

## ADMINISTRATIVE LAW IN FLUX: AN OPPORTUNITY FOR CONSTITUTIONAL REASSESSMENT

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Now is an auspicious time to consider questions of administrative law with flexibility and rigor. Administrative law in the United States is being contested in intense debates, which go far beyond technical discussions among specialists. Administrative law has broken out of the backwater into the American public and political eye in ways that mirror broader and deeper disputes, divisions, and confusions over the rule of law as embodied in the American Constitution.

Our thesis is easy to state and difficult to elaborate. It holds that today's administrative controversies reflect and refract more fundamental constitutional controversies; hence, they can be resolved only by reference to constitutional bedrock. We hope this paper will advance today's American debates and help bridge America's divides. But we also hope our ideas will find an audience among our friends in Europe, as they confront their own rule-of-law challenges. Today's debates in the United States call to mind the Anglo-European origins of our Constitution, and they can be resolved only by reference to those origins.

Administrative law in our tradition is not a mechanism for achieving political ends or constraining the size of government. It is, rather, a tool for improving government at any scale by furthering both administrative efficiency and administrative integrity. A sub-species of constitutional law, administrative law is a meta-law form: a law for governing the government, not private individuals. The ultimate ends of administrative law include ensuring *fidelity* to the commands of the sovereign demos, *regularity* in governing the demos, and the *transparency* to the demos of the nature and effects of the manifold activities government undertakes on its behalf. These logically interrelated aims—fidelity, regularity, transparency—are all presupposed by the idea that republican governments are accountable to their citizens. The concept of *accountability* serves as administrative law's organizing principle.

In this paper, we seek to elaborate and defend our thesis in ways that mimic (but do not retrace) the thinking of America's Founders. We hope to identify legal and logical reasoning that the Founders themselves would have emphasized if they, not us, had confronted today's unusual moment for administrative law.

The paper has five parts. Part I explains how and why administrative law in the United States is in flux, noting that the intense debates on this side of the Atlantic are, at bottom, arguments over the nature and legitimacy of American constitutional government. After briefly encapsulating these debates, we review Supreme Court opinions that call for re-thinking administrative law and re-tethering it to the Constitution.

In Part II we introduce our contention that today's controversies can be resolved only by eliciting administrative law from constitutional text, structure, and tradition. To help attain this goal, we offer an overview of certain defining elements of American constitutionalism—our characteristic ideas about constitutional law, common law, and legal logic. We then employ these elements to map out seven primary “jurisprudential forms.”

Part III builds on a signal advance in constitutional jurisprudence—the Supreme Court's increasing invocation of “accountability” as a principle for structuring constitutional doctrine. Against this backdrop, we employ the jurisprudential forms of Part II to derive constitutionally grounded distinctions that can be used to define a small number of primary types of administrative proceedings. We propose these classifications as a lingua franca for administrative-law scholarship and adjudication; we claim they provide the beginnings of an answer for every difficult administrative-law problem.

Part IV begins with Justice Thomas's proposal for overhauling the constitutional testing of delegations of administrative authority. We conclude that the linchpin of the Thomas position—that America's administrative law, like our constitutional law, is a law for governing the government, not private individuals—will prove persuasive as a matter of constitutional interpretation. Next, we explore what follows. Drawing on constitutional jurisprudence, we distill seven principles for structuring a liberal reformation rooted in constitutionally derived administrative classifications. We emphasize that what might at first appear as a cry for revolution is better viewed as a call for much-needed renovations to an existing regime.

Part V describes features of today's landscape that make acrimony and misunderstanding the order of the day for administrative-law commentary, adjudication, scholarship, and reform initiatives. It concludes with an admonitory word about the implications of America's administrative-law moment for our Supreme Court, our Congress, and our Nation.

## I. U.S. ADMINISTRATIVE LAW IN FLUX: WHY AND HOW?

Today's administrative-law moment is occurring, not coincidentally, in an American constitutional house divided.

### A. *A Profession Divided*

At the apex of the United States legal profession, there really is no profession. There is the Mount Olympus of the United States Constitution, the justices of the United States Supreme Court, often mistaken for demigods, and a multitude of organizations, legal officers, academics, lawyers, lawmakers, commentators, and kibitzers, most of whom harbor misconceptions about Mount Olympus, the ersatz demigods, or both—and many of whom find it difficult to define their basic constitutional beliefs except in oppositional terms.

It has not always been this way. The situation looked much different in recent times past (the Supreme Court nomination of Antonin Scalia was confirmed by a Senate vote of 98 to 0).<sup>1</sup> And the situation remains much different in other areas of the legal profession, such as those concerned with corporate formations, transactions, and bankruptcies, to say nothing of the learned professions more generally. Leaders in accounting, architecture, medicine, the military, and even the inter-faith clerical profession are not nearly so sharply and deeply divided as are today's theorists and practitioners of constitutional law.

It is true that, unlike those in other professions and areas of law, constitutional-law professionals confront seemingly intractable problems that are politically consequential. We are not naïve about what this means in every age and era for professional collaboration, camaraderie, and controversy in this area of practice. Still and all, today's circumstances are extraordinary. James L. Buckley, one of the Senate's most distinguished and broadly experienced former members, now proposes an end to the federal grants-in-aid to states (amounting to at least three-quarters of a trillion dollars annually) that for decades have formed the backbone of the federal-state relationship.<sup>2</sup> Senator Buckley recommends that, once terminated by Congress, such grants-in-aid be prevented by constitutional decision from returning.<sup>3</sup> And, as a mere "ancillary measure," Senator Buckley proposes that, for the first time in history, states employ their Article V power under the Constitution and call a convention to establish or modify constitutional term limits for the President, Senators, and Representatives in Congress.<sup>4</sup> For his part, Senator Ted Cruz of Texas, one of the more prominent constitutional advocates to serve in the United States Senate, proposes that Supreme Court justices stand periodically in retention elections.<sup>5</sup>

Meantime in the academy, Dean Larry Kramer<sup>6</sup> and Professor Mark Tushnet<sup>7</sup> are calling in different ways for an effective end to courts' power of judicial review, as justified by the *Federalist* during the 1780s' ratification debates and later recognized in the canonical 1803 *Marbury v. Madison*<sup>8</sup> decision. And Professor Abner Greene and Professor Louis Seidman, a co-author with Professor Tushnet of one of the most widely used constitutional-law casebooks, are calling for differing variants of a program of "constitutional disobedience."<sup>9</sup>

What we see today is constitutional ferment of a depth and on a scale seen only twice before in America's history—during the Civil War era and at the Founding. With all respect to other controversies at other historical moments (Impeach Earl Warren!), today's constitutional controversies are best approached through these historical prisms. Lenses drawn from other times and controversies are not just unhelpful; too often, they affirmatively mislead.<sup>10</sup>

Viewed through a Civil War lens, today's controversies are increasingly regarded, more or less expressly, as a second coming of the house di-

vided, with those sympathetic to originalism ranged on one side and advocates for a more living constitutionalism on the other. Just as debates over slavery pervaded nearly every constitutional controversy in the years before the Civil War, so today's legal debates, over administrative law and much else, are suffused with the great question of the day.

Viewed through a lens of the Founding, today's controversies look much like renewed volleys in old, persisting arguments.<sup>11</sup> One finds eloquently rearticulated Thomas Jefferson's objection to the idea of stable, written, political constitutions such as ours. As is well known, Jefferson once contended, based on logic rooted in Locke, that because "[e]ach generation is as independent as the one preceding, as that was of all which had gone before," each generation has "a right to choose for itself the form of government it believes most promotive of its own happiness."<sup>12</sup> An implication for Jefferson was that political constitutions ought to afford an opportunity for each generation to accommodate its "form of government" to "the circumstances in which it finds itself."<sup>13</sup> Jefferson concluded that "it is for the peace and good of mankind that a solemn opportunity" to amend the Constitution be provided "every nineteen or twenty years . . . so that it may be handed on, with periodical repairs, from generation to generation, to the end of time, if anything human can so long endure."<sup>14</sup>

These cogent views, antagonistic to the legitimacy of our Constitution as framed and ratified, are echoed in great variety in today's academic literature. The upshot is that American academics trained in constitutional theory, political science, political history, jurisprudence, and constitutional law often find it difficult to explain why our written constitution was an improvement on the English constitutionalism that preceded it. Meanwhile, another cadre, while convinced America's Constitution *was* an improvement on prior practice, wonders whether this remains the case in view of interpretive glosses since placed on the original document. And then too, there is a third cadre, the take-things-as-they-come practitioners, who find it difficult to keep pace with the evolving thinking of Supreme Court justices striving to be faithful, at once, to the Constitution, the demos, and the precedents of their Court. The result is heated constitutional controversy dominated by the disillusioned, the disheartened, and the dysfunctional.

#### B. *An Administrative-Law Moment*

One strand in today's larger constitutional debate is the more focused controversy surrounding the administrative state. In 2014, Professor Phillip Hamburger published a monumental work asking whether America's administrative law is entirely unlawful.<sup>15</sup> Soon thereafter, Professor Adrian Vermuele responded with a resounding "No."<sup>16</sup> Also in 2014, Professor Lawrence Tribe challenged an environmental administrator's sweeping and inventive climate-change regulatory program.<sup>17</sup> Soon thereafter, Professor

Tribe was in turn challenged—vigorously and for making purportedly “ridiculous” arguments—by fellow professors at the Harvard Law School.<sup>18</sup>

These scholarly and litigation controversies arose alongside the beginnings of a practical and theoretical reevaluation of administrative law by the Supreme Court. On a practical level, the Court’s recent decisions include stinging rebukes of administrative agencies for overreaching their authority. Such rebukes are best seen, perhaps, in *U.S. Army Corps of Engineers v. Hawkes* and *Sackett v. Environmental Protection Agency*, two unanimous decisions rejecting governmental assertions of regulatory power over private property on authority of the Clean Water Act.<sup>19</sup> In *Sackett*, the Court denounced the government’s “question-begging” defense of its attempts at “strong-arming of regulated parties into ‘voluntary compliance’ without the opportunity for judicial review—even judicial review of the question whether the regulated party is within the [agency’s] jurisdiction.”<sup>20</sup>

On a theoretical level, this questioning is best seen, perhaps, in opinions by Justice Thomas, including his concurring opinion in *Department of Transportation v. Association of American Railroads*.<sup>21</sup> In *American Railroads*, Justice Thomas calls for re-orienting administrative law based on two propositions. First, according to Justice Thomas, only Congress has authority, through a proper exercise of legislative processes, to impose generally applicable rules of private conduct.<sup>22</sup> Hence, neither the executive nor the judiciary (nor any private entity) can lawfully exercise such power.<sup>23</sup> Second, according to Justice Thomas, permissible delegations of power from the legislative branch to the executive must be defined and evaluated in qualitative, not quantitative, terms.<sup>24</sup> Hence, the “intelligible principle” doctrine, long used to test the permissibility of such delegations, should be abandoned.<sup>25</sup>

In issuing a clarion call for reform, Justice Thomas relies on broad foundations, including constitutional text, historical constitutional understandings, and scholarly literature. In the area of political theory and intellectual history, Justice Thomas cites work by Maurice J.C. Vile, as well as more famous works by John Locke and William Blackstone, in contending that the Constitution’s “particular blend of separated powers and checks and balances” is “informed by centuries of political thought and experiences.”<sup>26</sup> On a doctrinal level, Justice Thomas relies on work by Caleb Nelson that traces oft-forgotten distinctions between, on one hand, “core” private rights and, on the other, public rights and government-created “privileges.”<sup>27</sup> And from a perspective of legal history, Justice Thomas relies on Professor Hamburger’s scholarship, which looks beyond the familiar milestones of American regulatory history to consider the origins and logic of our separation of governmental powers. Professor Hamburger, more than any other working scholar, questions whether the exercise of legislative and adjudicative powers characteristic of modern administrative agencies is consistent with government according to the rule of law.

Justice Thomas’s views are singular for the breadth and definitiveness of his willingness to begin afresh in reading the Constitution’s Vesting

Clauses—the textual roots of our separation of governmental powers.<sup>28</sup> But he is not the only Justice to voice concerns about excesses in the modern administrative state. Justice Antonin Scalia stated definitively “that the power to write a law and the power to interpret it cannot rest in the same hands,” as is often the case under current doctrine, for “[w]hen the legislative and executive powers are united in the same person . . . there can be no liberty.”<sup>29</sup> And Chief Justice John Roberts has voiced concerns about administrative agencies wielding powers that are essentially judicial, contending that, with narrow exceptions, only the Judiciary may bind specifically named individuals.<sup>30</sup>

The significance of this critical thinking is difficult to overstate.<sup>31</sup> Importantly, it avoids certain polar positions sometimes favored by academics. On one hand, the justices’ openness to critically re-evaluating administrative law rejects a viewpoint that might loosely be called New Deal fundamentalism.<sup>32</sup> This view opposes meaningful reform of administrative law based on advanced understandings of constitutional principles. It tends to doubt whether such understandings are possible, while maintaining that the modern administrative state reflects an almost canonized legislative compromise, on which “opposing social and political forces have come to rest.”<sup>33</sup>

In a similar vein, even Justice Thomas effectively rejects reforms based on clause-bound constitutional understandings.<sup>34</sup> Justice Thomas’s reliance on principles embedded in pre-ratification English constitutional experience; his insistence that the Court draw logical conclusions from both this English experience and later American experience; and, above all, his singular insistence on a *logical form* of doctrine in advance of articulating the substantive doctrine itself, establish the legitimacy, at least for Justice Thomas, of logically deriving new principles from old texts.<sup>35</sup> Such interpretation importantly differs from what Americans understand as “clause-bound originalism.”

Although it avoids the shoals of New Deal fundamentalism and clause-bound originalism, the Court’s tentative steps towards reassessing administrative law does cast doubt on the most widely cited administrative case in United States history, the Supreme Court’s 1984 decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>36</sup> *Chevron* requires reviewing courts to defer to an administrative agency’s interpretation of a statute it administers so long as the statute is ambiguous and the agency’s interpretation is reasonable.<sup>37</sup> Only three years ago, six justices, including Justice Thomas, reaffirmed *Chevron*’s continued vitality in *City of Arlington v. FCC*.<sup>38</sup> In response to a forceful dissent by Chief Justice Roberts, the majority offered a discussion of alternative versions of a hypothetical delegation empowering an agency to prohibit “common carriers” from imposing unreasonable conditions on access to their facilities.<sup>39</sup> Under the reasoning of Justice Thomas’s later opinions, both versions of this hypothetical—the keystone of the Court’s analysis—are almost certainly unconstitutional.<sup>40</sup>

## II. RE-TETHERING ADMINISTRATIVE LAW TO THE CONSTITUTION

This paper seeks to excavate administrative law's foundations and engage lessons learned as guides to a liberal reformation of administrative law. But if such a reformation is indeed a solution that our divided profession has been looking for, this turn toward principle must be built on more than the usual bromides about liberty, a separation of governmental powers, and close readings of constitutional texts. It must become common ground that, even as we revere accomplishments of the Founders and President Lincoln, we have a generational need to unpack, dissect, understand, and meaningfully advance those accomplishments. The Founders' understandings, unelaborated, will no longer do. Their handiwork will survive intact only if it can be understood well enough to be substantively, logically—and apolitically—applied to circumstances unimaginable to them or us. This involves a giddy (and, for some, disorienting) sensation of understanding the Constitution in ways that advance, however incrementally, the terms in which it was understood by the geniuses who wrote it at the Founding and saved it in the Civil War. Reform of administrative law will be achieved, if at all, through a disintegrated profession regaining confidence in its highly-integrated Constitution—read as a whole.

### A. *Administrative Law As Constitutional Law*

The modern American administrative state is a creature of the New Deal jurisprudence of the 1930s and 1940s. American audiences are familiar with the contentious New Deal debates over the appropriate scope, scale, and structure of executive government. This paper puts aside almost all of that discussion in favor of broader and somewhat different questions of more immediate interest. It seeks to illuminate how American administrative law, properly framed, eschews political ends while enabling government at any scale to achieve both a high degree of administrative efficiency and a high degree of integrity. Whether large or small, government must respond to the demands of the times while remaining accountable to the citizenry.

Under our Constitution, administrative law is, at bottom, constitutional law, and republican accountability is its organizing principle.<sup>41</sup> The ultimate ends of our administrative-constitutional law include ensuring *fidelity* to the commands of the sovereign people, *regularity* in governing the people, and the *transparency* of the government's manifold activities in relation to the people. In thinking about this sub-species of constitutional law, several points should be borne in mind.

First, administrative law is ultimately grounded in the Constitution's separation-of-governmental-powers principle, and that principle is ultimately embodied not in plain constitutional text—as was done in the influential Massachusetts constitution of 1781—but in the logical relationships between and among the Constitution's three Vesting Clauses. (“All legislative Powers

herein granted shall be vested in a Congress of the United States . . .”<sup>42</sup>; “The executive Power shall be vested in a President of the United States of America”;<sup>43</sup> “The judicial Power of the United States shall be vested in one Supreme Court and such inferior courts as Congress may from time to time ordain and establish.”<sup>44</sup> The beginning of administrative-law wisdom is understanding the oft-overlooked relationships between and among these clauses.

