ADMINISTRATIVE VIRTUES

CHAD SQUITIERI*

Administrative law has developed to incorporate insights from two philosophical perspectives: deontology and consequentialism. This Article elucidates administrative law's reliance on those two perspectives and proposes that administrative law further develop to incorporate insights from a third perspective—virtue ethics—which the legal community has, in large part, ignored.

Unlike deontology (which focuses on actions) and consequentialism (which focuses on actions' consequences), virtue ethics focuses on actors. Thus, to begin incorporating virtue ethics' insights into administrative law—a task that a wide range of scholars and jurists can embrace—this Article explores how a virtuous agency official might act in accordance with the virtues of prudence, temperance, justice, and courage. A focus on those virtues (known collectively as the "cardinal virtues") counsels in favor of making important changes to administrative law—including by increasing the opportunities for judicial review of agency action. A focus on the cardinal virtues also offers additional support for existing administrative law doctrine—including the judicial deference courts give to an agency official's decision to use one regulatory approach rather than another. In short, virtue ethics offers valuable insights that scholars have yet to consider, but which both transform and reinforce our understanding of administrative law in important ways.

* Assistant Professor of Law, Catholic University of America, Columbus School of Law. I thank J. Joel Alicea, Emily Bremmer, Rachel Alexander Cambre, Marc O. DeGirolami, John C. Harrison, William M. M. Kamin, the Hon. Gregory G. Katsas, Antonio Fidel Perez, the Hon. Paul J. Ray, the Hon. Eugene Scalia, Lawrence B. Solum, and Kevin C. Walsh for their comments on previous drafts. I attribute any remaining errors to myself alone—at least to the extent that doing so is consistent with the virtue of justice.

INTRODUCTION

Suppose that a federal agency official has the constitutional and statutory authority to pursue a particular policy objective. Should principles of morality inform how the official pursues that objective? Administrative law has developed to answer that question with an implicit yes. Specifically, administrative law has implicitly relied on two philosophical perspectives—deontology and consequentialism—to develop morally based administrative procedures.[1] This Article elucidates the philosophical perspectives underlying modern administrative law and proposes that administrative law further develop to account for a third philosophical perspective—virtue ethics—which the legal community has, in large part, ignored.[2]

Let's start with the basics: what do the terms deontology, consequentialism, and virtue ethics mean? To many readers, such terms might seem complicated or even impenetrable. But the philosophical perspectives that those terms represent are both familiar and intuitive. Consider first the deontological perspective, which holds that certain actions are immoral, no matter

1. *See infra* Parts I.A., I.B.

2. Lee J. Strang, *Originalism and the Aristotelian Tradition: Virtue's Home in Originalism*, 80 FORDHAM L. REV. 1997, 1998–99 (2012) [hereinafter *Originalism and the Aristotelian Tradition*] ("A concept fundamental to philosophy—virtue—is, with a few notable exceptions, absent from scholarship on constitutional interpretation . . . . The legal academy . . . is dominated by scholars at home in the consequentialist and deontological traditions.") (citations omitted).

their consequences.[3] Think "Thou Shalt Not." As Part I.A explains, administrative law's implicit reliance on the deontological perspective is readily observed in the judicial space.

Courts have developed a vast array of judge-made doctrines that place procedural constraints on agency behavior. Those constraints might make for good government; indeed, Professors Cass Sunstein and Adrian Vermeule have suggested that such judge-made procedural constraints indicate that administrative law has developed its own internal morality.[4] But as scholars such as Sunstein and Vermeule explain, these judge-made procedural constraints are difficult to ground in any statutory or constitutional provision.[5] Instead, the constraints are derived from background maxims of procedural morality. Building upon the work of Sunstein and Vermeule, Part I.A will demonstrate that the judge-made procedural constraints that make up much of modern administrative law have been developed, at least in part, in accordance with the deontological perspective.

Part I.B. will then consider the consequentialist perspective, which tests morality by weighing an action's good consequences against its bad ones.[6] Administrative law's reliance on the consequentialist perspective can be observed in the Executive Branch, where long-standing practice requires that putative regulations be rejected when their costs outweigh their benefits.[7] Every President since Ronald Reagan has subjected regulations to the consequentialist framework through such cost-benefit analyses. Indeed, the

---

3. Larry Alexander & Michael Moore, *Deontological Ethics*, STAN. ENCYC. OF PHIL. (last updated Oct. 30, 2020), https://plato.stanford.edu/entries/ethics-deontological/.

4. Cass R. Sunstein & Adrian Vermeule, *The Morality of Administrative Law*, 131 HARV. L. REV. 1924, 1966 (2018) [hereinafter *The Morality of Administrative Law*].

5. *E.g.*, Evan D. Bernick, *Envisioning Administrative Procedure Act Originalism*, 70 ADMIN. L. REV. 807, 815 (2018) ("Today, much administrative law related to the [Administrative Procedure Act (APA)] is administrative common law that has never been grounded in the APA's text or history."); Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1295 (2012) ("[T]he judge-fashioned doctrines that comprise modern administrative law venture too far afield from statutory text or discernible legislative purpose to count simply as statutory interpretation."); *The Morality of Administrative Law*, *supra* note 4, at 1930 ("[I]n many of the cases that we discuss . . . it is not easy to identify an obvious statutory foundation for judge-made law.").

6. Walter Sinnott-Armstrong, *Consequentialism*, STAN. ENCYC. OF PHIL. (last updated Oct. 4, 2023), https://plato.stanford.edu/entries/consequentialism/ ("The paradigm case of consequentialism is utilitarianism . . . ."); Lawrence Solum, *Legal Theory Lexicon 012: Virtue Ethics*, LEGAL THEORY BLOG (last updated Mar. 19, 2023), https://lsolum.typepad.com/legal_theory_lexicon/2003/11/legal_theory_le.html.

7. Cass R. Sunstein, *Financial Regulation and Cost-Benefit Analysis,* 124 YALE L.J. F. 263, 264 (2015).

commitment to balancing regulations' consequences is so pronounced that, today, it is fair to label "cost-benefit balancing" as "the official creed of the executive branch . . . ."[8]

Virtue ethics, which is the focus of Part I.C, offers a third philosophical lens through which administrative power can be examined. Put simply: while deontology focuses on *actions* and consequentialism focuses on actions' *consequences*, virtue ethics focuses on *actors*.[9] The idea behind virtue ethics is to identify what an actor's function is, and then to instill in that actor the character traits (i.e., virtues) that will assist the actor in carrying out that function excellently.

Modern readers will almost certainly approach virtue ethics with less familiarity than deontology and consequentialism. But with roots tracing back to Aristotle and other ancient Greek philosophers,[10] virtue ethics was a well-known philosophical perspective up until the Enlightenment of the seventeenth and eighteenth centuries.[11] Virtue ethics then fell out of fashion until the 1950s, when philosophers began to consider it anew.[12] Although contemporary philosophers have expressed renewed interest in virtue ethics over the last half-century, the legal community has, in large part, ignored it. This Article, therefore, fills a void in the legal literature by incorporating virtue ethics into administrative law. The goal is to begin a scholarly conversation by exploring how administrative law can develop to account for virtue ethics' insights—just as administrative law has already developed to account for insights offered by deontology and consequentialism.

After introducing the deontological, consequentialist, and virtue ethics perspectives in Part I, Part II explains how virtue ethics can be embraced by a wide range of scholars and jurists. To demonstrate as much, Part II will

---

8. Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489, 1489 (2002).

9. Lawrence Solum, *Legal Theory Lexicon 012: Virtue Ethics*, LEGAL THEORY BLOG (last updated Mar. 19, 2023), https://lsolum.typepad.com/legal_theory_lexicon/2003/11/legal_theory_le.html (emphases added) (defining consequentialism, deontology, and virtue ethics).

10. *Originalism and the Aristotelian Tradition*, *supra* note 2, at 2015 (referring to Aristotle's, Plato's, and Socrates' influences on developing Aristotelian philosophical tradition as the central Western philosophical tradition).

11. Rosalind Hursthouse, *Virtue Ethics*, STAN. ENCYC. OF PHIL. (last updated Oct. 11, 2022), https://plato.stanford.edu/entries/ethics-virtue/ ("In the West, virtue ethics' founding fathers are Plato and Aristotle, and in the East it can be traced back to Mencius and Confucius. It persisted as the dominant approach in Western moral philosophy until at least the Enlightenment, suffered a momentary eclipse during the nineteenth century, but re-emerged in Anglo-American philosophy in the late 1950s.").

12. *Id.*

consider two competing schools of thought concerning a topic that sits at the core of "administrative" power: the separation of powers. The first school, formalism, calls for a rigid separation of legislative, executive, and judicial powers.[13] Formalists maintain that any one exercise of "administrative" power must be a function of only executive, only legislative, or only judicial power, not a mix of those powers.[14] Formalism is often associated (though not exclusively so) with originalism and judicial conservatism. The second school, functionalism, holds that modern problems call for a modern understanding of "administrative" power that need not maintain a rigid separation of powers.[15] This second school is often associated (but again, not exclusively so) with living constitutionalism and judicial progressivism. By considering both schools of thought, Part II aims to demonstrate that, whether one is a formalist or a functionalist (and thus, by loose proxy, an originalist or living constitutionalist, a conservative or progressive), virtue ethics has insights to offer.

The case for embracing virtue ethics is perhaps more difficult to make to formalists, and so Part II.A will begin by addressing them. Formalists may be reluctant to rely too heavily on any theory that they perceive as placing too much weight on the hope that governmental officials will act virtuously. After all, relying on the virtue of government officials would seem to run counter to James Madison's lesson concerning the difference between men and angels.[16] But, as Part II.A explains, formalists' initial reluctance to embrace virtue ethics is readily surmountable.

To start, agency officials are not Article III judges. Rather, agency officials play a distinct role in American governance. That distinct role demands that the agency officials who apply federal policy consider morality *ex ante*—in part because formalists might see judges as being limited in their ability to impose morality on administrative action *ex post*. Further, virtue ethics is consistent with what Madison described as the two-part "aim" of the Constitution's structural protections.[17] As Madison explains, the Constitution seeks

13. Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 230–32 (1992).

14. *See id.* (discussing the Vesting Clause's allocation of a single function to each of the branches of government).

15. *Id.* at 231.

16. THE FEDERALIST NO. 51, at 320 (James Madison) (Clinton Rossiter ed., 1961) ("If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal [controls] on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: [y]ou must first enable the government to [control] the governed; and in the next place oblige it to [control] itself.").

17. THE FEDERALIST NO. 57, at 350 (James Madison) (Clinton Rossiter ed., 1961).

first "to obtain for rulers, men who possess . . . *virtue* to pursue the common good of the society[,]"[18] and seeks second "to take the most effectual precautions for keeping [those rulers] *virtuous*, whilst they continue to hold their public trust."[19] In short, formalists need not understand virtue ethics as a *replacement* to the Constitution's rigid separation-of-powers principles. Virtue ethics can instead be understood as a *precondition* that lays the groundwork for the Constitution's separation-of-powers principles to work in practice. As Madison teaches, if there were "no virtue among us," then the country would be "in a wretched situation" because "[n]o theoretical checks, no form of government, can render us secure."[20]

Part II.B will then address functionalists, who are more likely to relax the Constitution's separation-of-powers principles to make room for a "more workable and efficient government . . . ."[21] Functionalists recognize that a relaxation of the Constitution's separation-of-powers principles creates a risk that government officials will abuse the mix of executive, legislative, and judicial power that the officials are trusted to wield in consolidated form. For this reason, functionalists often propose that administrative officials operate as technocrats who make decisions based on their professional expertise; the idea being that professionalized experts will be less likely to abuse consolidated power.[22]

Functionalists' technocratic focus on professional expertise demonstrates their effort to instill in administrators what Aristotle might understand as *technē* —which relates to a type of technical knowledge.[23] Functionalists' focus on *technē* thus opens the door to focusing on agency officials' character (i.e., virtuousness) more generally. Put differently, functionalists can move beyond their narrow focus on developing what might be called "*technē*-crats" to instead focus more broadly on developing administrators instilled with virtue—including the virtue of prudence, which would assist administrators in determining how their particular technocratic skillset relates to the federal government's broader purpose.

After Part I introduces virtue ethics and Part II explains why virtue ethics

---

18. *Id.* (emphases added).

19. *Id.* (emphases added).

20. James Madison, Remarks to the Virginia Convention (June 20. 1788), *in* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION 531, 536–37 (Jonathan Elliot ed., 2d ed. 1836).

21. Ilan Wurman, *Nonexclusive Functions and Separation of Powers Law*, 107 MINN. L. REV. 735, 737 (2022).

22. Jacob E. Gersen, *Unbundled Powers*, 96 VA. L. REV. 301, 352 (2010).

23. ARISTOTLE, ARISTOTLE'S NICOMACHEAN ETHICS 305 (Robert C. Bartlett & Susan D. Collins trans., U. Chi. Press 2011) (defining *technē*).

can be embraced by a wide range of scholars and jurists, Part III will consider how virtue ethics' insights can both transform and reinforce aspects of modern administrative law. To accomplish as much, Part III will explore the four cardinal virtues: prudence, temperance, justice, and courage.

On the one hand, staffing the administrative state with agency officials exhibiting the cardinal virtues would result in some changes to the way administrative power is exercised. For example, a *just* agency official would not insulate agency action from judicial review when doing so is inconsistent with norms and customs.[24] On the other hand, a focus on virtue would reinforce existing aspects of administrative law doctrine. For example, instilling *prudence* in agency officials would strengthen the case for the deference courts give to an agency official's decision to pursue a policy objective via one means rather than another.[25] Part III will examine those takeaways (among others) which scholars have yet to consider, but which both transform and reinforce our understanding of administrative law in important ways.

I. INTRODUCING VIRTUE ETHICS

Administrative law, at least on its surface, might seem to have little to do with moral philosophy. But a deeper look reveals an undercurrent of philosophical principles that have shaped administrative law as we know it. Specifically, administrative law has developed to incorporate insights from two philosophical perspectives: deontology and consequentialism. Parts I.A and I.B will elucidate administrative law's implicit reliance on those two philosophical perspectives. Part I.C will then introduce a third philosophical perspective—virtue ethics—which the legal community has, in large part, ignored.

One point of clarification before entering the thicket: this Article does not take on the heavy burden of arguing that administrative law should be shaped *exclusively* by virtue ethics. Instead, this Article takes on the more modest task of suggesting that virtue ethics, like deontology and consequentialism, has insights to offer. Defending virtue ethics, deontology, or consequentialism (or a particular blend of the three) as the preferred means of shaping administrative law is work better left to the scholarly dialogue that this Article seeks to begin, not end.

A. Deontology

The deontological perspective holds that certain actions are immoral no

24. *See infra* Part III.

25. *See infra* Part III.

matter their consequences.[26] The name originates with the Greek *deon*, which refers to duty or obligation.[27] At the risk of oversimplifying, one can imagine the faithful deontologist determining the morality of their actions by checking their behavior against a list outlining obligatory, permissible, and prohibited conduct.[28] How does the deontologist go about making such a list? Various strands of deontology offer different answers.[29] But one well-known answer is provided by the German deontologist Immanuel Kant.

According to Kant, moral duties can be derived from reason.[30] And it is through reason that one can deduce the "categorical imperative," which is a thought exercise that Kant coined for distinguishing between moral and immoral action.[31] Pursuant to one of Kant's formulations of the categorical imperative, an actor should "[a]ct only according to that maxim whereby you can at the same time will that it should become a universal law."[32] For example, one should not make a lying promise (i.e., a false promise) in any *particular* circumstance because, if lying promises became *universal* (i.e., if everyone made them), then humans would exist in a crisis of trust.[33]

Deontologists conclude that actors should always act in accordance with their duties—such as the duty to tell the truth. The deontologist thus holds, for example, that one should not depart from the rigid command to always tell the truth, even when a particular lie in a particular circumstance might bring about particularly good consequences. As an arguable example of the

---

26. Larry Alexander & Michael Moore, *Deontological Ethics*, STAN. ENCYC. OF PHIL. (last updated Oct. 30, 2020), https://plato.stanford.edu/entries/ethics-deontological/.

27. Joseph Kranak, *Kantian Deontology*, REBUS (2019), https://press.rebus.community/intro-to-phil-ethics/chapter/kantian-deontology/ (last visited Aug. 11, 2024).

28. *See* David A. McNaughton & J. Piers Rawling, *Deontology*, *in* PRINCIPLES OF HEALTHCARE ETHICS 65, 68 (R.E. Ashcroft, A. Dawson, H. Draper & J.R. McMillaneds eds., 2d ed. 2007) (Kant "gives structure to his theory by offering us the categorical imperative test to determine whether an act is required, permissible or forbidden.").

29. *See* DAVID ROSS, THE RIGHT AND THE GOOD 21 (Philip Stratton-Lake ed., Oxford Univ. Press 2003) (1930) (discussing David Ross' strand of deontology's identification of five *prima facie* duties that may give in some contexts).

30. *See* IMMANUEL KANT, CRITIQUE OF PURE REASON 483 (J. M. D. Meiklejohn trans., P. F. Collier & Son 1901) (1787).

31. IMMANUEL KANT, GROUNDING FOR THE METAPHYSICS OF MORALS 26, 39 (James W. Ellington trans., Hackett Publ'g Co. 1993) (1785) ("This imperative is categorical . . . . This imperative may be called that of morality.").

32. *Id.* at 30.

33. McNaughton & Rawling, *supra* note 28, at 68 ("Kant claimed that lying is always wrong."). *But see* Thomas L. Carson, *Kant and the Absolute Prohibition against Lying*, *in* LYING AND DECEPTION: THEORY AND PRACTICE 67, 78–79, 84 (2010) (arguing that that the universal law formulation of the categorical imperative does not imply that lying is always wrong).

deontologist perspective having some (even if not exclusive) influence on one's thought, consider the Oxford theologian John Henry Newman, who concluded that it would be "better for the sun and moon to drop from heaven, for the earth to fail, and for all the many millions on it to die of starvation . . . than that one soul . . . tell one willful untruth . . . ."[34]

1. Administrative Common Law

In the administrative law context, the deontological perspective has been invoked by courts developing so-called "administrative common law." To better see how this is so, Part I.A.1 will first demonstrate that much of administrative common law is difficult to trace to any particular statute or constitutional provision and that administrative common law has been judicially derived from background maxims of procedural morality. Part I.A.1 will then demonstrate more specifically that administrative common law was developed (at least in part) in accordance with deontological thought.

"[A]dministrative common law" refers to the procedural "requirements that are largely judicially created, as opposed to those specified by Congress, the President, or individual agencies."[35] As Professor Gillian E. Metzger notes, "the judge-fashioned doctrines that comprise modern administrative law venture too far afield from statutory text or discernible legislative purpose to count simply as statutory interpretation."[36] Other scholars offer similar conclusions.

Sunstein and Vermeule, for example, observe that much of administrative common law has no "obvious . . . foundation" in either statutory or constitutional provisions.[37] Writing elsewhere on his own, Vermeule states more explicitly that "[m]any of the principles that pervade administrative law" appear to "stem from institutions about natural procedural justice and float free of any enacted source of law . . . ."[38] Professor Evan Bernick concludes

34. JOHN HENRY CARDINAL NEWMAN, APOLOGIA PRO VITA SUA 247 (1902).

35. Metzger, *supra* note 5, at 1295.

36. *Id.*

37. *The Morality of Administrative Law*, *supra* note 4, at 1930 (referring to unpersuasive efforts to utilize the Constitution's Due Process Clause as a foundation, as well as the lack of a "statutory" foundation); *see also* ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM 138 (2022) ("I argue that our current body of administrative law, itself a central component of our largely unwritten constitutional order, is not structured around positive textual rules or *ad hoc* administrative commands . . . . Rather our administrative law is built around juridical principles that are part of the larger domain of political morality, yet retain their distinctive character as legal morality - in just the way Dworkin characterized all of law toward the end of his career.") (citations omitted).

38. VERMEULE, *supra* note 37, at 139–40; *see also Id.* at 147 ("The body of caselaw that

similarly that much of "administrative law related to the [Administrative Procedure Act] is administrative common law that has never been grounded in the [Administrative Procedure Act's] text or history."[39] In sum, scholars of various stripes conclude that much of administrative common law is difficult to trace to any particular statute or constitutional provision.[40]

If administrative common law is difficult to trace to particular statutes or constitutional provisions, from where does it come? In an important article[41] and book,[42] Sunstein and Vermeule lay the groundwork for demonstrating how administrative common law can be traced to background maxims. To wit, Sunstein and Vermeule offer a detailed catalog of the various judge-made doctrines that make up administrative common law, and the duo concludes that what "unif[ies]" this "disparate array of judge-made doctrines . . ." is their connection to background maxims identified by the legal philosopher Lon Fuller.[43]

This Article builds upon Sunstein's and Vermeule's key insight by demonstrating that the background maxims that have come to shape administrative common law are background maxims that can be attributed to deontological thought. Although Sunstein and Vermeule are not explicit in labeling administrative common law as being deontologically derived, that conclusion follows from Sunstein's and Vermeule's persuasive argument that administrative common law is Fullerian.[44] That is because Fuller, who "believed that the principles of moral duty could be traced to . . . Kant's categorical imperative[,]" can be "place[d] . . . squarely within the territory of deontological

---

the Court has generated under the heading of 'arbitrary and capricious' review is only tenuously connected to the positive source of law that gave rise to it.").

39. Bernick, *supra* note 5, at 815.

40. This is despite the Supreme Court's occasional reminder that judges should more "close[ly] adhere[] to the text of the APA or other governing statutes[,]" rather than embrace the sort of "judicial creativity" from which administrative common law often flows. Metzger, *supra* note 5, at 1304. Most notably, in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, the Supreme Court announced that although "[a]gencies are free to grant additional procedural rights in the exercise of their discretion, [] reviewing courts are generally not free to impose them if the agencies have not chosen to grant them." 435 U.S. 519, 524 (1978).

41. *See generally The Morality of Administrative Law*, *supra* note 4.

42. *See generally* CASS R. SUNSTEIN & ADRIAN VERMEULE, LAW & LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE (2020) [hereinafter LAW & LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE].

43. *The Morality of Administrative Law*, *supra* note 4, at 1926–27.

44. LAW & LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE, *supra* note 42, at 91, 94, 143–44.

moral theory."[45] Let's dive a bit deeper to see why that is.

