: A Positive Political Theory Perspective*, 68 U. CHI. L. REV. 1137, 1142 (2001); Terry M. Moe & William G. Howell, *Unilateral Action and Presidential Power: A Theory*, 29 PRESIDENTIAL STUD. Q. 850, 851 (1999).

164. Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,737 (Oct. 4, 1993).

A powerful way of examining how the policy preferences of the President and Congress direct agency behaviors is to look at the effect of divided government on agency output. While there are mixed findings as to the effect of divided government on all aspects of government,<sup>165</sup> important empirical work has demonstrated that, indeed, the preference differences between President and Congress, which are of course exacerbated in times of divided government, can drive agency decisionmaking “in real time” as opposed to *ex ante* through agency design. Shipan and Potter show that regulatory output is controlled by presidential priority in conjunction with congressional preferences.<sup>166</sup> Similarly, Yackee and Yackee find that that divided government leads to a lower output of agency rules.<sup>167</sup>

Examining this research, Vermeule finds two major takeaways. First, he makes certain generalizations about theoretical findings:

As policy conflict between politicians and bureaucrats declines (i.e., the preferences of politicians and their bureaucrat-allies converge), bureaucrats will receive more discretion; as policy uncertainty increases, bureaucrats will receive more discretion; as politicians are better able to engage in *ex post* monitoring of bureaucratic behavior, bureaucrats will receive more discretion; as politicians have a greater expectation of continuing to hold office in the future, bureaucrats will receive more discretion.<sup>168</sup>

At the same time, in practice and given the complexity of administrative structure—which ranges from huge, sprawling multimember partisan independent commissions to tiny agencies under direct presidential control—generalization beyond quite modest points is difficult. That leads to the second takeaway:

The presence of nested levels of multiple principals and multiple agents produces an n-body problem of exorbitant complexity; on one view, this makes simple dominance models untenable . . . . But it also pushes well beyond the current capacities of positive modeling . . . the administrative state presents a clear example of the n-body problem in political science theory.<sup>169</sup>

This inability to determine delegation to administrative bodies effectively undermines agency theory’s ability to offer legitimacy to administrative lawmaking. If it is impossible to determine whether the bureaucracy is implementing Congress’s, the President’s, or anyone’s will, then claims that

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165. DAVID R. MAYHEW, *DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING AND INVESTIGATIONS, 1946–2002*, at 1, 4 (2d ed. 2005).

166. Rachel Augustine Potter & Charles R. Shipan, *Agency Rulemaking in a Separation of Powers System*, 39 J. PUB. POL’Y 89 (2019).

167. Susan Webb Yackee, *The Politics of Rulemaking in the United States*, 22 ANN. REV. POL. SCI. 37, 48–49 (2019).

168. Vermeule, *supra* note 140, at 265.

169. *Id.* at 268.

the agency can provide democratic legitimacy to the administrative state are undermined. Without transparency as to how decisions are made, voters cannot ascertain the effectiveness of the agency. This is not the argument typically made against agencies—that they are unaccountable.<sup>170</sup> Rather, it is the argument that Congress cannot be accountable for the schemes they create, and therefore, the central accountability in our democracy—that between the voter and Congress—can never be established.

### III. REASON, PREFERENCES, AND LEGITIMIZING THE ADMINISTRATIVE STATE

Another line of agency legitimization turns on reason-giving or reasonableness. This family of justifications asserts that an agency's reasoned decisionmaking, or even the process of giving a reasoned explanation, legitimizes agency action.<sup>171</sup> This view has an unclear perspective on what constitutes legal pronouncements. On one hand, if law is simply the expression of majoritarian preference, such as preferring chocolate over strawberry (as the Introduction suggests), it is unclear why reason should legitimize this preference.