Second, these logical relationships trace their roots in part to continental Europe. As is evident from the *Federalist*, the Founders’ thinking about republican government in general, and their separation of powers in particular, was substantially influenced by logical advances seen in Montesquieu as compared to Locke.<sup>45</sup> This paper refers to the Constitution’s “Anglo-European” foundations as a reminder that our Constitution was written by theorists, and in their quest for good ideas these theorists crossed not only the Atlantic Ocean, but also the English Channel.

Third, eliciting administrative law has been made more difficult by the Constitution’s administrative-law “diaspora.”<sup>46</sup> Relevant texts for administrative law are found not only in the Vesting Clauses of Articles I, II, and III, but also in Article II’s Appointments Clause and Article III’s case-or-controversy requirement.<sup>47</sup> In addition, administrative law is derived from, among other provisions, the bicameralism and presentment requirements of Article I, the oath requirement of Article II, and the substantive delegations of federal power in Article I, section 8.<sup>48</sup>

Finally, we Americans are limited in how we teach, discuss, and understand constitutional-law relationships. Professor Nelson rightly reminds us that “[t]he modern legal academy has little patience for taxonomy.”<sup>49</sup> And Derek Webb rightly directs our attention to the “remarkable” fact that, in constitutional-law studies at elite schools, American students “rarely get the chance to study the Constitution as a whole.”<sup>50</sup> After describing a typically “piecemeal and often incomplete” course of constitutional-law study, Dr. Webb prescribes as a partial remedy more holistic courses (such as a Stanford Law School course entitled “Reading the Constitution”) in order to create “space for thinking about the Constitution in ways that are genuinely independent of politics and policy preferences.”<sup>51</sup> Notably, even Dr. Webb omits mention of what may be the two most difficult constitutional-law courses: the traditional course in “federal courts” (or “federal jurisdiction”) and—our subject here—the traditional course in “administrative law.”

In sum, understanding administrative law has proved difficult for American lawyers.<sup>52</sup> This is partly due to traditions that assign practical-skill development and the imparting of detailed knowledge to one side of an educational chasm, and strategic-thinking skills and theoretical knowledge to an opposing side. But it is also due to our diminishing intuitive grasp of the differences between a “government of laws” and a “government of men.” The result is a corpus of American administrative law that remains attributable in part to the gravitational pull of constitutional principle—but is even

more attributable to the practical demands of coordinating separated powers into “a workable government.”<sup>53</sup>

### B. *Understanding the Elements and Forms of Law*

Although maintaining a divide between constitutional theory and administrative practice may seem odd to Europeans, the rationale for such traditions may include unspoken (and not unreasonable) worries that grappling with theory as the Founders did would lead to endless, fruitless, perhaps destabilizing, debate. But whatever its hidden virtues, a divorce between theory and practice can itself destabilize. Precisely because the legitimacy of our system is mostly assumed and seldom explained in law school, our profession can remain cohesive only so long as the system’s legitimacy appears obvious to all but the disgruntled and disaffected.

Today, however, doubters abound. Fundamental assumptions of American constitutionalism are no longer universal articles of faith. And this is especially true among academics. To dispel such doubts, one has to offer more than reminders of the familiar advantages of our traditions. We must either remake law school and the world, as some are urging, or do a better job of explaining how (and ensuring that) administrative and other constitutional doctrines align with well-articulated theories of American constitutionalism.

The Supreme Court’s tentative steps toward rapprochement with administrative first principles put administrative law in the vanguard of what could become a larger family reunion of legal theory with practice. Justice Thomas’s recent administrative-law opinions are notable for, if nothing else, their fusion of scholarly treatments of political theory and intellectual history (Professor Vile), legal history (Professor Hamburger), and doctrinal analysis (Professor Nelson). To further this promising endeavor, we review below some defining elements of American law and then employ those elements to map the primary forms of law and legal systems.

#### 1. Elements of American Law

Among the foundational elements of the United States’ legal system are characteristically American notions of constitutional law, common law, and legal logic. For present purposes, the core of this system can be thought of as a three-story edifice, with logically and jurisprudentially distinct activities taking place on each level—common law on the ground floor, constitutional law in the penthouse, positive law in the large working space in between. Legal logic is central, albeit in different ways, to the operations of the jurisprudential systems found on each level of the structure.

*The Constitution.* Constitutional law defines a given people’s ultimate criterion of legal obligation in ways that constitute that people as a unique “body politic” that is indefinite in duration, authority, and extent as

to the potential number of persons and actions encompassed.<sup>54</sup> By definition, every body politic has some form of constitutional law.<sup>55</sup> By definition, constitutional law occupies pride of place within the body politic's legal system.

In the American tradition, constitutional law has quietly assumed a narrower meaning than that given by standard definitions.<sup>56</sup> Constitutional law in our tradition is not just the constitutive, ultimately supreme, source of law in our system's hierarchy (as, for instance, federal law is supreme over state law under our Supremacy Clause). Constitutional law is also, for Americans, an alternative type of law. Provisions in our Constitution have been confined for some 225 years—with the discredited exception of the Eighteenth Amendment's repealed prohibition on the "manufacture, sale, or transportation of intoxicating liquors"—to what specialists call "meta-law"; that is, a law for governing the government.<sup>57</sup>

Three implications follow from this remarkably uninterrupted practice. First, there is a vital difference in kind between laws governing conduct by government officials and laws governing conduct by private citizens. Second, in the actual practice of drafting, ratifying, and amending America's Constitution, this distinction has been invariably adhered to by American lawmakers who were mostly, perhaps uniformly, unaware they were adhering to it. Third, this uninterrupted adherence is not attributable to constitutional text or any express statements in the antecedent English tradition; rather, it can be attributed only to an unyielding, albeit implicit, recognition of the power of the distinction's underlying logic.

*The Common Law.* Every legal system includes a baseline presumption governing cases not addressed by positive law. It has often been thought that these presumptions may assume one of two forms—either everything not prohibited is permitted, or everything not permitted is prohibited.<sup>58</sup> Anglo-American law breaks through this false dichotomy.

In Anglo-American legal systems, every action not prohibited is permitted, but only conditionally and provisionally, not unequivocally. Actions left unaddressed by positive law may proceed without fear of subsequent punishment. But they may proceed only on condition that persons harmed by the action receive compensation, and only with a proviso that no prior injunction restraining the action has been obtained by persons who anticipate irreparable harm from the action's likely consequences.

The underappreciated elegance of this baseline, which in absence of a proper legal immunity reaches infinite variations "in behavior, custom, and practice," is that it works hand in glove with the principle limiting constitutional doctrine to state action.<sup>59</sup> In our system, every legal ordering begins at a tolerably just common law baseline and then proceeds, if at all, to a statutory-law ordering that presumably is even more just than the baseline, precisely because it has been enacted in conformity with an integrated suite of meta-rules that establish government of, by, and for the whole people.<sup>60</sup> And, significantly, the various steps of this complex process are either imple-

mented directly or ultimately reviewed, as to every involuntary rearrangement of common law rights, by an independent judiciary.<sup>61</sup> This is the American advantage in constitutional jurisprudence.

Common law in the American system is, then, not an inferior kind of “judge-made” substantive law (in the way state laws are inferior to federal laws). Rather, common law in the United States is, like constitutional law, an alternative type of law, an alternative jurisprudential form.<sup>62</sup> Specifically, common law is an enforceable natural law form that is based on its own principles and reasoning and is flexible enough to “establish[] a stable legal order largely impervious to variations in behavior, custom, and practice.”<sup>63</sup> As emphasized by others, the Founders assumed the objective existence of a thing called The Common Law.<sup>64</sup> This assumption has since proved a stumbling block, cleaving later generations of the profession into an appreciative camp tempted to constitutionalize the common law, in whole or part and under an array of constitutional provisions, and a detractors’ camp tempted to denigrate it as merely judge-made positive law, different in status and provenance but not in kind from statutory law. Only recently has the profession begun the arduous process of rejecting these polar views and recognizing that common law is neither positive nor normative, but simply our system’s “benevolent omnipresence on the ground.”<sup>65</sup>

*Legal Logic.* A third element of the American system is its legal logic, which in our tradition is part and parcel of law. While other types of American professional schools employ “case method” instruction, only American law schools employ rigidly Socratic teaching techniques and rigidly fact-pattern-based testing techniques. The goal of such pedagogy is to teach students to think in terms of legal logic; enable them to intuitively recognize better and worse examples of legal reasoning; and train them in eliciting the hidden logic underlying judicial decisions.<sup>66</sup>

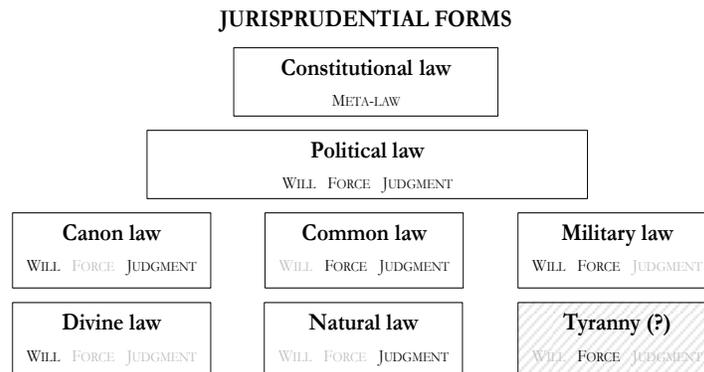
The assumption that legal logic properly extends the written law, whether statutory or constitutional, can be seen in Alexander Hamilton’s seminal discussion of judging and the judiciary in the *Federalist*.<sup>67</sup> There, Hamilton contends that an inherent power of judicial review is “deducible” from “the general theory of a limited constitution” as opposed to “any circumstance peculiar to” the specific “plan of convention.”<sup>68</sup> He notes that Congress would lack power to revise judicial judgments under the Constitution, not because of “anything in the proposed constitution,” but because “the impropriety of the thing” appears from “general principles of law and reason.”<sup>69</sup> And he invokes “reason and law” as the basis for a proposition that later-enacted statutes trump earlier, conflicting statutes.<sup>70</sup> In practice, the Supreme Court has endorsed Hamilton’s reasoning, not only in ruling on these specific issues, but also in accepting the legitimacy of logically deriving doctrine from beyond the plain language of written materials.<sup>71</sup>

As a result, today’s Supreme Court employs a set of discrete, non-doctrinal, logical building blocks. These building blocks express in preferred wording logical presuppositions of law divorced from any particular legal

text or context. Some such building blocks can readily be thought of (like Hamilton's point about later-enacted statutes) as canons of statutory construction. But whatever their subject, they constitute an essential vocabulary for judicial discourse.<sup>72</sup> A lawyer's ability to persuade the Supreme Court is often directly proportional to his or her mastery of this vocabulary.

## 2. Primary Jurisprudential Forms

The legal elements reviewed above prepare the way for a crucial step in tethering American administrative law more tightly to the Constitution; namely, a specification of primary types of law and legal systems that can be found implicit in *Federalist* No. 78. Under our reading of the *Federalist*, and American jurisprudence generally, there are seven primary types of law, and six primary types of legal systems.<sup>73</sup> These typologies were first developed, and are best seen, as a jurisprudential analogue to the ancient practice of categorizing political systems into a limited number of primary types, such as monarchy, aristocracy, and democracy. The types of law recognized in American jurisprudence include constitutional law, political law, common law, military law, canon law, divine law, and natural law.<sup>74</sup> For convenience, this paper refers to these as the seven primary "jurisprudential forms."



**Fig. 1.**

"Jurisprudential forms" are the forms taken by law, in whole or part, within a given legal system, viewed as distinct from the "political" practices or institutions that establish the content of the law. As one would expect, the importance of the relation between content and form in law has not gone unremarked by scholars. H.L.A. Hart took up his pen to write the landmark of twentieth-century jurisprudence, *The Concept of Law*, largely to refute "legal positivism," a movement characterized in Professor Hart's view by a few "great battle-cries," including a cry that "legal norms may have any kind of content."<sup>75</sup> While illuminating as a refutation of legal positivism, Professor Hart's work fails to adequately address two considerations. First, the logic of the content-form relationship is a problem that has arisen (and been produc-

tively pursued, it appears) in modern disciplines from mathematics to physics, social science, theology, and philosophy. The upshot, unsurprisingly, is that content and form appear as both related and distinct. Second, the particular question of content-form relationships in law appears to have been attacked—brilliantly, if implicitly—by America’s Founders. The upshot is that questions Professor Hart was struggling with in the twentieth century appear to have been importantly illuminated, and perhaps implicitly answered, in the eighteenth.

The jurisprudential foundations for administrative law stretch back to the Founders and the *Federalist*. Just as passages quoted above justify judicial review based on legal logic, not text, so neighboring *Federalist* passages offer logical grounding for the rule of law—what Americans call a “government of laws, not of men.”<sup>76</sup> These passages encapsulate the separate branches of government and their exercise of WILL, FORCE, and JUDGMENT.<sup>77</sup> The discussion logically implies (with only minor elaboration) a definition for the rule of law. Under this definition, the rule of law means public specification of general rules binding private conduct (legislative WILL prescribing a logical universal); the subsequent application of one or more rules to an individual action and person (executive FORCE applying the general rule to a logical individual based on a logical particular); and judicial authorization, as a safeguard or double-check, for these applications of universal rules to individual actions and persons based on particular properties and qualities. Under this latter requirement, exercises of executive FORCE must be proven legitimate, often in advance, by the purely logical *chef-d’oeuvre* of a judicial JUDGMENT holding that a case “falls under” a general rule.<sup>78</sup>

*The Common Law Jurisprudential Form.* One key to unlocking American jurisprudence is understanding that in our tradition common law is jurisprudentially distinct, not only from constitutional meta-law, but also from substantive political law. As emphasized by the *Federalist*, three phases or moments in the rule of law (WILL, FORCE, JUDGMENT) are all present and plainly visible in paradigmatic instances of legislative-executive-judicial lawmaking. In our nomenclature, this lawmaking mode—and any other mode in which three rule-of-law phases or moments are plainly in view—is called *political law*. Political law therefore includes, not only statutory law, but also executive regulations that bind private conduct and, in general, any substantive body of law for private conduct that is visibly and coercively enforced and subject to deliberate amendment via what Professor Hart calls “rules of change.”<sup>79</sup>

In applications of *common law*, by contrast, these same logical phases or moments remain present, but only two are “visible” in a Hobbesian sense; the other, while present, is submerged.<sup>80</sup> This subtle but crucial distinction is part of the reason why Anglo-American common law is frequently mistaken for other forms of law, including natural moral law, political law, and constitutional law.

To further grasp the point, recall the edifice described above. The structure houses on its ground floor a common law fashioned by judges that, for this very reason, must be elicited via legal logic—not by politics, policy, or morality; by JUDGMENT not WILL.<sup>81</sup> Exactly how judges perform this feat is not the problem for this paper. If pressed, one might conjecture that a body of law able to consistently, comprehensively, and non-arbitrarily function “impervious to variations in behavior, custom, and practice within and across societies”<sup>82</sup> must necessarily be based on some robust and synthetic logical principle or principles, whether “simple rules,”<sup>83</sup> notions of efficiency,<sup>84</sup> or something else.<sup>85</sup> Sufficient for present purposes is the fact that our Founders, and their common law tutor, William Blackstone, assumed such synthetic unity; that they expected judges to exercise JUDGMENT not WILL based on this unity; and that, if anything, the belief that professionals trained in judgment can accurately classify cases without knowing the grounds for their classifications is stronger today than yesterday.<sup>86</sup>

Some scholars may view Professor Suzanna Sherry’s objections to “value-free” constitutional-law judging as applicable in their essentials to “value-free” common law judging.<sup>87</sup> For those scholars, it may be possible to transplant her elegant criticisms to contexts involving the common law as follows:

To tell judges they must engage in ‘value-free’ common law judging, to confine them to the limiting forms and ancient rules of a supposed common law logic, diminishes the very definition of moral choice by curtailing judges’ exercises of moral authority. Moreover, once we recognize that the legislature should have available some ‘benevolent’ and ‘omnipresent’ baseline to legislate against (as opposed to more straightforward baselines found in other systems), we must delegate authority to define this ‘benevolent omnipresence’ to someone. Should we entrust this delicate task to contemporary judges, who can reason openly about the best, most persuasive, conceptions of morality, utility, and consent in light of the world we live in? Or to some indefinite logic said to derive from the work of an ancient Oxford jurist, who happened to be the bee’s knees of the English-speaking legal world at a time when the United States Constitution was ratified and first amended?<sup>88</sup>

With all deference, objections of this type largely misunderstand how common law works in the United States. A main battle-cry for an important American reform movement, led by Justice Holmes, holds that common law ought not be conflated with moral law.<sup>89</sup> A moral obligation to keep promises and a common-law legal obligation to perform contracts are qualitatively different, according to this view.<sup>90</sup> So long as this perspective is embraced, common-law judging can pass the judicial umpire test.<sup>91</sup> That is, assuming that common law judges renounce WILL as to who should or should not prevail in a given contest (whether by name, status, activity, or any other non-relational criterion), and assuming that judges judge consistently over time, society will remain ignorant as to the ultimate social outcomes pro-

duced by the judiciary's renunciation of moral and political WILL. The judiciary's WILL thus ceases, in a Hobbesian sense, to be "visible"—to participants, to third-parties, even to the arbiters themselves. And so we arrive at the technical definition of the common-law jurisprudential form: a common-law system is one in which the phases or moments of FORCE and JUDGMENT in the rule of law are visible, but the moment of WILL, while present, is submerged.<sup>92</sup>

*Other Forms.* As is well known, Hobbes's distinction between visible and invisible phases or moments of law was prompted by worries about systems in which no visible FORCE is evident.<sup>93</sup> The most developed of these, we call *canon law* systems. In legal systems taking this form, the moments of WILL and JUDGMENT are visible, but FORCE is submerged. As its name suggests, this form is associated with church law for the reason that an excellent source of invisible FORCE is belief in eternal damnation. In canon-law systems, WILL as such is fully visible in the "thou shalt" and "thou shalt not" of divine scripture or a catechism, and authoritative JUDGMENT as to a person's compliance or non-compliance with the scriptural or catechismal rules is available via dispensations from an authoritative ecclesial institution.