In *The Morality of Law*,[46] Fuller outlines eight ways "that the attempt to create and maintain a system of legal rules may miscarry . . . ."[47] Those eight failures of law are:

> (1) "a failure to achieve rules at all, so that every issue must be decided upon an ad hoc basis";
>
> (2) "a failure to publicize, or at least to make available to the affected party, the rules he is expected to observe";
>
> (3) "the abuse of retroactive legislation";
>
> (4) "a failure to make rules understandable";
>
> (5) "the enactment of contradictory rules";
>
> (6) "rules that require conduct beyond the powers of the affected party";
>
> (7) "introducing such frequent changes in the rules that the subject cannot orient his action by them"; and
>
> (8) "a failure of congruence between the rules as announced and their actual administration."[48]

Note the rigid "Thou Shalt Not" style in which these failures of law are listed. Failures number one and two, for example, do not permit a government to forego the creation or publicization of rules if particular circumstances warrant it. Nor does failure number seven call on a decisionmaker to balance a subject's interest in orienting his actions against a government's interest in frequently changing the rules; the balance is struck rigidly in favor of the subject.

Fuller is explicit in describing these eight points as *duties* that must be obeyed; they are not mere suggestions that can be ignored to account for particular consequences. Specifically, Fuller describes these eight failures of law as constituting a "morality of duty[,]" and explains that "anything like economic calculation [i.e., consequentialism] is out of place" when considering whether the eight failures of law can be avoided in any particular circumstance.[49] In other words, these eight failures of law serve as foundational duties that must be followed, no matter the consequences.

Sunstein and Vermeule recognize the rigidity of Fuller's eight failures of law when they note that one could critique a Fullerian conception of

---

45. Jamie Cassels, *Lon Fuller: Liberalism and the Limits of Law*, 36 U. TORONTO L.J. 318, 333 (1986).

46. LON L. FULLER, THE MORALITY OF LAW (rev. ed. 1969).

47. *Id.* at 38–39.

48. *Id.* at 39; *see also The Morality of Administrative Law*, *supra* note 4, at 1926 (listing a reformulated version of the same).

49. FULLER, *supra* note 46, at 44.

administrative law on the grounds that it fails to account for "welfarist" (i.e., consequentialist) tradeoffs.[50] Sunstein's and Vermeule's sympathetic treatment of this welfarist objection (as well as their effort to demonstrate that Fuller himself sought to account for the objection)[51] suggests that they (and Fuller) might argue for a legal system that incorporates aspects of both deontology and consequentialism. This is no doubt a fair reading of Fuller, who recognized a distinction between a morality of duty (e.g., one must *not* fail to publicize rules) and the morality of aspiration (e.g., one *should* publicize rules in the most efficient way).[52]

That sort of a hybrid argument, which incorporates aspects of both deontology and consequentialism, presents no problem for this Article. That is because this Article does not seek to demonstrate that administrative law generally (or even administrative common law specifically)[53] has developed to account for deontology *exclusively*. To the contrary, this Article seeks only to demonstrate that administrative law has developed to account for some mix of both deontological and consequentialist insights, thereby opening the door for a similar consideration of virtue ethics.

Are Sunstein and Vermeule correct to connect administrative common law to Fuller? And, more pressingly, is this Article correct in labeling Fullerian-inspired administrative common law as having been deontologically derived? A close examination of a few key examples should suffice to demonstrate that both of these questions can be answered in the affirmative.

Consider, for example, administrative law's *Arizona Grocery* principle.[54] That principle, named after a 1932 Supreme Court case,[55] holds that

---

50. LAW & LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE, *supra* note 42 at 97.

51. Sunstein and Vermeule note, for example, that Fuller distinguished between "the morality of duty and the morality of aspiration[,]" which they believe enabled Fuller to locate morality along "a sliding scale, with a moveable pointer operating between the minimum morality necessary to constitute a legal system, on one end, and the aspiration to perfect legality on the other." LAW & LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE, *supra* note 42, at 97.

52. *See, e.g.*, FULLER, *supra* note 46, at 44.

53. For example, and as Sunstein and Vermeule demonstrate, administrative law has no doubt developed to account for the "reliance" interests attributed to "regulated parties, including but not limited to economic actors who must plan long-term investments or other projects in a regulatory environment." *The Morality of Administrative Law*, *supra* note 4, at 1947–48. Sunstein and Vermeule see reliance interests as being "closely related" to Fuller's seventh failure of law (prohibiting frequent changes), although they recognize that "consistency has value even apart from reliance interests . . . ." *The Morality of Administrative Law, supra* note 4, at 1947–48.

54. Ariz. Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co., 284 U.S. 370 (1932).

55. *Id.*

agencies must enforce rules as they are—rather than as the rules ought to be or should have been.[56] In *Arizona Grocery* itself, the principle meant that the Interstate Commerce Commission (ICC) had to enforce the maximum shipping rate it had set for sugar (i.e., 96.5 cents per 100 pounds) rather than enforce a lower maximum rate (i.e., 71 or 73 cents per 100 pounds) that made more economic sense in light of later-identified consequences.[57]

The *Arizona Grocery* principle seems unobjectionable enough. But it is difficult to ground the principle in any statute or constitutional provision. Professor Thomas Merrill, for example, writes that "[t]he most honest answer is that [the *Arizona Grocery* principle] is just one of those shared postulates of the legal system that cannot be traced to any provision of enacted law."[58] Sunstein and Vermeule agree, and they further contend that the *Arizona Grocery* principle flows naturally from Fuller's eighth failure of law.[59] One can readily see how the *Arizona Grocery* principle is consistent with Fuller's eighth failure of law, which speaks of the need to maintain "congruence between the rules as announced and their actual administration."[60] And an analysis of the Court's rationale in *Arizona Grocery* demonstrates the principle's further congruence with deontology.

In *Arizona Grocery*, the ICC argued on consequentialist grounds that, because the ICC had only recently acquired information indicating that a lower maximum rate was more economically appropriate, it would be better to enforce that lower rate—and not the higher rate that the ICC had actually set.[61] But the *Arizona Grocery* Court rejected the ICC's consequentialist argument.[62] Once the ICC set a rate, the Court explained, a regulated carrier "is entitled

56. *The Morality of Administrative Law*, *supra* note 4, at 1956. The *Arizona Grocery* principle is sometimes referred to as the *Accardi* principle, named after United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954). Thomas W. Merrill, *The* Accardi *Principle*, 74 GEO. WASH. L. REV. 569, 571–78 (2006). In *Accardi*, the Supreme Court held that the Board of Immigration Appeals had to follow its preexisting regulations (rather than the Attorney General's new decision) regarding deportation. *See id.* at 575–76 (citing *Accardi*, 347 U.S. at 267–68).

57. 284 U.S. at 381–82, 390.

58. Merrill, *supra* note 56, at 598.

59. *See The Morality of Administrative Law*, *supra* note 4, at 1956, 1960, 1966 (The *Arizona Grocery* principle seems to be rooted in ambient thinking about the internal morality of administrative law, as captured in Fuller's eighth principle, which forbids "a failure of congruence between the rules as announced and their actual administration.").

60. FULLER, *supra* note 46, at 39.

61. *See* 284 U.S. at 383 ("Upon this record we [i.e., the Interstate Commerce Commission (ICC)] reach the conclusion that the rate prescribed in the first Phoenix case, during the period embraced in these complaints, was unreasonable and that a lower rate would have been reasonable during that period.").

62. *See id.* at 389.

to protection," so long as it is compliant with the set rate.[63] It was immaterial to the Court's analysis that enforcing a lower rate would lead to a better outcome on the whole.[64] To put this analysis in more obviously deontological terms: rates should be enforced as they exist on the books, even if enforcing a different rate might lead to really good economic consequences in a particular situation.

As a second example, consider the administrative law principle laid down in *Federal Communications Commission (FCC) v. Fox*,[65] which prohibits administrative agencies from "depart[ing] from a prior policy *sub silentio* . . . ."[66] The *Fox* principle means that if an agency wishes to change its policy, then the agency may not do so silently.[67] Instead, the agency must "provide [a] reasoned explanation for" the policy change.[68] This rule, which Sunstein and Vermeule trace to "a Fullerian insistence on transparency,"[69] does not leave an agency the discretion to depart *sub silentio* when particular circumstances (e.g., political or economic factors associated with lengthening an already lengthy rulemaking process) might warrant as much.

Finally, consider as a third example the judge-made major questions doctrine. That doctrine requires "Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance."[70] Given that the major questions doctrine is of relatively recent vintage,[71] Sunstein and Vermeule did not address the doctrine in their shared project. But the doctrine's requirement that Congress speak "clearly" is readily traceable to the Fullerian commitment to "make rules understandable . . . ."[72]

At least, such a Fullerian grounding for the major questions doctrine would seem as good as any—given that the doctrine (like much of administrative common law) is difficult to trace to a particular statute or constitutional provision.[73] Professors John Yoo and Robert Delahunty, for example,

63. *Id.* at 389.

64. *See id.* at 389–90.

65. 556 U.S. 502 (2009).

66. *Id.* at 515.

67. *Id.*

68. *Id.*

69. LAW & LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE, *supra* note 42, at 75.

70. Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs., 549 U.S. 758, 764 (2021) (citations and quotations omitted).

71. Chad Squitieri, *Major Problems with Major Questions*, L. & LIBERTY (Sept. 6, 2022), https://lawliberty.org/major-problems-with-major-questions/ ("This July in [*West Virginia v. Environmental Protection Agency*], the Supreme Court formally recognized the 'major questions doctrine.'" 597 U.S. 697 (2022)).

72. FULLER, *supra* note 46, at 39.

73. I have argued elsewhere, however, that the doctrine could be reformulated to address

bemoan "the Court's failure to root the major-questions doctrine in any firm constitutional grounding . . . ."[74] Similarly, Professor Mila Sohoni observes that the Court did not clearly ground the major questions doctrine in any constitutional value but has only offered a "rain check" that may be redeemed for a more thorough description of the doctrine's provenance on a future date.[75]

Is the major questions doctrine a product of deontology? It would seem so. The doctrine requires congressional approval for *any* major regulation—no matter the consequences.[76] Even if it might be more cost-effective to leave major decisionmaking responsibility in the hands of an expert agency rather than 535 politicians on Capitol Hill, the requirement for clear congressional approval proves unbending.[77] Indeed, the rigid requirement for clear congressional authorization even refuses to bend to the consequences presented by an emergency, when the equities in favor of deviating from the rule might be heightened.[78]

2. Administrative Law Scholarship

Having offered a few examples of deontology's influence on administrative common law in Part I.A.1, Part I.A.2 will now offer a few examples of deontology's influence on administrative law scholarship. Let's begin by turning again to Vermeule, who has proposed a new method of constitutional interpretation called "common good constitutionalism."[79]

In defending Common Good Constitutionalism, Vermeule relies heavily

---

that problem. Chad Squitieri, *"Recommend . . . Measures": A Textualist Reformulation of the Major Questions Doctrine*, 75 BAYLOR L. REV. 706, 759–60, 777 (2023) (proposing that the major questions doctrine be reformulated so as to be grounded in the Recommendation Clause of Article II).

74. John Yoo & Robert Delahunty, *The Major-Questions Doctrine and the Administrative State*, NAT'L AFFS. (Fall 2022), https://www.nationalaffairs.com/publications/detail/the-major-questions-doctrine-and-the-administrative-state.

75. Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 266 (2022).

76. *See, e.g.*, Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs., 594 U.S. 758, 764 (2021).

77. *See* West Virginia v. U.S. Env't Prot. Agency, 597 U.S. 697, 756 (2022) (Kagan, J., dissenting) (dissenting from the majority's recognition of the major questions doctrine in part on the grounds that "Congress knows what it doesn't and can't know when it drafts a statute; and Congress therefore gives an expert agency the power to address issues—even significant ones—as and when they arise").

78. *See, e.g.*, Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs., 594 U.S. 758, 759, 764 (2021) (applying the major questions doctrine during the COVID-19 pandemic).

79. VERMEULE, *supra* note 37, at 1 (italics omitted).

on the work of the legal theorist Ronald Dworkin,[80] one of "the most prominent" legal deontologists of the modern era,[81] who has "carr[ied] the flag for deontology in the legal academy."[82] Given Vermeule's reliance on Dworkin, it is unsurprising that Vermeule makes explicit appeals to the deontological perspective. Vermeule explains, for example, that a legal system adopting Common Good Constitutionalism must not run afoul of "intrinsic evils, which place deontological side constraints on all public and private action."[83]

Vermeule has described Common Good Constitutionalism as a "substantively conservative approach."[84] But administrative law scholars on the political left have demonstrated a reliance on the deontological perspective as well. Perhaps most obvious is Ronald Dworkin himself, whose "theory, law as integrity, emphasizes the idea that the parties have preexisting rights that oblige judges to decide cases on the basis of principle rather than policy."[85]

Professor Blake Emerson offers a more progressive example of deontology's influence in administrative law scholarship. Emerson proposes that administrative law adopt a "principle of public care" that "requires" government officials "to attend to the needs and values of those who have a stake in law's administration."[86] His proposed "principle of public care . . . is informed by Progressive political thought and feminist social theory."[87]

---

80. *Id.* at 5 ("Methodologically, this work of interpretation draws . . . in limited ways, upon the parts of Dworkin's jurisprudence that are consistent with the classical view of law . . . ."); Adrian Vermeule, *Beyond Originalism*, ATLANTIC (Mar. 31, 2020) [hereinafter *Beyond Originalism*], https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/ ("Common-good constitutionalism is methodologically Dworkinian, but advocates a very different set of substantive moral commitments and priorities from Dworkin's, which were of a conventionally left-liberal bent.").

81. Colin Farrelly & Lawrence Solum, *An Introduction to Aretaic Theories of Law*, *in* VIRTUE JURISPRUDENCE 1, 4 (Colin Farrelly & Lawrence Solum eds., 2008).

82. *Id.*

83. VERMEULE, *supra* note 37, at 9.

84. *Beyond Originalism*, *supra* note 80; *see also* Micah Schwartzman & Richard Schragger, *What Common Good?*, AM. PROSPECT (Apr. 7, 2022), https://prospect.org/culture/books/what-common-good-vermeule-review/ (referring to Vermeule as a "conservative competitor to originalism").

85. Farrelly & Solum, *supra* note 81. The "moral commitments and priorities" underlying Dworkin's theory were "conventionally left-liberal bent." *Beyond Originalism*, *supra* note 80; *see also* Adam Liptak, *Ronald Dworkin, Scholar of the Law, Is Dead at 81*, N.Y. TIMES (Feb. 14, 2013), https://www.nytimes.com/2013/02/15/us/ronald-dworkin-legal-philosopher-dies-at-81.html ("Dworkin's dominant bent as a public intellectual . . . is to polemicize in favor of a standard menu of left-liberal policies.") (quoting Judge Richard Posner).

86. Blake Emerson, *Public Care in Public Law: Structure, Procedure, and Purpose*, 16 HARV. L. & POL'Y REV. 35, 38, 70 (2022).

87. *Id.* at 35.

Emerson's proposal can be described fairly as deontological—or at least as arguing for deontological guardrails capable of constraining a stubborn core of consequentialism. Emerson contends, for example, that "the public law system today is too unequal and too preoccupied with efficiency," and he critiques cost-benefit analyses on the grounds that "[e]conomic losses are inevitably easier to count in dollars than non-economic gains, such as health or dignitary effects."[88] While Emerson does not reject *all* considerations of "economic effects,"[89] he believes "we are on the other side of a 'cost-benefit revolution,' in which regulatory programs are assessed primarily" along the consequentialist grounds "of economic efficiency," which fails "to capture . . . the distinct values of fair distribution, public deliberation, and social solidarity."[90] And because Emerson thinks "[i]t is unlikely that simply fine-tuning cost benefits analysis will give adequate weight to value pluralism or to distributional concerns," he calls for "more robust deliberative democratic processes" to "[r]eorient[] our administrative process around a philosophy of public care."[91] In short, Emerson concludes that "[a]dministrative reasoning should (re)learn to incorporate . . . moral and political values" that inform administrative action in ways that might run counter to a purely consequentialist analysis.[92]

* * *

Part I.A has demonstrated that deontology has had tremendous influence on administrative law. Courts invoke the deontological perspective when they look beyond the Constitution and statutes to place rigid, Fullerian-inspired constraints on agency action. And scholars invoke the deontological perspective to defend their conceptions of how administrative power should be exercised. Deontology's influence on administrative law would offer sufficient reason to consider whether virtue ethics also might also offer insights for administrative law. Nonetheless, Part I.B will offer an additional reason by demonstrating that a second philosophical perspective, consequentialism, has also been influential in shaping administrative law.

B. Consequentialism

Consequentialism, as its name suggests, tests morality by weighing an action's *consequences*.[93] This philosophical perspective focuses on increasing the

88. *Id.* at 64–65.

89. *Id.* at 66.

90. *Id.* at 39.

91. *Id.* at 67.

92. *Id.* at 66.

93. Sinnott-Armstrong, *supra* note 6 ("The paradigm case of consequentialism is utilitarianism," of the type advanced by Jeremy Bentham and John Stuart Mill.); Lawerence B.

"good" that results from particular actions.[94] In practice, this requires consequentialists to first identify various states of affairs that can be categorized as "good."[95] Consequentialists then assess a particular action's morality by calculating whether an action's consequences result in more or less of the "good."[96]

Perhaps the most well-known strand of consequentialism is utilitarianism, for which the relevant "good" is utility, or happiness.[97] As Jeremy Bentham contended: there is a "fundamental axiom" which holds that "it is the greatest happiness of the greatest number that is the measure of right and wrong."[98] Writing a century later, another prominent utilitarian, John Stuart Mill, wrote that "actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness."[99] Even more recent flavors of consequentialism include Kaldor-Hicks efficiency, which holds that efficient outcomes should be pursued even if they mean violating one's duty to another (such as breaching one's contractual duties for reasons of efficiency),[100] and welfarism, which maintains that "an action is good if it maximizes the welfare of relevant individuals."[101]

How might consequentialism work in practice? Consider again the example of telling a lie. A consequentialist would "den[y] that moral rightness depends directly on anything other than [the] consequences" of telling the

---

Solum, *Legal Theory Lexicon 012: Virtue Ethics*, LEGAL THEORY LEXICON (last revised Mar. 19, 2023), https://lsolum.typepad.com/legal_theory_lexicon/2003/11/legal_theory_le.html.

94. *See* Sinnott-Armstrong, *supra* note 6.

95. *Id.*

96. Larry Alexander & Michael Moore, *Deontological Ethics*, STAN. ENCYC. OF PHIL. (revised Oct. 30, 2020), https://plato.stanford.edu/entries/ethics-deontological/.

97. Although both Bentham and Aristotle both focus on what we might call "happiness," Aristotle's conception of the term involves a *qualitative* component, whereas for Bentham, happiness can be thought of in mostly *quantitative* terms. *See supra* Part I.

98. JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT 93 (1891).

99. JOHN STUART MILL, UTILITARIANISM 9–10 (1879). The umbrella term "consequentialism" is technically broader than the narrower term "utilitarianism," in part because the former holds more generally that the "good" should be promoted, while the latter holds more specifically that the relevant "good" is "utility." Nonetheless, the light between those two terms is immaterial for purposes of this Article.

100. *See* Gil Lahav, *A Principle of Justified Promise-Breaking and its Application to Contract Law*, 57 N.Y.U. ANN. SURV. AM. L. 163, 163 (2000); Lawerence B. Solum, *Legal Theory Lexicon 060: Efficiency, Pareto, and Kaldor-Hicks*, LEGAL THEORY LEXICON (Jan. 27, 2024), https://lsolum.typepad.com/legal_theory_lexicon/2006/10/legal_theory_le_1.html.

101. Eric A. Posner, *International Law: A Welfarist Approach*, 73 U. CHI. L. REV. 487, 500 (2006).

lie.[102] Thus, if a murderous assassin were to ask a consequentialist where a friend is located, a consequentialist might conclude that lying to the assassin about the friend's whereabouts is morally acceptable on the grounds that lying might save the friend's life.[103] Consequentialism thus stands in stark contrast to the deontological position on lying, exampled by Kant and Newman above.[104]

1. Executive Branch Practice

Today, "the flag of consequentialism is borne by the normative law and economics movement."[105] And the crowning achievement of the law and economics movement, at least in the administrative law context, is the widespread adoption of cost-benefit analysis.[106] "Generally speaking, cost-benefit analysis involves tallying up all costs of a project or decision and subtracting that amount from the total projected benefits of the project or decision."[107] Thus, cost-benefit analysis—which informs regulatory decisionmaking by weighing negative consequences (costs) against positive consequences (benefits)—offers a quintessential example of the consequentialist perspective at work.

Cost-benefit analysis has had "enormous currency in the federal policymaking apparatus,"[108] particularly since the 1980s when the modern law and economics movement truly came into its own.[109] Of particular import was President Reagan's Executive Order 12,291, which revolutionized the federal regulatory process.[110]

Issued in 1981, Executive Order 12,291 was the first executive order to

102. Sinnott-Armstrong, *supra* note 6.

103. *See* Christian L. Hart, *Is It Always Wrong to Lie?*, PSYCH. TODAY (June 13, 2019), https://www.psychologytoday.com/us/blog/the-nature-deception/201906/is-it-always-wrong-lie (describing the consequentialist perspective).

104. *Supra* Part I.A.

105. *See* Farrelly & Solum, *supra* note 81, at 4.

106. *See* RICHARD L. REVESZ & MICHAEL A. LIVERMORE, RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH 11 (2008) [hereinafter RETAKING RATIONALITY].

107. Tim Stobierski, *How To Do A Cost-Benefit-Analysis & Why It's Important*, HARV. BUS. SCH. ONLINE (Sept. 5, 2019), https://online.hbs.edu/blog/post/cost-benefit-analysis.

108. RETAKING RATIONALITY, *supra* note 106, at 11.

109. Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building A Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1795 (2020) (referring to "the rise in the 1970s and 1980s of modern law and economics, an intellectual enterprise that approached law using the tools of neoclassical economics").

