

NONDELEGATION AND THE UNITARY EXECUTIVE

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Americans have always mistrusted executive power, but only recently has “the unitary executive” emerged as the bogeyman of American politics. According to popular accounts, the idea of the unitary executive is one of “presidential dictatorship”¹ that promises not only “a dramatic expansion of the chief executive’s powers”² but also “a minimum of legislative or judicial oversight”³ for an American President to exercise “essentially limitless power”⁴ and thereby to “destroy the balance of power shared by our three co-equal branches of government.”⁵ Readers of the daily press are led to conclude the very notion of a unitary executive is a demonic modern invention of political conservatives,⁶ “a marginal constitutional theory” invented by Professor John Yoo at UC Berkeley,⁷ or a bald-faced power grab conjured up by the administration of George W. Bush,⁸ including, most

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1 John E. Finn, Opinion, *Enumerating Absolute Power? Who Needs the Rest of the Constitution?*, HARTFORD COURANT, Apr. 6, 2008, at C1.

2 Tim Rutten, Book Review, *Lincoln, As Defined by War*, L.A. TIMES, Oct. 29, 2008, at E1.

3 Editorial, *Executive Excess*, GLOBE & MAIL (Toronto), Nov. 12, 2008, at A22.

4 Robyn Blumner, *Once Again We'll Be a Nation of Laws*, ST. PETERSBURG TIMES, Jan. 11, 2009, at 5P.

5 Stephen L. Goldstein, Opinion, *McCain's an Injustice*, S. FLA. SUN-SENTINEL, Aug. 29, 2008, at 23A.

6 Dana D. Nelson, Opinion, *How Powerful a President?*, L.A. TIMES, Oct. 11, 2008, at A19.

7 Tim Rutten, Opinion, *Bush's Executive Tyranny*, L.A. TIMES, Mar. 4, 2009, at A29.

8 See, e.g., John C. Binkley, Book Review, PARAMETERS 123, 125 (2009) (reviewing TIMOTHY J. LYNCH & ROBERT S. SINGH, *AFTER BUSH: THE CASE FOR CONTINUITY IN AMERICAN FOREIGN POLICY* (2008)) (discussing “the Bush Administration’s ideal of the unitary executive with its potential for unlimited inherent executive power”); Editorial, *Senators Should Grill Court Pick*, SACRAMENTO BEE, May 28, 2009, at A20 (“The reality is that in recent years the president and the Supreme Court have aggressively claimed powers at the expense of Congress. President George W. Bush, for example, claimed ‘unitary executive’ powers, going around laws passed by Congress.”); Michael Tomasky, *Obama Triumph: The Transition: Expect the Man With the Ball to Play It His Way*, GUARDIAN, Nov. 6, 2008, at H3 (denouncing “the Bush-Cheney theory of the ‘unitary executive’”).

ominously, Vice President Cheney.⁹ It is no surprise that the *New York Times* agreed with then-candidate Joe Biden's assessment that "Mr. Cheney's theory of the 'unitary executive'" made him "the most dangerous vice president we've had in American history."¹⁰

In fact, the theory of a unitary executive has nothing to do with the extent of presidential power but only with who is to exercise those powers, however broad, allocated to the executive. Its proponents seek not to evade the limitations of separated powers, but rather insist—especially when dealing with the other branches—that the President alone is responsible for the actions of the executive branch. The idea seems ominous today because so many functions have been allocated to the now-fragmented executive branch that reuniting it under presidential leadership seems to the present generation both to enhance presidential authority unimaginably and to create an unmanageable administrative structure.

We suggest the "unitary executive" has fallen into ill repute and apparent obsolescence not because of an executive bent upon autocracy but because of a legislature freed from the constraints of the separation of powers. In Part I we introduce the nondelegation doctrine as a necessary corollary of the unitary executive and examine the failure of the Supreme Court to enforce that doctrine. In Part II we examine the similar failure of the President to resist encroachments by the Congress. In Part III we explore the implications of these failures.

I.

No reader of this *Journal* will be surprised to hear that Dick Cheney did not originate the idea that the executive power should be united under presidential control. That was part of the original con-

⁹ See, e.g., Peter Baker, *When 535 Take on Number 1*, N.Y. TIMES, Oct. 5, 2008, at WK1 ("A young Dick Cheney, chief of staff for the weak, unelected president who followed Nixon, Gerald R. Ford, resolved when he returned to the White House a quarter-century later to do all he could to restore that lost power. The 'unitary executive' theory he embraced held that because the Constitution provides for only one executive branch, Congress cannot intrude upon the president's duties to manage the government. . . . With the acquiescence of a Republican Congress and a public eager to fight terrorism, Mr. Bush and Mr. Cheney advanced their cause for years—the secret deliberations of an energy task force; the Patriot Act; 'signing statements' that express reservations about enforcing a bill; warrantless surveillance; unrestricted detention of terrorism suspects; the reinterpretation of the Geneva Conventions."); Jonathan Raban, *The Golden Trumpet*, GUARDIAN, Jan. 24, 2009, at R2 (condemning "the spectre of a dictatorial administration, emboldened by Dick Cheney's theory of the 'unitary executive'").

¹⁰ Editorial, *Dick Cheney, Role Model*, N.Y. TIMES, Oct. 4, 2008, at A18.

stitutional design. In fact, the provision of a unitary executive was a response to the fear, seldom heard today, that the Congress would become tyrannical. Indeed, for all the contemporary hysteria over the unitary executive, few seemed to recognize, until Professors Calabresi and Yoo began to publish their research on the subject,¹¹ how important the idea has been in American history. Contentious debate over the separation of powers and over the unitary executive in particular has been a perennial feature of American politics, about which the Founders left warnings worth revisiting today.

In *The Federalist No. 51*, Madison wrote, “[i]n republican government, the legislative authority necessarily predominates.”¹² His remedy for this tendency toward domination was to divide the legislature into different chambers, while the executive was to remain unitary so it would not be overmatched in its battles with the legislature. “As the weight of the legislative authority requires that it should be thus divided,” explained Madison, “the weakness of the executive may require, on the other hand, that it should be fortified.”¹³

Today, Madison’s warning seems quaint. Having seen the socially transformative power of the courts,¹⁴ many scoff at Hamilton’s characterization of the judiciary as the “least dangerous” branch.¹⁵ Editorialists, as we have seen, conclude the executive is the most powerful branch and the legislature weak by comparison.¹⁶ Against this newly received wisdom, we argue that Madison was right, and his modern inversion mistaken.

We start with the simple reminder that the Framers of our Constitution did not establish a parliamentary system with a prime minister dependent upon the national legislature. The President is not selected by the Congress; his salary is protected against any congressional diminution; and his term in office is fixed. Thus did our Founders seek to establish a President who was more than an agent of the legislature, as was the prime minister under the British constitution. To quote Madison again:

11 See STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008).

12 *THE FEDERALIST NO. 51*, at 319 (James Madison) (Clinton Rossiter ed., 1961).

13 *Id.* at 319–20.

14 For contrasting views of the Supreme Court’s influence upon American society, compare ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990) with MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* (1998).

15 *THE FEDERALIST NO. 78* (Alexander Hamilton), *supra* note 12, at 464.

16 See, e.g., *Senators Should Grill Court Pick*, *supra* note 8.

In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others.¹⁷

The theory of the unitary executive focuses upon the extent to which Article II, Section 1, Clause 1 of the Constitution—"The executive Power shall be vested in a President of the United States of America"—protects the President's authority to appoint, direct, and remove officers within the executive branch.¹⁸ Complementing this positive grant of authority to the President is the understanding that the other branches would be confined to their own respective spheres. A necessary corollary of the theory of the unitary executive, then, finds expression in the nondelegation doctrine—the idea that the Congress cannot delegate its lawmaking powers to the executive or the judiciary. It is the demise of that doctrine that has allowed the Congress both to augment and to fragment the executive branch by establishing federal agencies within the executive tasked with making policy pursuant to broad mandates from the Congress, agencies that effectively exercise legislative power through rulemaking.

