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DISCOUNTING ACCOUNTABILITY

*Abner S. Greene**

INTRODUCTION

SCIENCE blinds, and politics binds. This is how American constitutional law goes, according to the ambitious and provocative work of Professor Larry Lessig.[1] Often legal rules are constructed and interpreted against the backdrop of accepted scientific truths.[2] The legal rulemakers and interpreters have not themselves, in these instances, self-consciously and transparently discussed and resolved the matter at hand. Rather, they have deferred authority to science—they have abdicated responsibility and have become unaccountable in an important way. Science, in this way, blinds. It blinds us to the decisions we are making, allowing us to make decisions without recognizing our responsibility for those decisions. But there is a saving grace here. Future interpreters of the same legal texts originally constructed or interpreted in the imposing light of science can expose the earlier understandings as erroneous if the scientific predicates are later seen as erroneous. If the old scientific truth can be unmasked and replaced by a new one, then judges accept the new scientific truth as a predicate for its decision. Sometimes, however, no new scientific truth is available to play this role. In that case, judges still defer, but this time to politics, and only if the original understanding of the text or a later interpretation of that text was resolved openly as a normative matter in the political process. Presumably this result obtains because it is politicians and not judges who are directly accountable to the electorate. In such a case, responsible actors stepped forward and did not defer to science; therefore, judges need not concern themselves with a responsibility or accountability gap. Thus, according to Lessig, openly normative political decisions and scientific predicates both earn deference in constitutional interpretation. In both cases, accountability is maintained, although accepted scientific truths are accountable in a much different way than are openly contested and resolved political

* Associate Professor, Fordham University School of Law. Thanks to Martin Flaherty, Jim Fleming, Bob Kaczorowski, and Bill Treanor for helpful comments. I am grateful for a Fordham University School of Law summer research grant that helped support this Response.

1. *See* Lawrence Lessig, *Fidelity and Constraint*, 65 Fordham L. Rev. 1365 (1997) [hereinafter Lessig, *Fidelity and Constraint*]; Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 Stan. L. Rev. 395 (1995) [hereinafter Lessig, *Understanding Changed Readings*]; Lawrence Lessig, *Fidelity in Translation*, 71 Tex. L. Rev. 1165 (1993) [hereinafter Lessig, *Fidelity in Translation*].

2. Science here includes both natural and social science. The term "science" is a stand-in for (my phrasing here) "uncontested background understanding of something about the world."

decisions. Of greatest importance is that in both instances, the presumably unaccountable judiciary has deferred authority.

I would like to question the role of accountability, or responsibility, in Lessig's work. I face two problems at the outset. First: Lessig claims, in his work on constitutional interpretation broadly put, to be merely describing the practice of American constitutional law and not to be normatively defending this practice. My criticisms will, in part, accept this claim, and will themselves be descriptive. At other times I will challenge normatively the role of accountability; to be fair, I suppose that at such times I am challenging not Lessig but the body of doctrine as he describes it. Second: Until his article for this Symposium, Lessig had not distinguished between cases involving the allocation of power among governmental institutions and rights cases. Now, in an important addition accompanied by an admission of earlier error,[3] Lessig draws a sharp distinction between the two types of cases. It is only in the institutional power cases that courts defer to politics when predicates become contested; in rights cases, Lessig now argues, when predicates move from being uncontested to contested, the ground for such deference is removed. Although judges in rights cases do not defer to politics when a matter is contested, according to Lessig judicial work is still highly preservationist, preserving past commitments in a new terrain. My critique of Lessig's work in part I will challenge his descriptive account of both institutional power and rights cases, and will dispute normatively the underlying preservationist mode of his translation theory more generally.

Next I want to look at a specific area of constitutional law about which Lessig and I have both written—the constitutional status of independent agencies. My principal point in part II will be that accountability once again plays a large and problematic role in Lessig's writing.[4] I will also examine and question two other significant positions in the debate about independent agencies—the works of Stephen Calabresi and Martin Flaherty.[5]

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3. *See* Lessig, *Fidelity and Constraint*, *supra* note 1, at 1392.

4. *See* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1 (1994) [hereinafter Lessig & Sunstein, *The President and the Administration*].

5. *See* Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 Ark. L. Rev. 23 (1994) [hereinafter Calabresi, *Some Normative Arguments*]; Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 Yale L.J. 541 (1994) [hereinafter Calabresi & Prakash, *The President's Power*]; Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 Harv. L. Rev. 1153 (1992) [hereinafter Calabresi & Rhodes, *The Structural Constitution*]; Martin S. Flaherty, *The Most Dangerous Branch*, 105 Yale L.J. 1725 (1996).