On the other hand, implementing regulation could be seen as rational to the degree it instrumentally furthers the goals of regulation. And, as discussed below, that is a form of rationality. If the statute says, "Let them eat cake," and the Federal Communications Commission (FCC) subsidizes German chocolate cake production, the FCC is rational in a very attenuated way. As discussed below, this type of rationality cannot distinguish goals and desires. Subsidizing either German chocolate or strawberry cake is rational, but the choice between the two could be preferentially salient. Most accounts, therefore, concede that administrative decisionmaking requires "reasonableness," which is a balancing of various concerns and values. This step has nothing to do with reasons; it simply reflects a preference. Nonetheless, we see numerous theories of agency legitimacy relying upon notions of "reasonableness."<sup>172</sup>

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170. Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2134 (2005) ("The point of this cursory discussion, however, is not to solve the problem of administrative supervision, but simply to indicate that holding someone accountable is a complex, technical task. The various factors discussed above indicate how fully the concept of accountability is tied into an administrative hierarchy and requires the sort of continuous, intensive interaction between superior and subordinate that is characteristic of this hierarchy.")

171. Jud Mathews, *Minimally Democratic Administrative Law*, 68 ADMIN. L. REV. 605, 650 (2016) ("The reason-giving requirement is foundational to modern administrative law.")

172. *Id.*

Compare reason-based theories of legitimacy with agency-based approaches. Agency-based approaches accept the notion of preference and, indeed, gain their democratic legitimacy from it. Agency actions are legitimate because the President or Congress—or whichever theory you adopt—directs and controls agency action. They do so by, for instance, directing through leadership choices what rules to implement or enforcement policies to pursue. Or, by being responsive to Congress's threats for defunding budgets. Under agency principles, the agency follows preferences of the principal, which are the President, Congress, and in turn the electorate.

Reason-based justifications do not depend on the preferences of the President or Congress. They simply depend purportedly upon “reason,” which untethered from any democratic preference can legitimize political decisions. Ever odder are the claims that administrative processes, which employ reason and deliberation, can model constitutional process and thus legitimize agency decisionmaking. That is putting the cart before the horse. We have a system of democratic legitimacy: the U.S. Constitution. The “challenge” of administrative law is whether the post-New Deal administrative state works within the Constitution and, in particular, how the Constitution can be squared with delegation. To those questions, abstract political theory says little. If Congress can simply enact any preference (within the broadest of limits), including delegating its power under the Constitution, then legitimacy questions are resolved.

A. *Reason = Minimal Rationality + Political Preference?*

It is claimed that agency decisionmaking is legitimate if it is nonarbitrary because “arbitrary administrative decisionmaking is not rational, predictable, or fair . . . generat[ing] conclusions that do not follow logically from the evidence, rules that give no notice of their application, or distinctions that violate basic principles of equal treatment.”<sup>173</sup> A supporter of this views puts it this way: “Congress may enact legislation entrusting lawmaking authority to administrative agencies as long as it constrains administrative decisionmaking substantively, procedurally, and structurally in such a way that delegation does not engender domination by manifestly increasing the government’s capacity for arbitrariness.”<sup>174</sup> Administrative state defenders understand this

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173. Bressman, *supra* note 146, at 493; Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L.J. 1811, 1822 (2012) (“[R]eason giving lends a kind of moral force to agency decisions because the act of giving reasons demonstrates respect for the governed subject.”).

174. Evan J. Criddle, *When Delegation Begets Domination: Due Process of Administrative Lawmaking*, 46 GA. L. REV. 117, 121 (2011); Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1287–88 (2009) (“The idea is not that reasoned deliberation will

requirement differently, some looking only to rational processes while others go further afield to the deliberative democracy.

1. *Instrumental Rationality and “Reasonableness”*

Writing consciously as a response to Hamburger and recent rumblings on the Court against the administrative state, Jerry Mashaw wrote a small book defending reason a legitimating administrative action.<sup>175</sup> Mashaw envisions a two-step process. The first involves instrumental logic. The agency looks at the statute, discovers its purpose, aims, or direction, and then crafts rules that further those aims.