The nondelegation doctrine was once recognized as a foundational principle of the separation of powers.¹⁹ Its roots go back to John Locke, who put it this way:

[T]he legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others. . . . The power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws and place it in other hands.²⁰

Locke developed the nondelegation doctrine out of an elementary maxim of the law of agency, *delegata potestas non potest delegari*—delegated powers cannot be further delegated.²¹ Once the people

¹⁷ THE FEDERALIST NO. 51 (James Madison), *supra* note 12, at 318.

¹⁸ U.S. Const. art. II, § 1.

¹⁹ *See* *Field v. Clark*, 143 U.S. 649, 692 (1892) ("That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.").

²⁰ JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT § 141, at 81 (Thomas P. Peardon ed., The Liberal Arts Press, Inc., 1952) (1690).

²¹ JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY § 13 (Boston, Little, Brown & Co. 1839); *see also* *Shankland v. Mayor of Washington*, 30 U.S. (5 Pet.) 390, 395 (1831) ("[T]he general rule of law is, that a delegated authority cannot be delegated."). *But cf.* Patrick W. Duff & Horace E. Whiteside, *Delegata Potestas Non Potest Delegari: A Maxim of*

had delegated the lawmaking power to the legislature, it could pass no further lest it elude the people's oversight.

Chief Justice Taft recognized the nondelegation doctrine as a fixture of American constitutional law. In *J.W. Hampton, Jr. & Co. v. United States*,²² the Court considered whether the Congress may delegate to the President the authority to raise or lower duties imposed by the Tariff Act of 1922 in order to equalize differences between foreign and domestic costs of production. The Act specified the criteria the President was to consider and required a prior investigation by the Tariff Commission to inform the President's decision. American courts, especially state courts, had been grappling with the reach of the nondelegation doctrine since the beginning of the Republic. Chief Justice Taft drew upon their work in crafting his opinion, and the cases he cited demonstrate how the importance of the nondelegation doctrine to the American constitutional system was well understood at the time.

In an 1852 case, the Supreme Court of Ohio had considered whether the general assembly could require county commissioners, upon a referendum of the public, to subscribe to the capital stock of a private company established to build a new railroad and to issue bonds in payment. The court started from first principles:

That the general assembly can not surrender any portion of the legislative authority with which it is invested, or authorize its exercise by any other person or body, is a proposition too clear for argument, and is denied by no one. This inability arises no less from the general principle applicable to every delegated power requiring knowledge, discretion, and rectitude, in its exercise, than from the positive provisions of the constitution itself. . . . [W]hile it continues in force, every citizen has a right to demand that his civil conduct shall only be regulated by the associated wisdom, intelligence, and integrity of the whole representation of the state.²³

Similarly, the Minnesota Supreme Court in 1888 had considered whether the state legislature could delegate to a commission the authority to set rates for common carriers that are "equal and reasonable."²⁴ The court first stated the common understanding of the time:

American Constitutional Law, 14 CORNELL L.Q. 168 (1929) (questioning the historical pedigree of the nondelegation maxim).

²² 276 U.S. 394 (1928).

²³ *Cincinnati, Wilmington & Zanesville R.R. Co. v. Comm'rs of Clinton County*, 1 Ohio St. 77, 87 (1852).

²⁴ *State of Minn. ex rel. R.R. & Warehouse Comm'n v. Chicago, Milwaukee & St. Paul Ry. Co.*, 38 Minn. 281, 282 (1888).

It is, of course, one of the settled maxims in constitutional law, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body. Where the sovereign power of the state [referring here to the people] has located the authority it must remain. The department to whose judgment and wisdom this high prerogative has been intrusted cannot relieve itself of the responsibility by choosing other agencies, and substituting their judgment and wisdom for its own.²⁵

Despite its paean to the nondelegation principle in American law, the Minnesota Supreme Court, like the Supreme Court of Ohio, upheld the challenged delegation of authority. In *J.W. Hampton* the Supreme Court followed suit, first extolling the nondelegation doctrine but then upholding the challenged delegation.²⁶ “The true distinction,” explained Chief Justice Taft, quoting the Ohio Supreme Court, “is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law.”²⁷ To operationalize that distinction, Taft declared the Congress may authorize executive agents to carry out its legislation as long as it “lay[s] down by legislative act an intelligible principle to which the person or body authorized . . . is directed to conform.”²⁸

Despite the careful line-drawing of the Chief Justice, the Supreme Court has invoked this principle to strike down an act of Congress exactly two times, both in the same year and with respect to the same act. Section 9(c) of Title I of the National Industrial Recovery Act of 1933 (NIRA)²⁹ authorized the President to prohibit the transportation in interstate commerce of petroleum products produced in excess of the amount permitted by state authority, but it did not define the circumstances or conditions under which the transportation was to be allowed or prohibited. Instead, the President was left to adopt by executive order his own “Code of Fair Competition for the Petroleum Industry” to guide his decisions. In *Panama Refining Co. v.*

25 *Id.* at 299.

26 276 U.S. at 405–06 (“The well-known maxim ‘*Delegata potestas non potest delegari*’ . . . has had wider application in the construction of our Federal and State Constitutions than it has in private law. . . . [I]t is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President, or to the Judicial branch . . .”).

27 *Id.* at 407 (quoting *Cincinnati, Wilmington & Zanesville R.R. Co.*, 1 Ohio St. at 88). The Minnesota Supreme Court quoted the same passage. *R.R. & Warehouse Comm’n*, 38 Minn. at 300.

28 *J.W. Hampton*, 276 U.S. at 409.

29 National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933).

Ryan,³⁰ the Court adjudged section 9(c) an unconstitutional delegation of legislative power. “As to the transportation of oil production in excess of state permission, the Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited,” explained the Court.³¹ “So far as this section is concerned, it gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit.”³²

That same year, the Court also considered the “Code of Fair Competition for the Live Poultry Industry of the Metropolitan Area in and about the City of New York,” which, again pursuant to the NIRA, had been proposed by the industry and adopted by the President in an executive order. In *A.L.A. Schechter Poultry Corp. v. United States*,³³ the Court concluded, “[s]uch a delegation of legislative power is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress.”³⁴ Justice Cardozo, who had dissented in *Panama Refining*, now declared, “[t]his is delegation running riot. No such plenitude of power is susceptible of transfer.”³⁵

These decisions had momentous political consequences. The National Recovery Administration halted operations; the Congress temporarily stopped work on New Deal legislation and looked to the White House for a response to the Court.³⁶ President Roosevelt did respond, with a lengthy press conference, angrily denouncing the Court for crippling the federal government and imperiling the nation. “We have got to decide one way or the other,” he said, “whether in some way we are going to . . . restore to the Federal Government the powers which exist in the national Governments of every other

30 293 U.S. 388 (1935).

31 *Id.* at 430.

32 *Id.* at 415.

33 295 U.S. 495 (1935).

34 *Id.* at 537.

35 *Id.* at 553 (Cardozo, J., concurring).

36 See Arthur Krock, *Court is Unanimous: President Cannot Have ‘Roving Commission’ to Make Laws by Code*, N.Y. TIMES, May 28, 1935, at 1 (“At NRA headquarters officials and employees sat in gloom, wondering what is to become of them . . .”); *Richberg Issues Plea: He Calls on Employers to Maintain Labor, Fair Practice Standards*, N.Y. TIMES, May 28, 1935, at 1 (noting the demoralized atmosphere and the nervousness that abounded after the Court’s decision in *Schechter Poultry Corp.*); *Roosevelt Maps Moves: Congress at Standstill Waiting for Word on White House Plans*, N.Y. TIMES, May 29, 1935, at 1 (stating that the Congress would engage in little if any business of note until the President addresses the nation).