*Military law* systems are those in which WILL and FORCE are visible but JUDGMENT is submerged. This form is associated with the military, because prompt obedience to orders and scope for a commander's discretion have been thought essential in military organizations and endeavors. Nonetheless, the most important military-law systems are found in civilian contexts, as in modern Russia and China. In military-law systems, WILL and FORCE, as such, are visible to subjects of the system. But because there is no open, logical connection between the various rules, wishes, and hopes a government maintains regarding its subjects' conduct, the government's JUDGMENT in enforcing law is unknown and unknowable. Russian subjects are acutely aware that whatever may be the WILL of the ranking governmental official in regard to them and their actions, it will be backed by FORCE; what they don't know, and cannot know due to its arbitrary nature, is how determinations to apply FORCE are made. Military law systems are paradigmatic "governments of men."

To complete the picture, *divine law* systems are ones in which the phase or moment of WILL alone is visible, while FORCE and JUDGMENT are not visible. In a paradigmatic instance of this system, the Deity has made known the divine WILL in scripture, in binding "thou shalt" and "thou shalt not," but has left application of the divine precepts as an initial matter to the conscience of the believer, who expects JUDGMENT and FORCE only in the next life. Similarly, in *natural law* systems, JUDGMENT according to reason is visible, while the WILL underlying the rules and the FORCE supporting them are submerged. Examples include Deism and similar otherworldly systems of binding law thought by adherents to be deduced from reason alone.<sup>94</sup>

It may seem strange to approach what appear as discrete, if important, doctrinal controversies over matters like the intelligible principle test or *Chevron* ruling through resort to theoretical jurisprudence. It shouldn't. Supreme Court justices are mistaken for demigods precisely because so much of the logic underpinning the Court's constitutional jurisprudence remains impenetrable to practitioners. Absent some visible, traceable foundation in legal logic, the Court's rulings are invariably taken for so many dispensations from on high—willful, powerful, inscrutable, capricious. So long as constitutional doctrine is not well grounded, and seen to be well grounded, in constitutional logic, the justices will be mistaken for demigods; the Court will remain home alone on Mount Olympus; and constitutional mythologies will abound.

### III. A LINGUA FRANCA FOR ADMINISTRATIVE LAW

More than any other area, administrative law is where the “great problem” of reconciling contradictory elements in democratic government must be confronted and resolved.<sup>95</sup> A key to understanding administrative law is recognizing that it, like constitutional law, is a meta-law form, a law for the governing of government, not private individuals.<sup>96</sup> Administrative law in the United States can be thought of as the constitutional and sub-constitutional rules that bind executive officials, either because they address them directly, or because they address them indirectly via judges' review of their actions (or inaction).

#### A. *Accountability as Administrative Law's Organizing Principle*

The recent questioning of traditional administrative law in Supreme Court opinions is of a piece with the Court's rulings, beginning with the 1992 decision in *New York v. United States*,<sup>97</sup> invoking “accountability” as a concept for structuring doctrine in a widening swath of constitutional law.<sup>98</sup>

*New York* held that Congress may not employ state governments as regulatory agencies or coerce States into accomplishing federal regulatory objectives.<sup>99</sup> In reaching this conclusion, the Court emphasized that “where the Federal Government compels States to regulate, the *accountability* of both state and federal officials is diminished.”<sup>100</sup> Because accountability serves the interests of citizens, not necessarily those of officials, the Court held that constitutional claims based on accountability concerns cannot be waived.<sup>101</sup>

The concept of accountability has since emerged as an organizing principle in administrative-law cases. As Justice Samuel Alito has emphasized, “Liberty requires accountability[,]” because “[w]hen citizens cannot readily identify the source of legislation or regulation that affects their lives, Government officials can wield power without owning up to the consequences.”<sup>102</sup> This same theme has been voiced in other opinions.<sup>103</sup>

At a basic level, the concept of accountability reminds officials that republican governmental action entails the complication that republican governmental officers serve, always and everywhere, as agents for a sovereign people.<sup>104</sup> As Abraham Lincoln puts it, “[t]he people [are] the sovereigns, and the representatives their servants.”<sup>105</sup>

Further, accountability brings to mind the idea of an accounting; the idea that governmental activities should be classified in regular fashion, just as business activities are rationally and consistently summarized and classified using systems of accounts. A system of accounts is, after all, a comprehensive, consistent, value-neutral, classification scheme, rooted in economic fundamentals, for categorizing and summarizing business transactions. Preparing a ledger of accounts does not imply judging the wisdom *vel non* of a business’s activities. Accounting makes business decision making quicker, more regular, more transparent; it does not presume to direct it. So too with accountability in administrative law.

For this reason, the accounting analogy helps prevent the fallacious conflation of a separation of governmental powers with balanced allocations of authority between branches of government or checks on the exercise of specific powers.<sup>106</sup> Most generally, it helps make clear the fallacy of assuming that rule-of-law principles serve as a qualification to the coherence, or stumbling block to the efficiency, of governmental institutions and activities. In addition to “financial” accounting addressing problems going to the fidelity of managers as agents for the principals who own an enterprise, there is a large body of theory and practice addressing “managerial” accounting. The goal of this branch of the profession is to make management more effective, not more cumbersome.

The accounting analogy also helps answer the oft-voiced objection that adhering to rule-of-law, separation-of-powers, and administrative-constitutional-law principles covertly privileges smaller, *laissez faire* government over larger, activist government. Financial accounting is essential to ensuring the fidelity of managers to owners in businesses of every size in which management and ownership are divided. But managerial accounting is especially essential for large businesses—those for which coordination problems are most formidable. Proper accounting is essential for a separately owned and operated lemonade stand; it is even more essential for General Electric, Apple, and Google.

Finally, the accounting analogy helps defuse risks that our modern courts might succumb to the temptations of formalistic constitutional-law doctrines. A basic accounting principle holds that transactions that differ in legal form will be differently categorized for accounting purposes only if they materially differ in their underlying economic fundamentals. So too in administrative law; in the first instance, different types of executive actions should be differently categorized only if they meaningfully differ in constitutional fundamentals.

## B. *From Jurisprudence to Doctrine*

Some may find excessive the Court's enthusiasm for the accountability concept. To such objections, we say only that accountability to a sovereign people is a *sine qua non* of republican government and that the accounting analogy can trace its roots to the origins of modern political theory, which viewed "reckoning" in "accounts of money" as a pristine form of rationality and resolving accounting controversies as an archetypal form of dispute resolution.<sup>107</sup> Justice Cardozo once remarked that legal metaphors begin by liberating thought and often end up enslaving it.<sup>108</sup> If so, we should be grateful for these particular chains.

### 1. The Jurisprudence of Republican Government

The accountability concept and accounting analogy provide jumping-off points for deriving concrete doctrines of administrative law, beginning with a classification scheme for administrative proceedings. As explained below, such a scheme is derivable from the Founders' theory of republican sovereignty, that theory's embodiment in the Vesting Clauses, and other principles of American constitutionalism. This taxonomy is, we believe, the beginning of an answer to every administrative-law problem.

*Modes of Republican Governmental Action.* Just as the *Federalist* derives principles of judicial review and revision from a "general theory of a limited constitution," not anything peculiar to the specific "plan of convention," so too the modes of republican governmental action can be categorized by consulting the Constitution's structural principles and underlying theory of republican government.

#### MODES OF REPUBLICAN GOVERNMENTAL ACTIVITY



Fig. 2.

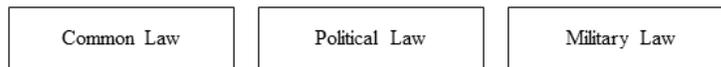
A first principle of republican government holds that republican sovereign-subject relations—relations in which institutions of government dictate terms to subject citizens—constitute one of three modes of republican governmental activity. The other modes involve, on one hand, relations between the republican sovereign and foreign sovereigns (be they republican or not) and, on the other, relations between republican institutions and the citizenry, viewed not as subjects but as superiors—as principals whom the sovereign serves as agent and to whom it must be held accountable.

This last mode of action is peculiar to the republican form of government. Whereas the other modes, representing domestic and foreign governmental policies, are familiar and found in every government, this third mode is less familiar and uniquely found in republican governments; it lacks

even a conventional name.<sup>109</sup> For this reason, disputes arising in this third context can appear as enigmas. *Bush v. Gore*—a case involving Supreme Court review of state-court review of a state executive’s administration of a federal election—has proved exceedingly controversial in part because it arose in an unfamiliar administrative context.<sup>110</sup>

A second principle of republican government is derivable using the primary jurisprudential forms. It holds that all relations between republican sovereigns and their citizen-subjects may assume one of three jurisprudential forms: common-law relationships based on voluntary consent; political-law relationships of compulsion and obedience; and, in certain limited contexts, military-law relationships of more discretionary (albeit more strictly bounded) compulsion and obedience.

**MODES OF SOVEREIGN-SUBJECT RELATIONS IN  
REPUBLICAN GOVERNMENTAL ACTIVITY**



**Fig. 3.**

To see why republican governments may employ these, and only these, types of sovereign-subject relations, recall that an effective, secular, republican government must wield visible, but non-tyrannical, FORCE. Even before the First Amendment’s adoption, the Constitution significantly limited reliance on the invisible FORCE of religious sanction through its prohibition on religious tests used as a prerequisite for holding office.<sup>111</sup> Moreover, as James Madison insisted at Virginia’s ratifying convention, “[t]here never was a government without FORCE . . . A government leaving it to a man to do his duty, or not, as he pleases, would be a new species of government, or rather no government at all.”<sup>112</sup> Taken collectively, such principles imply that permissible modes of republican action include only those few that involve real and visible FORCE—as opposed to either an absence of FORCE (Madison’s “no government at all”); FORCE invisibly applied by a Deity (a violation of religious freedom and the ban on religious tests); or the unbounded FORCE of legal tyranny. Republican sovereign-subject relations are therefore channeled through precisely three types of jurisprudential sub-systems.

A third premise of republican government holds, as we have seen, that republican governments rule through law and that WILL, FORCE, and JUDGMENT exhaustively define the logical phases or moments in a rule of law. Although this principle sounds familiar, its importance is widely underestimated. Precisely because deriving administrative law means teasing doctrine from logical relationships, eliciting administrative-law doctrines requires understanding precisely how and why a rule of law constitutes an essential prerequisite for accountable government. In the words of a statesman, a republican government *of* the people must be not only *for* the people, in the sense of treating them fairly, in conformance with their inherent dignity, and

in accord with traditional notions of due process. In addition, government *of* the people must be conducted *by* the people, albeit not directly, as in ancient democracies, but indirectly through the apparatus of modern representative government.<sup>113</sup> And representative government *by* the people—government in which officials truly are held accountable as “servants”—can practically be accomplished only by adhering to a rule of law that hews closely to principles found textually, historically, and logically embedded in the Vesting Clauses.<sup>114</sup>

*Modes of Executive Action.* The above discussion considers modes of activity of governmental institutions in general. But the problems of administrative law are more narrowly confined. As noted, administrative law consists as a general matter of constitutionally derived, legislatively enacted, and administratively promulgated rules for binding executive officials, either because the rules address those officials directly or because they address them indirectly via judicial review of their actions or inactions. Viewed from executive officials’ perspective, the relevant modes of (and constitutional constraints on) republican governmental activity can be summarized as follows.

#### MODES OF REPUBLICAN EXECUTIVE ACTIVITY

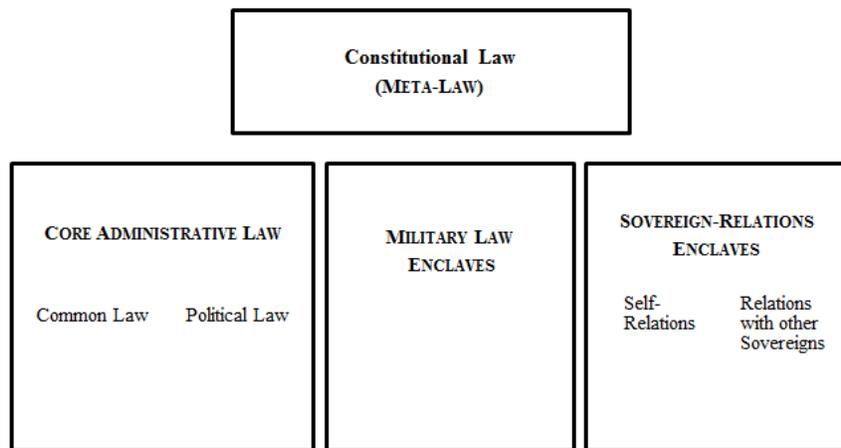


Fig. 4 (see Fig. 2 and Fig. 3).

#### 2. Administrative Law’s Primary Categories: Basic Definitions

With some logical elbow grease, one can deploy the thinking sketched above and develop an apolitical lingua franca for administrative-law scholarship and adjudication. In particular, we identify below the following primary types of administrative proceedings: (i) core administrative proceedings, (ii) administrative exceptions, (iii) proceedings involving sovereign interests, and (iv) status determinations.

STATUS DETERMINATIONS						
Core Proceedings			Exceptions		Sovereign Interests	
Public-Rights Determinations	Private-Rights Conferrals	Regulatory-Licensing Proceedings	Military Institutions	Civil Wardenship	Exactions Proceedings	Regulatory Proceedings

Fig. 5.

a. Core Administrative Proceedings

At the core of American administrative law are proceedings involving private citizens solely in their capacity as subjects of governmental action. Within this core, sovereign-subject interactions may assume the form of common-law relations, based either on corporate- and property-law analogies of voluntary permission or else on corporate- and contract-law analogies of offer and acceptance. Alternatively, sovereign-subject interactions may take the form of coercive relations that conform to rules governing the exercise of political authority in administrative contexts.

One subcategory of core administrative law encompasses what we venture to call *public-rights determinations*.<sup>115</sup> In these proceedings, the government exercises propriety, non-coercive power—authority it would enjoy even if it were a corporate entity lacking the powers of a sovereign.<sup>116</sup> Public-rights determinations involve executive officials' decisions in managing, for the benefit of the public at large, property and similar rights that belong uniquely to government. Classic examples include the general public's right to enter a public park or, famously, to operate a certain vehicle in the park.<sup>117</sup> A characteristic modern example, rooted in justiciability doctrines of recent vintage, is the public's right to insist that park management be conducted in accordance with applicable law.<sup>118</sup> Public-rights litigation is akin to private-sector litigation brought against a business corporation by shareholders claiming mismanagement of the enterprise.

A second core subcategory encompasses what we call *private-rights conferrals*.<sup>119</sup> Private-rights conferrals are based on principles of voluntary offer and acceptance, not coercion. Hence, litigation challenging private-rights conferrals can often be analogized to a consumer's suit claiming that in some transaction he or she received less than what a business was obliged to confer. An important feature of private-rights conferrals—in our view a constitutional requirement under the non-delegation doctrine—is adjudication of rights eligibility through a regime of largely statutory status determinations.<sup>120</sup> In conferring private rights, as in determining public rights, the

government exercises proprietary, non-coercive power. But in these proceedings rights are involved that, once conferred, come to “vest” in the hands of a subset of the public.<sup>121</sup> The line defining the rights conferred in such proceedings begins with a common-law analysis and extends however far the Supreme Court’s “new property” jurisprudence demands.<sup>122</sup>

The third subcategory of core administrative law encompasses *regulatory-licensing proceedings*. In this subcategory, the government exercises the sovereign, coercive power it would lack if it were a private corporation; namely, the power to rearrange preexisting legal rights and duties. As explained below, one element missing from current administrative law is a recognition that regulatory licensing involves the same logical and legal phases or moments as does civil enforcement of the law by the judiciary. America’s constitutional jurisprudence provides two equally valid forms of political lawmaking—one administrative, one non-administrative.<sup>123</sup>

Notably, the distinctions between the three core administrative subcategories—exercises of proprietary administrative authority not involving conferrals of rights; voluntary acceptances of administratively conferred rights; administrative reshufflings of preexisting rights—is workable, precisely because the common law extends a comprehensive, pre-existing regime of private rights to the infinite variety of custom, practice, and behavior. The common law abhors a legal vacuum.