110. Exec. Order No. 12,291, 3 C.F.R. 127 (1981).

require administrative agencies to perform cost-benefit analyses.[111] As Sunstein explains, "[a]lthough there [we]re historical antecedents" to Executive Order 12,291, "no other President" had gone "so far" as to "provide that regulatory action *may not be initiated* unless the benefits exceed the costs."[112]

Executive Order 12,291 received some initial skepticism.[113] This was in part because, prior to the Order, cost-benefit analysis of agency action had been conducted by courts.[114] Executive Order 12,291, therefore, appeared to be something of an executive power grab—one that took power from the courts to grant "enormous discretion to [the executive officials] charged with" weighing the costs and benefits of administrative actions.[115] This consolidation of power into the Executive Branch is perhaps one reason why, in the decades "[s]ince President Ronald Reagan signed . . . Executive Order 12,291," *every* President "has required executive branch agencies to analyze the benefits and costs of their proposed regulations and to promulgate rules

111. Hahn & Sunstein, *supra* note 8, at 1489 n.1 (citing Exec. Order No. 12,291).

112. Cass R. Sunstein, *Cost-Benefit Analysis and the Separation of Powers*, 23 ARIZ. L. REV. 1267, 1268 (1981) [hereinafter *Cost-Benefit Analysis*] (emphasis added); *see also* C. Boyden Gray, *The President's Constitutional Power to Order Cost-Benefit Analysis and Centralized Review of Independent Agency Rulemaking*, at 6, available at https://boydengrayassociates.com/wp-content/uploads/2017/06/Boyden-Gray-The-President's-Constitutional-Power-to-Order-Cost-Benefit-Analysis-and-Centralized-Review-of-Independent-Agency-Rulemaking-Mercatus-Working-Paper-2017.pdf ("Executive Order 12,291 distinguished itself from the orders of presidents Gerald Ford and Jimmy Carter by authorizing [the Executive Branch's Office of Management and Budget (OMB)] to block publication of proposed and final rules that did not satisfy its review.").

113. Such skepticism may in part be a function of so-called "antinovelty" rhetoric, which works to reject novel interpretations of law. *See* Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407, 1422–27, 1491 (2017) (describing the Supreme Court's antinovelty rhetoric in the context of statutory interpretation and concluding that such rhetoric should be abandoned); *Id.* at 1425 (referring to "a similar trend in recent administrative law cases") (citation omitted).

114. *Cost-Benefit Analysis*, *supra* note 112, at 1267 (explaining that "in recent years it has become increasingly clear that judicial review may perform the critical function of safeguarding against costly regulatory intrusions into the private marketplace" because "the courts have carefully scrutinized agency action in order to ensure that the expenditures will be devoted to a significant problem or that the costs of regulation will not exceed its benefits").

115. *Id.* at 1276 (referring to the "enormous discretion" exercisable by the Executive Branch when performing cost-benefit-analysis); Michael Livermore, *Cost-Benefit Analysis and Agency Independence*, 81 U. CHI. L. REV. 609, 610 (2014) ("[In 1981,] Professor Cass Sunstein worried that President Ronald Reagan's recently signed Executive Order requiring that the Office of Information and Regulatory Affairs (OIRA) in the White House review new regulations accords enormous discretion to those who are charged with interpreting the order's cost-benefit-analysis requirement.") (internal citation and quotations omitted).

only if the benefits outweigh the costs."[116]

Today, the Executive Branch's commitment to cost-benefit analysis is demonstrated through President Clinton's Executive Order 12,866,[117] as supplemented by President Obama's Executive Order 13,563.[118] Both orders adhered to the core of President Reagan's Executive Order 12,291, although each of the latter two orders offered some adjustments.[119] This continued commitment to the cost-benefit framework is so potent that it is fair to describe "cost-benefit balancing" as "the official creed of the executive branch."[120]

2. Administrative Law Scholarship

Many scholars have come to embrace the stronghold that the cost-benefit framework exerts on Executive Branch action. Sunstein, for example, contends that the "American government is becoming a cost-benefit state."[121] He believes that "the strongest arguments for cost-benefit balancing are based not only on neoclassical economics, but also on an understanding of human cognition, on democratic considerations, and on an assessment of the real world of such balancing."[122] Professor John O. McGinnis refers to "[c]ost-benefit analysis" as "a salutary development for the administrative state" because it "disciplines" agencies to use their "discretion . . . in a more reasonable and predictable way that maximizes benefits for society."[123] In

116. Gray, *supra* note 112, at 3 (emphasis added).

117. Exec. Order No. 12,866, Regulatory Planning and Review, 58 Fed. Reg. 51,735 (Sept. 30, 1993).

118. Exec. Order No. 13,563, Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821 (Jan. 21, 2011).

119. Neil Esner, *The Life and Times of Executive Order 12866*, GEO. WASH. REGUL. STUD. CTR. (Oct. 10, 2018), https://regulatorystudies.columbian.gwu.edu/life-and-times-executive-order-12866 (referring to "E.O. 12291" as "E.O. 12866's predecessor" and describing "a carry-over from E.O. 12291," found in E.O 12866, as "a valuable management tool for some agencies"); Gray, *supra* note 112, at 6–7 ("President Bill Clinton replaced Reagan's order with Executive Order 12,866 but retained all the core features of Executive Order 12,291, including cost-benefit analysis and OMB review of executive agency rules. President Barack Obama supplemented Executive Order 12,866 with Executive Order 13,563, which allowed agencies to consider qualitative benefits and costs 'that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.'") (citations omitted).

120. Hahn & Sunstein, *supra* note 8, at 1489.

121. CASS R. SUNSTEIN, THE COST-BENEFIT STATE 4 (2002).

122. *Id.* at 9.

123. John O. McGinnis, *Expanding Cost-Benefit Analysis Helps Tame the Administrative State*, L. & LIBERTY (Apr. 13, 2018), https://lawliberty.org/expanding-cost-benefit-analysis-helps-tame-the-administrative-state/.

line with such arguments, Professors Eric A. Posner and Glen Weyl have proposed extending the cost-benefit framework to cover additional areas of regulatory decisionmaking.[124]

To be sure, the commitment to the cost-benefit framework demonstrated by these scholars (in addition to the commitment demonstrated by Presidents Reagan, George H. W. Bush, Clinton, George W. Bush, Obama, Trump, and Biden) should not be taken to suggest that the framework has been free from criticism. To the contrary, although cost-benefit analyses have been embraced by political "conservative[s]," who perceive cost-benefit analyses as a means of "reduc[ing] or relax[ing] economic regulation," political "liberal[s]" have often viewed cost-benefit analyses as a form of decision making that too easily "justif[ies] deregulation or less stringent regulation."[125]

In *Retaking Rationality*, published in 2008, Professors Richard Revesz and Michael Livermore "challenge[d] the liberal camp to rethink its position on cost-benefit analysis."[126] Although Revesz and Livermore recognized that, as a historical matter, cost-benefit analysis was "biased against regulation," they argued that "those biases are not inherent to the methodology."[127] Instead, they contended that "[i]f those biases were identified and eliminated, cost-benefit analysis would become a powerful tool for neutral policy analysis."[128] Thus, Revesz and Livermore concluded that "progressive groups should seek to mend, not end, cost-benefit analysis."[129]

Revesz and Livermore revisited their argument in *Reviving Rationality,* published in 2020 at the tail end of the Trump Administration.[130] In this second book, Revesz and Livermore maintain their commitment to the cost-benefit framework, although they contend that the framework is susceptible to manipulation.[131] Nonetheless, Revesz and Livermore maintain that cost-benefit analysis should continue to inform regulatory decisions in the future.[132]

---

124. Eric A. Posner & Glen Weyl, *The Case for Cost-Benefit Analysis of Financial Regulations*, CATO (2014), https://www.cato.org/regulation/winter-2013-2014/case-cost-benefit-analysis-financial-regulations#cba-of-federal-regulations (proposing that cost-benefit analysis be applied to financial regulations).

125. RETAKING RATIONALITY, *supra* note 106, at 9.

126. *Id.* at 10.

127. *Id.*

128. *Id.*

129. *Id.*

130. *See generally* RICHARD L. REVESZ & MICHAEL A. LIVERMORE, REVIVING RATIONALITY (2020).

131. *Id.* at 3 ("This book is . . . more frank in its recognition of the partisan dynamics that have shaped how cost-benefit analysis is used and abused . . . .").

132. *Id.* 8–9 (referring to "our thoughts on how cost-benefit analysis might be saved" and the authors' "agenda for reforming cost-benefit analysis and regulatory review," and arguing

In 2022, President Biden nominated Revesz to serve as the Administrator of the Office of Information and Regulatory Affairs (OIRA).[133] The position is critical to the Executive Branch's oversight of administrative decisionmaking. As former OIRA Administrator Sunstein explains, OIRA is tasked with the "responsibility . . . to review and approve (or decline to approve) federal rules from executive agencies, with careful consideration of costs and benefits."[134] For this reason, OIRA is often referred to as "the most important agency you've never heard of,"[135] and "[t]he Administrator of OIRA is often described as the nation's 'regulatory czar.'"[136] Given Revesz's sustained commitment to cost-benefit analysis over the last several decades, as well as the significant influence that an OIRA Administrator can bring to bear on regulatory decisionmaking, one can presume that the consequentialist perspective exampled by cost-benefit analysis will continue to serve as "the official creed of the executive branch" for the foreseeable future.[137]

* * *

Part I.B has described how the Executive Branch routinely subjects putative regulations to cost-benefit analyses, a tool of consequentialism that many administrative law scholars have also embraced. Having now demonstrated how administrative law has been shaped by both deontology and

---

that "future administrations should push forward by improving the practice of cost-benefit analysis").

133. Press Release, Exec. Off. of the President, President Biden Announces Key Nominees (Sept. 2, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/09/02/president-biden-announces-key-nominees-30/; EXEC. OFF. OF THE PRESIDENT, OFF. OF INFO. & REG. AFFS., https://www.whitehouse.gov/omb/information-regulatory-affairs/ (last visited Aug. 11, 2024).

134. Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1839 (2013) [hereinafter *Myths and Realities*].

135. Susan Dudley, *A Trump Nomination Shows He's Serious About Deregulation*, WALL ST. J. (Apr. 9, 2017), https://www.wsj.com/articles/a-trump-nomination-shows-hes-serious-about-deregulation-1491768677; Dylan Matthews, *The Trump Administration is Quietly Helping People Get Kidneys*, VOX (June 26, 2019), https://www.vox.com/future-perfect/2019/6/26/18744536/kidney-transplant-requirements-rules-trump-white-house (citation omitted).

136. *Myths and Realities*, *supra* note 134.

137. Hahn & Sunstein, *supra* note 8, at 1489. In April of 2023, Administrator Revesz announced changes to OIRA's cost-benefit framework. *See* Richard Revesz, *Strengthening Our Regulatory System for the 21st Century*, OFF. OF MGMT. & BUDGET (Apr. 6, 2023), https://www.whitehouse.gov/omb/briefing-room/2023/04/06/strengthening-our-regulatory-system-for-the-21st-century/. These changes include changing the discount rate to account for future benefits, considering global (rather than domestic) effects, and increasing the dollar amount which triggers a more thorough cost-benefit analysis. *Id.*; OFF. OF MGMT. & BUDGET, CIRCULAR A-4, REGULATORY ANALYSIS (Apr. 6, 2023) https://www.whitehouse.gov/wp-content/uploads/2023/04/DraftCircularA-4.pdf.

consequentialism, the remainder of Part I will introduce virtue ethics, which also offers insights that may prove fruitful in the administrative law context.

C. Virtue Ethics

Unlike the deontological perspective, which focuses on *actions*, and the consequentialist perspective, which focuses on actions' *consequences*, virtue ethics focuses on *actors*.[138] Consider an example offered by the "distinguished moral philosopher[] Rosalind Hursthouse,"[139] which helps demonstrate a difference between the three philosophical perspectives:

> Suppose it is obvious that someone in need should be helped. A utilitarian will point to the fact that the consequences of doing so will maximize well-being, a deontologist to the fact that, in doing so the agent will be acting in accordance with a moral rule such as "Do unto others as you would be done by" and a virtue ethicist to the fact that helping the person would be charitable or benevolent.[140]

As Hursthouse's example helps demonstrate, virtue ethics holds that an actor should be shaped by various virtues, which serve as "internal guides" governing a virtuous actor's behavior.[141] Of course, deontology, consequentialism, and virtue ethics can *each* "make room for virtues, consequences, and rules."[142] But "[w]hat distinguishes virtue ethics from consequentialism or deontology is the *centrality* of virtue within the theory."[143]

1. Virtue Ethics' Ancient Roots

The marginal differences between deontology, consequentialism, and virtue ethics might seem clear enough. But a preliminary question remains: what is virtue? For Aristotle, a virtue (in Greek, *arête*) is a characteristic that is both instrumental to *achieving* excellence and a constitutive part of what it

---

138. *Originalism and the Aristotelian Tradition*, *supra* note 2, at 2018 ("In virtue ethics, the fundamental issue is not action: it is character."); Hursthouse, *supra* note 11 ("[Virtue ethics] may, initially, be identified as the one that emphasizes the virtues, or moral character, in contrast to the approach that emphasizes duties or rules (deontology) or that emphasizes the consequences of actions (consequentialism)."); Farrelly & Solum, *supra* note 81, at 1 ("[V]irtue ethics offers a third way—an alternative to the deontological and consequentialist approaches that dominated modern moral philosophy until very recently.").

139. Lawrence Solum, *Legal Theory Lexicon 012: Virtue Ethics*, LEGAL THEORY BLOG (Nov. 30, 2003) (revised Mar. 19, 2023), https://lsolum.typepad.com/legal_theory_lexicon/2003/11/legal_theory_le.html.

140. *Id.* (citing Hursthouse, *supra* note 11)

141. *Originalism and the Aristotelian Tradition*, *supra* note 2, at 2023 (2012) (citing 2 THOMAS AQUINAS, SUMMA THEOLOGIAE I-II, Q. 49).

142. Hursthouse, *supra* note 11 (italics omitted).

143. *Id.* (emphasis added).

means for something to *be* excellent.[144] In the Aristotelian tradition, an object's excellence is identified in relation to the object's ultimate purpose (in Greek, *telos*).[145] An excellent steak knife, for example, has a sharp blade and firm handle—two characteristics (virtues) that help the steak knife fulfill its ultimate purpose (*telos*), which is to cut steak.[146] Moreover, the Aristotelian tradition focuses on activity. While a sharp blade and firm handle give a steak knife the capacity to achieve excellence, a truly excellent knife is the one that puts its capacity to use by actually fulfilling its *telos*: a knife that utilizes its sharp blade and firm handle to actually cut steak.[147] Similarly, a human's virtues are those characteristics that enable a human to achieve their *telos*.

What is a human's *telos*? For Aristotle, the answer is encapsulated by the Greek term *eudaimonia*.[148] It is difficult to accurately translate *eudaimonia* into English, but the term is best translated as "flourishing" or "happiness."[149]

Aristotle believed *eudaimonia* to be a human's *telos* because *eudaimonia* is the only thing humans pursue as an end goal in itself.[150] As Aristotle explains, in life, "there are many actions, arts, and sciences," each of which has their own

144. *See* ARISTOTLE'S NICOMACHEAN ETHICS, *supra* note 23, at 33 ("[E]very virtue both brings that of which it is the virtue into a good condition and causes the work belonging to that thing to be done well."); Lawrence Solum, *Legal Theory Lexicon 012: Virtue Ethics*, LEGAL THEORY BLOG (Nov. 30, 2003) (revised Mar. 19, 2023), https://lsolum.typepad.com/legal_theory_lexicon/2003/11/legal_theory_le.html; Hursthouse, *supra* note 11 ("A virtue is an excellent trait of character."); 2 AQUINAS, *supra* note 141, at I-II Q. 56 art. 3 (St. Thomas Aquinas, who worked within the Aristotelian tradition, defined virtue as "a habit by which we work well.").

145. *See Aretē*, OXFORD REFERENCE, https://www.oxfordreference.com/display/10.1093/oi/authority.20110803095423468;jsessionid=0B274B98A0DB1F68BD71A40A1AA50BDB (last visited Aug. 11, 2024).

146. *See* Corey A. Ciocchetti, *Tricky Business: A Decision-Making Framework for Legally Sound, Ethically Suspect Business Tactics*, 12 CARDOZO PUB. L. POL'Y & ETHICS J. 1, 20 (2013) ("To Aristotle, human beings have functions just as a knife has a function. A properly functioning, or good, knife is one that cuts well.").

147. Aristotle makes this point with reference to the Olympic games. ARISTOTLE'S NICOMACHEAN ETHICS, *supra* note 23, at 16 ("[J]ust as it is not the noblest and strongest who are crowned with the victory wreath in the Olympic Games but rather the competitors . . . , so also it is those who act correctly who attain the noble and good things in life.").

148. *See Eudaimonia*, OXFORD REFERENCE, https://www.oxfordreference.com/display/10.1093/oi/authority.20110803095800495, (last visited Aug. 11, 2024).

149. *See id.*; Richard Kraut, *Aristotle's Ethics*, STAN. ENCYC. OF PHIL. (2022), https://plato.stanford.edu/entries/aristotle-ethics/ (last visited Aug. 11, 2024).

150. *See Originalism and the Aristotelian Tradition*, *supra* note 2, at 2022 ("Virtue ethics is teleological because the goal towards which the virtues enable their possessor to move is human flourishing.") (citation omitted).

subordinate ends.[151] The end of medicine, for example, "is health."[152] The end of "shipbuilding" is to build "a ship," and the end "of generalship, victory."[153] But those ends are only subordinate ends, which is to say that they are ends pursued for the sake of something else.[154] In other words, one builds a ship to achieve victory in battle; one achieves victory in a battle to win a war; one wins a war to bring peace; one brings peace to spend time with their loved ones; and so on. Ultimately, these subordinate ends culminate into one final end, which Aristotle believed to be *eudaimonia*, or the one end pursued for itself.[155]

For Aristotle, a human's pursuit of *eudaimonia* is a result of a human's distinctive function: the function that makes humans different from all other things.[156] Identifying something's distinctive function requires comparing it to other things. Start broad: humans are animals that, unlike rocks and Rolex watches, have the capacity to grow.[157] Go narrower: while many animals have the ability to *perceive*, a human is the only animal able to *reason*.[158] And it is that unique capacity to reason that constitutes a human's distinct function. Thus, the Aristotelian tradition holds that a human behaves excellently when a human *reasons* excellently.[159] And it is only by reasoning excellently that a human, acting in relation to other members in their community, can achieve *eudaimonia*.

Virtues assist a human in reasoning excellently in pursuit of *eudaimonia*. The Aristotelian tradition recognizes at least two categories of virtue.[160] First

---

151. ARISTOTLE'S NICOMACHEAN ETHICS, *supra* note 23, at 2.

152. *Id.*

153. *Id.*

154. *Id.* at 11.

155. *See, e.g.*, Kraut, *supra* note 149.

156. *See, e.g.*, *Id.*

157. *Cf.* ARISTOTLE'S NICOMACHEAN ETHICS, *supra* note 23, at 12 (discussing the relationships between different limbs, as compared to the difference between a human and a plant).

158. *See* ARISTOTLE'S NICOMACHEAN ETHICS, *supra* note 23, at 12–13; *Originalism and the Aristotelian Tradition*, *supra* note 2, at 2017 (describing the Aristotelean tradition as holding that "human acts are good when they conform to the type of being humans are: rational animals"); *Id.* at 2022 ("Humans are distinct from other animals by having the capacity to reason.") (citations omitted).

159. *Originalism and the Aristotelian Tradition*, *supra* note 2, at 2022 ("Human flourishing is the state of being most fully human which, in the Aristotelian tradition, means acting rationally excellently.") (citations omitted).

160. ARISTOTLE'S NICOMACHEAN ETHICS, *supra* note 23, at 25; *Originalism and the Aristotelian Tradition*, *supra* note 2, at 2018 ("Virtues are conventionally divided into two categories: intellectual virtues and moral virtues.") (citations omitted). Christian thinkers have recognized

are the intellectual virtues, such as wisdom.[161] These "virtues of thought," which "enable proper exercise of reason itself,"[162] can be developed "mostly from teaching—hence it requires experience and time."[163] For example, one might take an environmental science class or read a textbook about the innerworkings of securities markets to better perfect one's wisdom and knowledge respecting those subjects.

The second category of virtues are moral virtues, such as temperance and courage.[164] These "virtues of character . . . assist [with] living according to reason."[165] Unlike the intellectual virtues, which can be developed through teaching, moral virtues must be developed through habituation.[166] The emphasis here is on action. Like the artist who improves their craft by making art, Aristotle explains that it is "by doing just things [that] we come just," and it is by doing "courageous things" that we become "courageous."[167] It is not enough to simply learn about the moral virtues; one must habitually *act* consistent with the moral virtues in order to better perfect the virtues within oneself.[168]

Of course, humans can be habituated to act contrary to virtue. As

---

a third category of virtue (i.e., the theological virtues). *See* J. BUDZISZEWSKI, COMMENTARY ON THOMAS AQUINAS'S VIRTUE ETHICS 64 (2017) (referring to the theological virtues of faith, hope, and charity).

161. ARISTOTLE'S NICOMACHEAN ETHICS, *supra* note 23, at 25.

162. Brad Kallenberg, *The Master Argument of MacIntyre's 'After Virtue' in* VIRTUE: READINGS IN MORAL THEOLOGY 16, 32 (Charles C. Curran & Lisa A. Fullam eds., 2011); *see also Originalism and the Aristotelian Tradition*, *supra* note 2, at 2018 ("The intellectual virtues perfect our reasoning faculties.").

163. ARISTOTLE'S NICOMACHEAN ETHICS, *supra* note 23, at 26.

164. *See id.* (explaining the habitual components of what constitutes a moral virtue); *see also Originalism and the Aristotelian Tradition*, *supra* note 2, at 2018 ("The moral virtues perfect our appetites and most prominently include justice, temperance, and fortitude.") (citation omitted).

165. Kallenberg, *supra* note 162, at 32.

166. ARISTOTLE'S NICOMACHEAN ETHICS, *supra* note 23, at 26 ("[M]oral virtue is the result of habit."); Lawrence Solum, *Legal Theory Lexicon 012: Virtue Ethics*, LEGAL THEORY BLOG (Mar. 19, 2023), https://lsolum.typepad.com/legal_theory_lexicon/2003/11/legal_theory_le.html.