I. DISCOUNTING ACCOUNTABILITY: CONSTITUTIONAL INTERPRETATION GENERALLY

In much of Lessig's work, judges get to say what the law is without assuming responsibility for such pronouncements. In this way, Lessig's theory of constitutional interpretation follows a widely held understanding that constitutional decision-making should not be done in an openly normative manner by unelected judges. There are at least three ways in which Lessig advances this claim. First, he argues that judges defer to scientific predicates when those predicates undergirded an earlier text and also when they buttress a contemporary reading of that text. Judges defer to an old scientific predicate if it is still in place as accepted truth; they defer to a new scientific predicate if it has displaced an old one as accepted truth. Second, at least in institutional power cases, Lessig argues that judges defer when matters have been openly contested, in part because judicial intervention here would appear political. Third, in rights cases, although judges do not defer when matters have become contested, they still do not engage in openly normative or moral reasoning, but rather must closely tie their reasoning to past commitments. Adding together these three types of deference, we can see traces of Bickel's passive virtues in Lessig's work.[6] And looking back further, we can see all those who have advanced similar views of judicial deference to politics—back to Thayer[7] and back to Marshall's description in *Marbury v. Madison* of "[q]uestions in their nature political."[8] But this elaborate edifice of judicial deference, at least as set forth in the late twentieth century, is mistaken both descriptively and normatively. The descriptive problems come in two types. Regarding institutional power cases, Lessig overstates the case for judicial deference when matters become contested and when judicial intervention might appear political. Regarding rights cases, he overstates the case for judicial intervention. The doctrine just does not divide this neatly.

Institutional power cases first: Here I want to question two of Lessig's prime examples for deference, which he discussed in earlier writing and discusses again here. The constitutional defense of independent agencies, Lessig claims, was first grounded in understanding those agencies to be acting out of scientific expertise, and as not acting politically. As we have come to understand all agency action (executive and independent agencies alike) as highly political, the constitutional defense of independent agencies has accordingly weak-

6. *See* Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (1962).

7. *See* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129 (1893).

8. 5 U.S. (1 Cranch) 137, 170 (1803).

ened, says Lessig.[9] This misses two key points. First, as I shall argue further in part II, the best argument for the constitutionality of independent agencies is not that they act apolitically, but rather that they help combat concentrated power in the President. Second, if Lessig were correct descriptively about independent agencies, they would have already been declared unconstitutional or would be in danger of being so declared. But the doctrine is against Lessig here—the last Supreme Court case on the subject, *Morrison v. Olson*,[10] upheld the constitutionality of independent agencies by a 7-1 vote.

Lessig makes a similar mistake regarding *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[11] He correctly describes the way in which that opinion openly acknowledged the policymaking that agencies do.[12] Agencies, not courts, should fill statutory gaps when what is really at issue is policymaking and not interpretation of congressional intent. But after an initial surge in lower court deference to agencies, we have since returned to an unruly hodgepodge of cases involving agency implementation of statutes.[13] Some courts defer quite readily, while others engage in a wide-ranging search—way beyond statutory text and the most obvious sources of legislative history—in reviewing the agency action. To be sure, these courts do not say they are making policy, but if Lessig were correct, courts would be more concerned than they often are about the appearance of making policy. One more point about institutional power cases: The Court sometimes defers to politics in such cases (*Garcia v. San Antonio Metropolitan Transit Authority*[14] is the best example of this), but often does not, instead invalidating legislation on various theories of separation of powers or federalism. Such cases include: *Myers v. United States*,[15] *Springer v. Government of the Philippine Islands*,[16] *Buckley v. Valeo*,[17] *INS v. Chadha*,[18] *Bowsher v. Synar*,[19] *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*[20] (in the separation of powers category), *New York v. United*

9. *See* Lessig, *Fidelity and Constraint*, *supra* note 1, 1410-12; Lessig, *Understanding Changed Readings*, *supra* note 1, at 433-36.

10. 487 U.S. 654 (1988).

11. 467 U.S. 837 (1984).

12. *See* Lessig, *Understanding Changed Readings*, *supra* note 1, at 436-38.

13. *See* Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 Duke L.J. 984, 1035-41.

14. 469 U.S. 528 (1985).

15. 272 U.S. 52 (1926).

16. 277 U.S. 189 (1928).

17. 424 U.S. 1 (1976).

18. 462 U.S. 919 (1983).

19. 478 U.S. 714 (1986).

20. 501 U.S. 252 (1991).

States,[21] *United States v. Lopez*,[22] and *Seminole Tribe of Florida v. Florida*[23] (in the federalism category).

Regarding rights cases: Lessig's position is that state action often prevails pursuant to background scientific understandings. For example, racial segregation prevailed according to widely accepted views about race. When those understandings become contested and up for grabs politically, they can no longer be used to justify state action when claims of constitutional right are raised against the government. The contestation of discourse weakens the governmental interest, says Lessig. Judicial deference is no longer warranted.