To students of logic, this is a version of belief/desire sets that answers what an agent should do. A person is rational if she desires X, believes that doing Y gives you X, and then does Y.<sup>176</sup>

**Major Premise: I want Ø;**

**Minor Premise: My A-ing would contribute to bringing about Ø;**

**Conclusion: I should A.**<sup>177</sup>

As applied here, the Commission of Confections desires to implement the statutory command, “Let them eat cake.” Subsidizing the production of German chocolate cake will contribute to bringing about cake eating. It, therefore, institutes a program of subsidy for the production of German chocolate cake.

**Major Premise: I want to follow the command “Let them eat cake”;**

**Minor premise: Subsidizing German chocolate cake helps achieve this end;**

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**Consistent action: I should promulgate a rule subsidizing German chocolate cake.**

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eliminate fundamental moral disagreement or lead to the discovery of uniquely correct answers to controversial policy questions, but rather that it will compel participants in the policy-making process to respect fundamentally divergent perspectives, while simultaneously improving the quality of the particular policy decisions that are rendered through the pooling of both information and ideas, and the utilization of substantive expertise.”). *See generally* Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1541–42 (1992) (asserting that in the right circumstances, administrative agencies can fulfill the civic republicanism ideal of deliberative decisionmaking).

175. JERRY L. MASHAW, *REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY: HOW ADMINISTRATIVE LAW SUPPORTS DEMOCRATIC GOVERNMENT* (2018).

176. Robert Audi, *A Theory of Practical Reasoning*, 19 AM. PHIL. Q. 25, 31 (1982).

177. *Id.* at 25.



This is certainly a form of reason, a species of “practical reason”; it demonstrates that an actor can be consistent and follow a rule or his or her own desires.<sup>178</sup> It is a way of describing rational behavior that traces its routes to Aristotle. However, it is a very mild form of rationality that simply assures that the entity can act according to reasons. Not all entities can. For instance, the Model Penal Code (MPC) adopts the following rule for insanity: “A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.”<sup>179</sup>

According to the MPC, the insane cannot conform their behaviors to appropriate goals. The insane do not understand the nature of their desired goal, i.e., they believe killing their law professor is killing an evil supernatural minion of Satan—and they cannot act in a way to bring about their desired action. They might want to follow the law but are driven by an irresistible impulse to kill their law professor. Thus, instrumental reason demonstrates internal consistency.

Mere sanity, while perhaps a necessary condition, is not a sufficient condition for political legitimacy. Indeed, the mildness of instrumental reason demonstrates this. Consider a statute: “Let them eat cake.” There are potentially thousands of reasonable implementations of this “intelligible principle.” How can an agency pick among them? Or, more specifically, how can reason-giving make this choice democratically legitimate?

Of course, one response to this argument is the political reasons are not, in the words of Cass Sunstein, “naked preferences.”<sup>180</sup> Political discussions always involve, by their nature, other-regarding justifications and reference to the public good. To pose regulatory decisions as one between chocolate and strawberry cake is therefore simplistic and misleading. Because political justification refers to the public good, reason plays a role in mediating interests, or so the story goes.

Regulatory rulemaking, in which corporate interests dominate, involves interests which, if not naked, are certainly wearing little more than bikinis and speedos. Regulators know what side most corporate comments will take simply by consulting the corporation’s financial interests. Regulatory deliberation in the modern administrative state consists of corporate interests wearing the clothes of public interest. Sometimes, indeed, these interests coincide; however, interest—not reason—guides the process.

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178. Criddle, *supra* note 174, at 125.

179. MODEL PENAL CODE § 4.01(1) (1962).

180. See generally Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984) (defining “naked preferences”).

## 2. *Reasonability and Preference*

The insufficiency of instrumental reason compels defenders of reasoned administrators to embrace a more comprehensive vision of reason—what some call “reasonableness.”<sup>181</sup> After establishing it has followed the goal of the statute, i.e., it formed its instrumental practical reasoning syllogism properly, the agency must show that it is “reasonable.” Mashaw sets forth a scheme by which this is done. The agency demonstrates that: (i) “[T]hey have grasped the current state of the world the degree to which the current situation diverges from the results that the agency is meant to achieve”<sup>182</sup>; (ii) the administrators enact “quasi-legislative rules that conform to the relevant criteria for action specified in the establishing legislation”<sup>183</sup>; and (iii) “agencies need to provide a rationale for their decisions that demonstrates that their actions promote the goals of the statute, are based on reasonable factual premises, had have been made within the relevant constraints.”<sup>184</sup>