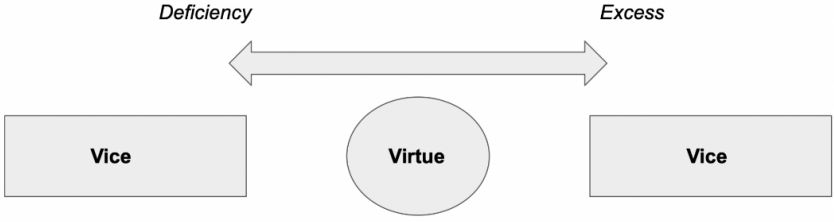
167. ARISTOTLE'S NICOMACHEAN ETHICS, *supra* note 23, at 27.

168. In addition, one must act in a certain way—i.e., one cannot act virtuously by chance in the way that one might strike the correct piano keys by chance. *See* ARISTOTLE'S NICOMACHEAN ETHICS, *supra* note 23, at 31 (distinguishing virtue from art and stating that "[b]ut whatever deeds arise in accord with the virtues are not done justly or moderately if they are merely in a certain state, but only if he who does those deeds is in a certain state as well: first, if he acts knowingly; second, if he acts by choosing and by choosing the actions in question for their own sake; and, third, if he acts while being in a steady and unwavering state.").

Aristotle explains with an example that is perhaps more fit for his times than ours, one can become either a "good" or "bad cithara player[]" depending on how they practice playing the cithara.[169] Similarly, a person who routinely acts contrary to virtue can develop specific character traits called vices.[170]

Vices have a particular relationship to virtues. Specifically, the Aristotelian tradition understands each moral virtue as existing between two vices,[171] with each moral virtue helping humans "seek the right action between excess and deficiency in every sphere of conduct."[172] **Figure 1** offers a visual depiction of this relationship between vice and virtue:

Figure 1



To use the moral virtue of courage as an example: Aristotle explains that "he who avoids and fears all things and endures nothing becomes a coward, and he who generally fears nothing but advances toward all things becomes reckless."[173] The moral virtue of courage thus stands in between a deficiency of courage (the vice of cowardice) and an excess of courage (the vice of recklessness).[174] To develop the moral virtue of courage, one must do more than, say, read a book about courageous actions, or attend a lecture describing the same. One must instead be regularly put to the test so that one can develop the habit of acting courageously.[175]

---

169. ARISTOTLE'S NICOMACHEAN ETHICS, *supra* note 23, at 27. A cithara is an ancient stringed instrument. *See Kithara*, BRITANNICA, https://www.britannica.com/art/kithara (last visited Aug. 11, 2024).

170. *See* ARISTOTLE'S NICOMACHEAN ETHICS, *supra* note 23, at 30.

171. *Id.* at 35 ("Virtue, therefore, is a characteristic marked by choice, residing in the mean relative to us, a characteristic defined by reason and as the prudent person would define it. Virtue is also a mean with respect to two vices, the one vice related to excess, the other to deficiency . . . .").

172. BUDZISZEWSKI, *supra* note 160, at 20.

173. ARISTOTLE'S NICOMACHEAN ETHICS, *supra* note 23, at 28.

174. *Id.* at 28–29.

175. *Id.* at 29 ("[F]or as a result of abstaining from pleasures, we become moderate; and by so becoming, we are especially able to abstain from them. Similar is the case of courage as

Diving a bit deeper, a complete understanding of Aristotle's writings on virtue requires an understanding of his writings on politics. This is because "Aristotle believed that ethics and politics were closely linked, and that in fact the ethical and virtuous life is only available to someone who participates in politics."[176] For Aristotle, the relevant unit of political society was the city-state (in Greek, *polis*).[177] And Aristotle believed that "humanity . . . is by nature a political animal . . . whose end (*telos*) is fulfilled only in the *polis*."[178] Why? Because humans are political animals who do not reason alone; they instead reason collectively by communicating with their broader community.[179]

2. Virtue Ethics' Revival

Modern readers should not take Aristotle's focus on the *polis* to mean that virtue ethics is relevant only to humans living in that particular political unit. Far from it. One of the most influential thinkers to have written within the Aristotelian tradition, St. Thomas Aquinas, adapted virtue ethics to a wider array of political structures—including "hamlets, villages, neighborhoods, cities, kingdoms and provinces."[180] Regardless of whether a human lives in a city-state, kingdom, or even a country governed via the modern administrative state, the underlying idea is that humans are rational, political animals who utilize the virtues to achieve *eudaimonia* through their dealings with other humans.

Although St. Thomas Aquinas has proven to be widely influential within the Aristotelian tradition, one need not fully adopt a Thomistic lens

---

well: by being habituated to disdain frightening things and to endure them, we become courageous, and by so becoming, we will be especially able to endure frightening things.").

176. Edward Clayton, *Aristotle: Politics*, INTERNET ENCYC. PHIL., https://iep.utm.edu/aristotle-politics/ (last visited Aug. 11, 2024).

177. Nicholas Aroney, *Subsidiarity, Federalism and the Best Constitution: Thomas Aquinas on City, Province and Empire*, 26 L. & PHIL. 161, 165 (Mar. 2007) ("Aristotle's political theory was almost exclusively concerned with the individual city-state (*polis*).").

178. *Id.* at 176.

179. *See* ARISTOTLE, POLITICS 1253a (book 1.2) (OXFORD U. PRESS 2009) ("[M]an is by nature a political animal . . . . [M]an alone of the animals possesses speech. . . . [S]peech is designed to indicate the advantageous and the harmful, and therefore also the right and the wrong; for it is the special property of man in distinction from other animals that he alone has perception of good and bad and right and wrong and other moral qualities, and it is partnership in these things that makes a household and a city-state.").

180. Aroney, *supra* note 177, at 165; *see also Originalism and the Aristotelian Tradition*, *supra* note 2, at 2015 ("[A]fter the fall of the Western Roman Empire, St. Thomas Aquinas began the synthesis of Aristotle's thought with the Christian philosophical inheritance . . . .") (citations omitted).

(including its theological commitments) in order to work within the broader Aristotelian tradition. To be sure, there are some differences between Aquinas and Aristotle. For example, while they both would agree that the virtues assist humans in achieving their natural *telos* (human flourishing), Aquinas would add that humans also have a super-natural *telos* (eternal beatitude).[181] Aristotle (who is believed to have died in 322 B.C.) did not have the occasion to discuss Christian beliefs as such.[182] But differences such as these are not of immediate importance for the purposes of this Article.

Following Aquinas, who wrote in the thirteenth century,[183] the Aristotelian tradition remained a dominant philosophical theory in the Global West until the Enlightenment of the seventeenth and eighteenth centuries, at which time virtue ethics fell out of style.[184] Modern philosophers began to offer virtue ethics renewed attention following G. E. M. Anscombe's 1958 publication, *Modern Moral Philosophy*.[185] In that seminal work, Anscombe outlined some of the shortcomings of the consequentialist and deontological perspectives that had come to dominate philosophy (in addition to dominating broader political debates, such as those concerning the morality of using atomic weaponry).[186] In response to those shortcomings, Anscombe proposed a return to Aristotelian virtue ethics.[187] As one scholar explains,

181. BUDZISZEWSKI, *supra* note 160, at 104 ("In St. Thomas' view, temporal happiness is a real end in the sense that it is desirable in itself, not just a means to something else. But it cannot be our final end, because for that it would have to be completely satisfying, leaving nothing further to be desired. Eternal happiness, or beatitude, has both of these properties.").

182. *See* Anselm Amadio, *Aristotle*, BRITANNICA (last updated May 25, 2024), https://www.britannica.com/biography/Aristotle.

183. *See* JOSEF PIEPER, GUIDE TO THOMAS AQUINAS 3 (Richard Winston & Clara Winston trans., Ignatius Press 3d rev. ed. 1991).

184. *See Originalism and the Aristotelian Tradition*, *supra* note 2, at 2015 (citations omitted); Hursthouse, *supra* note 11.

185. G. E. M. Anscombe, *Modern Moral Philosophy*, 33 PHIL. 1 (1958); *Originalism and the Aristotelian Tradition*, *supra* note 2, at 2025 ("Starting with a seminal article by Elizabeth Anscombe in 1958, Modern Moral Philosophy, virtue ethics experienced its modern revival."); Hursthouse, *supra* note 11 (explaining that virtue ethics "persisted as the dominant approach in Western moral philosophy until at least the Enlightenment, suffered a momentary eclipse during the nineteenth century, but re-emerged in Anglo-American philosophy in the late 1950s" when virtue ethics was "heralded by Anscombe's famous article").

186. *See* Julia French, Paul Blaschko, & Justin Christy, *Anscombe's Intention: Ethics in Action,* NOTRE DAME U., https://godandgoodlife.nd.edu/digital-essays/anscombes-intention-ethics-in-action/ (last visited Aug. 11, 2024) ("Anscombe who, though no pacifist, considered [President] Truman's use of the atomic bomb on Hiroshima and Nagasaki to be morally reprehensible.").

187. Anscombe, *supra* note 185, at 9 (referring to philosophical theories of Jeremy Bentham, John Stuart Mill, Immanuel Kant, and Aristotle); Lawrence B. Solum, *The Aretaic Turn*

Anscombe's *Modern Moral Philosophy* "marks the beginning of . . . [a] turn in moral philosophy—initiating both a return to Aristotle's theory of the virtues and the development of new varieties of virtue theory."[188]

Although modern philosophers have given renewed attention to virtue ethics in the decades since Anscombe's 1958 article, the legal community has still, in large part, failed to grapple with virtue ethics.[189] One legal scholar seeking to change that state of affairs is Professor Lawrence B. Solum. In *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*,[190] Solum applies virtue ethics to modern legal theory. His work is motivated by a desire to add to "[t]he hegemony of deontological and [consequentialist] theories" that "prevail[]" in the legal community.[191] To date, Solum has focused primarily on the virtues that make for a good *judge*, although his contributions extend beyond that particular focus.[192]

Professor Lee Strang offers another notable exception to the legal community's general lack of engagement with virtue ethics. In a series of

---

in Constitutional Theory, 70 BROOK. L. REV. 475, 492 (2004) ("In *Modern Moral Philosophy*, Elizabeth Anscombe famously noted persistent problems with the deontological and utilitarian approaches that dominated normative ethics when she wrote in 1958."); Nafsika Athanassoulis, *Virtue Ethics*, INTERNET ENCYC. PHIL., https://iep.utm.edu/virtue/ (last visited Aug. 11, 2024) ("Among the theories [Anscombe] criticized for their reliance on universally applicable principles were J. S. Mill[']s utilitarianism and Kant's deontology. . . . In its place, Anscombe called for a return to a different way of doing philosophy. Taking her inspiration from Aristotle, she called for a return to concepts such as character, virtue and flourishing.").

188. Lawrence B. Solum, *Legal Theory Lexicon 012: Virtue Ethics*, LEGAL THEORY BLOG (Nov. 30, 2003) (revised Mar. 19, 2023), https://lsolum.typepad.com/legal_theory_lexicon/2003/11/legal_theory_le.html.

189. *See* Lawrence B. Solum, *Virtue Jurisprudence: A Virtue Centered Theory of Judging*, 34 METAPHILOSOPHY 178, 180 (2003) [hereinafter *Virtue Jurisprudence*] ("Legal philosophy (as [practiced] by philosophers or academic lawyers) has only recently paid attention to one of the most significant developments in moral theory in the second half of the twentieth century, the emergence of virtue ethics."); *Originalism and the Aristotelian Tradition*, *supra* note 2, at 1998 ("A concept fundamental to philosophy—virtue—is, with a few notable exceptions, absent from scholarship on constitutional interpretation generally, and originalism in particular.") (citations omitted).

190. *Virtue Jurisprudence*, *supra* note 189.

191. *Id.* at 180.

192. *See id.* at 189; *see also* Farrelly & Solum, *supra* note 81, at 1–16; Lawrence B. Solum, *Legal Theory Lexicon: Virtue Jurisprudence*, LEGAL THEORY BLOG (Sept. 12, 2021), https://lsolum.typepad.com/legaltheory/2021/09/legal-theory-lexicon-virtue-jurisprudence.html.

articles[193] and a book,[194] Strang incorporates virtue ethics into constitutional interpretation generally, and originalism specifically. Strang contends that incorporating virtue ethics into the latter "will make originalism more descriptively accurate and normatively attractive."[195] Like Solum, Strang's efforts to incorporate virtue ethics into modern legal thought have focused primarily on judicial behavior.[196]

To date, no scholar has focused on applying virtue ethics to administrative officials. This is not to say that administrative law scholars have not addressed the morality of administrative law more generally. To the contrary, recent administrative law scholarship has exhibited something of a "moral turn."[197] Consider again, for example, Sunstein and Vermeule, who speak of administrative law's internal "morality."[198] Similarly recall Revesz and Livermore, who do not speak of morality in explicit terms, but who demonstrate a continued commitment to grading administrative action through a consequentialist lens.[199]

Emerson's focus on "the politics of care" offers another example of administrative law's recent "moral turn."[200] Emerson argues that the concept of public care should "govern[] the conduct of officials who implement the law, ranging from the President to other executive and administrative officers."[201] For Emerson, a focus on public care would "direct[] the state to provide those institutions, services, and protections that are necessary to people's moral and political agency but which they cannot obtain on their own initiative."[202]

---

193. *See, e.g.*, *Originalism and the Aristotelian Tradition*, *supra* note 2; Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419, 484–86 (2006) [hereinafter *An Originalist Theory of Precedent*].

194. *See* LEE J. STRANG, ORIGINALISM'S PROMISE: A NATURAL LAW ACCOUNT OF THE AMERICAN CONSTITUTION (2019) [hereinafter ORIGINALISM'S PROMISE].

195. *Originalism and the Aristotelian Tradition*, *supra* note 2, at 2026.

196. *See, e.g.*, ORIGINALISM'S PROMISE, *supra* note 194, at 142–57; *Originalism and the Aristotelian Tradition*, *supra* note 2, at 2018–19 ("Professor Lawrence [B.] Solum identified and described the primary virtues required for judging, and my discussion parallels his excellent scholarship.") (citation omitted).

197. Jodi Short, *Legalizing the Politics of Care: The Search for the Moral Foundations of Administrative Law*, JOTWELL (Sept. 30, 2022) (reviewing Blake Emerson, *Public Care in Public Law: Structure, Procedure, and Purpose*, 16 HARV. L. & POL. REV. 35 (2022)), https://adlaw.jotwell.com/legalizing-the-politics-of-care-the-search-for-the-moral-foundations-of-administrative-law/.

198. *Infra* Part I.B.

199. *See, e.g.*, RETAKING RATIONALITY, *supra* note 106, at 9.

200. Emerson, *supra* note 86, at 38; Short, *supra* note 197.

201. Emerson, *supra* note 86, at 38.

202. *Id.*

Relatedly, Professor Alan Rozenshtein has examined the contours of *presidential* virtue.[203] Rozenshtein contends that "[e]xecutive-power law and scholarship must take into account each President's unique personal characteristics" because "certain character traits," which Rozenshtein refers to as "the executive virtues," inform a "proper understanding and functioning of Article II."[204] According to Rozenshtein, the "executive virtues" include "loyalty, honesty, responsibility, justice, inclusiveness, and judgment."[205]

As the above-mentioned scholarship demonstrates, moral arguments abound in administrative law—even if the philosophical underpinnings of those arguments are not always made explicit. The remainder of this Article will thus contribute to administrative law's growing focus on morality by demonstrating that virtue ethics can be both embraced (Part II)[206] and applied (Part III)[207] in the administrative law context.

II. EMBRACING VIRTUE ETHICS

Part I introduced virtue ethics by placing it alongside the deontological and consequentialists perspectives that have long shaped administrative law. In doing so, Part I went *broad*, and it demonstrated how deontology and consequentialism have influenced a wide range of judicial and Executive Branch practices. Part II will now seek to demonstrate that virtue ethics can be embraced by a wide range of scholars and jurists, regardless of their priors. To demonstrate as much, Part II will go *narrow*. In particular, Part II will focus narrowly on an issue that gets at the core of what "administrative" power is: the separation of powers.

The idea behind Part II's focus is that, by focusing on a specific issue that is so central to administrative law, Part II can split the atom, so to speak, and place nearly all scholars and jurists into one of the two broad camps. In the first camp are those who take a formalistic approach to the separation of powers. In the second camp are those who view the Constitution's separation of powers principles through a more functionalist lens.

A scholar's or jurist's association with either of the two camps can sometimes signal the scholar's or jurist's association with additional labels, such as originalism and judicial conservatism (often associated with formalism) and living constitutionalism and judicial progressivism (often associated with

203. Alan Rozenshtein, *The Virtuous Executive*, 108 MINN. L. REV. 605, 610 (2023) (discussing virtues that "limit[] the scope of presidential power").

204. *Id.* at 609–10.

205. *Id.* at 613.

206. *See infra* Part II.

207. *See infra* Part III.

functionalism).[208] But of course, a formalist need not be an originalist or conservative, nor a functionalist a living constitutionalist or progressive. And so, while these additional labels will be referenced occasionally as helpful mental landmarks that readers can use to orient themselves, the focus of Part II will remain on the formalist and functionalist understandings of the separation of powers. Nonetheless, the association that formalism and functionalism have with the additional labels serves to underscore further Part II's main contention, which is that virtue ethics has widespread appeal. Whether one is a formalist or a functionalist—and thus, by loose proxy, an originalist, living constitutionalist, conservative, or progressive—virtue ethics has insights to offer.

A. Formalism

One way to enforce the Constitution's separation-of-powers principles is to do so formalistically. "[T]he formalist insists that the structural provisions of the Constitution establish a set of rules—an 'instruction manual'—that must be followed whatever the consequences."[209] For this reason, "[t]he formalist" has been described as "adopt[ing] what amounts to a deontological theory of justification: separation of powers is a rule that must be followed because it is laid down in the Constitution and the Constitution is supreme law."[210] Put differently, the formalist maintains that "each of the three [federal] branches has exclusive authority to perform its assigned function, unless the Constitution itself permits an exception," which demonstrates a "rule-like understanding" of the separation of powers that "is obviously congenial to a deontological method of justification."[211]

Examining the formalist conception of the separation of powers thus offers yet another example of deontology's influence on administrative law. But Part II.A will not further dwell on deontology's influence on administrative law (that horse deserves some rest). Instead, Part II.A. will introduce a few examples of the formalist conception of the separation of powers and explain that although formalism is influenced by deontological theory, formalists can readily embrace virtue ethics. In short, formalists can embrace applying virtue ethics to the administrative state because administrative officials play a distinct role in American governance that formalists should see as presupposing virtue.

---

208. *See* Robert L. Glicksman & Richard E. Levy, *The New Separation of Powers Formalism and Administrative Adjudication*, 90 GEO. WASH. L. REV. 1088, 1091–92, 1103 (2022).

209. Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 230 (1992) (internal quotations and citation omitted); *see also* Ilan Wurman, *Nonexclusive Functions and Separation of Powers Law*, 107 MINN. L. REV. 735, 736 (2022).

210. Merrill, *supra* note 209, at 230.

211. *Id.* at 231–32, 235.

1. Examples of Formalism

Formalism is often associated with constitutional originalism, although a formalist need not be an originalist. Most originalists are committed to two core theses: one, the fixation thesis, which holds that a law's meaning is fixed at the time of enactment, and two, the constraint thesis, which holds that governmental behavior is constrained by that original meaning.[212] When applied to the administrative state, these two theses commit most originalists—at least most originalist formalists—to maintaining a rigid separation between the federal government's legislative, executive, and judicial powers, as those powers were understood at the time the Constitution was ratified.

Consider Professor Gary Lawson, an originalist formalist who concludes that "[t]he Constitution was designed specifically to prevent the emergence of the kinds of institutions that characterize the modern administrative state."[213] As Lawson describes it, the "architects of the modern administrative state fully understood" that "validating the administrative state required either a new constitution, . . . or a new theory of constitutionalism."[214] And he believes that dichotomy led to the development of "functionalism," i.e., the new theory of constitutionalism that Lawson critiques.[215] Using functionalism as his foil, Lawson calls for a rigid enforcement of the Constitution's separation-of-powers principles.[216] To be sure, he recognizes that the formalist need to "draw precise distinctions among legislative, executive, and judicial powers" can prove difficult.[217] But he thinks the Constitution's response to that complaint is simple: "Get over it."[218] Less colorfully, Lawson contends, because "[t]he Constitution separately identifies legislative power, executive power, and judicial power," interpreters must work to maintain a formal distinction between those powers, "however tough that might be."[219]

Consider also Justice Neil Gorsuch, another originalist formalist, who has written that the Framers' decision to separate the federal government's powers into three distinct branches was "one of [the Framers'] most important

212. Lawrence Solum, *Legal Theory Lexicon: The New Originalism*, LEGAL THEORY BLOG (June 5, 2022), https://lsolum.typepad.com/legaltheory/2022/06/legal-theory-lexicon-the-new-originalism.html.

213. Gary Lawson, *Burying the Constitution Under a TARP*, 33 HARV. J.L. & PUB. POL'Y 55, 55 (2010).

214. *Id.* at 56–57.

215. *Id.* at 57 ("[T]he administrative state has buried the Constitution beneath it.").

216. *See id.* at 60–61 n.28.

217. *Id.* at 62.

218. *Id.*

219. *Id.* (internal citations omitted).

contributions to human liberty."[220] Justice Gorsuch believes that any "mixing of what are supposed to be separated powers" can "undermine the rule of law and diminish liberty."[221] For example, when "the legislature delegate[s] its lawmaking powers to the executive," the law can develop "so quickly that no one [can] keep up with all the new restrictions."[222] Relatedly, when "the judicial branch arrogates to itself the legislative function of deciding what the law *should be*," the result is that "[t]he people are excluded from the lawmaking process" and are "replaced by a handful of unelected judges."[223] And to complete the triangle, Justice Gorsuch explains that when "the elected branches assume the judicial function . . . the people are left with politicized decisionmakers who will be tempted to pick winners and losers based less on the merits than on their current electoral popularity."[224] In sum, Justice Gorsuch concludes that "[h]owever you mix what are supposed to be separated powers, the threats to the rule of law and liberty are much the same."[225]

Of course, not all formalists are originalists. Consider, for example, Professor Phillip Hamburger. In *Is Administrative Law Unlawful?*, Hamburger offers a thorough critique of the way that legislative, executive, and judicial power has been consolidated in the modern administrative state.[226] In his critique, Hamburger "does not directly engage the originalism-versus-living-constitutionalism debate," nor does his thesis depend on a "particular theory of constitutional interpretation."[227] Nonetheless, Hamburger argues that the modern administrative state "is really just the most recent manifestation of a recurring problem"—that problem being the "consolidation . . . of power outside and above the law."[228]

Drawing on his background as a legal historian, Hamburger distinguishes the constitution's formal vesting of distinct powers with the more amorphous conception of "administrative" power, which Hamburger defines as the unique type of power that is exercised when "the executive makes binding

220. NEIL M. GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 40 (2019).

221. *Id.* at 43.