This certainly helps to explain the many rights cases in which judges pronounce controversial constitutional interpretations in the face of openly contested political struggle. Lessig gives examples of Equal Protection Clause cases. But now Lessig is in danger of overstating the matter in a different way from before, this time toward too much judicial intervention. For there are many examples of judges essentially deferring to politics even when opposite claims of right and even when the matter is contested openly and normatively. Let me mention two examples. Despite some tinkering (okay, a lot of tinkering), the Court has accepted the judgment of many states that the death penalty is constitutional (or, if one prefers a different formulation, has upheld the death penalty statutes of many states).[24] And despite an occasional case to the contrary, the Court has accepted the judgment of various governmental entities that random drug testing is constitutional (same reformulation, if one prefers).[25] Lessig might say, about these cases, either that (i) the Court did actively interpret the Constitution, and just held against the rights claimant, or that (ii) the Court could not develop a method of adjudicating these rights claims without appearing political. But I think a better explanation is that (iii) the Court backed down in the face of strong political will to fight crime.

Another problem with Lessig's theory as a descriptive matter is that courts often fail to defer to changing scientific predicates, even when given the opportunity. Let me use the preceding two examples: In death penalty cases, a growing body of scientific evidence suggests

21. 505 U.S. 144 (1992).

22. 115 S. Ct. 1624 (1995).

23. 116 S. Ct. 1114 (1996).

24. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279 (1987) (upholding death penalty in the face of evidence that African-Americans were substantially more likely to receive that sentence than whites); Tison v. Arizona, 481 U.S. 137 (1987) (upholding death penalty in felony murder case where defendants did not intend to kill victims); Gregg v. Georgia, 428 U.S. 153 (1976) (upholding a death penalty statute that allowed for guided discretion).

25. *See* Veronia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386 (1995); National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989).

that certain methods of execution are tantamount to torture (which is something the Court has for years considered cruel and unusual punishment).[26] But the courts do not seem to be deferring to this new scientific predicate. In search and seizure cases, modern methods of obtaining information about people are becoming more and more intrusive. I am thinking in particular of increased drug testing. The Court has not, though, deferred to the new scientific predicates of intrusiveness in determining the reasonableness of such searches. In both the death penalty and drug testing settings, one might respond that the Court has indeed deferred responsibility just as it ought to do—but to politics, not science. This might be true, but if true it does not help Lessig's argument.

Lessig's theory is all about deference. It is about deference to science, about deference to politics (in institutional power cases), and about deference to the framers' principles (in rights cases). It is important to remember that even in rights cases, where Lessig claims judges do not defer to contemporary political resolutions of constitutional disputes, judges still must tie their "activism . . . to acts with strong democratic pedigree,"[27] i.e., the framers' acts. As a normative matter, I would like to challenge this general model of strong judicial deference to the accountability of either science or politics (present or past), on three grounds. First, it is not clear that accountability should play so large a role in democratic governance. As Martin Flaherty has eloquently argued, the vices of accountability were of great concern to the Constitution's framers, who had witnessed exercises in legislative dominion that had arisen in part out of a perceived need for a more direct link between citizens and governmental actors.[28] The framers of the Constitution responded to the imperfections of a system that too closely resembled direct democracy. Citing not only the experience in the states under the Articles of Confederation but also the lesson of other nations that had fallen where there was too little buffer between citizens' desires and government, the framers carefully chose a system in which, if anything, it would be quite hard to tell which governmental actor was to blame on many occasions. Madison's *Federalist* No. 10 is the most well-known effort to defend a republican form of government in which citizens' desires would be refracted through the prism of representation, and there refined.[29]

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26. *See* Deborah W. Denno, *Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death over the Century,* 35 Wm. & Mary L. Rev. 551 (1994); Deborah W. Denno, *Testing* Penry *and its Progeny,* 22 Am. J. Crim. L. 1 (1994).

27. Lessig, *Fidelity and Constraint, supra* note 1, at 1432.

28. *See* Flaherty, *supra* note 5, at 1730, 1767, 1821-25.

29. *See* The Federalist No. 10, at 77-84 (James Madison) (Clinton Rossiter ed., 1961).

One might object that I have conflated normal politics and constitutional politics,[30] and that although there are good reasons to avoid strict deference to the former, we should still defer to the latter. This view would still permit a normative challenge to deference to normal politics in institutional power cases, but it would also support Lessig's claims about deference to framing principles (constitutional politics) in rights cases. We must ask, therefore, in what way do framing principles constrain adjudication in rights cases? How does "fit" work in this setting? Here I want to offer a sympathetic revision of part of Lessig's account. Lessig's theory of deference—to science, to normal politics (in institutional power cases), and to constitutional politics (in rights cases)—turns on a series of observations about the contested and the uncontested. I want to use Lessig's terminology to make a somewhat different point. We can use the concepts of the contested and the uncontested to see that "fit" in fact does little work in the adjudication of rights cases, that deference to framing principles is elusive.