Reason properly understood can provide little uncontroversial light into these factors. First, these factors could involve preferences, like chocolate or strawberry cake. Or, they could involve transfers or wealth or grants of harms and benefits in equal proportion to society. More importantly, these are fraught, contested political questions, and it is simply fraudulent to claim otherwise. Take them seriatim. What does it mean to “grasp the current state of the world”?<sup>185</sup> This seems like a factual question. From a certain perspective, it is. The world has a state. Only omniscient beings perceive and understand this world. It is far too complex. Human beings rely upon ideology—which is simply a fancy way of saying one’s prior intellectual commitments and system of beliefs about the way the world works and affects one’s “grasp” of its current state.

This is not an abstract point—particularly in the administrative context, where regulators must make subtle judgments about matters of which they only have imperfect knowledge. Ideology invariably and fundamentally shifts these judgments. It is, by definition, the group of prior beliefs and assumptions people have about how the world works. Given that agencies make highly technical decisions about which they have imperfect knowledge, or which perfect knowledge does not exist, ideology plays a central role in “grasp[ing] the current state of the world.”

Additionally, ideology strongly affects people’s views on regulatory matters. The right believes in the efficiency of free markets and capitalism; the left

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181. MASHAW, *supra* note 175, at 64–69.

182. *Id.* at 60.

183. *Id.* at 61.

184. *Id.*

185. *Id.* at 60.

believes in the importance of intervention to bring about efficient and equitable results. The right typically views the value of nature skeptically and views pollution as a reasonable trade-off for the advantages and advances of modern technological society. The left values pristine nature and views the threats of industrialization, such as global warming, in far more urgent terms.<sup>186</sup>

Deeply based ideological differences cannot be bridged by reason. They cannot be resolved because they go to profound differences in how people view the world, which defy scientific or logical demonstration. If that is the case, then differences in ideology should be resolved democratically—at the ballot box. Administrative law makes a mistake in believing an agency’s resolution of an ideological difference offers democratic legitimacy. It does the opposite.

First, some supporters of deliberative justifications for the administrative state recognize the inevitable value-based, political decision in agency action. The resolution is for the President to make these calls.<sup>187</sup> Essentially, this is a concession that lawmaking is made by the President. This does offer democratic legitimacy, but it is certainly not what the Constitution contemplated.

Second, Mashaw argues that the legislative rules should conform to the relevant criteria. Again, as pointed out above, this requirement makes little sense. If reason legitimated agency decisions, then there should not be statutory commands or preferences; there should simply be subject matters. Congress need not express an intelligible principle. It merely must give an agency a subject matter, and sweet reason will do the rest. After all, under the nondelegation doctrine, could not Congress pass a law that commands an agency to “write all regulations related to [fill in: environment, antitrust, communications, education] that are appropriate”?

Third, “agencies need to provide a rationale for their decisions that demonstrates that their actions promote the goals of the statute, are based on reasonable factual premises, had have been made within the relevant constraints.”<sup>188</sup> Again, this step will lead to confusion and suspicion of agencies. If the choices made are largely a matter of preference, presenting

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186. Recent work in social psychology has underscored the importance of how ideological difference proceeds from profoundly moral commitments, which dramatically affect the way people not only make value judgments but also evaluate evidence and make factual conclusions. See Jonathan Haidt et al., *Above and Below Left–Right: Ideological Narratives and Moral Foundations*, 20 PSYCH. INQUIRY 110, 112 (2009).

187. Mark Seidenfeld, *The Role of Politics in a Deliberative Model of the Administrative State*, 81 GEO. WASH. L. REV. 1397, 1457 (2013) (“[A]gency rulemaking requires value judgments underlying plausible choices of rules that the agency can identify through its deliberative processes . . . for rulemaking in which the President personally dictates his preference for an outcome at the end of the deliberative process, presidential preference has greater legitimacy than the independent choice of the agency.”).