222. *Id.* at 43–44.

223. *Id.* at 44.

224. *Id.*

225. *Id.* at 45.

226. *See generally* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014) (noting the shift from governance through congressional legislation and federal judicial decisions to governance through executive "administrative action," which often takes a legislative or adjudicatory form).

227. Gary Lawson, *The Return of the King: The Unsavory Origins of Administrative Law*, 93 TEX. L. REV. 1521, 1529 (2015) [hereinafter Lawson, *The Return of the King*].

228. HAMBURGER, *supra* note 226, at 5–6.

edicts and thereby strays into legislative and judicial power."[229] Hamburger thus distinguishes himself from "[d]efenders" of the modern administrative state who "candidly acknowledge that [the administrative state's] consolidation of powers conflicts with the separation of powers."[230] For Hamburger, constitutionalism in general (and the U.S. Constitution in particular) seeks to maintain a formal separation of legislative, executive, and judicial powers because of the dangers that have been historically associated with consolidating different types of power into single sets of hands.[231]

2. Constitutional Distinctions and Presuppositions

Formalists may be hesitant to embrace virtue ethics on the grounds that their rigid understanding of the separation of powers leaves them unable to engage in moral argument—at least in the judicial context.[232] The formalist might maintain that engaging in moral argument is something akin to policymaking, which is the very sort of political conduct that an Article III jurist may not engage in. Other formalists might disagree, but for present purposes, the narrow point is that even if a formalist is not convinced that *judges* can look to morality to impose constraints on government actors, a formalist has reason to embrace *administrative officials* filtering their administrative discretion through some conception of morality. This is because agency officials and Article III judges play distinct roles in American governance.[233]

Under a formalist view, an Article III judge is tasked with exercising the federal government's judicial power, which is to say the judge is tasked with applying preexisting law to particular sets of facts. By comparison, the formalist—who must either (a) locate an administrative official within one of the three federal branches, or (b) conclude the official to be running afoul of the separation of powers—is likely to locate the administrative official within the

229. *Id.* at 3.

230. *Id.* at 325.

231. *Id.* at 344–45; *see also* Lawson, *The Return of the King*, *supra* note 227, at 1521.

232. This is particularly true for originalist formalists. *See* Lauren Eckenroth, *For Moral Readings of the Constitution and Against Originalisms*, THE RECORD, https://www.bu.edu/law/record/articles/2015/for-moral-readings-of-the-constitution-and-against-originalisms/ (last visited Aug. 11, 2024) (quoting James Fleming as stating that "[t]he only things originalists agree upon" is that "a moral reading is the wrong approach" to law interpretation); *see also* J. Joel Alicea, *The Moral Authority of Original Meaning*, 98 NOTRE DAME L. REV. 1, 10 (2022) (referring to originalists' "reluctance to make moral arguments").

233. *See* Alicea, *supra* note 232, at 52 ("The situations of the judge and the legislator in responding to conflicts between the original meaning and the natural law are, therefore, meaningfully different in the American system and should be considered separately.").

Executive Branch.[234] Given the formalist's commitment to maintaining a rigid separation of the three federal powers, the formalist must, therefore, understand any constitutional exercise of "administrative" power to, at least in most instances, be an exercise of *executive* power.

Now, Executive Branch officials exercise significant discretion—consider the federal prosecutor who decides against bringing charges on a sympathetic set of facts. The formalist can recognize administrative officials as exercising a similar type of discretion.[235] For example, the formalist can recognize the administrative official as exercising executive discretion when determining to promulgate a regulation codifying that *x* parts per million of a particular substance (rather than *y* parts per million of the substance) triggers a statutory prohibition regarding "unsafe" work environments.[236] Similarly, the formalist can recognize the administrative official as exercising executive discretion when the official decides not to issue a citation for every single violation of a codified regulation. And critically, the formalist can embrace those situations in which administrative officials, when exercising executive discretion, decide to channel their exercise of discretion through a particular moral lens.

In short, while a formalist might wish to conclude that an Article III judge is limited to interpreting the law without reference to moral considerations, a formalist can readily approve of a federal agency official who draws on a

234. *See, e.g.*, Chad Squitieri, *Is the Administrative State a "Faithful Development"?*, L. & LIBERTY (Jan. 9, 2023), https://lawliberty.org/is-the-administrative-state-a-faithful-development/ ("Administrative agencies, which fall within the executive branch if they are to fall anywhere at all, are thus poorly fed when they devour the legislative and judicial powers belonging to Congress and the judiciary."). Formalists might recognize some administrative officials as falling within the Judicial Branch, on the theory that the officials (like federal magistrate judges) do not exercise judicial power themselves, but instead assist Article III courts in doing so. *See, e.g.*, William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1554–55 (2020) (describing "adjuncts," officials who are not themselves "responsible for the exercise of judicial or executive power," but who participate in the adjudication process in a supportive capacity).

235. *See, e.g.*, Heckler v. Chaney, 470 U.S. 821, 832 (1985) ("[A]n agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'") (citation omitted); Mistretta v. United States, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting) (writing in the nondelegation context that "a certain degree of discretion, and thus of lawmaking, *inheres* in most executive . . . action").

236. *See, e.g.*, Occupational Exposure to Beryllium, 82 Fed. Reg. 2470 (Jan. 9, 2017) (Occupational Safety & Health Administration standard setting permissible exposure limits for beryllium).

moral framework when administering the law.[237] Even more strongly, a moral defense of formalism as applied to the U.S. constitutional system might *require* that, if Article III judges are prohibited from looking to morality to ensure consistency between morality and positive law, other government actors—whether it be Congress or agency officials—must be afforded more leeway to ensure that the broader U.S. constitutional system is not immoral overall.[238]

What moral framework should formalists prefer administrative officials use when bringing administrative law into existence? The Reagan Administration's initial adoption of cost-benefit analysis, followed by successive Administrations' allegiance to that structure, suggests that both formalists and functionalists alike have chosen to adopt consequentialism as the relevant moral framework to constrain administrative discretion. But virtue ethics offers an alternative option that formalists might find more enticing given that developing virtue within government officials is a key component of the Constitution's original design.[239]

As James Madison explained, "[r]epublican government *presupposes*" that there will be "sufficient *virtue* among men for self-government."[240] To conclude otherwise, Madison cautioned, would require giving up on the American experiment on the grounds "that nothing less than the chains of despotism c[ould] restrain" government officials "from destroying and devouring one another."[241]

Thankfully, the Framers took a chance on avoiding despotic regimes by establishing a tripartite system of government, within which virtuous individuals would exercise separated powers. While that tripartite system does seek to avoid "putting one person too much to the test too much of the time,"[242]

---

237. *See* Christopher J. Walker, *Legislating in the Shadows*, 165 U. PA. L. REV. 1377, 1380 (2017) (offering "support to the growing scholarly call that agencies should be allowed to engage in more purposivist interpretation (than their judicial counterparts)").

238. *See* Alicea, *supra* note 232, at 52, 55 (discussing originalism and noting that "if the Constitution provided *no realistic recourse* for correcting conflicts between the natural law and the original meaning" then the Constitution "would indeed be contrary to the natural law," but explaining further that such is not the case in the U.S. constitutional system because "[w]here there is a conflict between the natural law and a particular application of the Constitution, our system permits the political branches much more creativity and freedom in responding to the problem.").

239. Adam J. White, *Law's Attrition, Virtue's Abnegation*, YALE J. ON REGUL. (Dec. 5, 2018), https://www.yalejreg.com/nc/laws-attrition-virtues-abnegation/.

240. THE FEDERALIST NO. 55, at 346 (James Madison) (Clinton Rossiter ed., 1961) (emphases added).

241. *Id.*

242. Conversations with Bill Kristol, *William Baude: On the Supreme Court after Dobbs*,

the Constitution presumes that government officials can sometimes be called on to carry out their roles "on the honor system."[243] This is to say that, although the Constitution does *not* presume men to be angels, it *does* presume that government officials will be virtuous enough to resist the temptation to cheat at every available opportunity.[244] Government officials have a lot of discretion, and there will not always be another official from another branch looking over the official's shoulder. Given as much, "the Framers . . . recognized that . . . constitutional structure is not enough" to ensure good governance.[245] Instead, the "proper functioning" of government requires not just structure but also "the ceaseless reinforcement of . . . virtues."[246]

This sort of reliance on virtue might seem inconsistent with James Madison's familiar quip, hinted at above, which maintains that "[i]f men were angels, no government would be necessary."[247] But a few moments of careful thought reveal that there is no inconsistency. Start by considering what Madison says in the sentence immediately before his familiar quip about men and angels. In that preceding sentence, Madison asks: "But what is government itself, but the greatest of all reflections on human *nature*?"[248] Reading his two sentences together makes clear that Madison is drawing a distinction between angelic and human *nature*.[249]

What is the difference between angelic and human nature? St. Thomas Aquinas, who incorporated Aristotelian virtue ethics into Catholic thought, dedicated significant attention to that very difference (although, as previously noted, one need not adopt the theological commitments of the Thomistic perspective in order to work within the Aristotelian tradition more generally).[250] As Aquinas, who is frequently referred to as the "Angelic Doctor,"[251]

YOUTUBE (Sept. 29, 2022), https://www.youtube.com/watch?v=5ja668RDNMI, at 5:15–5:22.

243. *Id.* at 5:03.

244. *See* White, *supra* note 239 ("Publius's observations" concerning the difference between men and angels "were true, but they were not his entire truth. For the Framers, especially Publius, recognized that the constitutional structure is not enough, and that its proper functioning would require the ceaseless reinforcement of certain republican virtues.").

245. *Id.*

246. *Id.*

247. THE FEDERALIST NO. 51, at 320 (James Madison) (Clinton Rossiter ed., 1961).

248. *Id.* (emphasis added).

249. *See id.*

250. *Supra* Part I.C.

251. The Catholic Church honors certain saints by referring to them as "doctors" of the Church. Rev. Romanus Cessario, O.P., *The Three Titles of St. Thomas Aquinas*, THOMAS AQUINAS COLL. (Jan. 30, 2015), https://www.thomasaquinas.edu/news/fr-romanus-three-titles-st-thomas-aquinas. St. Thomas Aquinas is often referred to as the "Angelic Doctor"

informs: angels determine whether they will fulfill their *telos* in a single act,[252] whereas humans rely on the virtues to work that decision out more slowly over the course of their natural lives.[253] Given the single decision by angels to fulfill their *telos*, there may not be a need for a system of government that incorporates something like constitutional checks and balances—which would work to ensure that angelic officials did not, say, exhibit cowardice in the face of political dangers, or unjustly take more power than that allotted to them. Human officials, by comparison, will often face temptations on their journey toward their natural *telos*. It therefore makes sense to develop a system of government that limits the occasion for human officials to give in to the type of temptations that angels have presumably moved beyond. And yet, a constitutional system can only police human behavior to a certain degree. For the system to work, it must presume that human officials will have enough virtue to avoid giving in to the temptations that can be expected to present themselves on occasion—despite the Constitution's best structural efforts to limit those occasions.

This relationship between structure and virtue is consistent with Madison's broader thought.[254] Madison was elsewhere clear in warning that if there were "no virtue among us," then the country would be "in a wretched situation" because "[n]o theoretical checks, no form of government can render us secure."[255] Madison's defense of the Constitution's structure can therefore be understood as *presupposing* that the government officials operating within the Constitution's system would be government officials operating in accordance with virtue.[256]

Indeed, as Madison further explained, the Constitution seeks to accomplish a two-fold "aim."[257] First is "to obtain for rulers men who possess most wisdom to discern, and most **virtue** to pursue, the common good of the

---

because of the special attention he gave to discussing angels. *Id.; see also* BUDZISZEWSKI, *supra* note 160, at xxii (referring to the "Angelic Doctor").

252. *See* 1 THOMAS AQUINAS, SUMMA THEOLOGIAE I Q. 63 art. 5 ("[I]t is manifest that creation is instantaneous; so also is the movement of free-will in the angels; for, as has been already stated, they have no occasion for comparison or discursive reasoning . . . . Consequently, there is nothing to hinder the term of creation and of free-will from existing in the same instant.").

253. *See id.*

254. *See* James Madison, Remarks to the Virginia Convention (June 20. 1788), *in* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION 536–37 (Jonathan Elliot ed., 2d ed. 1836).

255. *Id.*

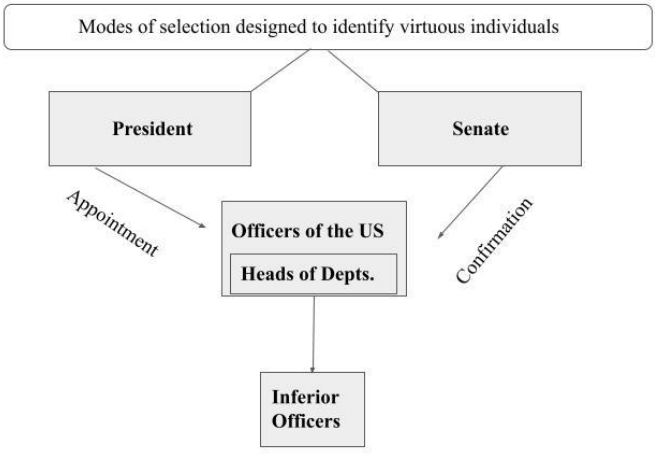
256. *Id.* at 537.

257. THE FEDERALIST NO. 57, at 350 (James Madison) (Clinton Rossiter ed., 1961).

society."[258] Second is "to take the most effectual precautions for keeping [those rulers] **virtuous**, whilst they continue to hold their public trust."[259] This Madisonian commitment to virtue can be observed in two codified sets of constitutional requirements. First are those requirements outlining the manner in which government officials are selected to hold office. Second are the requirements outlining the manner in which government officials are supervised once in office.

Consider first the requirements concerning how government officials are selected. The constitutional gatekeepers responsible for ensuring those requirements are depicted in **Figure 2**:

Figure 2



As **Figure 2** illustrates, the Constitution establishes a tiered system for selecting the individuals who are tasked with carrying government policy into effect.

The Constitution's tiered system for selecting government officials increases the likelihood that the government's business will be conducted by virtuous individuals. To see why, begin with the box at the top of **Figure 2**, which refers to the constitutionally required modes for selecting the President and Senators. These modes permit—indeed, seem to call out for—a focus on selecting *virtuous* individuals. As Madison wrote only a few days before the Constitutional Convention, one way to improve the republican form of government is to establish "a ***process of elections*** as will most certainly extract from the mass of the society the ***purest and noblest characters***

258. *Id.* (emphasis added).

259. *Id.* (emphasis added).

which it contains."[260] Such a process of elections, Madison continued in what can fairly be described as a teleological argument, would help ensure that the selected individuals "feel most strongly the proper motives to pursue ***the end*** of their appointment, and be most capable to devise the proper means of attaining it."[261] Put differently, officials should be selected in a manner that best ensures that they will have the characteristics (i.e., virtues) that enable them to pursue best the purpose (i.e., *telos*) of their office.[262] Such officials can thereby assist in pursuing the overall purpose (i.e., *telos*) of the federal government.

As to the President, the Framers codified into the Constitution a method of electing the President via an "intermediate body of electors,"[263] i.e., the Electoral College.[264] As Alexander Hamilton explained, this "process of election affords a moral certainty that the office of President will seldom fall to the lot of any man who is not in an eminent degree endowed with the requisite qualifications" to serve within "the distinguished office of President of the United States."[265] It was because of the protections offered by the Electoral College that Hamilton predicted that the Office of the President would be "filled by characters pre-eminent for ability and ***virtue***."[266] John Jay came to a similar conclusion.[267]

As to the Senate, the Constitution requires Senators to satisfy heightened eligibility requirements. Senators must be "thirty years" old (members of the House need only be twenty-five) and be a "citizen of the United States" for at least "nine years" (members of the House need only be citizens for seven years).[268] Madison explained that "these distinctions" between the House and Senate eligibility requirements were "explained by the nature of the senatorial trust, which, requiring greater extent of information and stability of ***character***, requires at the same time that the senator should have reached

260. James Madison, *Vices of the Political System of the U. States* (Apr. 1787) (unpublished manuscript), *reprinted in* 2 THE WRITINGS OF JAMES MADISON 361, 369 (Gaillard Hunt ed., 1901).

261. *Id.* (emphases added).

262. *Id.*

263. THE FEDERALIST NO. 68, at 412 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

264. U.S. CONST. art. II, § 1 (outlining the methods of electing the President).

265. THE FEDERALIST NO. 68, at 414 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

266. *Id.* (emphasis added).

267. THE FEDERALIST NO. 64, at 391 (John Jay) (Clinton Rossiter ed., 1961) ("As the select assemblies for choosing the President . . . will in general be composed of the most enlightened and respectable citizens, there is reason to presume that their attention and their votes will be directed to those men only who have become the most distinguished by their abilities and virtue . . . .").

268. U.S. CONST. art. I, § 2, CL. 2; U.S. CONST. art. I, § 3, CL. 3.

a period of life most likely to supply these advantages."[269] Jay similarly concluded that the Senate would be staffed by those who "have become the most distinguished by their abilities and ***virtue***."[270] In short, the Constitution provides for modes of election that seek to fill the Office of the President and the Senate with virtuous individuals.

The Constitution, having required modes of selection designed to fill the Office of the President and the Senate with virtuous individuals, goes on to empower the President and Senate to appoint and confirm "Officers of the United States."[271] By placing the appointment and confirmation powers in a presumably virtuous President and Senate, the Constitution increases the chances that "Officers of the United States" will themselves be virtuous. What's more, and as depicted in **Figure 2**, the Constitution further establishes that a subset of the "Officers of the United States" (which the Constitution refers to as "Heads of Departments") can be empowered by law to appoint the "inferior officers" that carry out much of the federal government's daily business—including much of the business that is today handled by administrative agencies.[272] Because the Constitution is structured to increase the chances that the "Heads of Departments" are virtuous, there is an increased chance that the "inferior officers," too, would be selected with an eye toward their virtue.[273] In sum, the Constitution establishes a tiered scheme for staffing the federal government, and this tiered system increases the chances that the federal government will be staffed by virtuous individuals from top to bottom.

Let's pause here to consider the obvious counterpoint: the Constitution's means of staffing the federal government is not *sure* to result in a federal bureaucracy filled with virtuous individuals. There have no doubt been Presidents and Senators who have, at least on an occasion or two, acted more consistently with vice than virtue. And even if the Constitution were somehow able to ensure that virtuous individuals *always* fill the Office of the President and the Senate, it does not follow that those virtuous officials *must* appoint and confirm virtuous "Officers of the United States." Nor would it

269. THE FEDERALIST NO. 62, at 376 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added).

270. *See* THE FEDERALIST NO. 64, at 391 (John Jay) (Clinton Rossiter ed., 1961) (referring to both the President and Senators).

271. U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate . . . [to] appoint . . . Officers of the United States").

272. U.S. CONST. art. II, § 2, cl. 2; *see also* Freytag v. Comm'r, 501 U.S. 868, 920 (1991) (Scalia, J., concurring in part and concurring in the judgment) (deducing that Heads of Departments are "principal officers [who] could be permitted by law to appoint their subordinates").

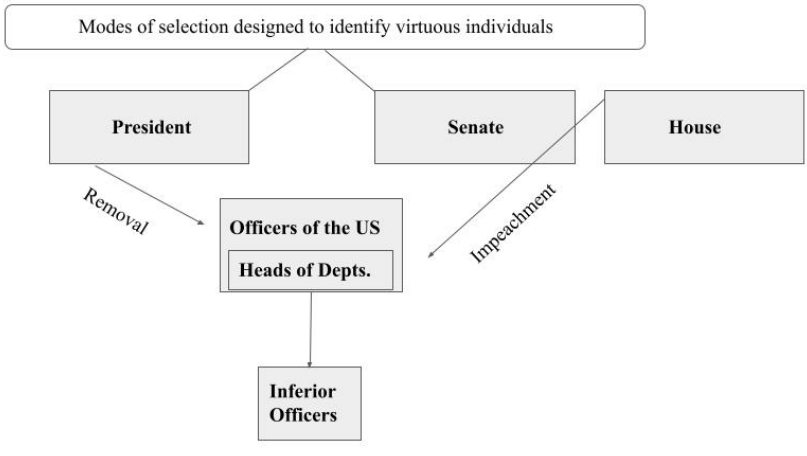
273. U.S. CONST. art. II, § 2, cl. 2.

necessarily follow that the "Heads of Departments" *must* select virtuous "inferior officers." In short, the Constitution does not *ensure* that federal agency officials will be virtuous.

Nonetheless, the Constitution certainly works to increase the chances that the federal government will be staffed by virtuous individuals. The Constitution's structure is thus entirely consistent with a virtue ethics framework—which would counsel in favor of filling the Office of the President and Senate with virtuous individuals who can be trusted to staff the government with individuals of similar character, even if there are no iron-clad guarantees that Presidents and Senators will always exercise their appointment and confirmation powers virtuously.

Consider next how agency officials are supervised, which offers "precautions for keeping [government officials] **virtuous** whilst they continue to hold their public trust."[274] As **Figure 3** demonstrates, the Constitution's chosen means of supervision increase the likelihood that government officials will act in accordance with virtue after they are placed into office:

Figure 3



As **Figure 3** illustrates, the President—as the head of the Executive Branch—oversees the work of the Officers of the United States who staff Executive Branch agencies. Those Officers of the United States then, in turn, supervise the work of Inferior Officers. Should the President conclude that an individual working within an Executive Branch agency does not contain sufficient virtue to effectuate their duties, the President has the authority (absent putative limitations, such as good-cause removal protections or a purporting to make an agency "independent" of the Executive Branch) to

274. THE FEDERALIST NO. 57, at 350 (James Madison) (Clinton Rossiter ed., 1961).

remove that individual from office.[275]

As also illustrated in **Figure 3**, the Senate can supervise Officers of the United States by exercising its impeachment power. And because the Senate is (hopefully) staffed by virtuous individuals, it can be presumed that Senators will exercise their impeachment authority by considering an impeached officer's character instead of unadulterated political passion.