#### b. Administrative Exceptions

Certain administrative-law contexts are characterized by weakened rule-of-law requirements and enlarged scope for official discretion. These contexts involve the unique, constitutionally authorized institutions of the military, plus certain civil contexts involving lawful wardenship over persons, places, and activities lying outside the core of the Nation’s citizenry, territory, and regulatory power. In such contexts, a military law-like “rule of men” is tolerated within boundaries—but only within boundaries policed by separate and specialized status determinations. In the United States, these contexts include, in addition to military tribunals, imprisonment, territorial courts, and bankruptcy courts.<sup>124</sup>

### c. Proceedings Involving Sovereign Interests

As noted, administrative proceedings may involve not only private interests but also the sovereign interests of a national government, state and local governments, foreign governments, or of a sovereign people. There are two subcategories of such proceedings.

The first subcategory involves *exactions by the sovereign* for maintaining and supporting the government, such as taxes, most importantly, but also including jury service, the draft, mandatory voting,<sup>125</sup> and takings of private property for public use.<sup>126</sup> Because of citizens' natural resistance to governmental exactions and, more importantly, because a properly supported and defended government is a pre-condition for governmental activity of any sort, such proceedings have rightly been considered appropriate for specialized treatment.<sup>127</sup>

A second subcategory is composed of *regulatory proceedings involving sovereign interests*. This subcategory encompasses proceedings involving not only foreign sovereigns and citizens, but also sovereign states and their subdivisions, and private citizens in their sovereign political capacity (as, for example, voters, candidates, or members of political organizations). This subcategory should also include any and all constitutionally authorized regulatory and institutional regimes not encompassed by other categories. Administrative proceedings in this subcategory, too, are appropriate for specialized treatment.<sup>128</sup>

### d. Status Determinations

A final category includes segregable proceedings that produce *status determinations*.

Status determinations are individualized judgments by the executive that serve as constitutionally or statutorily compelled components in broader decisions regarding legal claims to substantive rights or benefits. Prominent examples include determinations regarding citizenship, disability, eligibility to vote, and marital and veteran status. Other examples involve determining the status of property ownership, either in proceedings creating a property interest, such as patent proceedings, or in proceedings recognizing a pre-existing property interest based on (for example) first possession or use—such as trademark registration proceedings or real property recordation proceedings.

Status determinations may be employed in conjunction with various types of administrative proceedings; in our view, they *must* be employed in conjunction with proceedings involving administrative exceptions.

#### IV. AN OPPORTUNITY FOR REFORMATION

The classifications defined above have been framed to enable an administrative law that empowers agency action, constrains agency excess, finds grounding in constitutional principle, and provides for more predictable review through reliance on distinctions in kind. Start with the classifications and look upward, and one sees the primary jurisprudential forms, the *Federalist's* theory of separation of powers, and American versions of constitutional law, common law, and legal logic. Look downward, and one can espy a flexible, evolving, logically ordered, constitutionally grounded, context-specific set of proceedings—one capable of being built out to cover manifold areas of substantive law and types of determinations.

In the discussion below, we begin by addressing a key dimension of Justice Thomas's reading of the Vesting Clauses, concluding that it will likely be proved correct as a matter of original constitutional interpretation. Drawing on the discussions above, we then set forth seven principles for structuring an accountability-based reformation that conforms to Justice Thomas's core constitutional principles.

##### A. *The Thomas Thesis*

A great question is whether Justice Thomas is correct in reading the Article I, Section 1 reference to "legislative Powers" as encompassing a non-delegable power to issue generally applicable rules for private conduct that must conform to some qualitative—as opposed to quantitative—criteria of constitutionality.

Put aside, for the moment, the elephant in the room—the long-standing, long-unquestioned assumption that Congress may delegate its power to issue rules of private conduct; the reliance on this assumption; the difficulty of disturbing it. The question then becomes one of pure constitutional interpretation. For reasons related to or implicit in the discussions above, we believe Justice Thomas will be proved correct on that question.

First, Justice Thomas's starting point is a commonplace of constitutional interpretation; namely, that eighteenth-century constitutional texts should be interpreted in light of English constitutional experience. As with interpretation of the Bill of Rights, so too with the Vesting Clauses.

Second, the distinction between law governing private conduct and law governing government—the pivot of the Thomas position—is, as noted, a foundation of American constitutionalism. In the constitutional drafting, ratification, and amendment process, this distinction has been uniformly adhered to for more than 225 years. It would be unsurprising if it reappeared in a different guise in a proper interpretation of the Vesting Clauses.

Third, one non-doctrinal, logical building block of recent Supreme Court decisions holds that a persisting non-use by the political branches of an "attractive" and obvious governmental power is potent evidence that the

power is not constitutionally available.<sup>129</sup> The underlying insight is that—at least as to obvious and politically attractive governmental practices and powers—an enduring absence of judicial precedent may be an even more persuasive hallmark of unconstitutionality than an affirmative decision declaring a practice unconstitutional. Where a reported decision striking down a governmental power is found, the very presence of the decision signifies a constitutional judgment by the Court at odds with a similar judgment by the political branches. In contrast, an absence of such a decision over some significant portion of the Constitution's long history tends to support a judgment by the political branches that the power is constitutionally unavailable.

A power for executive officials to issue rules that bind private parties, if one in fact exists, would appear both unmistakably obvious and alluring to those officials.<sup>130</sup> Especially so, as the necessity for administrative regulations binding private parties is defended on grounds that officials need such power to fill in details and resolve ambiguities in statutory language.<sup>131</sup> But if that is the rationale for the power, it is hard to believe that, before the twentieth century, no executive officer ever thought that unilaterally declaring a law binding private conduct would be helpful.

Viewed in this light, the inaugural volume of the Code of Federal Regulations, published in 1938, can be seen as approaching a confession that before then the federal executive had not long claimed power to legislate for private parties. If such power had previously been thought to exist, how, during the earlier period, did the executive publish the law, inform private parties of their duties, and satisfy its due process obligations? Not using the Statutes at Large, inaugurated with the First Congress; that was reserved for congressional enactments. Not using the Code of Federal Regulations; that did not exist.

The due process quandaries raised by any assertion of an executive power to legislate rules of conduct for private parties much before the 1930s; the lack of open debate over the constitutionality of such power in the 1930s;<sup>132</sup> and the inability of defenders of such power to identify a clear instance of its use before the twentieth century, all suggest that, while more research is in order, Justice Thomas will eventually be proved correct as a matter of original constitutional interpretation.<sup>133</sup>

#### B. *Constitutional-Administrative Law Reform*

Once an administrative reformation is under discussion—whether under Justice Thomas's principles or others'—a question arises as to whether activist government has been rendered difficult by eighteenth-century choices made by America's Founders. Many readers of Professor Hamburger's scholarship and Justice Thomas's opinions, both sympathizers and detractors, assume an affirmative answer to this question. For reasons we will explain, we answer it in the negative. At the same time, we concede that administrative law must undergo some kind of thoroughgoing reevaluation. In

our view, this reassessment should consist not so much in recovering the past, as in extending its constitutional logic. The Founders and President Lincoln were conservative liberals, not liberal conservatives. They bequeathed us the Constitution, not by battening down hatches in rough political seas, but by logically advancing the received state of the political art. Reproducing such achievement is the challenge for today.

### 1. Administrative Law's Primary Categories: Key Lessons

The American governmental heartland is the place where political lawmaking is used to affect the interests of private citizens. The core of administrative law therefore involves proceedings and determinations in which private interests are affected directly by politically authorized executive action (in contrast to situations where the executive merely proposes that the judiciary issue a particular form of binding decree). It follows that, if the avenue to an accountability reformation runs through realigning administrative procedures with constitutional categories, this realigning ought to begin at administrative law's core; in contexts where private interests are directly affected by executive action.

Would-be reformers of administrative law would do well in conceiving what might be called a Core Administrative Procedure Act ("CAPA"). Among the most important provisions of such legislation would be those defining what this CAPA would *not* cover; namely, executive branch proceedings involving sovereign interests and administrative exceptions. Other important provisions would define and subdivide agency actions falling within the new statute; namely, public-rights determinations, private-rights conferrals, and regulatory-licensing proceedings. And yet another provision would define status determinations as its own category of administrative proceeding.

With such a statutory structure in place, conventional legal thinking would at a stroke become more acquainted with the Constitution's logical categories. And problems of the executive branch exercising legislative authority that rightly belongs to Congress and adjudicative authority that rightly belongs to the judiciary would become that much more tractable.

*Core Administrative Proceedings.* At the core of American administrative law one finds two simple principles. First, all administrative action not involving sovereign interests or an administrative exception can be classified in one of three ways: as a public-rights determination, private-rights conferral, or private-rights deprivation. Second, administrative deprivations of private rights are permitted, but only if they are carried out through regulatory-licensing proceedings.

This second principle constitutes an enigma for conventional understandings of administrative law. But to see how the executive may be deprived of power to legislate rules of private conduct without dismantling the administrative state, it is critical to see that regulatory-licensing regimes,

while they do not involve agency-issued rules for private conduct, nonetheless encompass the same logical rule-of-law moments as do ordinary processes of legislative enactment, executive enforcement, and judicial judgment. They therefore constitute a legitimate, albeit an alternative, form of political lawmaking.

In regulatory-licensing proceedings, legislative WILL, executive FORCE, and judicial JUDGMENT remain present and visible, as in ordinary political-law contexts. But these proceedings differ from ordinary lawmaking in that the relevant legislative enactment must assume a particular binary form; the executive is authorized to issue “binding advisory judgments” as to part, but not all, of the legislature’s enactment; and these executive judgments are subject to specialized forms of review. Regulatory-licensing regimes always consist of three types of generally applicable provisions.

One statute in such regimes is addressed exclusively to private parties (for example: “No person may perform common-carrier services without first obtaining a license from the Common Carrier Bureau.”).<sup>134</sup> This statute defines the scope of the regulatory regime’s imposition on pre-existing statutory and common-law rights and duties.

The next statute is addressed exclusively to executive officials (for example: “The Common Carrier Bureau may issue licenses to qualified applicants who have filed for approval by the Bureau, in advance, a tariff reflecting rates that are just and reasonable.”).<sup>135</sup> This statute defines conditions under which executive officials may relieve the operation of the first statute.<sup>136</sup>

A third statute, addressed to the judiciary, provides a quality-control check on the relief provided by the executive from the generally applicable prohibition addressed to private conduct. This element takes the form of a jurisdictional provision for judicial review of licensing determinations.<sup>137</sup>

These formal requirements ensure that regulatory licensings entail the same logical and legal moments, or phases in the rule of law, as do standard cases of congressional legislation and executive enforcement through the judiciary. The first two types of generally applicable statutes combine to specify one substantive, generally applicable, rule for private conduct (in the above example: “No person may perform common carrier services without establishing in advance that they are qualified and will charge just and reasonable rates.”). This “conjoined rule” is then applied to an individual, albeit in different ways depending on actions taken (or not) by that individual. Executive enforcement in court occurs in cases where a person violates the statute addressing private conduct (say, by providing common carrier services without first obtaining a license). By contrast, executive enforcement via agency judgment, which is binding on the agency but advisory as to the private party, occurs in cases where a person applies for a license before acting. In this fashion, as in ordinary lawmaking, the logical and legal moments of legislative WILL, executive FORCE, and judicial JUDGMENT remain visibly present, with the qualification that the executive is permitted to issue a

“binding advisory judgment” as to one of the two requirements encompassed by the conjoined rule.

Regulatory licensing makes available a form of administrative power that satisfies Justice Thomas’s high-level non-delegation principles, while still allowing effective delegations of political authority. Congress may broadly delegate. But it may do so only if it expressly lays down a prohibitory provision addressed to the public; an empowering provision addressed to the executive; and a jurisdictional provision for the judiciary. Administrative power is made constitutionally available. But the power can be exercised only in ways that bolster the fidelity, regularity, and transparency of the executive’s decision making. This is an American advantage in administrative jurisprudence.

*Sovereign Interest and Exceptions Proceedings.* There likely has been no more consequential misstep in all administrative law than that of conflating proceedings outside of administrative law’s core with those within it.

Consider, as an example, the Supreme Court’s authorization of broad transfers of adjudicatory authority from the judiciary to executive agencies and non-Article III courts. As regards transfers of such authority to administrative agencies, the key precedent is the Supreme Court’s *Atlas Roofing* decision, which was mistakenly rooted in decisions in inapposite cases involving sovereign interests (such as exercises of the taxing and foreign commerce powers).<sup>138</sup> Likewise, as regards transfers of adjudicatory authority to non-Article III courts, the key precedents mistakenly conflate public-rights determinations with administrative exceptions proceedings.<sup>139</sup> In both instances, the fundamental mistake is the same—failing to distinguish administrative law’s core from its outlying areas.<sup>140</sup>

An important step toward reform is, therefore, the profession gaining a better grasp of the types of proceedings falling within and outside administrative law’s core. This is not as difficult as one might expect. As regards sovereign-interest proceedings, there are only a limited number of constitutionally permissible types of exactions, including compensated exactions (takings for public use); monetary exactions (taxes); and in-kind exactions for the benefit of the legislature (mandatory voting); executive (the draft); and judiciary (jury service). Likewise, there are only so many types of sovereigns whose interests can be at stake in non-exaction regulatory proceedings; namely, foreign sovereigns and their citizens, sovereign states, political subdivisions of sovereign states, and the American people in their sovereign political capacity. Finally, as regards administrative exceptions regimes, there are aside from the military itself only so many civilian contexts—such as the discretionary authority wielded by territorial courts, prison wardens, bankruptcy courts, and the like—in which the Constitution, read in light of tradition, legitimately allows a legal wardenship or “rule of men” over persons, places, or activities lying outside of the core United States territory, citizenry, and regulatory power.

*Status Determinations.* As noted, status determinations may be thought of as individualized judgments employed as components of broader legal claims to rights and benefits.<sup>141</sup> A status determination can relate either to a constitutional status, such as citizenship, or to a status grounded in statutory law.<sup>142</sup> Status determinations are frequently conjoined<sup>143</sup> to substantive law involving sovereign interests,<sup>144</sup> core administrative law,<sup>145</sup> or an area in which an administrative exception applies.<sup>146</sup>

In our view, the Constitution affirmatively requires status determinations in some contexts and positively forbids them in others. Separate status determinations are constitutionally required on occasions involving admittance to or discharge from the supervision of authorities wielding the kind of military-law-like power that characterizes administrative-exceptions proceedings. For instance, in leaving the jurisdiction of such discretion-wielding officials and tribunals, a person is officially discharged from the military or released from prison; a corporation is officially discharged from bankruptcy; a territory is officially admitted as a state (or formally granted sovereign independence). These sea changes in legal status must be made openly and unambiguously; they are deemed legally effective as of some unequivocal point in time.

On the other hand, a reformed non-delegation doctrine would likely limit agencies that determine public rights, confer private rights, or award regulatory licenses from creating their own legal statuses, or giving relevance to statuses not mentioned in their governing statutes (except, perhaps, as to a few concededly relevant constitutional or statutory statuses, such as citizenship). One strategy agencies seeking legislative-style powers currently employ is to assert implied, delegated authority to develop new status distinctions for use in their own decision making.<sup>147</sup>

## 2. Principles For Structuring Reform: Towards “Qualitative” Administrative Law Distinctions And A Rule of Meta-Law

The utility of the primary procedural forms lies in, among other things, the path they pave toward recovering a submerged continent of rule-of-law principle—the rule of meta-law.<sup>148</sup> This rule-of-law dimension draws from general accounts of how law is implemented to make possible the republican accountability of the administrative state.

*A rule of meta-law.* Understanding the rule of meta-law begins with Professor Hart’s subtle distinction between two different steps involved in legal adjudication: discerning applicable universal rules from among the possibilities on the law books; then applying those rules to individual persons, pieces of property, and actions found in the real world.<sup>149</sup> Significantly, non-ministerial administrative action by republican institutions involves this very two-step process—discerning general rules (namely, rules defining the scope of an agency’s delegated authority), then applying them to individualized circumstances.<sup>150</sup> In our nomenclature, the proper execution of Professor Hart’s

initial adjudicatory step, when performed by republican administrators (not judges), is called administrative *fidelity*. Proper execution of step two is *regularity*. And the public visibility of the two steps together, so administrators are properly *accountable*, we call *transparency*. In crucial respects, then, republican administration *is* judging—judging performed by executive officials pursuant to legislatively delegated authority.<sup>151</sup>

Against this backdrop, judicial review of administrative action in the United States has, understandably, been structured to parallel appellate review of trial court determinations. Unfortunately, as seen in Professor Merrill's work, such review relies more on quality-control principles and intuitions of reasonableness than rigorous logic.<sup>152</sup> Under current doctrine, courts reviewing two-fold administrative judgments typically perform deferential review of each aspect of an agency's decisionmaking as opposed to limiting review to procedural issues, legal questions, and overall results. In an archetypal instance, a court will deferentially analyze an administrative action, not only for adherence to proper procedures, but also for proper fact-finding,<sup>153</sup> policy-selection,<sup>154</sup> legal interpretation,<sup>155</sup> and explanation of "choices made."<sup>156</sup> Such thorough but deferential rehashing produces unpredictable outcomes and bewildered lawyers.