188. MASHAW, *supra* note 175, at 61.

the agency decision as a logical, cohesive whole only hides moral and political judgments and cannot further healthy democratic deliberation. It is to those who argue that the administrative process can forward healthy democratic deliberation that we now turn.

### B. *Deliberative Democracy and Administration*

Others have sought to legitimize agency action on broader political and philosophical grounds associated with so-called “deliberative democracy,” a philosophy based on the works of John Rawls and the Frankfurt School German philosopher Jürgen Habermas.<sup>189</sup> As an initial matter, it is important to question whether any moral or political theory could possibly provide legitimacy to administrative action. These theories are all general theories of legitimacy of governmental authority—so it is not clear how they could legitimize any specific administrative action. These theories forward models of democratic behavior that have moral claims for political legitimacy. But that is not the major question for the legitimacy of administrative actions, which turns on the question of legitimacy of delegation. This question asks whether democratic power can be given away to a third party. As we will see, these theories do not respond to that question.

The only response to that objection is to argue that the Constitution contemplates agency rulemaking and is open to diverse approaches, other than constitutional majoritarianism, to legitimize agency decisionmaking. Even if one rejects constitutional originalism, these theories of administrative legitimacy are inconsistently hybrid. On one hand, agency actions are legitimate because the Supreme Court allows them, a legal positivist, non-normative position. But this response is open to the rejoinder: if you believe that deliberative democracy, Rawls, Habermas, or whatever sets forth standards of political legitimacy, you must accept that the U.S. Constitution does not reflect such theories, as shown below. In short, if you truly believe in deliberate democracy, you should get your own constitution. Even if we were to overcome these initial objections for using extra-constitutional theories of legitimacy, relying on these theories is like fitting a square peg in

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189. Carrie Menkel-Meadow, *The Lawyer's Role(s) in Deliberative Democracy*, 5 NEV. L.J. 347, 357 (2004); Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 205 (1997) (“To begin with, deliberation must occur through a process of dialogue, or discourse, based in communicative reason. The dialogue provided by deliberative democratic decisionmaking processes goes beyond the rationality provided by expertocratic models to the extent that it relies upon communicative action within the regulated community.”) (citing JOHN RAWLS, *POLITICAL LIBERALISM* 48–54 (1993)); JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 25 (William Reh’g trans., 1996) (1992)).

a round hole—for the very simple reason that the models they describe as legitimate democracy are incompatible with the administrative law as now practiced, or really any potential version allowable by American legal and political structures. In fact, they are inconsistent with democracy, as most people understand the term.

“Deliberative democracy” is a family of political beliefs, following Rawls and Habermas, that maintains the need to “justify decisions made by citizens and their representatives” through “reason-giving.”<sup>190</sup> It allows for other types of decisionmaking, such as administrative rulemaking, provided “these forms themselves [are] justified at some point in a deliberative process.”<sup>191</sup> Not just any reason satisfies deliberative democracy’s reasons-giving requirements. Rather, the only reasons that count are those that “appeal to principles that individuals who are trying to find fair terms of cooperation cannot reasonably reject” and can be accessible and comprehensible to all citizens.<sup>192</sup>

According to one of its most prominent exponents, requiring this reason-giving deliberative democracy promotes the legitimacy of collective decisions and the inevitable “hard choices that public officials have to make” if several conditions are met. First, decisions are made on the merits, rather based on a “party’s bargaining power.”<sup>193</sup> This apparently will reassure individuals who are losers that decisions were legitimate and made in good faith. Second, deliberation must “encourage[e] participants to take a broader perspective on questions of common interest.”<sup>194</sup> To encourage this happy result, “deliberators are well informed, have relatively equal resources, and take seriously their opponents’ views.”<sup>195</sup> Third, deliberation “promote[s] mutually respectful processes of decisionmaking.”<sup>196</sup> Fourth, deliberation encourages society to correct mistakes made by previous deliberation.<sup>197</sup>

Presumably, decisions made on the “merits,” by public-minded individuals in a respectful manner capable of correction, satisfy the stringent conditions for a just society set forth by Rawls and Habermas. But whether they do or do not, these requirements have nothing to do with the way administrative law is practiced or constitutionally mandated. Indeed, it takes a heroic imagination to see how reason-giving in current administrative law

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190. AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? 2–3 (2004).