Distinguishing between easy cases and hard cases may help here. One might argue that in easy rights cases, "fit" does a lot of work. But this is a mistake. Cases are easy not because of "fit" but rather because of the presence of uncontested predicates. As these predicates become contested, the cases become harder, and the "fit" story becomes more and more unpalatable. For example, Ronald Dworkin uses economic justice as an example of something the Constitution doesn't require; stating that the Constitution requires economic justice wouldn't "fit" with the constitutional materials.[31] But what would it take for economic justice to come back on the table as a serious constitutional argument? Dworkin's argument implies that it would take an Article V amendment,[32] because this is the formal way of breaking the narrative of "fit" that rejects economic justice as a constitutional right. But perhaps a serious constitutional argument for economic justice as a constitutional right could be made in response to social upheaval of a sort that caused people to question the goodness of a Constitution that lacked certain minimal economic rights. The argument would become a serious one not because it "fit" with the past nor because of an Article V amendment, but rather because the predi-

30. *See* Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 Yale L.J. 1013 (1984).

31. *See* Ronald Dworkin, Freedom's Law: The Moral Reading of the American Constitution 11 (1996).

32. During the Symposium, Professor Dworkin indicated that economic justice could come back on the table in a less formal way. He stated: "How would it get back on the table? That depends on what you take the data set for interpretation to be. I am disposed to think that it includes such things as legislation, revulsion, referenda, and the kind of phenomena that you are talking about." Ronald Dworkin, Symposium, *Fidelity in Constitutional Theory*, Fordham University School of Law 219 (Sept. 20, 1996) (transcript on file with the *Fordham Law Review*).

cate for considering it a not serious argument would be contested socially.

As a corollary to this point about easy cases, hard cases are hard not because of the lack of "fit," but rather because of the presence of contested predicates. For example, the constitutionality of racial affirmative action appears to be a hard case. This is so, however, not because of the absence of a "fit" story in either direction (I happen to believe that there is a fairly straightforward "fit" story that supports the constitutionality of racial affirmative action[33]). Instead, the constitutionality of racial affirmative action appears to be a hard case because American society is so deeply divided about whether racial affirmative action is a good or bad thing (or, if one prefers a different formulation, because American society is so deeply divided about whether racial affirmative action violates our constitutional principle of equality).

Thus, it is not "fit" with the framers' intentions or with history more broadly put that constrains judicial interpretations in rights cases. Rather, it is the movement of an issue between the uncontested and the contested. This is a sympathetic response to Lessig, who focuses in illuminating ways on precisely this movement between the uncontested and contested. Where I disagree with Lessig is in his description of constitutional practice in response to whether matters are uncontested or contested. As discussed above, the doctrine does not neatly break down into judicial deference to normal politics in institutional power cases and to constitutional politics in rights cases.

The second normative argument against strong judicial deference to the accountability of science or politics (present or past) is that good reasoning can often (or at least sometimes) do a better job of ensuring liberty than can accountability-democracy. As the preceding argument revealed, it is not so clear that our central constitutional predicate is democracy, understood as a governmental system in which the citizens are sovereign and in which the accountability of governmental actors to the citizens is of highest importance. Theories of constitutional interpretation that depend primarily on fidelity to framers' intent—whether in a fairly literal fashion or through a translation model—overvalue this conception of democracy. Rather than adopting a structure with accountability-democracy as the foundation, we have chosen instead a scheme in which accountability-democracy and liberty understood more abstractly must compete for a foundational role.[34] I say "liberty understood more abstractly" because accountability-democracy can be seen as a tool for reaching the underlying goal of liberty. That argument acknowledges the primacy of liberty, but

33. *See* Abner S. Greene, Kiryas Joel *and Two Mistakes About Equality*, 96 Colum. L. Rev. 1, 63-70 (1996).

34. *See* Abner S. Greene, *The Irreducible Constitution*, 7 J. Contemp. Legal Issues 293 (1996).

suggests that experience has taught us that there are no direct lines to the truth of liberty, and that only a structure such as accountability-democracy, in which assuring that citizens are sovereign is valued most highly, can properly ensure the conditions of liberty. This argument, however, tends to reduce the role of reasoning about liberty. There is reason to believe (as the framers did) that the *vox populi* will often miss good answers, distracted by self-interest and the short-term. Judges who need not face reelection can often reason better to protect the citizens' liberty than can the citizens themselves or their elected representatives. Knowing what the framers of the Fourteenth Amendment thought about either officially segregated schools or equality more generally, for example, might be less important in reaching a good constitutional answer than engaging in moral reasoning about the concept of equality as applied to such schools, detached from the concerns of the ballot box.

One might object that this view assumes that there are right answers and that judges can find them. What if either right answers don't exist or they're too hard for judges to locate? Would we not then be better off focusing on accountability-democracy, for at least there the citizens can believe that even if they or their elected representatives didn't get things right, at least they participated in the attempt to get the right answer? Here perhaps the best one can say is that experience has taught us that reasoning by unelected judges has, all things considered, provided a great bulwark against the vices of accountability-democracy, and that the principles of liberty and equality that the Court has developed are not, in truth, derivable from the framers without a significant addition of judicial moral reasoning.