Nation in the world.”³⁷ The President accused the Court of wanting to revert to “the horse-and-buggy age.”³⁸ Organized labor was outraged,³⁹ but general public opinion divided because much of the NIRA had been unpopular.⁴⁰ A debate emerged in the public press about judicial review and the role of the Court,⁴¹ and academics deliberated over whether “the ‘rule against delegation,’ as applied by the Supreme Court, threaten[ed] to defeat the efforts of our political democracy to use government as an instrumentality for the effective control of our national economy.”⁴²

Ongoing confrontation with the political branches appeared too perilous a course for the Court and, though it has never overruled *Schechter Poultry* or expressly repudiated the “intelligible principle” standard of *J.W. Hampton*, its standards for intelligibility have become so flaccid that the Congress may now delegate authority to regulate the private sector in “the ‘public interest, convenience, or necessity’”⁴³ and to be “generally fair and equitable.”⁴⁴

The U.S. Court of Appeals for the D.C. Circuit played a modest role in the last gasps of the nondelegation doctrine. In *American*

37 William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347, 357 (quoting WASH. POST, June 1, 1935).

38 Otto Friedrich et al., *The New Deal: FDR's Disputed Legacy*, TIME, Feb. 1, 1982, at 35.

39 See Louis Stark, *Labor Leaders Much Disturbed*, N.Y. TIMES, May 28, 1935, at 17 (“Organized labor was dazed by the Schechter case decision today . . .”).

40 Barry Friedman, *The History of the Counter-majoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971, 990–91 (2000).

41 See *id.* at 992–93 (“These 1935 decisions triggered a vigorous debate about the practice of judicial review. There was, however, no clear opinion as to the appropriate outcome of the struggle. At the end of that year, newspaper editors voted the debate about judicial review and the Court’s encounter with the New Deal the year’s ‘biggest’ news story.”).

42 James Hart, *Limits of Legislative Delegation*, 221 ANNALS AM. ACAD. POL. & SOC. SCI. 87, 87 (1942) (suggesting reinterpretation where “constitutional law that has been built upon precedents which antedate the American industrial revolution is not well adapted to modern circumstances and needs”).

43 *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 215 (1943) (“The criterion governing the exercise of the Commission’s licensing power is the ‘public interest, convenience, or necessity.’”); see also *United States v. Rock Royal Coop., Inc.*, 307 U.S. 533, 577 (1939) (upholding the authority of the Secretary of Agriculture to fix prices for agricultural commodities at a level that will reflect economic conditions, “provide adequate quantities of wholesome milk and be in the public interest”).

44 *Yakus v. United States*, 321 U.S. 414, 420 (1944) (“[T]he Administrator is authorized . . . to promulgate regulations fixing prices of commodities which ‘in his judgment will be generally fair and equitable . . .’”); see also 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 2.01 (1958) (“Much of the judicial talk about requirement of standards is contrary to the action the Supreme Court takes when delegations are made without standards. The vaguest of standards are held adequate, and various delegations without standards have been upheld.”).

Trucking Associations v. EPA,⁴⁵ the D.C. Circuit considered the provision of the Clean Air Act that requires the EPA to set national ambient air quality standards for pollutants at a level “requisite to protect the public health” with an “adequate margin of safety.”⁴⁶ Because ozone and particulate matter are nonthreshold pollutants,⁴⁷ the EPA lacked a determinate criterion for setting any particular limit. The EPA’s construction of the Clean Air Act left it free to set air quality standards at any point between zero and a concentration that would yield a “killer fog.”⁴⁸ The court held there was no intelligible principle in the Act to govern the decision of the EPA and remanded the matter to the agency so that it might, if possible, construe the Act to provide an intelligible principle by which to govern its decisions. On further review, however, the Supreme Court concluded no such construction was necessary. In *Whitman v. American Trucking Associations*,⁴⁹ the Court held the phrase “requisite to protect the public health” was determinate enough to stand alongside its precedents upholding statutes authorizing, for example, regulation “in the public interest.”⁵⁰ As the Court explained, “we have ‘almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.’”⁵¹

True, but why? If nondelegation was so fundamental a principle to our constitutional order—with roots in Lockean political philosophy and the very notion of popular sovereignty—why did it have so little a constraining effect? Why are there no more than those two cases from the first half of the twentieth century in which the Supreme Court found an unconstitutional delegation of legislative power? It is certainly not for want of opportunities. Rather, we submit, the explanation lies in Madison’s warning about the predominance of the legislature in republican governments or what we might today call “the counter-majoritarian difficulty.”⁵²

45 175 F.3d 1027 (D.C. Cir. 1999), *rev’d in part*, *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457 (2001).

46 42 U.S.C. § 7409(b)(1) (2006).

47 Nonthreshold pollutants are thought to pose some possibility of adverse health effects at any level of exposure above zero.

48 *Am. Trucking Ass’ns*, 175 F.3d at 1036 (referring to London’s “Killer Fog” of 1952).

49 531 U.S. 457 (2001).

50 *Id.* at 472–74. *But see* David Schoenbrod, *Politics and the Principle That Elected Legislators Should Make the Laws*, 26 HARV. J.L. & PUB. POL’Y 239, 272–83 (2003) (arguing the Court’s interpretation of the Clean Air Act confined the EPA to regulating against “medically significant” risks in order to avoid a delegation problem).

51 *Whitman*, 531 U.S. at 474–75 (citation omitted).

52 *See generally* ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962).

If we look back to the nondelegation cases upon which Chief Justice Taft relied in *J.W. Hampton*, we see that the judges' rhetorical enthusiasm for the nondelegation doctrine was overmatched by their reluctance to confront the legislature. In the *Cincinnati Railroad* case, for example, before the Court reached the nondelegation issue it devoted one-third of its opinion to justifying its authority to review an act of the legislature for constitutionality—this some fifty years after *Marbury v. Madison*.⁵³ After noting that “[t]he Legislature is, of necessity, in the first instance, to be the judge of its own constitutional powers,” the Court explained:

Doubt, in their case, as in that of the courts, should be conclusive against all affirmative action. This being their duty, we are bound, in all cases, to presume they have regarded it; and that they are clearly convinced of their power to pass a law before they put it in the statute book. If a court, in such case, were to annul the law while entertaining doubts upon the subject, it would present the absurdity of one department of the government overturning in doubt what another had established in settled conviction, and to make the dubious constructions of the judiciary outweigh the fixed conclusions of the general assembly.⁵⁴

The Minnesota Supreme Court similarly understood that the legislature's role was to pass “[f]irst, on its authority to make the enactment” and only second on its “expediency.”⁵⁵ This view of the legislature's role led to the conclusion that, as the Massachusetts Supreme Judicial Court had said in 1817, “[t]he legislature is, in the first instance, the judge of its own constitutional powers, and it is only when manifest assumption of authority, or misapprehension of it, shall appear, that the judicial power will refuse to execute” the law.⁵⁶ The Massachusetts Supreme Judicial Court therefore announced its determination “never [to] declare a statute void, unless the nullity and invalidity of the act are placed, in their judgment, beyond reasonable doubt.”⁵⁷

The Supreme Court of Pennsylvania similarly denied the power of the courts “to set aside a law, unless the legislature have encroached on ground which they are positively or by necessary implication for-

53 See GEORGE P. FLETCHER & STEVE SHEPPARD, *AMERICAN LAW IN A GLOBAL CONTEXT: THE BASICS* 133 (2005) (noting judicial review “was specifically enshrined in some state constitutions, and it had been employed in both state courts’ and federal courts’ in actions dealing with state statutes” prior to *Marbury*).