191. *Id.* at 3.

192. *Id.*

193. *Id.* at 10.

194. *Id.* at 11.

195. *Id.*

196. *Id.*

197. *Id.* at 12.

meets *any* of these requirements. Indeed, the design of administrative agencies guarantees the opposite.

First, decisions in the administrative state are very political—and by design. They are not made on the “merits,” however defined. Agencies are run by political appointees. Even independent agencies are political in that Congress and the President appoint their leaders in a political process. And, that is not even considering the question of political capture. The judiciary, on the other hand, with its structural independence, is designed to make decisions “on the merits.”

Second, it is unclear how, for example, informal rulemaking—which encourages comments from interested members of the public to forward their own interests toward public-spiritedness—encourages deliberation. Informal rulemaking, which is the dominant form of rulemaking, is more akin to supplication before a king. Individuals submit comments, and sometimes reply to comments, with the hope of swaying the agency. There is no back-and-forth discussion, nor is there any requirement that individuals play the game sincerely.

Yes, the agency must provide a reason for its decision, but in many situations, it just picks a politically expedient answer and then dresses up its justification with public spirited-sounding phrases in its order. While that does not mean that the decision is necessarily wrong, it hardly satisfies anyone that the agency made the decision on the merits in the spirit of public interest.<sup>198</sup>

Further, this requirement is best met when “deliberators are well informed, have relatively equal resources, and take seriously their opponents’ views.”<sup>199</sup> This is manifestly not the case in administrative proceedings. Monied special interests dominate.<sup>200</sup> This failing points to a broader problem with adopting deliberative democracy into the administrative context. By definition, the administrative state is involved in millions of tiny

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198. *Jagers v. Fed. Crop Ins. Corp.*, 758 F.3d 1179, 1185–86 (10th Cir. 2014) (rejecting argument that “the agency’s subjective desire to reach a particular result must necessarily invalidate the result, regardless of the objective evidence supporting the agency’s conclusion.”). The recent splintered case, *Dep’t of Com. v. New York*, 139 S. Ct. 2551 (2019), demonstrates this difficulty. While the plurality opinion rejected the Department of Commerce’s decision based on “pretext,” the decision’s four opinions hardly remove controversy from these questions. *Id.* at 2574–75.

199. GUTMANN & THOMPSON, *supra* note 190, at 11.

200. The domination of agency rulemaking by corporate and special interests has been extensively documented. Anne Skorkjær Binderkrantz et al., *A Privileged Position? The Influence of Business Interests in Government Consultations*, 24 J. PUB. ADMIN. RSCH. & THEORY 879, 885 (2014); John Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 128–29 (2006); David C. Nixon et al., *With Friends Like These: Rule-Making Comment Submissions to the Securities and Exchange Commission*, 12 J. PUB. ADMIN. RSCH. & THEORY 59, 60 (2002).

little decisions that most people neither care about nor have the time or resources to comment on. To the degree “justice” under deliberative democracy theories requires equal participation, broadly construed, such participation is impossible for most people for the overwhelming majority of administrative actions. They simply do not have the time or interest—as opposed to corporate lobbyists who will have both for the right price. Rather, its models are designed to create basic principles for society because individuals only have time and effort to agree on these basic issues. Once you get beyond them, however, you face an issue of delegation, which these theories do not directly address.