In short, we should resist the tendency to think that the legitimacy of government can be found only in the accountability of politics or science. On this view, which appears to be Lessig's, legitimacy is predicated first in legal rules or interpretations made by those directly accountable to the citizens. Science can (and does) displace politics, on this view, when its truths serve as the uncontested backdrop for legal rules and interpretations. But judicial moral reasoning should not displace politics, the argument continues, because it lacks the (perceived) objective status that science commands. This theory of legitimacy—which seems to undergird Lessig's work—improperly devalues moral reasoning as an objective source of rules and interpretations, incorrectly seeing moral reasoning as free-floating rather than constrained. Political legitimacy should be seen as stemming not only from means—from the participation of citizens and the accountability of their governmental agents—but also from ends—from locating the best answers regarding cardinal principles such as liberty and equality.

The final normative argument against the accountability-democracy theory of legal rule creation and interpretation is that it obscures the responsibility of judges. When judges defer to either politics or sci-

ence they do so only after a complex set of decisions. They must ask which predicates deserve deference and at what level of generality, they must determine which political decisionmakers deserve deference and which scientific facts exist, and so on. There is no mechanical way to make these decisions; the decisions about when and how to defer to the perceived greater legitimacy of politics and science are themselves contested, normative decisions. Whenever one thinks he or she is escaping responsibility by deferring to the authority of another, it is probably wise to take a closer look. A literary example of this problem is in Shakespeare's *Measure for Measure*.[35] There the Duke of Vienna is unwilling to enforce the severe Viennese laws, so he invents a trip abroad to delegate authority to Angelo, a deputy whom he suspects will enforce the laws strictly. Rather than going abroad, however, the Duke disguises himself as a monk, and remains in Vienna to observe the goings-on. When Angelo's decisions go too far, the Duke must devise a way to intervene to prevent an injustice. Discussion of *Measure for Measure* often focuses on the decisions Angelo makes once authorized to act. But the Duke's behavior deserves sharp criticism as well. The Duke should not be permitted to avoid responsibility for the law's strict enforcement by delegating power to a man the Duke knows will enforce the law strictly. Judicial deference to science or politics should be similarly unmasked; the normative choices behind the deference should be seen as placing the judiciary in a position of responsibility, as well.

II. Discounting Accountability: Independent Agencies

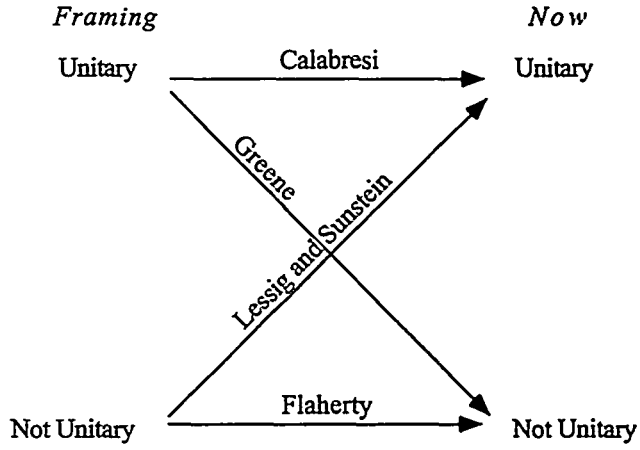
Just as the accountability of politics and science plays a large role in Lessig's theory of constitutional interpretation, so does the accountability of the President play a central role in Lessig's answer to a question raised by that more general theory, namely, whether independent agencies are constitutional. Here is the problem: Some federal agencies are headed by a multi-member group of commissioners who are removable by the President for good cause only. The Court has upheld the constitutionality of these so-called "independent agencies,"[36] but many academics have questioned this result, concluding that the Constitution requires that the President be able to remove policymaking officials at will.[37] The academic debate over the constitutionality of independent agencies requires examination of the importance of presidential accountability, and also reflects the difficulty of applying Lessig's translation model.

35. William Shakespeare, Measure for Measure 545 (Houghton Mifflin Co. 1972).

36. *See* Morrison v. Olson, 487 U.S. 654 (1988); Wiener v. United States, 357 U.S. 349 (1958); Humphrey's Ex'r v. United States, 295 U.S. 602 (1935).

37. *See* Calabresi & Prakash, *The President's Power*, *supra* note 5, at 643; Lessig & Sunstein, *The President and the Administration*, *supra* note 4, at 69-70; Geoffrey P. Miller, *Independent Agencies,* 1986 Sup. Ct. Rev. 41.