54 *Cincinnati, Wilmington & Zanesville R.R. Co. v. Comm’rs of Clinton County*, 1 Ohio St. 77, 84 (1852).

55 *State of Minn. ex rel. R.R. & Warehouse Comm’n v. Chicago, Milwaukee & St. Paul Ry. Co.*, 38 Minn. 281, 299 (1888) (emphasis in original).

56 *Adams v. Howe*, 14 Mass. (13 Tyng) 340, 345 (1817).

57 *In re Wellington*, 33 Mass. (16 Pick.) 87, 95 (1834).

bidden to enter.”⁵⁸ Kentucky’s Court of Appeals agreed that “to merely doubt legislative power is not enough to justify judicial resistance. This Court will not decide an act of the Legislature to be unconstitutional on a mere doubt, but they must be fully satisfied that it is so.”⁵⁹

The United States Supreme Court early on expressed a similar hesitancy about declaring an act of Congress unconstitutional. As Justice Chase explained, “if the court have such power, I am free to declare, that I will never exercise it, *but in a very clear case.*”⁶⁰ So, too, Justice Washington: “[t]he presumption, indeed, must always be in favour of the validity of laws, if the contrary is not clearly demonstrated.”⁶¹ And Justice Paterson: “to authorise this Court to pronounce any law void, it must be a clear and unequivocal breach of the constitution, not a doubtful and argumentative implication.”⁶²

Finally, in 1810 Chief Justice Marshall wrote,

[I]t is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.”⁶³

Indeed, it was none other than John Marshall—the author of *Marbury* and the godfather of judicial review—who canonized this judicial deference to the legislature’s determinations of its own powers. “Let the end be legitimate,” he wrote in *McCulloch v. Maryland*, “and all means which are appropriate, which are plainly adapted to that end,

58 *Cincinnati, Wilmington & Zanesville R.R. Co.*, 1 Ohio St. at 85 (construing *Commonwealth v. M’Williams*, 11 Pa. 61, 70 (1849)).

59 *City of Louisville v. Hyatt*, 41 Ky. (2 B. Mon.) 177, 178 (1841) (“[W]e should be justly chargeable with wandering from the appropriate sphere of the *judiciary department*, were we, by a subtle elaboration of abstract principles and metaphysical doubts and difficulties, to endeavor to show that such a power may be questionable, and on such unstable and unjudicial ground, to defy and overrule the public will, as clearly announced by the legislative organ.” (emphasis in original)).

60 *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 175 (1796) (emphasis in original).

61 *Cooper v. Telfair*, 4 U.S. (4 Dall.) 14, 18 (1800).

62 *Id.* at 19; see also JAMES BRADLEY THAYER, *THE ORIGIN AND SCOPE OF THE AMERICAN DOCTRINE OF CONSTITUTIONAL LAW* 18 (Boston, Little, Brown & Co. 1893) (arguing courts may not invalidate a law “as a mere matter of course,—merely because it is concluded that upon a just and true construction the law is unconstitutional. That is precisely the significance of the rule of administration that the courts lay down. It can only disregard the Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational question”).

63 *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 128 (1810).

which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”⁶⁴

That was Marshall’s reading of the Necessary and Proper Clause, but consider the violence it does to the text. “Necessary and Proper” is the language of strict scrutiny: the Congress may pass laws which are *necessary* to secure a *proper* government interest; whatever is not necessary is not authorized.⁶⁵ Marshall, however, transformed the clause into a species of rational basis review: the Congress may pass laws that are “adapted” (that is, rationally related) to any *legitimate* government interest.⁶⁶ And so the constitutional presumption of liberty was reversed. Instead of adhering to the constitutional design of limited and enumerated powers—in short, the view that what the Constitution does not authorize the National Government to do it prohibits the National Government from doing—the courts decided, rather than confront the legislature, that the National Government may do whatever the Constitution does not prohibit. And who can blame them? It would take some nerve for an unelected judge, armed only with the power to persuade, to tell the people that a law duly adopted by a majority of both chambers of the legislature and signed by the executive will not be given effect because it is not, in the judge’s opinion, “necessary” but merely “expedient.” And so the counter-majoritarian difficulty (Madison’s republican tendency) doomed the Necessary and Proper Clause and, along with it, the nondelegation doctrine.

Justice Scalia explained this outcome in his dissent from *Mistretta v. United States*,⁶⁷ in which the Supreme Court upheld the constitutionality of the U.S. Sentencing Commission over a challenge based upon the separation of powers. “[W]hile the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system,” Scalia reasoned that because “no statute can be entirely precise, and that some judgments . . . must be left to the

64 17 U.S. (4 Wheat.) 316, 421 (1819).

65 See Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 313–14 (1993) (arguing the phrase “necessary and proper” was originally “understood as a significant limitation on legislative power”). Lawson and Granger document that the word “proper” was understood to require congressional statutes to conform to norms of federalism and separation of powers. Randy Barnett has aptly denominated the presumption against legislative action “the presumption of liberty.” See RANDY BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004).

66 *McCulloch*, 17 U.S. (4 Wheat.) at 419. Marshall argues the Congress “may employ the most convenient means.” *Id.* at 409.

67 488 U.S. 361 (1989).

officers executing the law and to the judges applying it, the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree.”⁶⁸ Such a determination involves “multifarious and (in the nonpartisan sense) highly political” considerations as to which the Congress and not the Court has the institutional competence.⁶⁹ Among those considerations Scalia included “whether the Nation is at war” or faces some inchoate emergency, here referring to the D.C. Circuit case upholding wage and price controls in the claimed economic emergency of 1971.⁷⁰

Although claims of emergency are indeed matters about which the Court is properly hesitant to second-guess the political branches, Justice Scalia’s explanation is not convincing. The separation of powers is not a “highly political” consideration wisely left to the political branches but a fundament of the constitutional framework within which our politics—and our political branches—are supposed to operate. No meaningful concept even of necessity, much less of emergency, could justify routine delegation of the lawmaking function to agencies and courts. What is needed (or what was needed, if it is too late to rescue the nondelegation doctrine) is a Supreme Court that heeds Madison’s warning about the propensity, in republics, of the legislative power to dominate the other branches of government and in response develops a judicially manageable standard for distinguishing excessive or unjustified delegations from those meeting, as Chief Justice Taft had put it, “the inherent necessities of the governmental co-ordination.”⁷¹ What is needed, in short, is a

68 *Id.* at 415 (Scalia, J., dissenting).

69 *Id.* at 416.