A better alternative would call for independent judicial identification and interpretation of applicable laws coupled with scrutiny of overall administrative judgments that varies in intensity, depending on the constitutional context in which administrative action has been taken. Under this approach, courts would make their own legal determinations without deference to an agency's reading of the law (Professor Hart's first step). But courts would decline to retrace the various administrative assessments and determinations underlying the application of the law to individual circumstances (Professor Hart's second step). Reviewing courts would instead assess the lawfulness of overall administrative actions, just as appellate courts review overall jury verdicts.<sup>157</sup>

Crucially, under this alternative regime, the intensity of judicial scrutiny would vary according to constitutionally grounded distinctions.<sup>158</sup> And separation-of-powers principles (not due process principles) would be used to require judicially reviewable status determination in certain contexts—thus ensuring that agency determinations are structured to enable review, not strategically tailored to augment discretion.<sup>159</sup> If reformed in this fashion, judicial review would test agency determinations based much more on legal distinctions in kind, much less on policy differences of degree.<sup>160</sup>

*Seven Principles for Liberal Reformation.* Drawing from the above, inspired by Professor Epstein,<sup>161</sup> and mindful of the difficulty of the task, we offer seven principles for structuring a liberal administrative reformation. These context-sensitive principles, if embraced, should reduce the occasions on which judges experience that queasy feeling of playing junior-varsity agency-head and quality-control inspector, or else rubber-stamping whatever the executive has brought before them.<sup>162</sup>

First, carve out on one side administrative proceedings involving the sovereign interests of the federal government, state governments, and people; recognize that confusing such proceedings with the core of administrative law complicates and degrades standard administrative-law doctrines.

Second, presume that administrative proceedings involving sovereign interests are divisible into exactions and regulatory subcategories and that proceedings in both subcategories are subject to specialized treatment; further, recognize that the regulatory subcategory can be employed as a residual category to the extent that there are constitutionally authorized proceedings not encompassed by other administrative-law categories.

Third, carve out on the other side proceedings involving military matters as well as civilian administration involving lawful wardenship over persons, places, and activities lying outside the core of the nation's citizenry, territory, and regulatory power; recognize that confusing such administrative exceptions with administrative law's core also complicates and degrades standard doctrines.

Fourth, enforce the rule that every exercise of discretion in the context of an administrative exception must be bounded by distinct jurisdictional determinations.

Fifth, understand that what's left after carving out proceedings involving sovereign interests and administrative exceptions is the core of administrative law; understand further that this core is comprehensively divisible into subcategories involving public-rights determinations, private-rights conferrals, and regulatory-licensing proceedings.

Sixth, appreciate that although agencies may not promulgate legislative rules of private conduct, they may issue regulatory licenses; strictly enforce the rule that every delegation of core administrative authority to rearrange private rights must take the form of a regulatory licensing.

Seventh, employ separation-of-powers principles (not due process principles) to require reviewable status determinations as a way to ensure that administrative decisionmaking is structured to enable review; enforce a presumption that, except within narrow bounds, delegations of core administrative authority do not encompass authority to extend the legal effect of preexisting status determinations or devise new legally relevant statuses.

*Replacing One-Size-Fits-All Doctrines.* Taken together and properly elaborated, such principles should ignite what might appear as a revolutionary overthrow of traditional administrative law, but what would really be a much-needed renovation of the *ancien régime*. Propositions such as those holding that processes used for taxation and military law ought to differ from core administrative procedures; or that administrative procedures governing determinations of public rights ought to differ from those governing conferrals and deprivations of private rights; or that a status determination as to whether someone is a citizen should involve more process than a determination as to whether someone of conceded alien status should be deported are all preexisting staples of the cases and commentary.<sup>163</sup> Our proposed lingua

franca, this taking up of old categories and setting of them down in newly logical arrangements, should thus be viewed as a not-unfamiliar starting point for discussing replacements for, or refinements to, one-size-fits-all doctrines that allow too much delegation of legislative authority, and too much migration of adjudicatory authority, to the executive—prominently including *Chevron*, the intelligible principle test, and the Administrative Procedure Act.

## V. TODAY'S MOMENT

The challenge of the moment is easy to describe and difficult to surmount: today's administrative-law disputes are at bottom disagreements over bedrock elements of American constitutionalism; hence, they are hard to understand, much less calmly discuss, much less mediate. Against this backdrop, we close with a word about the seemingly impossible dream of achieving a liberal, logical, almost paradoxical reformation in a constitutional house divided.

### A. *An Opportunity For Logical Reassessment*

At one end of our divided profession lies *Chevronist* post-modernism. This is an attitude rooted in the syllogism that says all language is ambiguous; law is written in language; hence all laws are ambiguous and, under *Chevron*, enlightened agencies may do as they please. On the profession's opposing end, one finds abhorrence of lawlessness eliding to impatience with legal logic.<sup>164</sup> To extend the business analogy, it is a greed market for some and a fear market for others. At such a moment, we do well to recall that greed for legal authority is positively dangerous and that any constitutional reassessment caught up in fears and misconceptions—even well-founded fears and understandable misconceptions—is likely to miscarry.

*Administrative Law in a Nutshell.* Today's administrative state has been built up over decades as an improvised amalgamation of traditional notions of fair play and newfangled substantive commitments—above all, the New Deal's expansive administrative state; the Warren Court's constitutional protections for "new property"; and the Rights Revolution's commitment to making judicially enforceable a range of public-rights determinations previously left to executive discretion. For better or worse, the logic of the Constitution, as well as logical advances achieved in non-legal disciplines, played only submerged and subordinate roles in this evolution.

Our inherited administrative regime—elegant, sophisticated, worthy in its way—is neither totally implausible nor totally unworkable. If you doubt your ability to derive constitutional classifications; favor an expansive administrative state; and insist that public-rights determinations be judicially reviewable, it can appear constitutionally plausible. And if you find general agreement over what constitutes a "reasonable" executive procedural choice,

policy selection, factual finding, or legal interpretation, it can be functionally workable. On the other hand, today's regime becomes constitutionally implausible once it is closely scrutinized. And it becomes functionally unworkable once there is no longer an elite consensus about what constitutes administrative "reasonableness."

Administrative law's detour was administrative lawyers' understandable (albeit inarticulate) rejection of difficult-to-identify constitutional classifications in hopes of finding one-size-fits-all doctrines that could accommodate, at least presumptively, review of public-rights determinations, more intrusive scrutiny of private-rights conferrals, and a vast enlargement of administrative power. Today's received regime, consisting of such doctrines, is a significant achievement. But what lawyers are coming to realize is that administrative law can either substantively perfect decision-making under consensus conditions, or else apolitically mediate policy controversy. It would appear no body of doctrine can do both.

*Towards Liberal, Logical, Administrative Jurisprudence.* In truth, deriving administrative law from the Constitution is every bit as practical as deriving constitutional principles of judicial review, such as those expounded by the *Federalist*, declared valid by *Marbury*, and entrenched today in an expansive body of doctrine.<sup>165</sup> Only we lawyers understand the logical coherence of the Founding but dimly, and we despair of our ability to elicit the neutral constitutional principles we need to justify the active administrative state we demand.<sup>166</sup>

All too often, lawyers overlook that, just as America's Founders split the atom of political sovereignty, so too they discarded conventions of jurisprudential uniformity. A customary society employs a unitary common law system; Russia employs a unitary military law system; but our system employs, not just administrative and non-administrative forms of political law, but common law, residual military law, and, via the religion clauses, protected enclaves of canon law, divine law, and arguably even natural law—every primary jurisprudential form save tyranny.<sup>167</sup> Understanding American administrative law means understanding that our complex jurisprudence, like our compound polity, rehearses but conceptually departs from the traditions that preceded it; understanding that, for our jurisprudential traditions as much as for our political traditions, a fitting motto is *novus ordo seclorum*.<sup>168</sup>

The keys to liberal reforms for administrative law therefore include a better appreciation that our Constitution is indeed logically modern and that it represents a breakthrough in not only the substantive science of politics, but also the logical science of jurisprudence. Notably, today's scholars have intuited many of the principles needed for a rule-of-law reformation. Scholars already employ the concept administrative constitutional law.<sup>169</sup> They emphasize the importance of agency accountability.<sup>170</sup> They spotlight the need for "agency fidelity" to statutory directives,<sup>171</sup> agency regularity in implementing them,<sup>172</sup> and agency transparency in acting on behalf of the public.<sup>173</sup> What's missing is an appreciation of the bigger picture, an awareness

of how to constitutionally ground administrative-law classifications, and, above all, an unmasking of the persisting, debilitating myth that the Framers failed us by forgetting to provide for an administrative state—supposedly forcing us, their heirs, to make one up or do without.

B. *An Opportunity for Liberal Reformation*

Reconciling administrative law with the Constitution will require jurisprudential enlightenment that encompasses, among its many dimensions, modifications to Supreme Court adjudicatory practices; changes to the workings of Congress; reformed “regulatory reform” initiatives; and quantum advances in administrative-law doctrine.

*Grounding a Doctrinal Reformation.* Our reform principles have been framed to break through the antimonies that define today’s profession—as seen especially in the divides between clause-bound originalism and living constitutionalism; constitutionalized common law and politicized common law; libertarian administrative law and New Deal fundamentalism. In particular, we hope a reformed administrative state might come to rest on completeness principles found at the very roots of republican government and that a new corpus of administrative law might unify adherents to both sides of today’s antimonies. While we sympathize with the academy’s impatience with traditional taxonomies, we hope scholars might join us in embracing new, constitutionally grounded, administrative classifications. Such classifications should ensure that the rule of law is better understood and more consistently observed, without paying the exorbitant price of regulatory rigor mortis.<sup>174</sup>

There remains the fraught question whether adherence to the Constitution and rule of law necessarily “inhibit[s] the Government from acting with . . . speed and efficiency.”<sup>175</sup> The answer, we respectfully suggest, is “No.” As Justice Holmes insisted, ours is a minimalist constitution that leaves to politics the basic choices as to the scope and scale of the activities that the governments of the United States—state and federal—will collectively undertake.<sup>176</sup> So long as constitutional rights, texts, structure, and logic are respected, the legislative lawmaking to executive implementation to judicial review sequence becomes, not a stumbling block for dispatch and efficiency, but a workable process proceeding from policy formulation to implementation to confirmation. Justice Thomas is surely correct that such a division of labor ought not be based, as it is today, on squishy distinctions and constitutional myths.<sup>177</sup> But granting the full force of that point, it does not follow that governmental divisions of labor are inherently subject to efficiency laws opposite to those thought to apply to economic divisions of labor.<sup>178</sup>

*Taming Elephantine Transition Problems.* Put simply, there is no realistic possibility that the Supreme Court, acting alone, could implement Justice Thomas’s reform proposals—or even that ordinary processes used at the

Court could accommodate a full and fair vetting of those proposals.<sup>179</sup> For the Court to receive the helpful advocacy it deserves, it will likely have to revise standard hearing practices. As a modest first step, however, members of the Court might begin making reference to administrative law's primary concepts and classifications, even if they are not of decisive importance for a particular case. Using such nomenclature would familiarize the bar with the natural dividing lines between one administrative context and the next.

But it also falls to the academy to be more constructive, and perhaps even a little less accusatory, with respect to the Court. As the Court assumes a larger role as constitutional- and administrative-law faculty to the nation, a certain subset of thoughtful professors is becoming increasingly influential—through briefing to the Court as well as traditional academic work—in the Court's most challenging cases.<sup>180</sup> It would be helpful if even more scholars were willing to engage in constructive fashion at this moment of flux for administrative law.

*Reinvigorating the Congress.* The difficulties for liberal reformation posed by an often under-appreciative academy are as nothing compared to those posed by a disengaged Congress. Any "Administrative Law Without Congress," however inspired, will not work.<sup>181</sup>

We propose, respectfully, that the bar and academy join in explaining to Congress that doctrines mandating that certain substantive enactments assume certain accountability-enhancing forms would do nothing to restrict Congress's legitimate legislative prerogatives. More concretely, we propose that Congress bind itself to taking legislative action (even if the action is an affirmative decision not to act) in certain administrative-law contexts. For instance, Congress might give "fast-track" legislative preference—ensuring prompt up-or-down votes and limited opportunities for amendments—to agency-submitted proposals to modify rules governing exercises of discretion within the agency's existing jurisdiction to confer private rights or issue regulatory licenses.<sup>182</sup> Likewise, Congress might give "fast-track" preference to executive proposals for responding to Supreme Court decisions holding legislation unconstitutional on non-delegation grounds.<sup>183</sup>

*Reforming "Regulatory Reform" Initiatives.* Told there are problems with agencies being faithful, regular, and transparent, and that current doctrines are unequal to the task of bringing them in line with the Constitution and rule of law, lawyers and policymakers incline toward breaking the problem into parts. They ask themselves how one might craft better rules for specific agencies, agency activities, or substantive areas of law. This straightforward approach entails fatal weaknesses.

For one thing, there is a Catch-22 problem. If agencies consistently skirt and evade existing limitations on their authority, what prevents them from skirting and evading any and all new limitations on their authority? For another, as Professor Vermuele points out, there is the difficulty that any analysis deeply rooted in particular past problems tends to come on the scene too late to make a difference.<sup>184</sup> The *next* time an agency is tempted to act in

a manner that is unfaithful, irregular, or non-transparent, it will likely be facing what it can plausibly claim are novel and urgent needs arising under exigent and unanticipated conditions. Under such conditions, past reforms aimed at preserving democratic accountability are easily brushed aside as naively ill-adapted to then-current realities.<sup>185</sup>

Then too, there are problems posed by the sheer scope, scale, and diversity of the substantive determinations that administrative law must overlay. Administrative law is by nature context indifferent. It must work well in the law's Model T factories and its Faberge Egg workshops. It must be robust enough to withstand sustained assaults from those with personal, financial, and ideological commitments to skewing what is right and fair and achieving what is unjust and advantageous. It must be rigorously upheld even though issues of administrative procedure will be seen as secondary in practically every context in which they arise.

Despite these obstacles, the historical grounding and intuitive appeal of administrative fidelity, regularity, transparency, and accountability are such that conventional "regulatory reform" efforts can succeed under conditions of policy consensus. But conventional appeals to intuitive notions of fairness and reasonableness, however sophisticated, can succeed *only* under those conditions. The fallacy in much regulatory-reform activity today is that it presupposes mutual—albeit implicit—constitutional, political, and legal understandings that are not to be found. Far from building on a pre-existing consensus, today's reforms must fashion the very climate of opinion that is essential for their success.

Impractical as it may seem, the most practical means of addressing administrative discontents in today's climate of constitutional acrimony is for administrative lawyers to roll up their sleeves and help reconcile administrative law with the Constitution. Just as doctors applaud medical research offered as a promise and prelude for later clinical results, so lawyers should applaud Justice Thomas and other jurists who have begun posing probing questions about possible breakthroughs in sequencing the liberal, logical DNA of our Constitution. Now that the boulder of administrative law has been set loose, it is rolling downhill to a resting place in some body of principle. It may take five, ten, twenty years or more to reach bottom. But just as an anti-segregation principle *had* to be recognized, sooner or later, as an element of constitutional bedrock, so too administrative principles that align with the Constitution *must* eventually be embraced by a reluctant profession. In the case of administrative law's reformation, predicting the future is easy. What's impossible to say is how soon it will arrive.<sup>186</sup>

## CONCLUSION

The American Founders were practical men schooled in the real world of electoral politics. But they were also theoretical men schooled in the intellectual world of Enlightenment political theory, political economy, and political

history. The United States Constitution is, as a result, an almost unfathomably able distillation and synthesis of lessons drawn from American practice and Anglo-European history and theory.

For years, the means of approaching this union of theory and practice have been parceled out in diverse places in the American academy and legal profession. This is due in part to the need to keep legal reasoning distinct from political argument. It may be that you can win your Supreme Court case only by relying on distinctions drawn from the logics of the ages. But you will actually win only if you bury the source of your logical insights: to reveal such thinking is to make it seem as if your side prevails only by drawing “contestable” ideas from beyond the legal materials.

Partly because of incentives to bury legal logic in Supreme Court advocacy; partly because of the need to stabilize constitutional politics by tolerating constitutional ignorance; partly because of the great divorce between theory and practice in American legal education; and partly because of the Constitution’s sheer brilliance, America’s constitutional achievements are understood on a theoretical level, but imperfectly, by one small cadre and on a practical level, but imperfectly, by a different small cadre.