Let me set forth four competing views on the question of the constitutionality of independent agencies. The diagram below shows the following: I have argued that the framers perhaps[38] intended the President to have at-will removal power over officials, but that to be faithful to the nonconcentration-of-power principle, independent agencies are today constitutional.[39] Steven Calabresi has argued that the framers established a President with at-will removal power, and that this power must be maintained today.[40] Lessig and Cass Sunstein have argued that the framers did not require that the President have at-will removal power, but that to be faithful to principles of accountability and coordination, independent agencies must today be deemed unconstitutional.[41] And Martin Flaherty has argued that the framers did not require that the President have at-will removal power, and that there is no reason to think that conclusion should today be any different.[42]



[In this diagram, "Unitary" means at-will presidential removal of officials is required, and "Not Unitary" means a good-cause removal restriction is permitted.]

In the remainder of this section, I will first challenge the role that accountability plays in Lessig and Sunstein's and Calabresi's theories. Second, I will examine the differences between Martin Flaherty's theory and mine, in light of the fact that both of us conclude that independent agencies are constitutional. Before doing any of this,

38. *See infra* notes 44–45 and accompanying text.

39. *See* Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. Chi. L. Rev. 123, 149 (1994).

40. *See* Calabresi, *Some Normative Arguments*, *supra* note 5, at 58-60; Calabresi & Prakash, *The President's Power*, *supra* note 5, at 642-45; Calabresi & Rhodes, *The Structural Constitution*, *supra* note 5, at 1165-68.

41. *See* Lessig & Sunstein, *The President and the Administration*, *supra* note 4, at 106-08.

42. *See* Flaherty, *supra* note 5, at 1788-92.

though, I must confess that my theory of separation of powers is based overtly in an argument of translation that depends upon understanding the framers' views regarding presidential power and applying those views to the post-New Deal world. To the extent that this interpretive method depends upon preserving past commitments by politically accountable actors, it is subject to at least some of the challenges I raised above. The competing theories about independent agencies, however, are also linked to readings of framers' intent, so to some degree I can escape by saying I'm participating in an intramural argument, which assumes *arguendo* the propriety of substantial deference to the framers. Furthermore, my argument for the constitutionality of independent agencies, although based in the framers' commitment to nonconcentration of powers, in the end turns on a contemporary normative defense of the nonconcentration principle.[43]

My basic argument is this: The framers established an executive that would be strong enough to ward off the branch then feared as most dangerous, the legislature. On the question of removal power, the best position is probably that there was no clear framing view about whether the President must retain at-will removal power over officials.[44] But there is some evidence that the framers would have chosen such power had they been confronted with the issue. Hamilton wrote in *Federalist* No. 72 (using "Chief Magistrate" to refer to the President):

> The actual conduct of foreign negotiations, the preparatory plans of finance, the application and disbursement of the public monies, in conformity to the general appropriations of the legislature, the arrangement of the army and navy, the direction of the operations of war; these and other matters of a like nature constitute what seems to be most properly understood by the administration of government. 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.*[45]

Although "subject to his superintendence" could mean simply that the President should have directive power over officials, it is fairly strong evidence for removal power, as well. But whether we conclude that the framers required presidential at-will removal power, or merely assume this for purposes of argument, independent agencies are nonetheless constitutional today. Of central importance is the fact that the

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43. *See* Greene, *supra* note 39, at 131-33.

44. *See* Flaherty, *supra* note 5, at 1788-92. *Compare* Myers v. United States, 272 U.S. 52 (1926) (Taft, C.J.) *with* Edward S. Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 Colum. L. Rev. 353 (1927).

45. The Federalist No. 72, at 435-36 (Alexander Hamilton) (Clinton Rossiter, ed., 1961) (emphasis added).

framers did not give the executive lawmaking powers, for the central principle animating the construction of the federal separation of powers was that of nonconcentration of power. The framers didn't want a king any more than they wanted overreaching legislatures. In the twentieth century, Congress has delegated great amounts of legislative power to agencies, and the Court has not enforced the nondelegation doctrine. If the President had control over all of this legislative power and his own executive power, the concentration of power in the President would be dangerous. Thus, it is permissible for Congress to establish agencies that are independent of the President even though the framers might have resisted such an arrangement, because this preserves the core principle against concentrated governmental power. Conversely, Congress may not draw executive power to itself through participating, say, in the removal of officers, and it may not exercise legislative power in a way that skirts the bicameralism and presentment provisions of Article I, Section 7, through, say, a legislative veto. In both instances Congress would be concentrating power in itself, which is just as problematic as concentration of power in the President.

My argument captures the Court's doctrine from *Myers*[46] through *Morrison*,[47] and beyond. The nonconcentration-of-power principle is the driving force behind the Court's doctrine even though the Court has not always justified its holdings in this fashion. Accountability not only is not a central concern, but the Court's doctrine has left a large accountability gap. Instead of insisting that the President, an electorally accountable actor, have at-will removal power over agency heads, the Court has allowed good-cause removal restrictions. And instead of allowing Congress, an electorally accountable actor, to play a role in executing the laws or in legislating outside Article I, Section 7, the Court has invalidated such congressional control mechanisms.