70 *Id.*

71 *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928); see Antonin Scalia, *A Note on the Benzene Case*, REG., July-Aug. 1980, at 25, 28 (“[S]urely vague constitutional doctrines are not automatically unacceptable. The Court’s opinions from obscurity to church-state relations to the commerce clause are full of them. And the risk of vagueness here [in applying the nondelegation doctrine] is much less than elsewhere.”); see also Louis L. Jaffe, *An Essay on Delegation of Legislative Power: II*, 47 COLUM. L. REV. 561, 577 (1947) (“[N]early every doctrine of constitutional limitation has been attacked as vague. Essentially the charges go to the institution of judicial review as we have it rather than specifically to the delegation doctrine.”). Readers of the Constitution in the eighteenth century understood the substantive distinction between legislative and executive power—see Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 341 (2002) and Michael B. Rappaport, *The Selective Nondelegation Doctrine and the Line Item Veto*, 76 TUL. L. REV. 265 (2001)—and the Court routinely draws such a distinction in other contexts. See, e.g., *Clinton v. City of New York*, 524 U.S. 417, 444 (1998) (holding cancellations pursuant to the Line Item Veto Act are “exercises of legislative power”); *INS v. Chadha*, 462 U.S. 919, 952 (1983) (holding the one-house veto to be “legislative in purpose and effect”); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 690 (1952) (Vinson, C.J., dissenting) (“The function of making laws is peculiar to Congress, and the Executive can

Court that recognizes that the nondelegation principle—although it is, like judicial review itself, a predominantly structural rather than a textual element—is no less a part of the judiciary’s charge to uphold the Constitution. Instead, the judiciary, shrinking before the authority of the democratic legislature, has been complicit in allowing delegation to run riot.⁷²

not exercise that function to any degree.”); *Springer v. Gov’t of the Philippine Islands*, 277 U.S. 189, 202 (1928) (“[T]he legislature cannot engraft executive duties upon a legislative office, since that would be to usurp the power of appointment by indirection . . .”); *cf.* *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 487 (2001) (Thomas, J., concurring) (“I believe that there are cases in which . . . the significance of the delegated decision is simply too great for the decision to be called anything other than ‘legislative.’”); *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst. (The Benzene Case)*, 448 U.S. 607, 675 (1980) (Rehnquist, J., concurring) (“[I]n my opinion decisions such as *Panama Refining Co. v. Ryan* suffer from none of the excesses of judicial policymaking that plagued some of the other decisions of that era.” (internal citation omitted)).

Modern scholars have proposed various formulations of a judicially manageable nondelegation principle. *See, e.g.*, MARTIN H. REDISH, *THE CONSTITUTION AS POLITICAL STRUCTURE* 136 (1995) (arguing courts should “demand as the prerequisite for legislative action some meaningful level of normative political commitment by the enacting legislators, thus enabling the electorate to judge its representatives”); DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* 183 (1993) (arguing “a person interested in knowing whether the statute prohibits any given conduct will, in most cases, get a clear answer from the statute that states the law, but may well get no answer, for any particular case, from a statute that delegates”); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1239 (1994) (arguing “the core of the Constitution’s nondelegation principle can be expressed as follows: Congress must make whatever policy decisions are sufficiently important to the statutory scheme at issue so that Congress must make them”).

⁷² The nondelegation doctrine is too essential a principle of American constitutionalism to disappear entirely. It survives instinctively, if only as part of “the constitution in exile,” *see* Douglas H. Ginsburg, *Delegation Running Riot*, REG., Winter 1995, at 83, 84 (reviewing DAVID SCHOENBROD, *supra* note 71), appearing variously in the guise of the Due Process Clause, *see, e.g.*, *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (holding the Congress violated due process by authorizing a majority of coal producers to set regulations for their entire industry because it “is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business”), or the “void for vagueness” doctrine, *see, e.g.*, *Smith v. Goguen*, 415 U.S. 566, 575 (1974) (“Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections. Legislatures may not so abdicate their responsibilities for setting the standards of the criminal law.”), or the requirements of bicameralism and presentment, *see, e.g.*, *Chadha*, 462 U.S. at 952 (invalidating one-house veto that “was essentially legislative in purpose and effect”), or canons of construction that cabin executive discretion, *see, e.g.*, *Benzene Case*, 448 U.S. at 641 (interpreting the Occupational Safety and Health Act to require the elimination of only “significant risks of harm”); *see also* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000).

II.

If the judiciary has failed to resist the encroachments of the Congress, then what can be said of the executive? In *The Unitary Executive*, Professors Calabresi and Yoo remind us, with impressive scholarly detail, that every one of our nation's Presidents has asserted his right to direct the activities of the executive branch.⁷³ But that only makes one even more curious: how is it that, despite an unexceptioned line of Presidents insisting upon the unity and independence of the executive, the executive branch could be transformed into a junior varsity legislature, issuing innumerable regulations according to no intelligible principle dictated by the Congress yet having, by judicial interpretation, the force of law?

The fragmentation of the executive, despite both its unassailably unitary pedigree and, as Calabresi and Yoo have documented, the uninterrupted efforts of American Presidents, can be a mystery only to those who focus upon formal lines of authority rather than political reality. Political scientists have long recognized that formally allocated "powers" are no guarantee of actual power. As Richard Neustadt trenchantly observed, "[t]he President of the United States has an extraordinary range of formal powers, of authority in statute law and in the Constitution. . . . [But] despite his 'powers' he does not obtain results by giving orders—or not, at any rate, merely by giving orders. . . . Presidential power is the power to persuade."⁷⁴

In the normal course, Presidents have very little contact with agency heads, let alone lesser policymakers within the agencies, and hence very little opportunity to persuade them. Instead, the agency policymakers interact with, are open to persuasion by, and become clients of others: the congressional committees that oversee their work, the industry they regulate, the trade press that reports their activities, and the permanent bureaucracy over whom they nominally preside. These constituencies reinforce the natural tendency of an agency, formed with a narrow mandate, to pursue a maximalist agenda within its own field of authority and without regard to competing values, let alone the policy objectives of the rather remote President of the United States.⁷⁵ Those objectives are voiced through the regu-

⁷³ CALABRESI & YOO, *supra* note 11.

⁷⁴ RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN 10–11* (The Free Press 1990) (1960).

⁷⁵ See Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1081 (1986) ("We all know that a government agency charged with the responsibility of defending the nation or constructing highways or promoting trade will invariably wish to spend 'too much' on its goals. An agency succeeds by accom-

latory review program, nascent under President Nixon and maintained or expanded by every President since. Even regulatory review, however, depends upon persuasion; the routine exercise of presidential authority would be counterproductive as it would antagonize both the regulating agencies and their patrons in the Congress.

Considering the forces arrayed against the President within his own branch of government, we recur to Madison's insight that "the weakness of the executive may require . . . that it should be fortified."⁷⁶ Perhaps the greatest and most vigorous exponent of an expansive administrative state, Franklin Roosevelt, was acutely aware of the need to shore up the executive against the Congress, as is highlighted by the episode, recounted in *The Unitary Executive*, concerning the Brownlow Committee. Louis Brownlow, an architect of FDR's domestic policy, also served as chairman of his Committee on Administrative Management, which recommended (with the President's enthusiastic support) the integration of the so-called independent agencies into the executive departments. The Committee observed that the Constitution "places in the President, and in the President alone, the whole executive power of the Government of the United States,"⁷⁷ yet "governmental powers of great importance are being exercised under conditions of virtual irresponsibility" by regulatory commissions beyond the President's direction:

The commissions produce confusion, conflict, and incoherence in the formulation and in the execution of the President's policies. Not only by constitutional theory, but by the steady and mounting insistence of public opinion, the President is held responsible for the wise and efficient management of the Executive Branch of the Government. The people look to him for leadership. And yet we whittle away the effective control essential to that leadership by parceling out to a dozen or more irresponsible agencies important powers of policy and administration.⁷⁸

The Committee concluded the so-called independent agencies had become a "'fourth branch' of the government for which there is no sanction in the Constitution" and which had begun to "defeat[] the constitutional intent that there be a single responsible Chief Executive to coordinate and manage the departments and activities in

plishing the goals Congress set for it as thoroughly as possible—not by balancing its goals against other, equally worthy goals.").

76 THE FEDERALIST NO. 51 (James Madison), *supra* note 12, at 319–20.

77 THE PRESIDENT'S COMM. ON ADMIN. MGMT, REPORT OF THE COMMITTEE WITH STUDIES OF ADMINISTRATIVE MANAGEMENT IN THE FEDERAL GOVERNMENT 31 (1937).