To be sure, the Constitution vests the House with the "sole Power of Impeachment"[276] and the Senate with "the sole Power to try all Impeachments."[277] Thus, the House—the federal body closest to the people—is charged with accusing an officer of wrongdoing. But it is the more levelheaded (and more politically insulated) Senate that is trusted to stand "between an individual accused and the representatives of the people, his accusers."[278] As Hamilton asked, "[w]here else than in the Senate could have been found a tribunal sufficiently dignified" that it could be trusted with the power of trying impeachments?[279]

* * *

In sum, formalists, who call for a rigid application of the Constitution's separation-of-powers principles, can readily embrace applying virtue ethics to the administrative state. Although formalists might be hesitant to permit federal *judges* to incorporate moral arguments into their decisionmaking processes, administrative officials—whom formalists recognize as exercising executive discretion—are constitutionally distinct. Virtue ethics, consistent with the original Constitution's presumptions, offers formalists an attractive and readymade lens through which administrative discretion can be channeled.

---

275. *See* THE FEDERALIST No. 72, at 436 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The persons, therefore, to whose immediate management these different matters are committed ought to be considered as the assistants or deputies of the Chief Magistrate, and on this account they ought to derive their offices from his appointment, at least from his nomination, and ought to be subject to his superintendence.").

276. U.S. CONST. art. I, § 2, cl. 5.

277. U.S. CONST. art. I, § 3, cl. 6.

278. THE FEDERALIST No. 65, at 398 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphases removed).

279. *Id.* (President George Washington saw the relationship between the Senate and House in similar terms); *See Senate Created*, U.S. SENATE, https://www.senate.gov/artandhistory/history/minute/Senate_Created.htm ("Washington is said to have told [Thomas] Jefferson that the framers had created the Senate to 'cool' House legislation just as a saucer was used to cool hot tea.").

B. Functionalism

In contrast to formalists, functionalists view the Constitution's separation-of-powers principles in less rigid terms. Functionalists hold "that structural disputes should be resolved not in terms of fixed rules but rather in light of an evolving standard designed to advance the ultimate purposes of a system of separation of powers."[280] For this reason, "the functional approach" can be understood as "adopt[ing] a consequentialist theory of justification" because the functionalist's "task . . . is to judge institutional arrangements in terms of their contribution toward attaining certain ends."[281]

Like formalism's relationship with deontology, functionalism's relationship with consequentialism offers another example of moral philosophy's influence on modern administrative law. But this additional influence of consequentialism in administrative law will not now be stressed. Instead, Part II.B will offer a few examples of the functionalist conception of the separation of powers and explain that, although functionalism may be influenced by consequentialism, functionalists can readily embrace virtue ethics.

The ability of functionalists to embrace virtue ethics stems from the fact that functionalists *already* contend that their conception of the separation of powers should be paired with a requirement that administrative officials exercise administrative power in accordance with the officials' professional expertise. And that technocratic focus on administrative officials' professional expertise opens the door for functionalists to consider officials' character (i.e., virtue) more generally.

1. Examples of Functionalism

Modern administrative agencies wield enormous power. For many functionalists, this is a benefit of the administrative state, not a bug. These theorists contend that because powerful private entities exercise consolidated power in ways that can be detrimental to society, the federal government must counterbalance those powerful private interests by consolidating government power into administrative agencies.[282]

---

280. Merrill, *supra* note 209, at 231.

281. *Id.*

282. *See, e.g.*, K. Sabeel Rahman, *The Democratic Political Economy of Administrative Law*, THE L. & POL. ECON. PROJECT (Sept. 5, 2019), https://lpeproject.org/blog/the-democratic-political-economy-of-administrative-law/ (arguing that "the Chamber of Commerce and business interests seized upon Milton Friedman's arguments about markets and the rise of public choice theory to dismantle New Deal era restraints on corporate power," and proposing that "we . . . (re)build administrative institutions as a key technology of democratic inclusion") (emphasis removed); WOODROW WILSON, THE NEW FREEDOM (Doubleday, Page & Co., 1913)

Of course, a successful consolidation of power into administrative agencies can only be accomplished if one is willing to apply the Constitution's separation-of-powers principles with less rigor than a formalist would. In light of these relaxed principles, how does the functionalist ensure that administrative officials do not abuse the consolidated power they are entrusted with? One common proposal is to insulate administrative officials from politics so that they can better make decisions in accordance with professional expertise.[283] The thinking behind that proposal, which "has been around at least since the beginnings of the Progressive Era," is that political "independence . . . promote[s] disinterested professionalism (because a group of tenured officials will presumably be less vulnerable to special-interest and presidential influence)."[284]

Many functionalists are "living constitutionalists," which is to say they maintain that the Constitution does not "rest[] . . . in any static meaning it might have had in a world that is dead and gone, but" instead outlines "great principles" that can be "adapt[ed] . . . to cope with current problems and current needs."[285] Under a living constitutionalism framework, the Constitution's original conception of separation of powers can be adapted and reapplied *within* agencies themselves. For example, by insulating administrative law judges from the President's political control (in a way that mimics how Article III judges are insulated from the President and Congress), administrative law judges can better adjudicate cases in accordance with their professional expertise.[286]

[hereinafter THE NEW FREEDOM] (describing the need for government adapt in order to respond to new forms of business structures).

283. GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 10 (9th ed. 2021) (referring to the "Progressive vision of impartial professional administration").

284. *Id.* at 9.

285. William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 438 (1986). Although "[t]here is no canonical statement of the living constitutionalist position," Justice Brennan offers an "influential, albeit very general, articulation of the living constitutionalist view." Ernest A. Young, *Dying Constitutionalism and the Fourteenth Amendment*, 102 MARQ. L. REV. 949, 950 (2019); *see also* Lawrence Solum, *Legal Theory Lexicon: Living Constitutionalism*, LEGAL THEORY BLOG (Nov. 25, 2018) https://lsolum.typepad.com/legaltheory/2018/11/legal-theory-lexicon-living-constitutionalism.html (defining living constitutionalism as "the view that the legal content of constitutional doctrine does and should change in response to changing circumstances and values").

286. *See, e.g.*, Richard E. Levy & Robert L. Glicksman, *Restoring ALJ Independence*, 105 MINN. L. REV. 39, 44–45 (2020) (arguing in favor of "establish[ing] an independent corps of federal [administrative law judges], who would no longer be officers of the agencies that employ them," which would enable the administrative law judges to "continue to specialize in cases for particular agencies so as to promote specialized expertise").

As one example of this view, consider President Wilson. Wilson, who was a founder of the modern administrative state, contended that the Constitution should be interpreted as a "living constitution."[287] Writing in 1913, he argued that "laws" must be continually "adjusted . . . to the facts" of the present age.[288] At the dawn of the twentieth century, this meant abandoning an original understanding of the Constitution's separation-of-powers principles in order to better address the complex issues of the day—which included concentrations of power in monopolistic businesses.[289] To advance his argument, Wilson analogized to the scientific work of Isaac Newton and Charles Darwin.[290] While Wilson believed that "the Constitution of the United States had been made under the dominion of the Newtonian Theory,"[291] Wilson thought it would be better to rearrange the federal government so that it was responsive to the laws of "Darwin, not . . . Newton."[292]

As Wilson saw it, the Constitution was designed originally so that "Congress, the Judiciary, and the President" would interact with one another's gravitational forces "as a sort of imitation of the solar system."[293] And it was because "[t]he Constitution was founded on the law of gravitation" of the sort described by Newton that the Framers "constructed a government as they would have constructed an orrery."[294] But in Wilson's view, modern government was better understood as a "living thing," which was to be governed not by the Newtonian "theory of the universe, but under the [Darwinian] theory of organic life."[295] Wilson thus argued that "[n]o living thing" could "have its organs offset against each other."[296] "On the contrary," a living thing's "life is dependent upon . . . quick co-operation" of its

287. David Eisenberg, *The Living Constitution's Illimitable Government*, L. & LIBERTY (Nov. 22, 2021), https://lawliberty.org/the-living-constitutions-illimitable-government/ (describing the views of President Wilson).

288. THE NEW FREEDOM, *supra* note 282, at 13.

289. *Id.* at 35–35 ("Business is in a situation in America which it was never in before; it is in a situation to which we have not adjusted our laws. Our laws are still meant for business done by individuals; they have not been satisfactorily adjusted to business done by great combinations, and we have got to adjust them.").

290. *Id.* at 47 ("The trouble with the theory is that government is not a machine, but a living thing. It falls, not under the theory of the universe, but under the theory of organic life. It is accountable to Darwin, not to Newton.").

291. *Id.* at 45.

292. *Id.* at 47.

293. *Id.* at 46.

294. *Id.* at 46–47.

295. *Id.* at 47.

296. *Id.*

component parts.[297] Thus, because "[l]iving political constitutions must be Darwinian in structure and in practice," Wilson concluded that the Constitution's initial system of checks and balances—which pitted three distinct federal branches against one another—should be abandoned.[298] In its place would be administrative agencies that combined all three powers of the federal government.[299]

A generation later, functionalist proponents of administrative power in the New Deal Era were, like Wilson, quite open about their desire to relax the Constitution's separation-of-powers principles. Consider James Landis, one of President Roosevelt's chief architects for shaping the New Deal's administrative apparatus.[300] Landis observed that "the administrative process springs from the *inadequacy* of a simple tripartite form of government to deal with modern problems."[301]

For Landis, the Constitution's rigid separation of legislative, executive, and judicial power resulted in an inefficient federal government that was unfit for the modern age.[302] To make government more efficient, the federal government's legislative, executive, and judicial power had to be consolidated into single entities.[303] Those single entities would be administrative agencies "[e]ntrusted" with the authority to develop "administrative law" by engaging in "[r]ule-making, enforcement, and the disposition of competing claims."[304]

In other words, functionalists like Landis understand "administrative" power as a consolidation of legislative ("[r]ule-making"), executive ("enforcement"), and judicial ("disposition of competing claims") powers.[305] Formalists like Hamburger would seem to agree with that definition of "administrative" power.[306] But while formalists maintain that such consolidated power

297. *Id.* at 48.

298. *Id.* at 45–48.

299. *See id.* at 48.

300. Ronald J. Pestritto, *The Progressive Origins of the Administrative State: Wilson, Goodnow, and Landis*, 24 SOC. PHIL. & POL'Y 16, 25 (2007), https://www.researchgate.net/publication/231960174_The_Progressive_Origins_of_the_Administrative_State_Wilson_Goodnow_and_Landis ("[T]he *animating ideas* behind the growth of the administrative state" is the "separation of politics and administration," which was championed by "James Landis, the New Deal architect of the administrative state" for President Franklin Roosevelt.).

301. JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 1 (1938) (emphasis added).

302. *Id.* (referring to "modern needs" from which the "administrative process" sprung).

303. *See id.* at 2.

304. *Id.*

305. *Id.*

306. *See* HAMBURGER, *supra* note 226, at 3. *But see* Emily S. Bremer, *Power Corrupts*, 41 YALE J. ON REGUL. (forthcoming 2024) (manuscript at 11–12),

is unconstitutional (requiring formalists to strip administrative officials' power down, through tools such as the nondelegation doctrine,[307] to exercises of executive power alone), functionalists believe that consolidated power is a critical aspect of modern government that need not fit entirely within any one of the federal government's three branches.

As the above-quoted selections from Wilson and Landis demonstrate, functionalists are often clear in explaining their desire to relax the Constitution's rigid separation-of-powers principles.[308] But for functionalists, relaxing those principles is only the first of two important steps. The second step is to develop substitute safeguards that can alleviate the risk that administrative officials would misuse the consolidated power that they are entrusted to wield. As Wilson put it, "[i]f we are to put in new boilers and to mend the fires which drive our governmental machinery, we must not leave the old wheels and joints and valves and bands to creak and buzz and clatter."[309] Instead, "[w]e must put in new running parts."[310]

One of the new "running parts," to use Wilson's terminology, is the development of a politically insulated and "technically schooled civil service" that would prove "indispensable" to the reimagined federal government.[311] According to Wilson, such civil servants are to receive "special schooling" and are to be "drilled, after appointment, into a perfected organization" that exercises "characteristic discipline."[312]

Like Wilson, Landis thought it "importan[t]" to "mak[e] the administrative agency independent" from political controls so that administrators could develop the type of "professionalism" that is slowly developed from an administrator's daily work.[313] Indeed, Landis warned that through "a judicious selection of personnel, discrimination in promotions, a shifting of responsibilities,"[314] politically accountable agency heads could interfere with a civil

---

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4375200 (referring to "the dominant understanding in the New Deal era that administrative action was, by definition, exclusively quasi-legislative and quasi-judicial and fundamentally *not* executive") (emphasis in original).

307. Chad Squitieri, *Who Determines Majorness?*, 44 HARV. J.L. & PUB. POL'Y 463, 469 (2021) [hereinafter *Who Determines Majorness?*] ("[T]he nondelegation doctrine prohibits Congress from delegating its legislative powers to other entities, such as administrative agencies.").

308. THE NEW FREEDOM, *supra* note 282, at 45–48; Landis, *supra* note 301, at 1–2.

309. Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 216 (1887) [hereinafter *The Study of Administration*].

310. *Id.*

311. *Id.*

312. *Id.* As Wilson elaborated, "[s]teady, hearty allegiance to the policy of the government [the civil servants] serve will constitute good behavior." *Id.*

313. LANDIS, *supra* note 301, at 113–14.

314. *Id.* at 114.

servant's "professional approach to . . . regulatory problems."[315] Administrative professionals could therefore "[a]ct[] as a check that substitutes for the obsolete checks of the Madisonian separation of powers."[316] Put differently, "even if the administrative state has slipped off the traditional constraints of the separation of powers," the requirement that administrators act with "professionalism" could serve as a "substitute safeguard[]" that acts as a "constraint[] against official abuses."[317]

Modern scholars, like Wilson and Landis, have argued in favor of developing a professionalized class of civil servants insulated from presidential politics. Indeed, as one scholar put it, one of "the elements that have made" the President's political control over administrative decisionmaking "acceptable . . . to much of the academic community" is "the commitment[] . . . to a professionalized, unusually transparent and apolitical administration."[318]

Consider Neal Katyal, who contends that because the modern "executive . . . subsumes much of the tripartite structure of government," the Constitution's original "concept[ion] of 'legislature v[ersus] executive checks' and balances must be *updated* to contemplate second-best 'executive v[ersus] executive' divisions."[319] Channeling Wilson and Landis, Katyal suggests that

---

315. *Id.* at 115.

316. Adrian Vermeule, *Bureaucracy and Distrust: Landis, Jaffe, and Kagan on the Administrative State*, 130 HARV. L. REV. 2463, 2471 (2017):

> For Landis, ultimately, the independent administrative tribunal is a qualified good. Writing against a backdrop of traditionalist criticism, based on a Madisonian conception of tripartite separated powers, his main concern is of course to establish that such tribunals have a legitimate title to existence, and that their combination of legislative, executive, and adjudicative functions, however shocking to the traditional mind, serves valuable institutional purposes. But the independent tribunal is limited in many ways under Landis's own conception. It is limited by its ultimate purpose of counterbalancing presidential power; by professional norms within expert communities; and by an open-ended, multifarious array of other institutional considerations that Landis details, among them information, coordination costs, and institutional energy or activity levels. Independence, rightly understood, becomes one good among others, to be limited and traded off in the service of a well-functioning scheme of administrative institutions.

See also Id. at 2472.

317. Adrian Vermeule, *Same Old, Same Old*, NEW REPUBLIC (Feb. 22, 2012), https://newrepublic.com/article/100987/richard-epstein-design-liberty-private-property-law; *see also Id.* ("Prominent among the substitute safeguards identified by Landis were professionalism and expertise").

318. Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 737 (2007); *Id.* at 756 ("[T]he professional civil service within any particular agency serves as an anchor against the influence of raw politics in the exercise of delegated responsibilities").

319. Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch*

one of the "second-best executive v[ersus] executive divisions" is "a system of experienced professionals who feel that they can challenge political decision-making" of the President because they are part of a "civil service" that is "not beholden to any particular administration."[320] Because these professionalized civil servants "have longer time horizons" than the President, they can act as an internal check against a President's short-term incentives.[321] In sum, Katyal argues that civil servants are "situated to protect . . . the nation's long-term interests" against the political passions of the day.[322]

Sunstein offers a similar argument, which stresses administrative officials' ability to make decisions based on their substantive expertise rather than presidential politics. As Sunstein observes, the administrative state is made up of "numerous specialists, many of whom have spent years or even decades engaged in concentrated work on particular subjects."[323] Although these specialists "work for political appointees, . . . they are not themselves political."[324] For Sunstein, then, these agency specialists are among the "most knowledgeable" officials in government.[325] He thus concludes that the President's reliance on a professionalized set of apolitical experts serves as "a central and insufficiently appreciated aspect of the *real world* of checks and balances."[326] And although the "informational advantage" of this "real world of checks and balances" "could not easily have been anticipated by the founding generation," the information advantage favoring the apolitical administrative professionals "continues to grow every year."[327]

As another example, consider Emerson, who proposes "a Progressive theory of the administrative state" that draws upon the work of "American Progressives like . . . Woodrow Wilson . . . who first advocated expansive national regulatory power in the United States."[328] Emerson's Progressive theory of the administrative state "incorporates" a Landisian focus on professionalism but "situates" that theory within a Progressive "concept[ion] of the state," pursuant to which "[a]dministrative agencies play a pivotal

from Within, 115 YALE L. J. 2314, 2316 (2006) (internal quotations omitted) (emphasis added).

320. *Id.* at 2316–17, 2332.

321. *Id.* at 2345.

322. *Id.* at 2317, 2345.

323. Cass R. Sunstein, *The Most Knowledgeable Branch*, 164 U. PA. L. REV. 1607, 1609 (2016).

324. *Id.*

325. *Id.* at 1608.

326. *Id.* at 1648 (emphasis added).

327. *Id.* at 1608, 1648.

328. Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2025 (2018).

role."[329] In defending his Progressive theory of the administrative state, Emerson explains how his theory "comports with significant aspects of current administrative law," such as those recognizing that "administrative agencies . . . institutionalize an *internal* separation of powers."[330]

Functionalist jurists have also exhibited a belief that administrative officials, who are both insulated from presidential politics and instilled with a sense of professionalism, can be entrusted to wield administrative power. In *Free Enterprise Fund v. Public Company Accounting Oversight Board (PCAOB)*,[331] for example, Justice Breyer explained in a dissenting opinion that the accounting board members in question were "technical professional experts" whose work required them to be insulated from "political influence[s]."[332] In defending his view that the administrative professionals at issue should be permitted to operate free from the President's removal authority, Justice Breyer cited Wilson and the "need for insulat[ing]" administrative professionals "from political influences."[333] Moreover, Justice Breyer explained that "the need for administrators with 'technical competence,' 'apolitical expertise,' and skill in 'scientific management' led to the original creation of independent agencies"—entities that can only exist in a world of relaxed separation-of-powers principles.[334] Justice Breyer's analysis in *Free Enterprise* was consistent with his larger body of work, within which he has "urged that professional administrators [should] . . . take center stage in regulatory policymaking, . . . with support from a more sophisticated variant of Landis's defense of technocratic values."[335]

Finally, consider Justice Kagan. As an academic, then-Professor Kagan was perhaps best known for her work describing "the presidentialization of administration," which she identified as "the emergence of increased presidential control over administration."[336] But even in advancing her argument that enhanced presidential supervision of agency action was something that could be embraced, then-Professor Kagan conceded that the President should "hesitat[e] both in acknowledging and asserting presidential authority in areas of administration in which professional knowledge has a particularly

329. *Id.* at 2026–27 (citing LANDIS, *supra* note 301, at 23–24).

330. *Id.* at 2080 (emphasis added).

331. 561 U.S. 477 (2010).

332. *Id.* at 531 (Breyer, J., dissenting).

333. *Id.* (citing Woodrow Wilson, *Democracy and Efficiency*, 87 ATL. MONTHLY 289, 299 (1901)).

334. *Id.* (internal quotations and citations omitted).

335. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2262 (2001).

336. *Id.* at 2252–53.

significant and needed function."[337]

On the Supreme Court, Justice Kagan has counseled against adopting a formalist conception—or, to use her words, a "Schoolhouse Rock" conception—of the separation of powers.[338] She believes the formalist conception of the separation of powers to be too "rigid."[339] She further contends that Congress should be able to "create zones of administrative independence," and thus be given "wide leeway to limit the President's removal power in the interest of enhancing independence from politics in regulatory bodies."[340] To defend that view, Justice Kagan has turned to history, explaining that as "the decades and centuries passed" from the Constitution's ratification, Congress has "[c]onfront[ed] new economic, technological, and social conditions" that have triggered "new needs for pockets of independence within the federal bureaucracy."[341] In light of those evolving needs, "Congress decided that effective governance depended on shielding technical or expertise-based functions . . . from political pressure," and Justice Kagan does not believe it to be the role of courts to second-guess such decisions.[342] In short, Justice Kagan believes that a rigid application of a "civics class version of separation of powers" fails to account for those instances in which government decisionmaking is best handled by professionalized experts who are insulated from at least some political pressures.[343]

2. Making Room for Character More Generally

As illustrated in Part II.A.1 above, functionalists have sought to remedy the dangers posed by concentrating power in administrative officials by arguing in favor of instilling administrative officials with a sense of professional expertise. By drawing upon their professional expertise in an environment of reduced political pressure, administrative officials can be entrusted to exercise government power for the public good—at least, that is the theory.[344]

---

337. *Id.* at 2356.

338. Seila L. LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 264 (2020) (Kagan, J., concurring in part).

339. *Id.*

340. *Id.* at 2224, 2226.

341. *Id.* at 2231.

342. *Id.*

343. *Id.* at 2226.