As a result, there are today no shared ways of thinking about, and there is no common vocabulary for talking about, America’s unique jurisprudential inheritance. Although American practitioners are intuitively familiar with this inheritance, they are mostly unfamiliar with the logical connections between constitutionally grounded distinctions and administrative-law doctrines. For all that appears to the naked eye of today’s lawyers, our Framers dealt in politics and law, but not so much in jurisprudence. For all most lawyers learn at school, our Framers are just recent exemplars in a millennia-long tradition of lawgiving, and adhering to the Constitution is not logically or jurisprudentially different from adhering to Justinian’s Code, save that our Founders are sometimes credited with more wisdom, and universally credited with more recency, than Emperor Justinian.

Indeed, America’s foremost administrative-law court, the D.C. Circuit court of appeals, sits en banc, symbolically speaking, under the watchful eyes of Emperor Justinian, together with those of Hammurabi, Moses, and Solon.<sup>187</sup> Those four figures, carved in stone above and behind the living judges, emblemize traditions that not only achieved eminence in their day, but have contributed much to legal arrangements in our own day, especially in the Mosaic religious law, the Catholic Church’s canon law, and the secular civil law.

Unbeknownst to America’s lawyers, the role of great lawgiver, epitomized by Hammurabi, Moses, Solon, and Justinian, has been eclipsed. The heroes of our tradition instead play the role of law-enabler and law-declarer, as epitomized by Hamilton, Lincoln, Madison, and Marshall. Unlike the legal achievements of antiquity, our Constitution aspires, perhaps uniquely, to magnify Robert’s Rules of Order on a large scale and organize—in what may,

enigmatically, be called politically neutral fashion—the republican deliberations of a vast people across a wide continent for an indefinite future. Unlike the lawgivers of antiquity, our heroes are not synthesizers, rationalizers, purifiers, or prophets of any or all substantive types of law. They are benevolent, far-sighted souls who learn from the past and employ the present to free the future. They are practically the opposite of lawgivers.

As things stand, eliciting administrative law from the Constitution has proved exceedingly difficult. But once doctrine has been legislatively or judicially laid down from on high, lawyers can readily elaborate, manipulate, and command that doctrine. This pattern of skill and disability, this divide between jurisprudential theory and administrative-law practice, suggests that, while an administrative reformation will be monumentally difficult to initiate, it just might become self-perpetuating—if ever it could be set in motion down the right jurisprudential path.



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<sup>1</sup> 132 Cong. Rec. 23,813 (1986).

<sup>2</sup> JAMES L. BUCKLEY, SAVING CONGRESS FROM ITSELF: EMANCIPATING THE STATES & EMPOWERING THEIR PEOPLE 58–59 (2014).

<sup>3</sup> *Id.* at 80–81 (urging the Court to revisit its holding in *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937)).

<sup>4</sup> *Id.* at 70.

<sup>5</sup> Ted Cruz, *Constitutional Remedies to a Lawless Supreme Court*, NAT'L REV. (June 26, 2015), <http://www.nationalreview.com/article/420409/constitutional-remedies-lawless-supreme-court-ted-cruz>.

<sup>6</sup> See LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 119 (2004); see also Larry Kramer, *Generating Constitutional Meaning*, 94 CAL. L. REV. 1439, 1443 (2006); Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CAL. L. REV. 959, 996–98 (2004).

<sup>7</sup> See MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 15 (1999); Mark Tushnet, *Politics, National Identity, and the Thin Constitution*, 34 U. RICH. L. REV. 545, 560 (2000).

<sup>8</sup> 5 U.S. 137 (1803).

<sup>9</sup> ABNER S. GREEN, AGAINST OBLIGATION: THE MULTIPLE SOURCES OF AUTHORITY IN A LIBERAL DEMOCRACY 96–101 (2012); LOUIS MICHAEL SEIDMAN, ON CONSTITUTIONAL DISOBEDIENCE 99–100 (2013); see also Abner S. Greene, *What is Constitutional Obligation?*, 93 B.U. L. REV. 1239, 1247–48 (2013); Louis Michael Seidman, *Let's Give up on the Constitution*, N.Y. TIMES, (Dec. 30, 2012), [http://www.nytimes.com/2012/12/31/opinion/lets-give-up-on-the-constitution.html?\\_r=0](http://www.nytimes.com/2012/12/31/opinion/lets-give-up-on-the-constitution.html?_r=0).

<sup>10</sup> Some readers may note our failure to find analogies for today's controversies in the New Deal era. While we acknowledge the modern administrative state's debts to New Deal jurisprudence, see *infra* Part II.A., we find the New Deal a poor point of reference for the controversies and challenges we face today. We also hope that our paper can break through the antinomies that divide the New Deal's admirers from its detractors. Calling balls and strikes and winners and losers in less-than-central but very contentious debates is hardly a way to advance an irenic project.

<sup>11</sup> At or near the core of the anti-Federalists' practical case for opposing the Constitution, one finds a contention that an overweening federal government would sooner or later overwhelm the states; that an overweening federal executive would sooner or later oppress the people; and that an overweening federal judiciary would sooner or later interpret the Constitution by its own lights in order to enhance its own authority. At or near the core of the anti-Federalists' theoretical case, one finds objections to the alleged mal-apportionment of the Senate and the alleged difficulty of maintaining free, republican government over a large territory. Echoes of such criticisms, voiced from a variety of political perspectives, loudly reverberate today. While we remain unabashed neo-Federalists, we acknowledge that the anti-Federalists' prophecies, to many, appear prescient.

<sup>12</sup> Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816) in THE WORKS OF THOMAS JEFFERSON, VOL. XII, 3, 13 (Paul Leicester Ford ed., 1905).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 1 (2014).

<sup>16</sup> Adrian Vermeule, *No*, 93 TEX. L. REV. 1547 (2015) (reviewing PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014)).

<sup>17</sup> See *EPA's Proposed 111(d) Rule for Existing Power Plants: Legal and Cost Issues: Hearing Before the Subcomm. on Energy and Power of the H. Comm. On Energy and Commerce*, 144th Cong. 7–15 (2015) (testimony of Laurence H. Tribe, Professor, Harvard Law School).

<sup>18</sup> Jody Freeman & Richard Lazarus, *Is the President's Climate Plan Unconstitutional?*, HARV. L. TODAY (March 18, 2015), <http://today.law.harvard.edu/is-the-presidents-climate-plan-unconstitutional/>.

<sup>19</sup> *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1813–15 (2016); *Sackett v. Envtl. Prot. Agency*, 566 U.S. 120, 128–31 (2012).

<sup>20</sup> *Sackett*, 566 U.S. at 128, 131.

<sup>21</sup> Justice Thomas's recent opinions on administrative law include: *Michigan v. Envtl. Prot. Agency*, 135 S. Ct. 2699, 2712–14 (2015) (Thomas, J., concurring) (questioning *Chevron* and other precedent requiring deference to agency interpretations of statutes); *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1314–17 (2015) (Thomas, J., dissenting) (addressing whether agency decisions have preclusive effect when resolving disputes in an adjudicatory setting, and noting that because agencies are part of the Executive Branch it is unclear whether they have power to adjudicate claims involving private rights, a function that arguably may be performed only by Article III courts); *Dep't of Transp. v. Ass'n of Am. R.R.s*, 135 S. Ct. 1225, 1240–45 (2015) (Thomas, J., concurring) (addressing the constitutionality of regulatory authority delegated to a private entity); *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1213–15 (2015) (Thomas, J., concurring) (questioning precedent requiring deference to administrative interpretations of regulations). For a general discussion of these cases, see Brian Lipshutz, *Justice Thomas and the Originalist Turn in Administrative Law*, 125 YALE L.J. F. 94 (2015).

<sup>22</sup> *Ass'n of Am. R.R.s*, 135 S. Ct. at 1242, 1246.

<sup>23</sup> *Id.* at 1252.

<sup>24</sup> *Id.* at 1249–50 (“[I]t is not the *quantity*, but the *quality*, of the discretion that determines whether an authorization is constitutional.”).

<sup>25</sup> *Id.* at 1246. Justice Thomas contends that the intelligible principle test is a “boundless standard” that is either no standard at all or impossibly calls for subtle distinctions based on matters of degree; he therefore calls for a new test that embodies more qualitative distinctions between legislative and executive power.

<sup>26</sup> *Perez*, 135 S. Ct. at 1215, 1217 (Thomas J., concurring); see also *Ass'n of Am. R.R.s*, 135 S. Ct. at 1243–44 (quoting JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT 13 (J Gough ed., 1947) and 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765)).

<sup>27</sup> See *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 848 n.2 (2015) (Thomas, J., dissenting) (citing Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 566–67 (2007)); see also *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1965 (2015) (Thomas, J., dissenting) (citing Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 569 (2007)); *B&B Hardware, Inc. v. Hargis Indus.*, 135 S. Ct. 1293, 1316 (2015) (Thomas, J., dissenting) (citing Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 561–74 (2007)). As Professor Nelson explains, although the “modern legal academy has little patience for taxonomy[,]” the distinction between “core” private rights and public rights (and government-created privileges) has traditionally carried significant implications for the ways in which rights are adjudicated. Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 625 (2007). According to Professor Nelson, “Congress’s longstanding practice of assigning adjudicatory tasks to nonjudicial actors is perfectly consistent with the letter” of the Constitution, because unless “core private rights hang in the balance,” “[e]xecutive officials charged with administering federal law do not trench on the unique province of the judiciary whenever they apply the law to individualized facts in ways that carry some legal consequences.” *Id.* Relying on such thinking, Justice Thomas contends that administrative agencies have historically adjudicated only public rights and government-created privileges, not private rights. *B&B Hardware*, 135 S. Ct. at 1316 (Thomas, J., dissenting). Justice Thomas further contends that these limits “carr[y] . . . forward into the Vesting Clauses” of the Constitution. *Wellness, Int'l*, 135 S. Ct. at 1965 (Thomas, J., dissenting) (“Those Clauses were understood to play a role in ensuring that the federal courts alone could act to deprive individuals of private rights because the power to act conclusively against those rights was the core of the judicial power.”).

<sup>28</sup> Each of Justice Thomas's five administrative law opinions from the 2014–2015 Term cite one or more of the Vesting Clauses. *See* *Michigan v. EPA*, 135 S. Ct. 2699, 2712–13 (2015) (Thomas, J., concurring); *Wellness Int'l*, 135 S. Ct. at 1965 (Thomas, J., dissenting); *B&B Hardware*, 135 S. Ct. at 1316 (Thomas, J., dissenting); *Ass'n of Am. R.R.s*, 135 S. Ct. at 1240–41 (Thomas, J., concurring); *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1216 (2015) (Thomas, J., concurring). *See also* Robert R. Gasaway & Ashley C. Parrish, *Structural Constitutional Principles and Rights Reconciliation, in* CITIZENSHIP IN AMERICA AND EUROPE: BEYOND THE NATION STATE? 206, 210–11 (Michael S. Greve & Michael Zöeller eds., 2009) [hereinafter Gasaway & Parrish, *Structural Constitutional Principles*] (noting the logical relationship between and among the three Vesting Clauses).

<sup>29</sup> *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1341 (2013) (Scalia, J., concurring in part and dissenting in part) (quoting BARON DE MONTESQUIEU, *SPRIT OF THE LAWS*, Vol. XI, 151–52 (O. Priest ed., T. Nugent transl. 1949)); *id.* at 1338–39 (Roberts, C.J., concurring); *see also* *Mistretta v. United States*, 488 U.S. 361, 416–17 (1989) (Scalia, J., dissenting) (“Precisely because 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. The major one, it seems to me, is that the power to make law cannot be exercised by anyone other than Congress, except in conjunction with the lawful exercise of executive or judicial power.”).

<sup>30</sup> Chief Justice Roberts’ dissenting opinion in *Wellness International Network v. Sharif* concludes that because “no branch of government can delegate its constitutional functions to an actor who lacks authority to exercise those functions,” Article III courts are not able to delegate their judicial power to non-Article III judges. *Wellness Int'l*, 135 S. Ct. at 1957–58 (Roberts, C.J., dissenting); *see also* *City of Arlington, Tex. v. Fed. Comm'n Comm'n*, 133 S. Ct. 1863, 1879 (2013) (Roberts, C.J., dissenting) (noting the “danger posed by the growing power of the administrative state”); *compare* *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1329–38 (2016) (Roberts, C.J., dissenting) (addressing structural constitutional principles that prevent the judicial power from being shared with other branches of government).

<sup>31</sup> For a critical discussion, however, see Cass R. Sunstein & Adrian Vermeule, *The New Coke: On the Plural Aims of Administrative Law*, 2015 SUP. CT. REV. 41, 43–45 [hereinafter Sunstein & Vermeule, *The New Coke*]; *see also* Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 394–402 (2015); *cf.* John Harrison, *Libertarian Administrative Law, or Administrative Law?*, 82 U. CHI. L. REV. DIALOGUE 134, 134–39 (2015).

<sup>32</sup> *Compare with* Sunstein & Vermeule, *The New Coke*, *supra* note 31, at 55, (describing what they call “a kind of APA fundamentalism”). Although used in a slightly different sense from what Professors Sunstein and Vermeule have in mind, “New Deal fundamentalism” is for us an apt label for administrative-law perspectives that regard the Constitution in general—and Vesting Clauses in particular—as incapable of providing helpful guidance in solving basic administrative-law problems.

<sup>33</sup> Sunstein & Vermeule, *The New Coke*, *supra* note 31, at 55 (quoting *Wong Yang Sung v. McGrath*, 339 U.S. 33, 40 (1950)). But note that it may be misleading to suggest that the shape and contours of the APA should be primarily attributed to—and are best interpreted in light of—the push and pull of opposing social and political forces: a Missouri Compromise for the mid-twentieth century. *Cf.* Abraham Lincoln, Peoria Speech (October 16, 1854) (describing the Missouri compromise as a “system of equivalents” without any underlying “principle”), <https://www.nps.gov/liho/learn/historyculture/peoria-speech.htm>. The fundamental challenge in crafting the APA was determining the extent to which it should embody principles and practices developed by courts over the preceding decades in which they had enjoyed jurisdiction over federal officials by virtue of Congress’s 1875 federal-question jurisdictional grant. As recent scholarship by Aditya Bamzai makes clear, Congress drew heavily on these materials in enacting a synthetic APA that adapted and carried forward pre-existing review practices into a brave, new world in which law and equity had merged and administrative agencies were wielding much more substantive authority than before. *See* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. (forthcoming 2017) (manuscript at 58–66), [https://papers.ssrn.com/sol3/Papers.cfm?abstract\\_id=2649445](https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2649445) (last visited Jan. 8, 2017).

<sup>34</sup> For a brief discussion of the limits of jurisprudence rooted in clause-bound originalism, see Gasaway & Parrish, *supra* note 28, at 209–12.

<sup>35</sup> *Dep't of Transp. v. Ass'n of Am. R.R.s*, 135 S. Ct. 1225, 1250 (2015) (Thomas, J., concurring) (“To the extent that the ‘intelligible principle’ test was ever an adequate means of enforcing [the qualitative distinction between legislative and executive power], it has been decoupled from the historical understanding of the legislative and executive powers and thus does not keep executive ‘lawmaking’ within the bounds of inherent executive discretion.”).

<sup>36</sup> See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984); see also RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* 158 (5th ed., 2010) (noting that courts cite and apply *Chevron* more than any other Supreme Court decision in history); Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 *ADMIN. L. REV.* 807, 809 (2002) (“*Chevron* . . . is the Court’s most important decision about the most important issue in modern administrative law”).

<sup>37</sup> *Chevron*, 467 U.S. at 865–66.

<sup>38</sup> *City of Arlington, Tex. v. Fed. Comm’n Comm’n*, 133 S. Ct. 1863 (2013). In concluding that agencies are entitled to deference in determining the scope of their own jurisdiction, the majority confronted a forceful dissent by Chief Justice Roberts (joined by Justices Alito and Kennedy) contending that before an agency is entitled to deference, a court must determine whether Congress has delegated authority to that agency in the first instance. The majority rejected that argument because it could identify no logical or principled basis for distinguishing between jurisdictional and non-jurisdictional questions. Under *Chevron*, the majority explained, the only question is “whether the agency has gone beyond what Congress has permitted it to do.” *Id.* at 1869.

<sup>39</sup> The Court compared a statute that grants an agency jurisdiction to prohibit any common carrier from imposing an unreasonable condition upon access to its facilities to a statute that itself prohibits common carriers from imposing unreasonable conditions and then authorizes an agency to prescribe rules and regulations necessary to effectuate that prohibition. According to the Court, because the agency would be entitled to deference in interpreting and implementing the second statute, there is no reason it also should not be entitled to deference in interpreting the first statute. On this basis, the Court concluded that there is no difference between an “agency’s exceeding the scope of its authority (its “jurisdiction”) and its exceeding authorized application of authority that it unquestionably has.” *Id.* at 1869–70.

<sup>40</sup> Note that *City of Arlington*’s discussion of the hypothetical delegation is introduced with a request that the reader “[i]magine the following validly-enacted statute.” *Id.* at 1869. Under Justice Thomas’s later opinions, this request is impossible to satisfy, for both versions of the administrative authority hypothesized by the Court violate non-delegation principles.