78 *Id.* at 40.

accordance with the laws enacted by the Congress.”⁷⁹ The Committee implicitly invoked the Lockean nondelegation principle that stood behind the constitutional design: “[p]ower without responsibility has no place in a government based on the theory of democratic control,” read its report, “for responsibility is the people’s only weapon, their only insurance against abuse of power.”⁸⁰ In other, more familiar words, the people having delegated legislative power to the Congress, that power could not properly be delegated further to unelected and hence potentially unaccountable agencies.⁸¹

The Brownlow Committee’s recommendations represented the executive’s attempt to maintain the constitutional separation of powers through a robust nondelegation doctrine, on the one hand, and a unitary executive branch, on the other. Notably, the President said in transmitting the report to the Congress:

What I am placing before you is not the request for more power, but for the tools of management and the authority to distribute the work so that the President can effectively discharge those powers which the Constitution now places upon him. Unless we are prepared to abandon this important part of the Constitution, we must equip the Presidency with authority commensurate with his responsibilities under the Constitution.⁸²

79 81 CONG. REC. 187–88 (1937) (written statement of President Roosevelt, read by the President pro tempore).

80 THE PRESIDENT’S COMM. ON ADMIN. MGMT., *supra* note 77, at 40; *see also* Robert E. Cushman, *The Constitutional Status of the Independent Regulatory Commissions*, 24 CORNELL L.Q. 13, 33 (1938) (arguing “that one whose rights have been adversely affected by the exercise of unrestrained legislative discretion in the hands of an administrative officer or agency is actually being deprived of liberty or property without due process of law”).

81 *Cf. Indus. Union Dep’t v. Am. Petroleum Inst. (The Benzene Case)*, 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring) (“[T]he nondelegation doctrine . . . ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will.”); *United States v. Robel*, 389 U.S. 258, 276–77 (1967) (Brennan, J., concurring) (arguing an executive officer’s judgment “is not a constitutionally acceptable substitute for Congress’ judgment, in the absence of further, limiting guidance”); *Arizona v. California*, 373 U.S. 546, 626 (1963) (Harlan, J., dissenting in part) (“The principle that authority granted by the legislature must be limited by adequate standards . . . insures that the fundamental policy decisions in our society will be made not by an appointed official but by the body immediately responsible to the people.”); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2368 (2001) (“The nondelegation doctrine . . . promote[s] distinctive rule of law values [because] legislative standards . . . provide notice, prevent arbitrariness, and facilitate judicial review.”); Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 335–36 (1999) (arguing the nondelegation doctrine promotes “the kind of accountability that comes from requiring specific decisions from a deliberative body reflecting the views of representatives from various states of the union”).

82 81 CONG. REC. 188 (1937) (written statement of President Roosevelt, read by the President pro tempore).

To be more precise but less diplomatic, President Roosevelt was asking not as much for authority commensurate with his responsibilities as for a rollback of the Congress's encroachment upon his responsibilities. Roosevelt may not have opposed the expansion of executive authority, in the form of delegations from the Congress, but he insisted that all executive activity should remain subject to presidential direction. The Congress, of course, did not agree to decolonize the executive.

In this respect, the New Deal really does represent what Cass Sunstein has called an "unfinished revolution," though not in the way Sunstein had in mind.⁸³ Roosevelt wanted the authority of the executive dispersed among specialized agencies subordinate to the President, so the President would be presented with conflicting policy advice, disagreements, and options. That is precisely the circumstance in which the President can most effectively exercise his power to persuade, as the ultimate decisionmaker, by mediating intra-branch disputes and shaping final agreements. As Carnes Lord has written, Roosevelt "sought to maximize presidential control through fragmentation of bureaucratic authority and active encouragement of conflict between individuals and agencies with unclear or overlapping mandates."⁸⁴ As Richard K. Betts put it, Roosevelt "dominated his burgeoning bureaucracies by politicizing them, by placing trusted lieutenants in middle-level positions, and by encouraging overlapping of jurisdictions, proliferation of communication channels, and bureaucratic competition and conflict to force issues to the top, maximizing the President's range of choice."⁸⁵ Such policy leadership is impossible when important questions are resolved without ever reaching the White House.

Roosevelt's failure to finish his revolution left not only policy development but ultimate decision-making authority fragmented. As a result, all that advice, all those disagreements and options, get filtered out by the agency head if not by the civil servants below him, and a decision is reached without the President ever considering or even being made aware of the issue, let alone balancing conflicting priorities in keeping with his vision of national policy.

83 See CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* (2004).

84 CARNES LORD, *THE PRESIDENCY AND THE MANAGEMENT OF NATIONAL SECURITY* 29 (1988).

85 RICHARD K. BETTS, *SOLDIERS, STATESMEN, AND COLD WAR CRISES* 33 (1977).

III.

Madison, of course, was right about the imperial instinct of the legislature: “[t]he legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex.”⁸⁶ Neither the judiciary nor the executive has managed to resist its force. Indeed, our system increasingly resembles the historical British system of parliamentary supremacy that the Framers did not adopt, despite their familiarity with its workings; there the executive and the judiciary exercise distinct powers, but do so only as agents of the legislature. Why, we might ask, did the Framers disfavor that system? What did they understand that we have lost?

First, consider accountability. The Clean Air Act provides a useful illustration. The Congress amended the Act in 1970 to “force technological development” by requiring automobile manufacturers to effect a 90% reduction in pollution emissions within five years—with devastating, industry-destroying penalties for noncompliance.⁸⁷ The Congress, not knowing whether achieving its goal was possible, but not wanting to be blamed either for failing to reach it or for destroying the industry, delegated to the Environmental Protection Agency (EPA) the authority to extend the deadline if necessary.

Various manufacturers applied for an extension in 1972, providing information to show the technical infeasibility of meeting the deadline. The EPA Administrator decided the manufacturers’ analysis was faulty, substituted his own, found he was “unable” to determine whether effective control technology was possible, and consequently denied the companies’ applications. The companies petitioned for review in the D.C. Circuit, and it fell to Judge Harold Leventhal—a distinguished jurist but not much of a technoscience—to evaluate data from five hundred test vehicles, comparing the impact of noble metal monolithic catalysts with base metal pellet catalysts, noble metal pellet catalysts, reactor systems, and various reactor/catalyst combinations in order to determine which methodology was most appropriate and whether the technology was feasible.⁸⁸

86 THE FEDERALIST NO. 48 (James Madison) *supra* note 12, at 306. Madison’s phrase does not necessarily imply that the Congress becomes more powerful, only that its expanding activity disrupts the balance of power; it is not always clear where political authority ends up.

87 See Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676, 1690 (codified as amended at 42 U.S.C. § 7401 (2006)).

88 *Int’l Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 633 (D.C. Cir. 1973).

The case, as Judge Leventhal put it, “taxes our ability to understand and evaluate technical issues.”⁸⁹

More than that, it was the court of appeals—not the people’s representatives, not even the bureaucrats at the EPA—who balanced the environmental costs of pollution against the economic costs to the auto industry and decided whether to extend the deadline. To be sure, the court did so with some trepidation. Leventhal prefaced the court’s discussion of the EPA’s methodology “with admission of our doubts and diffidence.”⁹⁰ Again, later: “[i]t is with utmost diffidence that we approach our assignment to review the Administrator’s decision on ‘available technology.’”⁹¹ For good measure, Leventhal concluded the opinion by noting, “[i]t is not without diffidence that a court undertakes to probe even partly into technical matters of the complexity of those covered in this opinion.”⁹²

Thus does the quasi-parliamentary system that has evolved result in a government of buck-passing. The Congress can claim to have delivered clean air but disclaim the costs associated with achieving that goal or, if there is no success, can disclaim responsibility for the failure.⁹³ The hard decisions are too often left to the courts, which have neither the legitimate authority nor the resources to evaluate complex policy matters or to balance the costs and benefits to American society.⁹⁴ Moreover, judicial decisions taken in this manner are made with neither energy and dispatch nor with public deliberation, but—as Judge Leventhal said—with “doubts and diffidence.”