344. Whether the Wilsonian theory truly a workable theory that could *ever* be put into practice is less clear. *See, e.g.*, Catholic Intellectual Tradition (CIT), *Practical Reason and the Administrative State*, YOUTUBE (Oct. 26, 2023), https://www.youtube.com/watch?v=GEWCk6QXA6A, at 26:14 (Professor Daniel E. Burns arguing that "the problem with the Wilsonian theory" is that it enables administrators to make

Whether that theory is correct is immaterial for present purposes. Instead, the narrow point is simply that agency officials' *character* is a central feature of functionalists' defense of the modern administrative state. Put more concretely, it is the professionalized administrator, and not the politico, who the functionalist contends should be trusted to exercise consolidated power in the public's interest. Virtue ethics, which focuses on character (i.e., virtue) more generally, thus offers a philosophical framework that functionalists can readily incorporate into their existing understanding of administrative law.

Because functionalists already rely on character in their defense of the modern administrative state, incorporating virtue ethics into that defense is relatively straightforward. But this is not to say that functionalists' incorporation of virtue ethics would be without friction. That is because functionalists currently focus rather narrowly on what Aristotle might understand as *technē*, which relates to a form of technical knowledge.[345] To focus more broadly on virtue, functionalists must move beyond their narrow focus on developing what might be called "*technē*-crats," and focus instead on developing administrators instilled with the virtues—including the virtue of prudence, which would assist administrators in determining how their particular skillset relates to the federal government's broader purpose, or *telos*.[346] Put differently, although a skilled *technē*-crat might know how to best engineer an energy plant to achieve environmental benefits, it is the *prudent* administrator who knows how such technical skillset fits within society's broader efforts to pursue the common good. And so, while each separate *technē*-crat might think that their preferred tool is the best tool for the job, it is the prudent administrator who knows when each tool is called for.

Despite the need to focus on virtues rather than *techne* alone, functionalists' existing focus on the latter offers a blueprint for instilling virtue in modern administrators. For example, consider the similarity between one, Wilson's plan to develop a "perfected" and "discipline[d]" set of civil servants through "special schooling" and "drill[ing],"[347] and two, Aristotle's instruction concerning the development of virtue. As noted in Part I.C. above, Aristotle explained that the intellectual virtues could be developed through teaching,[348] which would no doubt include the type of "special schooling" proposed by Wilson.[349] Further, Aristotle explained that moral virtue had to be

---

value-laden decisions but to "hide this fact from others and even from themselves").

345. ARISTOTLE'S NICOMACHEAN ETHICS, *supra* note 23, at 305 (defining *technē*).

346. ARISTOTLE'S NICOMACHEAN ETHICS, *supra* note 23, at 319.

347. *The Study of Administration*, *supra* note 309, at 216.

348. *Supra* Part I (citing ARISTOTLE'S NICOMACHEAN ETHICS, *supra* note 23, at 26).

349. *The Study of Administration*, *supra* note 309, at 216.

perfected through habit,[350] which could no doubt be developed through regular "drill[ing]" of the type envisioned by Wilson.[351] This similarity between Wilson and Aristotle demonstrates that a focus on instilling administrative officials with a sense of technocratic professionalism could be complemented by a focus on instilling virtue more generally.

In short, functionalists can embrace virtue ethics on the grounds that a *professional* agency official is not just a technically skilled expert, but a *virtuous* official. To be sure, a functionalist might contend that, while a narrow focus on professional expertise is appropriate, an examination of an administrative official's other character traits (such as the official's prudence and justness) is inappropriate. But defending that argument would require the functionalist to at least first consider virtue ethics' insights before deciding to reject the several thousand years of thought behind the philosophical perspective. To assist in that consideration, Part III will explore what a virtuous administrative official might look like in practice.

III. APPLYING VIRTUE ETHICS

Part I of this Article introduced virtue ethics as a philosophical perspective that stands as an alternative to the deontological and consequentialist perspectives that already shape administrative law. Part II then explained how virtue ethics can be embraced by a wide range of scholars and jurists. Part III will now begin the task of incorporating virtue ethics' insights into administrative law. To do so, Part III will consider how a virtuous agency official might act in accordance with what are commonly referred to as the four cardinal virtues—i.e., prudence, temperance, justice, and courage.[352]

Why focus on the four cardinal virtues? Well, the term "cardinal" is derived from the Latin *cardo*, or "hinge," which designates the centrality of the four virtues upon "which swing the gates of life."[353] Writing in Greek, Aristotle offers twelve virtues in his *Nicomachean Ethics*—an organizational point that has been critiqued on the grounds that it leaves readers "wondering why

350. ARISTOTLE'S NICOMACHEAN ETHICS, *supra* note 23, at 26; Nafsika Athanassoulis, *Virtue Ethics*, INTERNET ENCYC. OF PHIL., https://iep.utm.edu/virtue/ (last visited Aug. 11, 2024) ("Our natural tendencies, the raw material we are born with, are shaped and developed through a long and gradual process of education and habituation.").

351. *The Study of Administration*, *supra* note 309, at 216.

352. *See, e.g.*, R. George Wright, *Constitutional Cases and the Four Cardinal Virtues*, 60 CLEV. ST. L. REV. 195, 196 (2012) (referring to the "Four Cardinal Virtues").

353. JOSEF PIEPER, THE FOUR CARDINAL VIRTUES 145 (Univ. of Notre Dame, 1st ed., Harcourt, Brace & World, Inc. 1965) (1966) [hereinafter THE FOUR CARDINAL VIRTUES]; *cardinal (adj.)*, ONLINE ETYMOLOGY DICTIONARY, https://www.etymonline.com/word/cardinal (last updated Nov. 8, 2022) (explaining the etymology of *cardo*).

[Aristotle] lists just these virtues and not others."[354] But as Aristotle's Greek was translated into Latin, thinkers working within the Aristotelian tradition (such as Aquinas) were quick to recognize that *all* moral virtues can be traced to one of the four *cardo* virtues.[355] These four virtues thus serve as a natural starting point for incorporating virtue ethics insights into modern administrative law.

One note before we begin: virtuous officials will act differently depending on their roles. For example, a virtuous Attorney General will take different action than a virtuous SEC Commissioner. And virtuous aides to those principals will behave differently yet. This is because each official plays a different role in the federal government's broader mission. To put it in Aristotelean terms, each official is pursuing a different subordinate end, which is a part of the broader (but still subordinate) end pursued by the entire federal government.[356] Part III thus speaks only of administrative officials in the abstract and explores how an official might exercise whatever degree of legitimate decisionmaking discretion their role affords to them.

A. Prudence

The first of the cardinal virtues is prudence, sometimes referred to as "practical wisdom."[357] Prudence is the appropriate virtue to start with because it maintains an important relationship with the other three cardinal virtues. Although each of the four cardinal virtues is distinct from the others, prudence plays an overarching function that informs a proper exercise of temperance, justice, and courage.[358] "In other words, none but the prudent

354. BUDZISZEWSKI, *supra* note 160, at 43.

355. *Id.*

356. U.S. CONST. pmbl. (That subordinate end being "to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.").

357. *See, e.g.*, R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About A Prosecutor's Ethical Duty to "Seek Justice"*, 82 NOTRE DAME L. REV. 635, 649 (2006) ("Prudence, or 'practical wisdom,' is the one intellectual virtue which Aristotle also considered to be a moral virtue.") (citation omitted); Robert F. Cochran, Jr., *Lawyers and Virtues: A Review Essay of Mary Ann Glendon's* A Nation Under Lawyers: How the Crisis in the Legal Profession Is Transforming American Society *and Anthony T. Kronman's* The Lost Lawyer: Failing Ideals of the Legal Profession, 71 NOTRE DAME L. REV. 707, 708 (1996) (referring to "the virtue of practical wisdom or prudence"); *see also* THOMAS AQUINAS, SUMMA THEOLOGIAE I-II Q. 61 art. 1 ("We know that there are four cardinal virtues, viz. temperance, justice, prudence, and fortitude.") (citation omitted).

358. *See, e.g.*, Wright, *supra* note 352, at 204 ("The virtue of courage often depends, for example, upon the distinct cardinal virtue of practical wisdom or prudence.") (citation omitted).

man can be just, brave, and temperate."[359] For this reason, prudence can be thought of as the "mother of all the other cardinal virtues."[360]

To the modern ear, prudence might bring to mind an overly cautious or even excessively risk-averse actor.[361] But that understanding of prudence is mistaken.[362] Aristotle describes prudence as the "characteristic that is bound up in action, accompanied by reason, and concerned with things good and bad for a human being."[363] Aquinas followed by explaining that "prudence" concerns "decid[ing] in what manner and by what means man shall obtain the mean of reason in his deeds."[364] To use more modern terminology, prudence can be thought of as excellence in deciding between multiple means. A prudent actor is thus an actor capable of determining the most appropriate means for achieving a particular goal at a particular time in a particular setting. Prudence is, therefore, an important virtue for an agency official to have because agency officials are regularly tasked with selecting the means for achieving various policy objectives.

More specifically, agency officials are often given the choice to pursue a policy objective through one of at least three means: sub-regulatory guidance, regulatory action, and statutory action. In many instances, all three options are *legally* available. That means that an agency official will often have to exercise *discretion* in choosing an appropriate means for achieving a particular end. And prudence can help an agency official exercise that discretion by "decid[ing] in what manner and by what means" to proceed.[365]

The first option available to agency officials—subregulatory guidance—includes acting through channels, such as policy memos, website updates, and opinion letters.[366] Subregulatory guidance cannot be used to alter existing law.[367] Instead, it is typically used to express an administrative agency's

359. THE FOUR CARDINAL VIRTUES, *supra* note 353, at 3.

360. *Id.* (internal quotations omitted).

361. *Id.* at 4 (referring to the "contemporary mind" and stating that "[i]n colloquial use, prudence always carries the connotation of timorous, small-minded self-preservation, of a rather selfish concern about oneself").

362. *See* Kevin C. Walsh, *The Elevation of Reality Over Restraint in* Dobbs v. Jackson Women's Health Organization, 46 HARV. J.L. & PUB. POL'Y 915, 927 (2023) ("It is a common misunderstanding to equate prudence with caution or incrementalism.") (citation omitted).

363. ARISTOTLE'S NICOMACHEAN ETHICS, *supra* note 23, at 120.

364. AQUINAS, SUMMA THEOLOGIAE II-II Q. 47 art. 7 (quoted in Walsh, *supra* note 362, at 926).

365. *Id.*

366. *See* Hannah L. Cross, *The Return of Subregulatory Policy Reliance,* NAT. L. REV. (Sept. 7, 2021), https://www.natlawreview.com/article/return-subregulatory-guidance-reliance.

367. Kathryn E. Kovacs, *Rules About Rulemaking and the Rise of the Unitary Executive*, 70 ADMIN. L. REV. 515, 553 (2018) ("Subregulatory policy is limited, however, insofar as it

new or elaborated interpretation of existing law. Although subregulatory guidance does not, as a technical manner, create new legal requirements, regulated entities are "often under strong practical pressure to follow" subregulatory guidance.[368] An entity regulated by Agency *x*, for example, is likely to listen closely (and adjust its behavior accordingly) when Agency *x* offers a new interpretation of existing law—even if, as a formal matter, the law has not actually changed.

One benefit of subregulatory guidance is that it can be published quickly, without all of the procedural hurdles associated with more formal regulatory action.[369] But the ability to issue *new* guidance quickly also means that even *newer* guidance can soon take its place. This can leave regulated parties suffering from a form of regulatory whiplash. A regulated party that changes their conduct in accordance with subregulatory guidance issued by Presidential Administration *x*, for example, may soon encounter new (conflicting) subregulatory guidance issued by Presidential Administration *y*. And as each new presidential Administration comes and goes, this game of subregulatory ping-pong can continue.

The second means often available to agency officials is regulatory action. Regulatory action is an umbrella term that includes both rulemakings and adjudications.[370] An advantage of pursuing a policy objective through regulatory action rather than subregulatory guidance is that regulatory action can *alter* (rather than just interpret) existing regulatory action.[371] A downside of using regulatory action is that it can often take months, if not years, to see it through to completion.[372] And while regulatory actions may be more

---

cannot carry the force of law.") (citation omitted).

368. Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. ON REGUL. 165, 271 (2019); Alexander Nabavi-Noori, *Agency Control and Internally Binding Norms*, 131 YALE L.J. 1278, 1300 (2022) ("[G]uidance can nonetheless alter private parties' 'conceptions of their legal interests and liabilities such that they adjust their conduct to conform to the position stated in the guidance.'") (citation omitted).

369. *See HHS Proposes to Rein In Its Use of Regulatory "Dark Matter,"* AKIN GUMP STRAUSS HAUER & FELD LLP *(Sept. 14, 2020),* https://www.akingump.com/en/insights/alerts/hhs-proposes-to-rein-in-its-use-of-regulatory-dark-matter ("This type of guidance is technically not binding on the public and, therefore, agencies issue it with relatively little bureaucratic red tape and zero opportunity for public comment.").

370. Emily S. Bremer, *The Rediscovered Stages of Agency Adjudication*, 99 WASH. U. L. REV. 377, 379 (2021) ("It is axiomatic that the Administrative Procedure Act (APA) divides the universe of agency action into rulemaking and adjudication . . . .") (citation omitted).

371. *See* Encino Motorcars v. Navarro, 579 U.S. 211, 221 (2016) ("Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change.").

372. Consider, for example, "the ten years it took the Food and Drug Administration (FDA) to decide if peanut butter must be composed of a minimum of about 90 percent

difficult to retract and replace than subregulatory guidance, it is becoming increasingly common for incoming presidential Administrations to retract and replace regulatory actions issued by their outgoing predecessors.[373] President Biden's OIRA administrator, Richard L. Revesz, has referred to this phenomenon as "the new rules" of Presidential transitions.[374]

An agency official who determines to pursue a policy objective through regulatory action must also confront a secondary decision: what *type* of regulatory action should be used? There are at least two options: rulemaking and adjudication, which can be further subdivided into so-called "informal" and "formal" forms.[375] Current administrative law doctrine requires courts to often defer to an agency official's decision to use one means (i.e., a rulemaking or adjudication) over the other.[376]

Related administrative law doctrine also requires courts to defer to an agency official's choice to pursue regulatory action through an "interim"

---

peanuts." James Hobbs, *Is the Rulemaking Process Really a Quagmire?*, REGUL. REV. (Jan. 17, 2013), https://www.theregreview.org/2013/01/17/17-hobbs-regulatory-breakdown-chapter-8/; *see also Id.* ("The median completion time across agencies was twelve months and the mean completion time was slightly longer at eighteen months.").

373. Bethany A. Davis Noll & Richard L. Revesz, *Presidential Transitions: The New Rules*, 39 YALE J. ON REGUL. 1100, 1134–48 (2022); *see also* Taylor Ross, Katherine Rohde, & Caitlin Kim, *Does Subregulatory Guidance Protect Students' Civil Rights?*, REGUL. REV. (Apr. 9, 2022), https://www.theregreview.org/2022/04/09/saturday-seminar-does-subregulatory-guidance-protect-students-civil-rights/ ("Some scholars argue that . . . use of policy guidance documents may allow the agency to 'evade the more onerous constraints imposed on rulemaking . . . .'") (internal quotations and citation omitted).

374. Noll & Revesz, *supra* note 373, at 1134–48. As Noll and Revesz explain, these new rules have become "a core facet of the administrative state and the presidency has changed in significant ways as a result." *Id.* at 1103. For example, "[m]ajor durable policies now require a president to serve for two terms," and a "one-term president now only has approximately two years to finalize major policies, after which she can be reasonably confident that the policies will be undone speedily by a successor." *Id.*

375. Professor Bremer has argued that, while it is correct to think of informal and formal rulemaking as alternative modes, it is more accurate to think of formal and informal adjudications in terms of stages. *See* Bremer, *supra* note 370 at 379–80 ("It is axiomatic that the Administrative Procedure Act (APA) divides the universe of agency action into rulemaking and adjudication. With respect to rulemaking, this understanding is sound . . . . [But] as applied to adjudication, this contemporary modes-based understanding of the APA's procedural structure is wrong.") (citation omitted).

376. In *Securities and Exchange Comm'n. v. Chenery Corp. (Chenery II)*, the Supreme Court held that "the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." *Chenery II*, 332 U.S. 194, 203 (1947).

final rule rather than a truly final rule.[377] While a truly final rule is often issued *after* public comment, an agency can issue an interim final rule *before* soliciting public comment so long as the agency determines that there is "good cause" for forgoing public input.[378] In many instances, courts defer to an agency's official's determination that "good cause" exists.[379]

The third means often available to agency officials is statutory action. The federal lawmaking process moves slowly, but it has the benefit of codifying policy into statutes that are less easily changed than either subregulatory or regulatory actions.[380] Of course, agency officials are not formal parties to the federal lawmaking process.[381] The exclusive procedures governing the federal lawmaking process establish that only the President and Congress are to play a formal role in turning policies into federal statutes.[382] But agency officials play an influential (albeit informal) role in the federal lawmaking process.[383]

As Professor Chris Walker explains, "[f]ederal agencies help draft statutes."[384] Agencies assist with such drafting by both "propos[ing] substantive legislation to Congress that advances agency and Administration objectives, and . . . weigh[ing] in substantively . . . on pending legislation."[385] Further, "[f]ederal agencies also help draft statutes in the background by providing "technical drafting assistance" on legislation that originates from congressional staffers."[386] In a very real sense, then, agency officials can decide to pursue policy objectives through statutory action by proposing and editing legislation that is ultimately submitted to the President and Congress for approval.

What do the above-mentioned means of pursuing policy objectives mean for the prudent agency official? The prudent agency official would exhibit an excellence in determining which of the above-mentioned means is the most appropriate for pursuing a particular federal policy. A prudent agency official would know, for example, whether a situation calls for the type of quick-but-easily-reversible action made available through subregulatory

377. Kyle Schneider, Note, *Judicial Review of Good Cause Determinations Under the Administrative Procedure Act*, 73 STAN. L. REV. 237, 252–57 (2021).

378. *Id.* at 237, 252–57.

379. *Id.*

380. Noll & Revesz, *supra* note 373, at 1154.

381. *See* U.S. CONST. art. 1, § 7.

382. *See* U.S. CONST. art. I, § 7.

383. Christopher J. Walker, *Legislating in the Shadows*, 165 U. PA. L. REV. 1377, 1378 (2017).

384. *Id.*

385. *Id.*

386. *Id.* at 1378–79.

guidance, or the type of slow-but-stable action made available by funneling decisions through the federal lawmaking process. Moreover, staffing the administrative state with prudent agency officials would help justify existing administrative law doctrine that calls for courts to defer to an agency official's decision to pursue a policy objective through one means (e.g., a rulemaking) rather than another (e.g., an adjudication).[387]

Of course, the flipside of recognizing the centrality that prudence plays in justifying the deference courts give to agency officials is that the case for deferring to agency officials is actually *undermined* in a system in which those officials do not exhibit the virtue of prudence. This could be the situation presented by the modern administrative state, which appears more focused on ensuring that officials make decisions based on technocratic expertise (i.e., *techne*) rather than the broader framework demanded by the virtue of prudence. And if it is correct that the modern administrative state is indeed staffed with *techne*-crats that lack prudence, then reorienting administrative law to focus on instilling virtue would call for a change in how officials are selected and trained. But as was explained in Part II.B.2, the transition from a focus on staffing agencies with officials who exhibit *techne*, to a focus on staffing agencies with officials instilled with virtue more generally, is not insurmountable.

Staffing the administrative state with prudent agency officials would also help alleviate the harms associated with the regulatory whiplash that can occur when new presidential Administrations revoke and replace the policies of their outgoing predecessors. To be sure, elections have consequences, and a prudent agency official will know when it is appropriate to change regulatory direction. But a prudent agency official will also account for the fact that "the mere change of law is of itself prejudicial to the common good . . . ."[388] As Aquinas explains, "human law should never be changed, unless, in some way or other, the common weal be compensated according to the extent of the harm done" by the mere act of changing the law in the first place.[389] A prudent official would account for the harm inherent in changing federal policy.

In addition to Aquinas, the harm presented by too-frequent changes in the administration of government was considered by the Constitution's Framers. Hamilton, for example, recognized that "every new President" would have the incentive "to promote a change of men to fill the subordinate stations . . . ."[390] And because "[i]t is not generally to be expected, that men

387. *Supra* notes 376 & 377 (referring to *Chenery II* and the APA's "good cause" exception).

388. 2 AQUINAS, *supra* note 141, at I-II Q. 97 art. 2.

389. *Id.*

390. THE FEDERALIST NO. 72, at 436 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

will vary and measures remain uniform," Hamilton feared that regular turnover in the Executive Branch would result in a "disgraceful and ruinous mutability in the administration of the government."[391]

One constitutionally codified solution to regular turnover in the administration of the government was to make the President eligible for re-election.[392] Doing so helps ensure that "the people, when they see reason to approve of [the President's] conduct, . . . [may] continue him in [his] station[] in order to prolong the utility of his talents and virtues, and to secure to the government the advantage of permanency in a wise system of administration."[393] Instilling the virtue of prudence in the administrative officials who act on the President's behalf can complement that constitutionally-codified solution—which is focused on the Presidency itself.

B. Temperance

A second cardinal virtue is temperance.[394] Temperance is a moral virtue, which means that it helps perfect a human appetite.[395] As Aquinas explains, an "appetite is nothing else than an inclination of a person desirous of a thing towards that thing."[396] In the case of temperance, the appetite to be perfected includes the sense of appetite associated with alcohol.[397]

An agency official with the virtue of temperance would avoid an excessive and deficient relationship with alcohol. For example, a temperate agency official might enjoy the occasional glass of wine at work outings designed to build comradery among colleagues. At the same time, the temperate agency official would avoid drinking to excess, which might interfere with the official's ability to fulfill workplace duties excellently.

---

391. *Id.* at 436, 439.

392. U.S. CONST. art. II, § 1, cl. 5 (referring to Presidential eligibility); *See* THE FEDERALIST NO. 68, at 413 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (explaining that the President can be re-elected by the people).

393. THE FEDERALIST NO. 72, at 436 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

394. 2 AQUINAS, *supra* note 141, at I-II Q. 61 art. 1 ("We know that there are four cardinal virtues, viz. temperance, justice, prudence, and fortitude.") (citation omitted).

395. *Originalism and the Aristotelian Tradition*, *supra* note 2, at 2018.

396. 2 AQUINAS, *supra* note 141, at I-II Q. 8 art. 1.