Both Calabresi and Lessig and Sunstein argue that independent agencies are unconstitutional, although they reach this conclusion through dramatically different arguments. Calabresi argues that both text and history show that at-will removal power is required. Further, he contends that the need to preserve accountability and to prevent factionalization demand that the rule requiring at-will removal power be maintained today. Lessig and Sunstein set forth impressive historical evidence showing that in the years following the Constitution's ratification, various officials carrying out federal law operated with significant independence from the President. Despite this evidence of the lack of concern about presidential accountability during those early years,[48] Lessig and Sunstein conclude that independent agencies

46. Myers v. United States, 272 U.S. 52 (1926).

47. Morrison v. Olson, 487 U.S. 654 (1988).

48. The evidence is not strong enough, though, to show that the framers or early interpreters would have permitted good-cause rather than at-will removal power in

are today unconstitutional. Relying (as I do) on the great amounts of legislative power delegated by Congress, they reach the opposite conclusion from mine: accountability and coordination, they contend, require that delegated legislative power be united under the President and not dispersed to agencies independent from the President.

This conclusion is odd. First, what is the source of presidential accountability as foundational and in need of preservation? Lessig and Sunstein establish a very interesting historical case for precisely the opposite conclusion, namely, that those who interpreted the Constitution in practice in its earliest years did not deem presidential accountability so important. Indeed, Martin Flaherty has made an impressive historical case for the concerns the framers had about plebiscitary democracy, about the desire to fracture accountability. Perhaps recognizing this problem, Lessig and Sunstein qualify the historical claim so as to leave room for the later argument for at-will removal power. They write, "where no special reason existed to separate responsibility from the President, the pattern of original executive structures strongly supports the conclusion that the President remains accountable for the actions of government officers."[49] But according to Lessig and Sunstein's historical arguments, "special reasons" to separate responsibility from the President included criminal prosecutions, control of some Treasury Department functions, and control of some Postmaster General functions. If these can count as "special reasons" to limit presidential removal to good cause, then the case for presidential accountability more generally is gravely weakened.

Second, Lessig and Sunstein fail to acknowledge the importance of the nonconcentration-of-power principle. This principle is not just something that existed at the periphery of the framers' consciousness. There is ample evidence to support the conclusion that the fear of either legislative or executive supremacy led the framers to an elaborate checks and balances structure that would prevent either department from gaining the upper hand. Part of this package included lawmaking by the legislature, not the executive. If the framers knew that the executive would one day be given vast policy-making power and that the Court would permit this to happen, they surely would have found other ways to provide for checks against executive dominion. The concern with concentration of power in the President cannot simply be overridden or outweighed by citing "accountability" or "coordination."

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the President over key executive officials. Showing that various areas of execution existed independently of presidential control is not the same thing as showing that if push came to shove and the President insisted on removing a policy-making official, he could have been constitutionally blocked by a law demanding a showing of good cause.

49. Lessig & Sunstein, *The President and the Administration*, *supra* note 4, at 94.

Martin Flaherty agrees with Lessig and Sunstein's historical predicate—at-will removal power not required—but agrees with my conclusion that independent agencies are constitutional. I have some concerns, though, with Flaherty's argument. First, he fails to discuss *Federalist* No. 72, which contains some of the most persuasive evidence that the framers thought the President should be able to remove officials at will.[50] Second, he backs a view that would defer to congressional framework legislation unless it violates a clear textual command or represents a clear violation of underlying separation of powers principles. Flaherty thus criticizes the Court's invalidation of legislative vetoes in *INS v. Chadha*[51] and of the Gramm-Rudman-Hollings Act in *Bowsher v. Synar*.[52] But in both instances, Flaherty fails to address the concentration-of-power problem raised by the legislation at issue, even though he had earlier admitted that balance of power was a core concern of the framers and should still be today. Now it is true that legislative vetoes can be seen as taking back some of what Congress gave away, and thus as rebalancing power. But allowing Congress to have the final say over significant swaths of federal legislation, without having to present the legislative veto to the President for his signature or veto (which may be overridden), risks concentration of power in the Congress.[53] Similarly, the law invalidated in *Bowsher* gave Congress the power to fire the Comptroller General, and giving Congress such executive power again concentrates power in one branch inappropriately.