89 *Id.*

90 *Id.* at 632.

91 *Id.* at 641.

92 *Id.* at 647.

93 As the Supreme Court has noted, the nondelegation doctrine prevents such unaccountability. See *Loving v. United States*, 517 U.S. 748, 758 (1996) (“The clear assignment of power to a branch . . . allows the citizen to know who may be called to answer for making, or not making, those delicate and necessary decisions essential to governance. [One] strand of our separation-of-powers jurisprudence, the delegation doctrine, has developed to prevent Congress from forsaking its duties.”).

94 Writing in 1980, then-Professor Scalia noted that because “judicial review of agency action is virtually routine, it is the courts, rather than the agencies, that can ultimately determine the content of standardless legislation.” Scalia, *supra* note 71, at 28. See also *Indus. Union Dep’t v. Am. Petroleum Inst. (The Benzene Case)*, 448 U.S. 607, 672 (Rehnquist, J., concurring) (arguing that the divergent opinions of the justices over “whether the statistical possibility of future deaths should ever be disregarded in light of the economic costs of preventing those deaths. . . . demonstrate, perhaps better than any other fact, that Congress, the governmental body best suited and most obligated to make the choice confronting us in this litigation, has improperly delegated that choice to the Secretary of Labor and, derivatively, to this Court”); cf. *United States v. Cohen Grocery Co.*, 255 U.S. 81, 87 (1921) (noting that the power to define crimes “cannot be delegated either to the courts or to the juries”).

The Supreme Court, uncomfortable with the courts playing this policy role, has adopted a posture of deference to the legal conclusions of administrative agencies.⁹⁵ Indeed, the Supreme Court in *Chevron v. NRDC* upbraided the petitioners for “waging in a judicial forum a specific policy battle which they ultimately lost in the agency . . . but one which was never waged in the Congress.”⁹⁶ *Chevron* took the courts out of such policy battles, but at the cost of greater delegation to the agency.⁹⁷ Take, as an example, the breadth of the implicit delegation the Court discerned in the Endangered Species Act, which makes it unlawful for any person to “take” an animal of an endangered or threatened species. Applying *Chevron*, the Court held that the EPA permissibly interpreted the word “take” to prohibit “significant habitat modification or degradation” because “to take” includes “to harm,” and the species could be harmed by altering the animals’ habitat.⁹⁸ If an agency’s interpretation of the statute from which it derives its authority is simply unreasonable, the courts still may step in, as when the FDA asserted authority to regulate tobacco products as drug-delivery devices.⁹⁹ When a court intervenes, however, it is often deciding a question never considered by the Congress. Whatever one thinks of *Massachusetts v. EPA*,¹⁰⁰ in which the Supreme Court ordered the EPA to regulate carbon dioxide emissions, the fact remains that the Congress never confronted the costs and benefits of regulating carbon emissions.

The second thing the Framers understood is that democracy is weakened when the locus of policymaking shifts from the Congress to an agency and to the specialized congressional committees that oversee that agency—with aid, of course, from every affiliated pressure group. As political scientist Theodore Lowi has argued, the delegation of policy problems to administrative agencies fosters “the atrophy of institutions of popular control” because agency heads exercise their discretion in accordance with relationships between agencies

95 See generally *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992).

96 *Chevron*, 467 U.S. at 864.

97 See *id.* at 865–66 (“While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.”).

98 *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687 (1995).

99 *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

100 549 U.S. 497 (2007).

and interest groups rather than a full view of national priorities.¹⁰¹ To solve the problem, Lowi counseled a return to “juridical democracy,” which would mean limiting the federal role “to those practices for which it is possible to develop a clear and authoritative rule of law, enacted democratically and implemented absolutely” and asking the Supreme Court to declare “invalid and unconstitutional any delegation of power to an administrative agency that is not accompanied by clear standards of implementation.”¹⁰² Indeed, the point of the non-delegation doctrine was to keep the locus of lawmaking power in the Congress, where the requirements of bicameralism and presentment assure a connection to the public will. If the Congress had to vote on the Code of Federal Regulations rule by rule, much if not most of it surely would fail. Yet those rules have the force of law without the Congress having voted at all. Instead, a phalanx of administrative officers in the executive branch, working most closely with their congressional oversight committees and the industries they regulate, write the rules that govern the various spheres of American life.

Third, the Framers understood, and we have lost, the energy that is the distinguishing characteristic of a unitary, independent executive. “That unity is conducive to energy will not be disputed,” Hamilton wrote in *The Federalist No. 70*. “Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished.”¹⁰³ Indeed they have been. Jurisdiction over the use and handling of formaldehyde, for example, is shared among the EPA, the OSHA, the FDA, the CPSC, and HUD—each of which, in its regulations, applies different methodological assumptions concerning key variables, such as the value of a statistical life, the level of human exposure, and its effect upon human health.¹⁰⁴ A report by the Government Accountability Office found “notable differences in the . . . specific approaches, methods, and assumptions” of the EPA, the FDA, and the OSHA in assessing risks of chemical exposure such that “risk estimates prepared by different agencies, or by different program offices within those agencies, may not be directly compara-

101 THEODORE J. LOWI, *THE END OF LIBERALISM: IDEOLOGY, POLICY, AND THE CRISIS OF PUBLIC AUTHORITY* 86–90 (1969).

102 *Id.* at 271, 297–98.

103 THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 12, at 422–23.

104 See STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 46 (1993) (discussing the assumptions of risk exposure made by the EPA and the OSHA in assessing individual risks).

ble, even if the same chemical agent is the subject of the risk assessment.”¹⁰⁵ And these are not even so-called independent agencies; they are all squarely in the executive branch. Yet each carries out a mandate from the Congress directly to the agency, and the congressional delegations displace unitary executive leadership. The lack of presidential control over the independent agencies is explicit: so it is that the Secretary of the Treasury, as the presidential agent who oversees the Comptroller of the Currency, can promise swift action to restore confidence in the banking system but cannot secure the cooperation of the independent FDIC, CFTC, or SEC.¹⁰⁶

In exchange for the loss of energy, the Progressive Era theory goes, we get better government, that is, government by experts.¹⁰⁷ In principle, legislators make broad policy decisions and delegate to expert administrators responsibility for filling in the narrow technical details. Again, this makes sense in a formal, legalistic way but, as the political scientists know, the reality is different. The Congress cannot simply delegate technical questions; modern administration involves so many complex scientific, economic, and technological questions that agency rulemaking involves the same kinds of policy choices, interest balancing, and power struggles that attend real lawmaking by real legislatures. Nor does better legislation follow when technocrats are left to make such decisions. As political scientist Robert Dahl has written:

No intellectually defensible claim can be made that policy elites . . . possess superior moral knowledge or more specifically superior knowledge of what constitutes the public good. Indeed, we have some reason for thinking that specialization, which is the very ground for the influence of policy elites, may itself impair their capacity for moral judgment. Likewise, precisely because the knowledge of the policy elites is specialized, their expert knowledge ordinarily provides too narrow a base

105 U.S. GEN. ACCOUNTING OFFICE, *CHEMICAL RISK ASSESSMENT: SELECTED FEDERAL AGENCIES' PROCEDURES, ASSUMPTIONS, AND POLICIES* 46 (2001).