Recently, some have come forth with models of how agencies can implement deliberative democracy in their more specific reasoning. For instance, philosopher Henry S. Richardson examines how deliberative reason can guide agency action.<sup>201</sup> He rejects instrumental reason, or even cost–benefit analysis, as sufficient for reasons similar to those discussed above. He argues that one of the key purposes of deliberative democracy is to realize new extensions or applications of moral concepts—to establish “new ends.”<sup>202</sup> He uses the example of how the law requiring special education for students with special needs has developed, largely through administrative rulings, into mandates to “mainstream” students with special needs in classes with differently-abled students.<sup>203</sup>

The problem with that approach is found in Mashaw. He points out that part of the regulator’s job is to determine whether his or her rules fit the purposes of the statute. Society as a whole may not agree with every deliberative extension that a regulator can make. In fact, it is likely they could disagree. There simply is no justification to privilege the moral deliberating of one group of people over another. That idea is alien to American democracy.

Moreover, deliberative democratic theories imply a view of human nature and political action that is at best naïve and, at worst, at odds with our constitutional structure. The Founders distrusted government and the application of power.<sup>204</sup> They developed elaborate checks and balances because they assumed that those who exercise power would likely abuse it. Yet, these theories assume contrary to Madison that agency bureaucrats are,

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201. HENRY S. RICHARDSON, *DEMOCRATIC AUTONOMY: PUBLIC REASONING ABOUT THE ENDS OF POLICY* (2002).

202. *Id.* at 109.

203. *Id.*

204. Candeub, *supra* note 18, at 69–70 (“[M]any Framers, marinated in their Puritan heritage, thought political actors, indeed all humanity, tended to be selfish, self-serving, and even ‘depraved.’ At the same time, the Framers believed that political actors could perform well, perhaps even better, under the proper incentives.”).

if not angels, platonic guardians, immune from interest, spinning out ever new moral truths.

#### IV. A PREFERENCE-BASED NONDELEGATION DOCTRINE

If agencies do not serve as good agents of their congressional or presidential masters (or if they did, it would be impossible to ascertain the fact), and if reason does not contain agencies' power, then what drives agencies' actions? The best answer is—their preferences. Contrary to the implication earlier, these preferences are not necessarily “naked” like one's preference for German chocolate or strawberry cake. But, it has been a staple of positive political theory that preference, at least in terms of ideological preference, motivates judicial decisionmaking.<sup>205</sup> Tremendous progress has been made in understanding how ideology guides decisionmaking on the Supreme Court.<sup>206</sup> Complex, statistically valid measurements of Justice ideology have been developed for decades now, most notably the Martin-Quinn scores.<sup>207</sup> These scores estimate Justice ideology using Bayesian statistics to develop reliable measurements of liberal-conservative bias. Not surprisingly, these scores have proven highly predictive in determining judicial action.<sup>208</sup>

Agency behavior is more complex than judicial behavior. Justices are independent. Not only do bureaucrats' personal preferences come into play, but decisions are politically beholden to the President and Congress and, in the final analysis, industry and other powerful entities.<sup>209</sup> Determining how agencies make decisions may very well be an unsolvable problem. But it seems obvious that the preferences of bureaucrats, within a complex political structure, play a huge role. This is problematic to the degree that these preferences are making policy, not—as the nineteenth-century Supreme Court would say—filling gaps.

Most critiques of the administrative state flounder on their own excess. It is unlikely that the Supreme Court will eliminate the nondelegation doctrine soon, even if several of its members do not like it, much as its enemies devoutly wish for such a consummation. The administrative state is simply too ingrained

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205. See Andrew D. Martin et al., *The Median Justice on the United States Supreme Court*, 83 N.C. L. REV. 1275, 1281 (2005).

206. See Lee Epstein, et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483, 1486 (2007) (“[C]ontrary to the claims of prominent scholars, the President and his supporters in the Senate cannot guarantee the ‘entrenchment’ of their ideology on the Court in the long, or even medium, term.”).

207. *Id.* at 1503.

208. *Id.* at 1486.

209. See Yackee & Yackee, *supra* note 200, at 128.



in our society.<sup>210</sup> As Vermeule states rather tauntingly to critics of the administrative state, “you cannot put the butterfly back into the chrysalis.”<sup>211</sup>

Critics of the administrative state have not been good at proposals to tether the Calydonian boar rather than slay it. Most involve tiny embroidery around the edges or dramatic action by Congress or the Supreme Court. It is difficult to see a reform that could be initiated by either the judiciary or Congress that would be impactful.