<sup>41</sup> An interesting discussion of constitutional administrative law from a point of view that that does not invoke constitutional logic is found in Emily S. Bremer, *The Unwritten Administrative Constitution*, 66 *FLA. L. REV.* 1215, 1244–46 (2014).

<sup>42</sup> U.S. CONST. art. I § 1.

<sup>43</sup> U.S. CONST. art. II § 1, cl. 1.

<sup>44</sup> U.S. CONST. art. III § 3.

<sup>45</sup> See, e.g., *THE FEDERALIST NO. 47* (James Madison) (“The oracle who is always consulted and cited on the subject [that liberty requires governmental powers to be separate and distinct] is the celebrated Montesquieu”).

<sup>46</sup> We owe this term to Professor Akhil Amar. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 298 (1998) (referring to a “diaspora of rights”).

<sup>47</sup> U.S. CONST. art. II § 2, cl. 1 (“[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States whose Appointments are not herein otherwise provided for . . .”); U.S. CONST. art. III § 2, cl. 1–2.

<sup>48</sup> U.S. CONST. art. I § 1 (bicameralism clause); U.S. CONST. art. I § 7, cl. 2 (presentment clause); U.S. CONST. art. I § 8 (delegations of legislative power); U.S. CONST. art. II, § 1, cl. 8 (Presidential oath).

<sup>49</sup> Nelson, *supra* note 27, at 625.

<sup>50</sup> Derek A. Webb, *Between Two Palm Trees: Reading the Constitution in Paradise*, 64 *J. OF LEGAL EDUC.* 699, 700 (2015).

<sup>51</sup> *Id.* at 701–02.

<sup>52</sup> To be fair, administrative law has also proved challenging for judges. Justice Antonin Scalia, the *Chevron* doctrine’s great judicial champion, waffled in his *Chevron* commitment at the very end of his long career. *See Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1212 (2015) (Scalia, J., concurring) (expressing concern that *Chevron* had allowed agencies too much leeway and that this problem could be “insoluble if *Chevron* is not to be uprooted”). This uncharacteristic waffling is best explained, perhaps, by Justice Scalia’s embrace of certain Lockian separation-of-powers principles that are difficult to square with the text and structure of the Vesting Clauses.

<sup>53</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634–35 (1952) (Jackson, J., concurring).

<sup>54</sup> H.L.A. HART, *THE CONCEPT OF LAW* 21 (2001) (stating that the standard “form” of laws “is general in two ways; it indicates a general type of conduct and applies to a general class of personas . . . . Legal control is therefore primarily, though not exclusively, control by directions, which are in this double sense general”); THOMAS HOBBES, *LEVIATHAN* 170 (London, J.M. Dent & Sons, Ltd. 1914) (1651) (“Though nothing can be immortal, which mortals make; yet if men had the use of reason they pretend to, their Common-wealths might be secured, at least, from perishing by internal diseases.”); JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 2 (Richard H. Cox ed., 1982) (“Political Power then I take to be a right of making laws with penalties of death, and consequently all less penalties”) (emphasis omitted).

<sup>55</sup> HART, *supra* note 54, at 116–17.

<sup>56</sup> *Cf. id.* at 79–100 (defining the concept of law with reference to a legal system built on a union of primary and secondary rules). For a discussion with a different emphasis, see KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* 3–15 (1999); KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 38–46 (1999).

<sup>57</sup> *See* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 18-2 (2d ed. 1988) (“[B]y exempting private action from the reach of the Constitution’s prohibitions, it stops the Constitution short of preempting individual liberty—of denying to individuals the freedom to make certain choices, such as choices of the persons with whom they will associate. Such freedom is basic under any conception of liberty, but it would be lost if individuals had to conform their conduct to the Constitution’s demands.”). In Professor Tribe’s view, there are two currently operative constitutional provisions that arguably reach conduct by private individuals apart from state action: the Twenty-First Amendment’s Section 2 prohibition on “[t]he transportation into or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof,” and the Thirteenth Amendment’s prohibition on “slavery [or] involuntary servitude, except as a punishment for crime . . . .” U.S. CONST. amends. XIII, § 1, XXI, § 2. On examination, however, even these provisions may be viewed as falling within the narrow conception of constitutional law in the American tradition. Specifically, if no state regulates or prohibits “delivery or use” of “intoxicating liquors,” then there can be no Section 2 violations. Hence, Section 2 may be viewed as a qualification or exception to Congress’s preemptive commerce power, coupled with an authorization for direct, federal, judicially-crafted remedies for violations of states’ substantive liquor laws, as opposed to a rule for private conduct *per se*. Likewise, it is doubtful whether one person can truly “enslave” another without sanction in positive law, especially in common law nations. Without a recognized, positive-law, legal relation between slave and master, there can be tortious, un-remedied, continuing and even unlimited oppression. But it would appear, especially in common law countries, that there is no such thing as private “slavery.” If “slaves” retain all common law rights (unlike in the antebellum South), they can sue for damages and injunctions protecting their freedoms as against false imprisonment, battery, and other tortious conduct.

<sup>58</sup> *See* Stanley Mosk, *The Common Law and the Judicial Making Process*, 11 HARV. J. L. PUB. POL’Y 35, 38-40 (1988) (recounting different versions of this rule in different countries around the world and asserting that “[a]n American is permitted to do everything except that which is prohibited”).

<sup>59</sup> RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* 112 (1995).

<sup>60</sup> Interestingly, scholars as accomplished as Adam Tompkins, Michael McConnell and Nathan Chapman overlook common law in discussing the adjudicatory baselines of the British and American systems. *See* Adam Tompkins, *The Changing Nature of Citizenship in Britain: Constitutional and Legal*

*Perspectives*, in *CITIZENSHIP IN AMERICA AND EUROPE: BEYOND THE NATION-STATE?* 185, 185–202 (Michael S. Greve & Michael Zöller eds., 2009); Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 *YALE L.J.* 1672 (2012).

<sup>61</sup> See, e.g., *Marbury v. Madison*, 5 U.S. 137, 166 (1803) (“[T]he individual who considers himself injured, has a right to resort to the laws of his country for a remedy.”).

<sup>62</sup> Under this form of law, doctrine must be pronounced in standards not rules; obligations must be reciprocal; classifications of persons is prohibited; classifications of actions, as opposed to legal relations, is prohibited; and the body of law as a whole must be comprehensive. See generally Gasaway & Parrish, *Structural Constitutional Principles*, *supra* note 28 at 206–29; Robert R. Gasaway & Ashley C. Parrish, *The Problem of Federal Preemption: Toward a Formal Solution*, in *FEDERAL PREEMPTION: STATES’ POWERS, NATIONAL INTERESTS* 219–30 (Richard A. Epstein & Michael S. Greve eds., 2007).

<sup>63</sup> EPSTEIN, *supra* note 59, at 112.

<sup>64</sup> See Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 1998 *U. ILL. L. REV.* 173, 175 (1998); see also DANIEL A. FARBER ET AL., *CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION’S THIRD CENTURY* 135 (2003) (“[T]he framers were common-law lawyers.”); Hon. Diarmuid F. O’Scannlain, Speech, *Rediscovering the Common Law*, 79 *NOTRE DAME L. REV.* 755, 763 (2004) (“[T]he Framers also assumed that the common law tradition of principled judging would persist.”).

<sup>65</sup> Propelling this advance is a pathbreaking reexamination of the *Erie* doctrine by Professors Suzanna Sherry and Michael Greve. See MICHAEL S. GREVE, *THE UPSIDE-DOWN CONSTITUTION* 221–42 (2012); Suzanna Sherry, *Normalizing Erie*, 69 *VAND. L. REV.* 1161, 1175–79 (2016); Suzanna Sherry, *A Pox on Both Your Houses: Why the Court Can’t Fix the Erie Doctrine*, 10 *J.L. ECON. & POL’Y* 173, 191–92 (2013); Suzanna Sherry, *Wrong, Out of Step, and Pernicious: Erie as the Worst Decision of All Time*, 39 *PEPP. L. REV.* 129 (2011). The phrase “benevolent omnipresence on the ground” comes from Robert R. Gasaway & Ashley C. Parrish, *In Praise of Erie—And Its Eventual Demise*, 10 *J.L. ECON. & POL’Y* 225, 244 (2013).

<sup>66</sup> For a description of the history of the Socratic method in American law schools, and the challenge to that method that emerged in the 1960s and 1970s, see Alan A. Stone, *Legal Education on the Couch*, 85 *HARV. L. REV.* 392, 405–08 (1971). According to an oft-cited 1996 survey of law schools, 97% of first year classes and 67% of upper-level seminars used the Socratic method. Steven I. Friedland, *How We Teach: A Survey of Teaching Techniques in American Law Schools*, 20 *SEATTLE U. L. REV.* 1, 27 (1996).

<sup>67</sup> Another example is Abraham Lincoln’s masterful dissection of the terms of the Missouri Compromise, taken as a contract between North and South. See *Lincoln, Peoria Speech*, *supra* note 33.

<sup>68</sup> THE FEDERALIST NO. 81 (Alexander Hamilton).

<sup>69</sup> *Id.*

<sup>70</sup> THE FEDERALIST NO. 78 (Alexander Hamilton).

<sup>71</sup> See *Plaut v. Spendthrift Farm, Inc.* 514 U.S. 211, 231–32 (1995); *Marbury v. Madison*, 5 U.S. 137, 163–65 (1803); see also *Traynor v. Turnage*, 485 U.S. 535, 548 (1988) (noting that the Court will not infer a statutory repeal “unless the later statute ‘expressly contradict[s] the original act’” or unless such a construction “is absolutely necessary . . . in order that [the] words [of the later statute] shall have any meaning at all.” (first quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976), then quoting THEODORE SEDGWICK, *A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW* 98 (2d ed. 1874))).

<sup>72</sup> Examples include propositions that every law must be protected against circumvention, *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829 (1995) (“The Constitution nullifies sophisticated as well as simple-minded modes of infringing on constitutional protections.”) (quotation omitted), that every statute has its limit, *Rodriguez v. United States*, 480 U.S. 522, 225–26 (1987) (“[N]o legislation pursues its purposes at all costs.”) and that every statute may be judged by its substantive effects. *United Sav. Ass’n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 373 (1988).

<sup>73</sup> Constitutional law is a component, expressly or implicitly, of legal systems taking every form except tyranny. For purposes of this paper, we classify tyranny as an absence of legal form rather than an affirmative type of legal system.

<sup>74</sup> There is a long-standing debate as to whether “tyranny” is a form or anti-form of legal and political order. In Ancient Greece, tyranny was sometimes understood as a political order in which a ruler had seized authority without legal right. Plato characterized tyranny as the “fourth and worst disorder of a state”—a society that is enslaved because it lacks reason and order; he saw law as an “external authority” that can help protect against tyranny. Plato’s student, Aristotle, characterized tyranny as one of six forms of government that accomplish the distribution of political power. More modern philosophers have sometimes viewed tyranny, not as a form of political or social order, but as a breakdown that results from a violent breach of the social contract. Locke defined tyranny as “the exercise of power beyond right” and concluded that any executive body, not just a monarchy, that ceases to function for the benefit of the people is a tyranny.

<sup>75</sup> HART, *supra* note 54, at 205.

<sup>76</sup> *Marbury*, 5 U.S. at 163 (contending that the United States “will certainly cease to deserve this high appellation [as a government of laws and not men], if the laws furnish no remedy for the violation of a vested legal right”); *see also* Thomas W. Merrill, *Marbury v. Madison as the First Great Administrative Law Decision*, 37 J. MARSHALL L. REV. 481, 482 (2004).

<sup>77</sup> *See* THE FEDERALIST NO. 78 (Alexander Hamilton).

<sup>78</sup> HART, *supra* note 54, at 85 (“[T]he distinctive function of [a statement that a person has an obligation] is to apply [a] general rule to a particular person by calling attention to the fact that his case falls under it.”).

<sup>79</sup> *Id.* at 95.

<sup>80</sup> HOBBS, *supra* note 54, at 173 (explaining that men should join together in a commonwealth for “their own preservation and [for] a more contented life thereby; that is to say, [for] getting themselves out from that miserable condition of war, which is necessarily consequent . . . to the natural passions of men, when there is no visible [p]ower to keep them in awe”).

<sup>81</sup> *See* LOCKE, *supra* note 26, at 15 (noting that when men “are not under the ties of the common law of reason, [they] have no other rule but that of force and violence”).

<sup>82</sup> EPSTEIN, *supra* note 59, at 112.

<sup>83</sup> *Id.*

<sup>84</sup> *See, e.g.*, RICHARD A. POSNER, *ECONOMIC ANALYSIS OF THE LAW* 6 (1972); George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65, 65 (1977) (arguing that the common law process has a strong tendency toward efficient outcomes). *See also* Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487, 487–88 (1980); Richard A. Posner, *A Reply to Some Recent Criticisms of the Efficiency Theory of the Common Law*, 9 HOFSTRA L. REV. 775 (1981).

<sup>85</sup> Even if efficiency is definitively shown to be the ultimate basis for common law, this does not imply efficiency principles are normatively compelled or preferable, or that law tends toward efficiency over time unless corrupted by baleful influences (another way of asserting superiority for an efficiency criterion). It could well be that common law’s formal requirements can be non-arbitrarily satisfied only in a limited number of ways, and it may also be that economists would characterize all possible ways in which these conditions can be satisfied as “efficient” according to some criterion of efficiency. If so, then common law’s premises assure an efficiency conclusion. We call such a proposition a “Fundamental Theorem of Common Law,” but so far as we know, such a proposition has yet to be proved.

<sup>86</sup> MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* 3–8, 14 (2005). Gladwell’s book discusses how intuitive “snap judgments” are often accurate. He illustrates the point with an anecdote about an ancient Greek statue that was purchased by the Getty Museum. Although art experts could not articulate why they thought the statue was a fraud, they instantly knew that it was, even though the museum had carefully examined the statue with microscopes to test its provenance. *See also* Chad M. Oldfather, *Of Umpires, Judges, and Metaphors: Adjudication in Aesthetic Sports and its Implications for the Law*, 25 MARQ. SPORTS L. REV. 271, 292 (2014) (describing analogy by Professor Dan Kahan comparing trained lawyers to professional “chick sexers” who are able to make accurate judgments based on

difficult-to-explain intuitions (citing Dan M. Kahan, Address at the Yale University Law School Commencement (May 22, 2006), <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1007&context=yalsca> (last visited Jan. 8, 2017))).

<sup>87</sup> See Suzanna Sherry, *The Ninth Amendment: Righting an Unwritten Constitution*, 64 CHI-KENT L. REV. 1001, 1011 (1988).

<sup>88</sup> The indented material is a reworking of Professor Sherry's well stated objections to the idea of value-free judging. For the original, see Sherry, *supra* note 87, at 1011.

<sup>89</sup> See e.g., OLIVER WENDELL HOLMES, JR., THE COMMON LAW 37–38 (1881); Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) [hereinafter Holmes, *Path of the Law*].

<sup>90</sup> Holmes, *Path of the Law*, *supra* note 89, at 462.

<sup>91</sup> An umpire who resolves to be neutral will favor neither team, either by name or any other characteristic of a team or player (home team, away team, team ahead in standings, team behind in standings, media's darling, media's wallflower, team with fastball starter, team with knuckleballer, etc.). The umpire resolves, rather, that an unknown and unknowable team should win based on evenhanded calls. The resolution to fairly call the game may allow reasonable predictions about who will win tomorrow. But precisely because it is openly made and thus induces and strategic adaptation by players and coaches, it allows no reliable predictions about which team will win ten years hence.

<sup>92</sup> Hart emphasizes a closely related point; namely that the possibility of conscious change is not present in systems of moral law.

<sup>93</sup> HOBBS, *supra* note 54, at 173–74, 214–15.

<sup>94</sup> See LOCKE, *supra* note 26, at 4 (“The state of Nature has a law of Nature to govern it, which obliges every one, and reason . . . is that law.”).

<sup>95</sup> FEDERALIST NO. 51 (James Madison) (“If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.”); see also Abraham Lincoln, Message to Congress in Special Session (July 4, 1861) (“[T]his issue [civil war] embraces more than the fate of these United States. It presents to the whole family of man the question whether a constitutional republic or democracy—a government of the people by the same people—can or cannot maintain its territorial integrity against its own domestic foes. . . . It forces us to ask, ‘Is there in all republics, this inherent and fatal weakness?’ ‘Must a government of necessity be too strong for the liberties of its own people, or too weak to maintain its own existence?’”).

<sup>96</sup> America's administrative law is multi-dimensional. It conspicuously bounds and governs how Executive Branch agencies may be structured; how Executive Branch authority may be exercised; how the Judicial Branch should police Congress's delegations of authority to the Executive; and how and when citizens may enforce constitutional and statutory rights against the Executive, either during the administrative process or afterward.

<sup>97</sup> *New York v. United States*, 505 U.S. 144, 149 (1992). *New York* considered the constitutionality of certain provisions of the Low-Level Radioactive Waste Policy Amendments of 1985, which required States to be responsible for disposing of radioactive waste generated within their borders and provided incentives for the States to comply with that obligation. The State of New York, along with two of its counties, filed suit, claiming that the statute overstepped the boundary between federal and state authority by intruding on the States' sovereign prerogatives. The Court agreed and struck down the statute's “take title” provision, which offered the States a “choice” between either accepting ownership of the waste or regulating it according to Congress's instructions.