106 See Damian Paletta & Deborah Solomon, *Geithner Vents as Overhaul Stumbles*, WALL ST. J., Aug. 4, 2009, at A1 (reporting on the resistance of leaders of the Federal Reserve Board, the FDIC, and the SEC to the administration's proposal for financial regulatory reform and the frustration of the Secretary of the Treasury, who "reminded attendees that the administration and Congress set policy, not the regulatory agencies").

107 See JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 1 (1938) ("In terms of political theory, the administrative process springs from the inadequacy of a simple tripartite form of government to deal with modern problems."); see also DWIGHT WALDO, *THE ADMINISTRATIVE STATE: A STUDY OF THE POLITICAL THEORY OF AMERICAN PUBLIC ADMINISTRATION* 120 (1948) (discussing the view that independent regulatory commissions developed to "fill a vacuum created by the separation of powers").

for the instrumental judgments that an intelligent policy would require.¹⁰⁸

For this reason, perhaps, most agency heads are not scientists, engineers, or other sorts of technical experts. They are political operatives. Consider the EPA: between 1970 and 2009, American Presidents appointed eleven administrators of the EPA, only two of whom were scientists.¹⁰⁹ President Obama appointed a career environmental administrator trained as a chemical engineer, but then tapped a lawyer-legislator and former EPA administrator to run climate change policy directly from the White House.¹¹⁰

* * *

Surely President Obama, no less than his predecessors, wants to determine the policies of the executive branch as he goes about the execution of the laws. The President may not always resist delegations of authority to executive agencies, but at least when the Congress attempts to dictate policies to the executive and to those agencies, every American President has advanced the constitutional principle that the executive is unitary.¹¹¹ Most recently, President Obama has pursued two principal strategies to strengthen his control over the executive. First, he has tried to insulate policymakers in the executive branch from legislative control. In his first year he has appointed about twice as many “czars” as the Romanov dynasty had in

108 ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 337 (1989).

109 SCHOENBROD, *supra* note 71, at 120 (noting that “[f]rom EPA’s inception in 1970, seven of its eight administrators . . . were lawyers”). Since Schoenbrod made that observation, President Bush appointed to the post two former governors and one scientist.

110 Press Release, President-Elect Barack Obama, President-Elect Barack Obama Announces Key Members of Energy and Environment Team (Dec. 15, 2008), *available at* http://change.gov/newsroom/entry/president_elect_barack_obama_announces_key_members_of_energy_and_environment/ (last visited Jan. 29, 2010) (announcing the appointment of Carol Browner to the new White House post of Assistant to the President for Energy and Climate Change); *see also* Tom Kenworthy, *Activist Ex-Aide to Gore Tapped to Direct EPA*, WASH. POST, Dec. 12, 1992, at A10 (noting “Browner has the mind and training of an attorney-legislator but the soul of an activist”).

111 Justice Scalia has suggested that if “the scope of delegation is largely uncontrollable by the courts, we must be particularly rigorous in preserving the Constitution’s structural restrictions that deter excessive delegation,” among which he counts presidential or at least non-congressional control of the executive branch, because the Congress will hesitate to delegate authority to officers it cannot control. *Mistretta v. United States*, 488 U.S. 361, 416–17 (1989) (Scalia, J., dissenting); *id.* at 421 (noting that “even after it has been accepted . . . that those exercising executive power need not be subject to the control of the President, Congress would still be more reluctant to augment the power of even an independent executive agency than to create an otherwise powerless repository for its delegation”).

300 years; they help to formulate the President's policies on everything from economic recovery to domestic violence to peace in the Middle East—and they operate outside the morass of congressional oversight and agency rulemaking.¹¹²

Second, like his recent predecessors, President Obama has taken to issuing signing statements. During the 2008 presidential campaign, candidate Obama promised he would “sign legislation in the light of day without attaching signing statements that undermine the legislative intent”¹¹³ and would “not use signing statements to nullify or undermine congressional instructions as enacted into law.”¹¹⁴ Since assuming office, however, the President has pointed out that Presidents have issued signing statements “[f]or nearly two centuries,” opined that “such signing statements serve a legitimate function in our system,” and announced that he intends to continue the practice “when it is appropriate to do so as a means of discharging my constitutional responsibilities.”¹¹⁵

President Obama has so far employed signing statements to indicate he is not bound to press for certain policies within international organizations, follow format requirements for budget requests, accept congressional limitations upon his appointments to a commission, condition American participation in United Nations peacekeeping missions upon the approval of U.S. military leaders, or honor whistleblower protections for federal employees who give information to the Congress.¹¹⁶ Predictably, the czars and the signing statements have

112 Steven Menashi, *All the President's Czars*, WKLY. STANDARD, Oct. 12, 2009, at 16 (“By establishing policy czars accountable only to himself, Obama has sought to unify executive policymaking and guard against bureaucratic and congressional usurpation.”); see also Michael A. Fletcher & Brady Dennis, *Obama's Many Policy "Czars" Draw Ire from Conservatives*, WASH. POST, Sept. 16, 2009, at A6 (“Critics of the proliferation of czars say the White House uses the appointments to circumvent the normal vetting process required for Senate confirmation and to avoid congressional oversight.”); Don Wolfensberger, *Opinion, Policy Czars Fuel White House Power Surge*, ROLL CALL, Oct. 20, 2009, http://www.rollcall.com/issues/55_43/procedural_politics/39638-1.html (noting “the bigger the White House policy apparatus becomes, the more Congress is suspicious of the policies being devised, offended they’ve been left out of the loop and outraged about being denied information essential to good oversight”).

113 Position Paper, Obama Campaign '08, Restoring Trust in Government and Improving Transparency, at 4, <http://www.barackobama.com/pdf/TakingBackOurGovernmentBackFinalFactSheet.pdf>.

114 Charlie Savage, *Barack Obama's Q&A*, BOSTON GLOBE, Dec. 20, 2007, available at <http://www.boston.com/news/politics/2008/specials/CandidateQA/ObamaQA/>.

115 Memorandum from President Barack Obama to the Heads of Executive Departments and Agencies (Mar. 9, 2009), available at http://www.whitehouse.gov/the_press_office/Memorandum-on-Presidential-Signing-Statements/.

116 See Charlie Savage, *Obama's Embrace of Bush Tactic Criticized by Lawmakers From Both Parties*, N.Y. TIMES, Aug. 9, 2009, at A1 (“President Obama has issued signing statements claiming

raised hackles from the Congress, which understandably prefers to have its own way in matters of policy.¹¹⁷ But so does the President. That, in the end, is the last and, for that reason alone, the best hope for our system of separated powers. As Madison put it, “the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.”¹¹⁸ With the constitutional means now lost, the great security has come down to personal motive—that is, to the fortitude of the President.

the authority to bypass dozens of provisions of bills enacted into law since he took office, provoking mounting criticism by lawmakers from both parties.”).

117 A recent letter to President Obama from Democratic leaders reads, “During the previous administration, all of us were critical of the President’s assertion that he could pick and choose which aspects of congressional statutes he was required to enforce. We were therefore chagrined to see you appear to express a similar attitude.” Press Release, Congressmen Barney Frank & David R. Obey, Frank and Colleagues Warn the President About the Use of Signing Statements, July 21, 2009, *available at* <http://www.house.gov/frank/pressreleases/2009/07-21-09-signing-statements-letter-obama.html>. Senator Robert Byrd wrote to President Obama to voice his concern that White House czars could “threaten the Constitutional system of checks and balances.” Press Release, Senator Robert C. Byrd, Byrd Questions Obama Administration on Role of White House “Czar” Positions, Feb. 25, 2009, *available at* http://byrd.senate.gov/2009_02_25_pr.pdf.

118 THE FEDERALIST NO. 51 (James Madison), *supra* note 12, at 318–19.