If this Article is correct—that delegation simply allows agencies to impose their preferences—then there is a way to measure the intensity of preference. That way is cost. Specifically, the cost imposed upon society-at-large—its economic impact. If initiated by Congress, agencies would include an economic impact statement when writing final rules or orders with broad financial impact. Congress could set a threshold.

At the same time, if presented with the right case, the Supreme Court could make a rule that a regulation was simply too sweeping and impactful to be made by delegation. While such a common law approach would not set a clear boundary, it would be a fuzzy boundary that would undoubtedly encourage Congress to be more precise in a statute.

Agencies have extensive practice with providing economic impact analyses and dealing with economic impact thresholds. Perhaps most prominently, there is EO 12,866, which requires that all executive agencies submit significant regulatory actions to the Office of Information and Regulatory Affairs in the OMB. A “significant regulatory action,” as defined by EO 12,866, generally is any regulatory action that is likely to result in a rule that may: “[H]ave an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities.”<sup>212</sup> Because agencies routinely calculate the economic impact of their regulations, this information is readily available for judicial review.

This idea is hardly radical. Congress is considering a statutory version: the Regulations from the Executive in Need of Scrutiny (REINS) Act of 2017.<sup>213</sup>

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210. Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2074 (2005) (“What they share is a preanalytic hostility to the modern administrative state, an anti-bureaucratic pastoralism that feeds on nostalgia for simpler, more integrated times . . . none of those who express hostility toward it have advanced any realistic scenario by which such an alteration could occur.”)

211. ADRIAN VERMEULE, *LAW’S ABNEGATION: FROM LAW’S EMPIRE TO THE ADMINISTRATIVE STATE* 46 (2016).

212. Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,738 (Oct. 4, 1993).

213. Regulations from the Executive in Need of Scrutiny Act of 2017 (REINS Act), S.

This bill would require both chambers of Congress to approve a regulation that has a yearly impact on the economy of \$100 million or more.<sup>214</sup> If Congress did not approve a major rule, the federal agency that issued it would be prohibited from issuing any related rules for the rest of that congressional session.

Many, particularly from environmental public interest groups, have criticized the bill because undoubtedly it would give industry another bite at the apple in undermining environmental regulation.<sup>215</sup> On the other hand, it has been this Article's burden to assert that the Constitution might argue this bill is constitutionally required. In a democracy, the Legislature must make, and be accountable for, its big decisions.

### CONCLUSION

Legitimacy issues remain unresolved for the administrative state because our Constitution envisions an Executive that implements the law and does not make it. But the difference between making and implementing is fuzzy. As this Article has shown, the difference has constituted a political battle line since the seventeenth century.

Today's Supreme Court has shown renewed interest in reshaping the line. Unfortunately, academic debate has gone to the extremes, with some arguing for near complete Executive control and others arguing that the administrative state is unlawful, if not unconstitutional. Similarly, theories for justifying the administrative state or fitting it within the constitutional structure seem off base, failing to provide either transparent democratic oversight or democratic involvement in decisionmaking.

This Article has steered a middle course. It adopts a minimalist constitutional theory that follows from the nineteenth-century Supreme Court notion of "gap-filling": congressional preferences should dominate over bureaucratic preferences in lawmaking. Congress makes big decisions; agencies make little decisions. It has been suggested, therefore, that Congress cannot delegate decisions above a certain economic impact threshold.

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21, 115th Cong. (2017).

214. Kevin R. Kosar & Andrew Rudalevige, *Should Congress Have to Approve Every Federal Regulation? A Debate.*, WASH. POST (Feb. 2, 2017, 6:00 AM), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/02/02/should-congress-have-to-approve-every-federal-regulation-a-debate/>.

215. Letter from Alaska Wilderness League, et. al, to House of Representatives (Jan. 4, 2017), <https://www.lvw.org/sites/default/files/env.REINS%2520Community%2520Lette%252001%252004%25202017.pdf> (opposing the REINS act with a coalition of environmental and other groups).