397. Temperance also relates to food and sex. *See* 2 AQUINAS, *supra* note 141, at II-II Q. 141 art. 4. ("Hence temperance is properly about pleasures of meat and drink and sexual pleasures."). In other words, temperance is an umbrella virtue that encompasses the virtues of sobriety (which relates to alcohol), abstinence (which relates to food), and chastity (which relates to sex). *See id.* at Q. 143 art. 1; *see also* ARISTOTLE'S NICOMACHEAN ETHICS, *supra* note 23, at 28 ("[H]e who enjoys every pleasure and abstains from none becomes licentious; but he who avoids every pleasure, as the boorish do, is a sort of 'insensible' person.").

At first blush, some readers might find a focus on temperance to be intrusive and inappropriate. However, a focus on temperance would not require an intrusive inquiry into agency officials' off-the-clock drinking habits. Nonetheless, *some* consideration of an agency official's relationship with alcohol is entirely appropriate. For example, the familiar expression "sober as a judge" reflects the value of having government officials avoid an excessive attachment to alcohol.[398] We might expect to find the same virtue in, say, our doubly-insulated agency adjudicators.

As it turns out, many federal agency officials are already prohibited from regularly drinking to excess. Consider the National Security Adjudicative Guidelines ("Adjudicative Guidelines"), which "establish[] the single, common adjudicative criteria for . . . initial or continued eligibility for access to classified information or eligibility to hold a sensitive position."[399] The Adjudicative Guidelines contain an entire section dedicated to alcohol consumption.[400] The Adjudicative Guidelines state, for example, that "[e]xcessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness."[401]

At bottom, temperance helps an agency official better perform their work by perfecting their relationship with alcohol.[402] An imperfect relationship with alcohol (whether it be a relationship of excess or deficiency) can interfere with an agency official's ability to perform their professional duties, which is a subordinate end that the official must fulfill in pursuit of the federal government's broader end, as well as the official's own *telos*. Temperance is thus correctly understood as a virtue that administrative law should continue to cultivate in agency officials.

---

398. *See* Lawrence B. Solum, *A Tournament of Virtue*, 32 FLA. ST. UNIV. L. REV. 1365, 1370 (2005) ("We have a saying that captures the intuitive sense that judges must have their desires in order: we say of a temperate human that she or he is 'sober as a judge,' and this suggests that we name this virtue 'judicial sobriety.'").

399. OFF. OF THE DIR. OF NAT'L INTEL., SECURITY EXECUTIVE AGENT DIRECTIVE 4, at 1 (2017), https://www.dni.gov/files/NCSC/documents/Regulations/SEAD-4-Adjudicative-Guidelines-U.pdf.

400. *See id.* at 16–17.

401. *Id.* at 16.

402. *See, e.g.*, Leah K. Walker, *The Effects of Alcohol Use in the Workplace*, AM. ADDICTION CTRS. (Mar. 8, 2024), https://americanaddictioncenters.org/alcohol/workplace; OFF. OF THE DIR. OF NAT'L INTEL., *supra* note 399, at 16.

C. Justice

A third cardinal virtue, justice, can be understood as giving each person their due.[403] Part III.C will focus on Aristotle's broadest conception of justice, which can be conceptualized as "justice as lawfulness."[404]

To fully understand the Aristotelian conception of justice as lawfulness, the modern reader must first recognize that Aristotle's conception of "law" (in Greek, *nomos*) is broader than what one might ordinarily think of as "law" today.[405] As the "distinguished Aristotle scholar" Richard Kraut explains, "when Aristotle says that a just person, speaking in the broadest sense, is *nomimos*, he is attributing to such a person a certain relationship to the laws, norms, and customs generally accepted by some existing community."[406]

Put differently, for Aristotle, law is more than just the legal requirements that a legislature might codify or that might be found in a judge's written opinion. Instead, an Aristotelian conception of law is broad enough to encompass custom and norms in addition to statutes and judicial decisions. To place things in Anglo-American legal parlance: one might think of the Aristotelean conception of law as being broad enough to include the "general law," which, at least prior to *Erie Railroad Co. v. Tompkins*,[407] was the "body of unwritten law [that] was not derived from any enactment by a single sovereign, but existed by common practice and consent."[408] It is only with this broader understanding of law in mind that one can fully understand "why Aristotle thinks that justice in its broadest sense can be defined as lawfulness."[409]

---

403. 2 AQUINAS, *supra* note 141, at I-II Q. 61 art. 1 ("We know that there are four cardinal virtues, viz. temperance, justice, prudence, and fortitude.") (citation omitted); *Id.* at II-II Q. 58 art. 1 ("[J]ustice is a habit whereby a man renders to each one his due by a constant and perpetual will[.]").

404. FARRELLY & SOLUM, *supra* note 81, at 177 ("Aristotle suggests an alternative understanding of justice as lawfulness . . . .").

405. *Id.* ("For the ancient Greeks, *nomos* had a broader meaning than does 'law' in contemporary English.").

406. *Id.* (internal citations omitted) (quoting RICHARD KRAUT, ARISTOTLE: POLITICAL PHILOSOPHY 105–06 (2022)).

407. 304 U.S. 64 (1938); William Baude, Jud Campbell & Stephen E. Sachs, *General Law and the Fourteenth Amendment*, 76 STAN. L. REV (forthcoming 2024) (manuscript at 10), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4604902 (discussing *Erie*).

408. Baude, Campbell & Sachs, *supra* note 407, (manuscript at 5) (quotation and citation omitted).

409. *See id.*; Lawrence Solum, *Civil Disobedience & the Virtue of Justice*, LEGAL THEORY BLOG: NORMATIVE LEGAL THEORY (Sept. 5, 2006), https://lsolum.typepad.com/legaltheory/2006/09/civil_disobedia.html.

The U.S. Department of Education's recent efforts to forgive federal student loan debt offers a recent case study for considering how developing an Aristotelian conception of justice in administrative officials could result in changes to existing aspects of administrative law. In September of 2022, the U.S. Secretary for the Department of Education issued "waivers and modifications" to "discharge" student loan debt.[410] The Education Secretary's decision was soon subject to multiple federal lawsuits.[411] A threshold issue for those lawsuits was whether challengers had legal standing to bring their claim in federal court.[412]

In *Garrison v. U.S. Department of Education*,[413] for example, the plaintiff argued that the Department of Education's loan forgiveness plan would result in the plaintiff "fac[ing] immediate tax liability from the state of Indiana" that the plaintiff would not face had the Education Secretary not forgiven his loans.[414] The Education Secretary's loan forgiveness policy was initially designed so that it would *automatically* forgive all eligible debt.[415] But in response to the challenge brought in *Garrison*, the Department of Education took two actions. First, the Department changed its website (i.e., the means that the Department had selected to effectuate its multi-billion-dollar policy) so that borrowers had a new opportunity to opt out of the otherwise automatic loan forgiveness program.[416] Second, the Department took steps to further "effectuate Plaintiff's clearly stated desire to opt out of the program and not

410. *See* Biden v. Nebraska, 143 S. Ct. 2355, 2364 (2023); Letter from Miguel A. Cardona, Sec'y of Educ., U.S. Dep't of Educ., to Nasser Paydar, Assistant Sec'y for Postsecondary Education, U.S. Dep't of Educ. (Sept. 27, 2022), https://www.supremecourt.gov/DocketPDF/22/22-506/246931/20221118113849375_Nebraska%20Stay%20Appl%20Appendix.pdf.

411. *See, e.g.*, Katie Lobosco, *Biden's Student Loan Forgiveness Plan Goes Before the Supreme Court Tuesday. Here's What Borrowers Need to Know*, CNN (Feb. 27, 2023), https://www.cnn.com/2023/02/27/politics/student-loan-forgiveness-biden-supreme-court (discussing multiple lawsuits resulting from the student loan forgiveness program).

412. Garrison v. U.S. Dep't of Educ., 636 F. Supp. 3d 935, 938–39 (S.D. Ind. 2022).

413. 636 F. Supp. 3d 935 (S.D. Ind. 2022).

414. Complaint at 3, Garrison v. U.S. Dep't of Educ., 636 F. Supp. 3d 935 (S.D. Ind. 2022) (No. 1:22-cv-01895-RLY-TAB).

415. *See Garrison*, 636 F. Supp. 3d at 937–38; Kelsey Reichmann, *Student Loan Borrowers Loan Borrowers Take Debt-Forgiveness Challenge to High Court*, COURTHOUSE NEWS SERV. (Nov. 1, 2022), https://www.courthousenews.com/student-loan-borrowers-take-debt-forgiveness-challenge-to-high-court/.

416. Defendant's Notice Regarding Plaintiff's Motion for Temporary Restraining Order at 1, Garrison v. U.S. Dep't of Educ., 636 F. Supp. 3d 935 (S.D. Ind. 2022) (No. 1:22-cv-01895-RLY-TAB).

receive . . . automatic cancellation of his federal student loan debt . . . ."[417]

The Department's decision to intentionally change its loan forgiveness policy appeared to be motivated by a desire to make it more difficult for that policy to be challenged in court. As one scholar explained, the change demonstrated that the government was "making changes to the [loan forgiveness] policy on the fly for the express purpose of blocking lawsuits."[418] At minimum, that sort of mid-litigation change in policy is inconsistent with existing norms and customs surrounding agency action. Pursuant to those norms and customs, agencies defend their actions in court rather than change their policy on-the-fly to insulate administrative action from judicial review.

A related challenge to the Department of Education's loan forgiveness plan brought in *Nebraska v. Biden* offers a second case study.[419] The *Nebraska* lawsuit concerned injuries stemming from the servicing of Federal Family Education Loans (FFEL).[420] After the lawsuit was filed, the Department of Education changed its loan forgiveness policy in order to exclude FFEL from federal forgiveness.[421] As National Public Radio (NPR) reported, "the U.S. Department of Education . . . quietly changed its guidance around who qualifies" under the "student debt relief plan[,]" which was "a remarkable reversal that will affect the fortunes of many student loan borrowers . . . ."[422] This sudden "reversal in policy[,]" NPR reported, "was likely made out of concern that the private banks that manage old FFEL loans could potentially file lawsuits to stop the debt relief . . . ."[423] Thus, like in *Garrison*, the change in policy appeared to be motivated by a desire to insulate that policy from judicial review.

As a matter of statutory and constitutional law, the Department of Education may have been well within its right to change its loan forgiveness

---

417. *See id.*

418. Josh Blackman, *How Do You Challenge a Student Loan Forgiveness Rule That Does Not Exist?*, REASON (Sept. 30, 2022, 1:36 AM), https://reason.com/volokh/2022/09/30/how-do-you-challenge-a-student-loan-forgiveness-rule-that-does-not-exist/.

419. Nebraska v. Biden, 636 F. Supp. 32 991, 995–96 (E.D. Mo. 2022).

420. *See id.*

421. *See* Adam S. Minsky, *5 Key Takeaways From The Sudden Change To Student Loan Forgiveness Eligibility*, FORBES (Sept. 30, 2022), https://www.forbes.com/sites/adamminsky/2022/09/30/5-key-takeaways-from-the-sudden-change-to-student-loan-forgiveness-eligibility/?sh=483eaf6b3cd2; Cory Turner, *In a Reversal, the Education Dept. is excluding many from student loan relief*, NPR (Sept. 30, 2022, 2:04 PM), https://www.npr.org/2022/09/29/1125923528/biden-student-loans-debt-cancellation-ffel-perkins.

422. Turner, *supra* note 421.

423. *Id.*

policy in order to insulate that policy from judicial review.[424] But if one were to consider lawfulness in the broader Aristotelian sense, the Department of Education's attempts to insulate itself from judicial review are unjust to the extent that those attempts break from the norms and customs, allowing members of the public to seek judicial review of agency action. Put differently, even if the challengers to the loan forgiveness policy had not been owed, as a matter of statutory or constitutional law, the opportunity to challenge that policy in court (contrary to what the Supreme Court ultimately held),[425] the challengers may have been owed that opportunity as a matter of norms and custom. A just agency official would consider what the public is owed as a matter of such norms and customs before taking administrative action that might give the public less than what the public is due.

D. Courage

The fourth and final cardinal virtue is courage, also referred to as fortitude.[426] Courage is situated between the vices of cowardice and recklessness.[427] A courageous firefighter, for example, is able to charge into a burning building—even when the firefighter rightly identifies the danger that might result from doing so. On the other hand, the courageous firefighter also knows when charging into a burning building would be rash and unwarranted.

The current administrative state fails to instill courage in at least two ways. Both ways treat political accountability as a danger that must be avoided, rather than a danger that can offer an opportunity to confront and develop

---

424. In finding that at least one plaintiff satisfied the conditions for constitutional standing in *Nebraska*, the Supreme Court ruled that the Department did not succeed in insulating itself from judicial review. *See* Biden v. Nebraska, 143 S. Ct. 2355, 2365 (2023) ("[W]e conclude that the Secretary's plan harms [the Missouri Higher Education Loan Authority] and thereby directly injures Missouri—conferring standing on that State . . . ."). The broader point made by this Article is that *even if* the Department could *legally* insulate itself from judicial review as a matter of statutory and constitutional law, the Department would have nonetheless violated a norm in doing so, and would have therefore acted unjustly in a broader Aristotelian sense.

425. *Id.*

426. 2 AQUINAS, *supra* note 141, at I-II Q. 61 art. 1 ("We know that there are four cardinal virtues, viz. temperance, justice, prudence, and fortitude.") (citation omitted); *see also* Wright, *supra* note 352, at 196 (referring to "courage or fortitude") (citation omitted); *Originalism and the Aristotelian Tradition*, *supra* note 2, at 2018 (citation omitted) ("A person who possesses fortitude will know what courage requires in particular situations, have the intellectual disposition to act courageously when called to do so, be emotionally disposed to act courageously, and will reliably act courageously.").

427. *See* ARISTOTLE'S NICOMACHEAN ETHICS, *supra* note 23, at 25.

courage. The first way that the current administrative state fails to instill courage concerns the way in which many administrative officials are purportedly insulated from the political accountability brought to bear by the President's removal authority.[428] Because these administrative officials are insulated from the political removal process, the officials have limited opportunities to confront political dangers, and thus have limited capacities to develop courage.[429]

To be sure, many of the administrative officials who are insulated from the President may still face political dangers presented by Congress. After all, Congress might decide to call a hearing to either take an official to task or reduce an agency's funding.[430] But that type of congressional oversight (which requires *legislators* to make potentially contentious appropriations decisions) presumes that Congress will be courageous. And as will be explained below, Congress is starved of its own opportunities to develop political courage—which makes the promise of congressional oversight appear lackluster, if not illusory.

There is reason to think, however, that future administrative officials will have enhanced opportunities to develop courage in the face of political danger. In a series of cases decided over the last decade and a half, the Supreme Court has been making doctrinal changes to existing administrative law that would better assist administrative officials in developing courage in the face of political danger.[431] In particular, the Court has made a series of rulings

---

428. *See, e.g.*, Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 549 Appendix A (2010) (Breyer, J., dissenting) ("There are 24 stand-alone federal agencies (i.e., 'departments') whose heads are, by statute, removable by the President only 'for cause.'") (listing statutes) (emphasis omitted); *Id.* at 556 Appendix B ("The table that follows lists the 573 career appointees in the SES who constitute the upper level management of the independent agencies listed in Appendix A, *supra*. Each of these officials is, under any definition—including the Court's—an inferior officer, and is, by statute, subject to two layers of for-cause removal.") (listing statutes).

429. *See* ARISTOTLE'S NICOMACHEAN ETHICS, *supra* note 23, at 52 (noting that "professional soldiers" only "*seem* brave" when facing "empty alarms in war, of which these [professional soldiers] have had the most comprehensive experience" but which citizen soldiers might mistakenly believe to present *actual* danger, "because the others do not know the nature of the facts.") (emphasis added).

430. *See* Christopher J. Walker & Aaron Nielson, *Congress's Anti-Removal Power*, 76 VAND. L. REV. 1, 58 (2023) (offering "creative legislative actions" Congress could use to influence the President's willingness to remove an official from office).

431. *See, e.g.*, Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 484 (2010) ("We hold that such multilevel protection from removal is contrary to Article II's vesting of the executive power in the President."); Seila L. LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 204 (2020) ("While we need not and do not revisit our prior decisions allowing

that have limited (or at least declined to extend) prior precedent that permitted agency officials to remain insulated from the President's removal authority.[432] Virtue ethics, which gives pride of place to developing the virtue of courage, offers a philosophical framework to structure this type of ongoing change to existing administrative law doctrine.

The second way that the current administrative state fails to instill the virtue of courage is in relation to Congress. Today, Congress is often able to punt politically dangerous questions to agency officials. Congresses can do so because of the lax way in which the Constitution's nondelegation principle (which constrains Congress's ability to delegate to others the powers that the Constitution vests in Congress alone) has been enforced.[433]

Under existing nondelegation doctrine precedent, Congress is free to enact open-ended statutes that enable Congress to duck essentially all political accountability relating to unpopular agency action.[434] In recent years, Congress has even sought to duck potential political public resulting from appropriations decisions by delegating to an agency the authority to decide how much funding it needs.[435] By making open-ended delegations, Congress can avoid facing the dangers associated with unpopular agency decisions.[436] What's worse, Congress can secure political *praise* by offering agency-related "constituent services"—a euphemism for legislators asking administrative officials to utilize their broad delegations of power to secure some good for

---

certain limitations on the President's removal power, there are compelling reasons not to extend those precedents to the novel context of an independent agency led by a single Director."); United States v. Arthrex, Inc., 594 U.S. 1, 18 (2021) ("[T]he unchecked exercise of executive power by an officer buried many layers beneath the President poses more, not less, of a constitutional problem."); *see also* Walker & Nielson, *supra* note 430, at 4 n.6 (collecting cases).

432. *See, e.g.*, *Free Enter. Fund*, 561 U.S. at 484; *Seila L.*, 591 U.S. at 204; *Arthrex*, 594 U.S. at 18; *see also* Bremer, *supra* note 306, at draft 31 (contending that if the Court operates from "an internal perspective that understands deeply the demands of administration in an adjudicatory context, as well as the logic of the APA's hearing structure" then the Court could "distinguish administrative adjudication" from the Court's recent cases concerning presidential removal).

433. Who Determines Majorness?, *supra* note 307, at 469–72 (defining the nondelegation doctrine and explaining its lax enforcement at the Supreme Court).

434. *See* Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 340, 370 n.167 (2002) (describing the problems with a hypothetical "goodness and niceness" statute).

435. *See* Chad Squitieri, *The Appropriate Appropriations Question*, 74 FLA. L. REV. F. 1, 15 (2023) (discussing efforts to remove the Consumer Financial Protection Bureau from the standard congressional appropriations process).

436. *See id.*

legislators' favored parties.[437]

Reorienting administrative law to focus on instilling virtue would provide a moral foundation for more regularly requiring Congress to make politically dangerous decisions themselves—rather than punting those decisions to agencies. As a doctrinal matter, this change could be accomplished by reinvigorating the Constitution's nondelegation principle, which would require a closer adherence to the Constitution's initial design for lawmaking.[438] That initial design called for politically dangerous decisions to be made through a particular lawmaking procedure requiring the House, Senate, and President to publicly approve (or reject) various policy proposals.[439] To influence policy within *that* system, legislators would no longer be able to rely on privately lobbying their contacts in administrative agencies. Instead, legislators (and the President) would have to again take public stands for or against various policies, thereby exposing themselves to the political dangers inherent in doing so.

To be sure, legislators and the President might be initially fearful of having to make politically dangerous decisions. But like the courageous firefighter who routinely faces the dangers posed by burning buildings, repeated confrontations with political danger can present opportunities to develop the virtue of courage. And while there might be some initial discomfort in developing such virtue, the payoff would be significant. This is in part because instilling courage in legislators could result in instilling courage in agency officials.

How so? Well, a reinvigoration of the nondelegation principle would require legislators to involve themselves more intimately with the workings of agency officials—after all, Congress (and the President, in the President's legislative capacity)[440] would be on the hook for approving regulatory actions

437. Joshua Bone, Note, *Stop Ignoring Pork and Potholes: Election Law and Constituent Service*, 123 YALE L.J. 1408, 1409 n.7 (2014) (noting that a "number of scholars have suggested that constituent services . . . involve delivery of public benefits to favored private parties or for campaign-related purposes") (citations omitted).

438. Although the reinvigoration of the nondelegation doctrine is often a cause advocated for by originalists, variants of the doctrine are also consistent with living constitutionalism. *See* Chad Squitieri, *Towards Nondelegation Doctrines*, 86 MO. LEV. REV. 1239, 1243 (2022) (arguing for an originalist-based reinvigoration of the nondelegation principle, but recognizing that a similar reinvigoration of the nondelegation principle could align with "a law and economics method" of legal interpretation, as well as "a method of interpretation pursuant to which text is better able to take on new meaning over time").

439. U.S. CONST. art. 1, § 7.

440. The President can influence legislation by making recommendations, U.S. CONST. art. II, § 3., and by flexing veto authority, U.S. CONST. art. I, § 7, cls. 2, 3. *See* Squitieri, *supra* note 71, at 33–40 (describing the President's role in the lawmaking process).

and budgets. That sort of "closer working relationship between the bureaucracy and the legislator" could encourage agency officials to "be more courageous" in their own actions, since those actions would more obviously have the backing of Congress and the President.[441] An administrative state staffed with both courageous agency officials and legislators would be better positioned to more excellently address the people's problems—i.e., would better positioned to be more excellently carry out the officials' and legislators' governmental functions, which are component parts of the federal government's broader *telos*.[442]

CONCLUSION

Administrative law has developed to incorporate insights from two philosophical perspectives: deontology and consequentialism. This Article has proposed that administrative law further develop to incorporate insights from a third perspective: virtue ethics. Incorporating virtue ethics into administrative law is a task that a wide range of scholars and jurists can embrace, regardless of their jurisprudential commitments.

This Article has taken the initial step toward incorporating virtue ethics into administrative law. That effort, which is designed to kick off a scholarly dialogue concerning the intersection of virtue ethics and administrative law, explored how a virtuous agency official might act in accordance with the cardinal virtues of prudence, temperance, justice, and courage. By focusing on the cardinal virtues, this Article has demonstrated that virtue ethics offers valuable insights that have previously gone unexamined, but which both transform and reinforce our understanding of administrative law in important ways.

441. *See* Charles H. Koch Jr., *James Landis: The Administrative Process*, 48 ADMIN. L. REV. 419, 423 (1996).

442. That *telos* being "to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity." U.S. CONST. PMBL.