Flaherty criticizes my focus on concentration of power (or aggrandizement) as formalist. He argues that Congress aggrandizes power every day, "whether by statute, restrictions it places on presidential removal power, or (formerly) legislative vetoes."[54] There is no "foreordained baseline," to determine what counts as aggrandizement, argues Flaherty, and any such baseline "is just another type of formalism."[55] Aggrandizement, adds Flaherty, "is not necessarily a bad thing from the Founding perspective."[56] Sometimes preventing aggrandizement can violate core separation of powers principles, he maintains; for example, he argues, invalidating the legislative veto "ignores the role that this device played in maintaining a balance between Congress . . . and the executive."[57]

Let me start with the last point first, which might just be a semantic squabble. Aggrandizement is necessarily a bad thing from the foun-

50. *See supra* text accompanying note 45.
51. 462 U.S. 919 (1983).
52. 478 U.S. 714 (1986).
53. There are some exceptions. *See* Greene, *supra* note 39, at 179-95 (suggesting a modification of the *Chadha* holding in certain narrow circumstances).
54. Flaherty, *supra* note 5, at 1829 n.537.
55. *Id.*
56. *Id.*
57. *Id.*

ders' perspective, and from ours as well.[58] Aggrandizement involves one department grabbing another department's power or rendering the exercise of its own power easier than the Constitution permits. The question is not whether aggrandizement is necessarily a bad thing; rather, the question should be, What counts as aggrandizement?

In defining what counts as congressional aggrandizement, Flaherty improperly lumps together statutes, restrictions on presidential removal power, and legislative vetoes. Statutes and restrictions on presidential removal power indeed represent congressional assertions of power, but statutes (generally) and restrictions on presidential removal power do not involve Congress tinkering with the lawmaking structure so as to give itself a final say or tinkering with the structure of execution so as to give itself a role in executing the laws. The concern with aggrandizement is a concern with one branch of government taking another branch's power or making it too easy to exercise its own power; the concern is not with core assertions of branch power (statutes) or with regulation of another branch's power without taking that power (independent agencies).

Finally, Flaherty uses the term "formalist" both in criticizing my position and throughout his article to refer to (among other things) judicial decisions that invalidate framework legislation (such as *Chadha* and *Bowsher*) and to theories that support such decisions. He uses the term "functionalist" to refer to the view that would defer to Congress on these matters. This seems to me an unhelpful way to use these terms. One can defend the Court's results in cases such as *Chadha* and *Bowsher* not via a rigid tripartite view of what the three branches of government are allowed to do (a defense that might properly be criticized as formalist), but rather through a purposive argument that would invalidate the legislative veto and the structure of authority over the Comptroller General because of the risk of concentrating power in the legislature. It is not clear to me why invalidating such legislation on this reasoning should be called "formalist."

CONCLUSION

Judicial deference plays a significant role in Larry Lessig's work. Judges defer to the uncontested background of scientific facts, they defer to politics (in institutional power cases) when matters are contested, and they defer to framing principles in rights cases. An analogue to judges, the unaccountable independent agencies are constitutionally problematic, says Lessig, because once we understand that agencies (often) make policy, the accountable President should

58. In addition to the cases involving congressional aggrandizement discussed in the text, the Court has also invalidated instances of presidential aggrandizement. *See* United States v. Nixon, 418 U.S. 683 (1974) (refusing to allow claim of executive privilege); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (refusing to allow presidential seizure of steel mills).

have at-will removal power over policymaking officials. Accountability, on this account, plays two different roles, one that I'll call "affirmative" and the other that I'll call "negative." The affirmative role of accountability is to tie governmental power directly to the citizens. Insisting that the President have at-will removal power is an example of this; the President must answer at the ballot box, independent agencies are not so encumbered. The negative role of accountability ensures that judges do not exercise political will. Developing an edifice of constraints that is built on past political actions—for example, ratified text, that text's structure, and its history—is an example of this.

It is hard to argue that accountability does not matter to American constitutional law, in both its affirmative and negative aspects. But accountability does not require that constitutional interpretation be tied either to science or politics (present or past) or that the President be at the top of a chain of command over agency policy-making. Constraints both past and present necessarily exist, and are not in danger of escaping. Regarding the past: We should not forget constraints of endogeneity and of reasoning. Judges in our system cannot help but be constrained, in this broad (and, yes, weak) way, by text, structure, and history. Judges live in our system and have been trained in it. And reasoning provides its own constraints. As a descriptive matter, it's not clear that the interpretation of the majestic and vague clauses—free speech, due process, equal protection, to name three—has been constrained in any stronger fashion than that provided by the constraints of endogeneity and reasoning. Regarding the present, and the presidency: Plenty of ballot box accountability remains even regarding independent agencies. They are created, dismantled, funded, and authorized to act through Acts of Congress that the President must either sign or see enacted over his veto. The agency commissioners are appointed by the President by and with the advice and consent of the Senate (and must be so reappointed), and the President often has the statutory power to name and remove the agency chair. Further, as a matter of political reality, both executive and independent agencies often seek presidential support, whether the support comes in the form of information or congressional lobbying.[59]

Accountability cannot be written out of our constitutional scheme. But it can, and should be, discounted. Other values—such as reaching good answers on questions raised by the majestic vague clauses of free speech, due process, equal protection, and the like; such as ensuring against concentration of power in the President—must be accounted for, as well.

59. *See* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 587-95 (1984).