<sup>98</sup> See, e.g., *Wood v. Moss*, 134 S. Ct. 2056, 2067 (2014) (discussing how the doctrine of qualified immunity balances the need to hold public officials accountable when they exercise power irresponsibly with the need to shield them from harassment when they perform their duties reasonably); *McCutcheon v. Federal Election Comm'n*, 134 S. Ct. 1434, 1467 (2014) (Breyer, J., dissenting) (noting that speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602 (2012) (noting that “[p]ermitting the Federal Government to force the States to implement a federal program would threaten the political accountability key to our federal system.”); *Doe v. Reed*, 561 U.S. 186, 199 (2010) (noting that public disclosure of

referendum petitions “promotes transparency and accountability in the electoral process,” an interest sufficient to justify burden on First Amendment rights); *Stop the Beach Renourishment, Inc. v. Fla. Dept. of Envtl. Prot.*, 560 U.S. 702, 734–35 (2010) (Kennedy, J., concurring in part and concurring in judgment) (asserting that judicial takings raise due process concerns because, unlike the executive and legislative branches, judges are not accountable in a political capacity for protecting the property owner and ensuring just compensation for authorized takings).

<sup>99</sup> *New York*, 505 U.S. at 149.

<sup>100</sup> *Id.* at 168 (emphasis added).

<sup>101</sup> The Court thus rejected the argument that state officials could “consent” to “the enlargement of the powers of Congress beyond those enumerated in the Constitution.” *Id.* at 182.

<sup>102</sup> *Dep’t of Transp. v. Ass’n. of Am. R.R.s.*, 135 S. Ct. 1225, 1234 (2015) (Alito, J., concurring).

<sup>103</sup> *See, e.g., Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1957–58 (2015) (Roberts, J., dissenting) (observing that unconstitutional delegations “threaten liberty and thwart accountability by empowering entities that lack the structural protections the Framers carefully devised.”); *Nat’l Fed’n of Indep. Bus.* 132 S. Ct. at 2602 (2012) (“Permitting the Federal Government to force the States to implement a federal program would threaten the political accountability key to our federal system.”); *Horne v. Flores*, 557 U.S. 433, 471–72 (2009) (noting that “[w]hen it is unclear whether an onerous obligation is the work of the Federal or State Government, accountability is diminished.”); *Cook v. Gralike*, 531 U.S. 510, 528 (2001) (Kennedy, J., concurring) (noting that “[i]f state enactments were allowed to condition or control certain actions of federal legislators, accountability would be blurred,” and that “[n]either the design of the Constitution nor sound principles of representative government are consistent with the right or power of a State to interfere with the direct line of accountability between the National Legislature and the people who elect it.”); *Edmond v. United States*, 520 U.S. 651, 660 (1997) (“By requiring the joint participation of the President and the Senate, the Appointments Clause was designed to ensure public accountability for both the making of a bad appointment and the rejection of a good one.”); *United States v. Lopez*, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring) (“The theory that two governments accord more liberty than one requires for its realization two distinct and discernable lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States.”).

In *Free Enterprise Fund v. Public Accounting Oversight Board*, 561 U.S. 477 (2010), the Court struck down parts of the Sarbanes-Oxley Act, which restricted the President’s ability to remove individual members of the Public Company Accounting Oversight Board. Rejecting that arrangement, the Court held that because the statute impermissibly denied the President “the ability to oversee the Board, or to attribute the Board’s failings to those whom he *can* oversee, the President is no longer the judge of the Board’s conduct,” preventing him from “ensuring that the laws are faithfully executed” and being held “responsible for a Board member’s breach of faith.” *Id.* at 496. Echoing *New York*, the Court rejected the notion that the President could elect to give up some of his powers to “escape responsibility for his choices by pretending that they are not his own.” *Id.* at 497–98. As the Court explained, a “diffusion of power carries with it a diffusion of accountability.” *Id.* at 497. By granting the Board “executive power without the Executive’s oversight,” the statute subverted “the President’s ability to ensure that the laws are faithfully executed—as well as the public’s ability to pass judgment on his efforts.” *Id.* at 498.

<sup>104</sup> The central importance of accountability for free government was nicely expressed by John Adams in the Massachusetts Constitution: “All power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them.” MASS. CONST. pt. 1, art. V.

<sup>105</sup> Abraham Lincoln, Speech at Bloomington, Illinois, (September 12, 1854), in 2 COLLECTED WORKS OF ABRAHAM LINCOLN, 233 (Ann Arbor, Michigan: University of Michigan Digital Library Production Services 2001), <http://name.umdl.umich.edu/lincoln2>.

<sup>106</sup> Justice Thomas’s *Perez* concurrence points toward an improved appreciation within the profession of the nature, distinctions, and inter-relationships between (i) a separation of governmental powers; (ii) checks on governmental powers; and (iii) balance between governmental powers. In American con-

stitutionalism, the separation of governmental powers refers to the logical distinctions at the root of legislative, executive, and judicial powers as such, together with the Constitution's assignment of these logically distinct powers to different "branches" or institutions of government, all of which are mutually independent of each other. A check on a governmental power refers to an instance in which action by one political branch may be hindered or blocked by another, as in the President's veto over legislation and the Senate's power to ratify treaties and confirm appointments. Finally, a balance between powers refers to instances in which a power assigned to one branch is balanced by a related power assigned to another, such as the President's authority as Commander in Chief, on the one hand, and Congress's power to make rules and regulations for the land and naval forces, on the other.

<sup>107</sup> HOBBS, *supra* note 54, at 15–16.

<sup>108</sup> *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926) ("Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.").

<sup>109</sup> Note that the *Federalist's* discussion of the execution of the laws takes on the objection that the people will be disinclined to obey the federal government "in any matter of an internal nature." Note as well that Hamilton "waives" any objection that might be made to the distinction between the internal and the external. See FEDERALIST NO. 27 (Alexander Hamilton).

<sup>110</sup> *Bush v. Gore*, 531 U.S. 98, 100–03 (2000) (per curiam).

<sup>111</sup> U.S. CONST. art. VI, cl. 3 ("[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.").

<sup>112</sup> James Madison, Speeches in the Virginia Ratifying Convention: Power Over the Militia (June 16, 1788), in THE WRITINGS OF JAMES MADISON, Vol. V, 200, 202 (Gallard Hunt ed., 1904) (capitals supplied).

<sup>113</sup> Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863), in SELECTED WRITINGS OF ABRAHAM LINCOLN 280, 280–81 (Albert Bushnell Hart ed., 1920).

<sup>114</sup> That the Founders considered representative government a quantum advance in the science of politics as compared with ancient direct democracy is well known. What is less well remembered is that assembling a representative congress is only a half measure. Once your congress is in business, you have a forum for debating and deciding political questions; now you need a mechanism for implementing the congress's decisions. And, once this additional challenge is taken up, it becomes clear that the one, proven way in which power can be translated from congressional declaration into real-world action in accordance with the wishes of a numerous, diverse, dispersed people—as opposed to by elites in the mere name of a people—is through congressional specification of general, public rules; faithful and regular application of those rules by executive officials to individual persons and actions based on logical particulars; and effective judicial safeguards ensuring the fidelity, regularity and transparency of this application of logical universal to logical individual thorough logical particular. For these reasons, an administrative law oriented by the accountability principle and more or less closely resembling the actual law of the Vesting Clauses is presupposed by, and found in, all republican governments.

<sup>115</sup> Employing this label is venturesome, because like the "jurisdictional" label it has known "many, too many meanings." *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 90 (1998) (citation omitted).

<sup>116</sup> Cf. Nelson, *supra* note 27, at 566–67.

<sup>117</sup> See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958) (posing hypothetical question about legal rule that forbids taking vehicles into a public park); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 663 (1958). For a modern-day variation, see *Bluewater Network v. Env't'l Prot. Agency*, 370 F.3d 1, 6 (D.C. Cir. 2004) (addressing EPA rule grouping snowmobiles with other land-based recreational vehicles for purposes of considering CO concentrations).

<sup>118</sup> The National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321, 7604 (2012)) is a classic example of a statutory conferral of judicially enforceable public rights. The recent vintage of widespread justiciability of such claims is one reason for the unsettled state of public-rights law.

<sup>119</sup> Employing this label is also venturesome, not because it has known "many, too many meanings," but because we have coined it for this paper.

<sup>120</sup> In our view, this can be done in every case by a statutory regime that keeps separate (1) the definition of the rights to be conferred; and (2) the criteria for claiming such rights.

<sup>121</sup> See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 266 (1970) (holding that procedural due process requires that pretermination evidentiary hearing be held when public assistance payments to a welfare recipient are discontinued).

<sup>122</sup> Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 733 (1964); see also HAMBURGER, *supra* note 15, at 3 n.b (discussing *Goldberg* and arguing that the fact that additional constitutional protections are provided for “new property” should not mean diminished constitutional protections should be provided for old property); Paul R. Verkuil, *Revisiting the New Property After Twenty-Five Years*, 31 WM. & MARY L. REV. 365, 368 (1990).

<sup>123</sup> The non-administrative form is seen in the familiar progression from legislative enactment to executive enforcement to judicial judgment. The administrative form, logically equivalent to ordinary lawmaking, is what we call regulatory licensing.

<sup>124</sup> A great mistake of American administrative law is conflating public-rights proceedings with exceptions proceedings. Although the intrusiveness of judicial review is diminished in both contexts, the reasons underlying this limited scrutiny are quite different. Furthermore, the jurisdiction-discretion distinction is maintained in exceptions proceedings, but not in public-rights proceedings.

<sup>125</sup> See, e.g., Stephanie Condon, *Obama Suggests Mandatory Voting Might be a Good Idea*, CBS NEWS (Mar. 18, 2015), <http://www.cbsnews.com/news/obama-suggests-mandatory-voting-might-be-a-good-idea/> (discussing speech to City Club of Cleveland, March 18, 2015). Mandatory voting is, of course, only a proposal; like the draft, it would have to be scrutinized for constitutionality on various grounds.

<sup>126</sup> While the possible types of exactions proceedings are limited in number, the regulatory subcategory is open-ended. As noted, this sub-category is essentially the residual administrative law category for any and all constitutionally authorized and permissible proceedings that do not fall within another classification.

<sup>127</sup> Admittedly, the Supreme Court has not yet recognized that what we call “exaction” cases constitute a distinct category for purposes of constitutional analysis. Cf. e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574, 596 (1983) (“In an area as complex as the tax system, the agency Congress vests with administrative responsibility must be able to exercise its authority to meet changing conditions and new problems.”); *Clark v. Gabriel*, 393 U.S. 256, 259 (1968) (per curiam) (upholding statutory provision precluding judicial review of military draft classifications before induction); *with Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 222–23 (1989) (declining to apply “a different and stricter nondelegation doctrine in cases where Congress delegates discretionary authority to the Executive under its taxing power”).

<sup>128</sup> For an important example of such proceedings in the context of the non-delegation doctrine, see *Marshall Field & Co. v. Clark*, 143 U.S. 649, 662–67, 692–95 (1892); see also David Schoenbrod, *The Delegation Doctrine: Could The Court Give It Substance?*, 83 MICH. L. REV. 1223, 1230 n.33 (1984) [hereinafter Schoenbrod, *Delegation Doctrine*] (arguing that non-delegation standards are relaxed in the context of rules governing foreign affairs (first quoting *Zennel v. Rusk*, 381 U.S. 1, 17 (1965), then citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 324 (1936), then quoting *United States v. Grimaud*, 220 U.S. 506, 516 (1911)); David Schoenbrod, *Separation of Powers and the Powers that Be: The Constitutional Purposes of the Delegation Doctrine*, 36 AM U. L. REV. 355 (1987).

<sup>129</sup> *Printz v. United States*, 521 U.S. 898, 905 (1997) (“[I]f . . . earlier Congresses avoided use of this highly attractive [governmental] power, we would have reason to believe that the power was thought not to exist”); see also *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2586 (2012) (noting as significant that Congress has never before attempted to rely on the commerce power to “compel individuals not engaged in commerce to purchase an unwanted product” (footnote omitted)); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 497 (2010) (rejecting new effort to shelter government bureaucracy behind two layers of good-cause tenure, when only a single layer had long been viewed as constitutionally permissible); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 230 (1995) (“Apart from the statute we review today, we know of no instance in which Congress has attempted to set aside the final

judgment of an Article III court by retroactive legislation. That prolonged reticence would be amazing if such interference were not understood to be constitutionally proscribed.”)

<sup>130</sup> The Supreme Court has held that a power to compel state officials to implement federal programs and a power to compel private parties to enter commercial transactions are examples of attractive powers that cannot have gone overlooked by public officials. *See Sebelius*, 132 S. Ct. at 2646. If those powers lay dormant for centuries, it may be because of constitutional intuitions or scruples preventing their use. *See Yi v. Sterling Collision Ctrs., Inc.*, 480 F.3d 505, 510–11 (7th Cir. 2007) (making a similar point).

<sup>131</sup> *See Marshall Field & Co.*, 143 U.S. at 691 (“[I]t is often desirable, if not essential for the protection of the interests of our people, against the unfriendly or discriminating regulations established by foreign governments, in the interest of their people, to invest the President with large discretion in matters arising out of the execution of statutes relating to trade and commerce with other nations.”). In the context of foreign relations, it has long been held that the executive has authority to fill in legislative gaps. As far as we can tell, however, before the 1900s, there is no example of the executive branch promulgating a rule to regulate private conduct in the area we have referred to as core administrative law.

<sup>132</sup> Interestingly, the 1930s Supreme Court addressed the due process dimension, but apparently not the regulation-of-private-conduct dimension, of the constitutional analysis. *See Panama Refining Co. v. Ryan*, 293 U.S. 388, 403 (1935); *see also* Abner J. Mikva & Jeff Bleich, *When Congress Overrules the Court*, 79 CAL. L. REV. 729, 734–35 (1991) (noting that Congress quickly responded to the Supreme Court’s decision in *Panama Refining*, striking down the National Industrial Recovery Act on non-delegation grounds, by forbidding the interstate transportation of “hot oil”).

<sup>133</sup> The academic and judicial sources most cited in connection with the question of broad delegations of administrative authority tend not to refute Justice Thomas’s position that Article II’s reference to “executive” power does not include authority to bind private parties. *See United States v. Grimaud*, 220 U.S. 506, 514 (1911) (case concerning executive rulemaking for federal lands, not for private conduct); *Wayman v. Southard*, 23 U.S. 1, 5–6 (1825) (case concerning delegation of authority to courts to set the rules of practice directly binding government officials); *see also e.g.*, JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* (2012). On the other hand, one must not press the point too far, given Congress’s infrequent use of its affirmative power to regulate internal commerce before the twentieth century.

<sup>134</sup> *See e.g.*, 33 U.S.C. § 1311(a) (2012) (prohibition on private discharge conduct in federal Water Pollution Control Act licensing regime).

<sup>135</sup> *See e.g.*, 33 U.S.C. § 1344(a) (2012) (authorizing issuances of administrative permits allowing discharge into navigable waters notwithstanding prohibition of 33 U.S.C. § 1311(a)).

<sup>136</sup> Taken together, these two types of provisions—one statute addressed to private parties, another to executive officials—guarantee that in each and every instance of regulatory licensing the law defining an agency’s jurisdiction is distinct from the law defining its discretion. Regulatory licensing thus provides the answer to the question whether administrative jurisdiction and discretion are distinct, which so perplexed the parties in *City of Arlington*. *City of Arlington, Tex. v. Fed. Comm’n Comm’n*, 133 S. Ct. 1863, 1866 (2013).

<sup>137</sup> Such review statutes can provide for varying degrees of scrutiny, as, for instance, the more searching review associated with equitable jurisdiction in comparison to a common law writ of mandamus. *See Bamzai, supra* note 33, at 6. Likewise, these review statutes, together with other review doctrines, can vary the degree of scrutiny depending on the interests of the petitioner before the court—as between, say, a disappointed applicant in a licensing denial and an aggrieved competitor in a licensing award.

<sup>138</sup> *Atlas Roofing Co. v. Occupational Safety Comm’n*, 430 U.S. 442, 456–57 (1977); *see also Nelson, supra* note 27, at 603–06.

<sup>139</sup> This mistake appears alike in cases, commentary, and advocacy. *See, e.g.*, *Wellness Int’l. Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1964–65 (2015) (Thomas, J., dissenting) (discussing history of public rights); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 66 (1989) (suggesting that adjudicating public rights is an exception to Article III’s requirements); *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 859 (1986) (Brennan, J., dissenting) (noting three exceptions to Article III’s “absolute mandate” as including territorial courts, courts-martial, and “courts that adjudicate certain disputes concerning

public rights”); *see also* Nelson, *supra* note 27, at 588–99 n.109 (discussing exceptions to Article III requirements).

<sup>140</sup> A second common administrative-law mistake is conflating proceedings involving sovereign interests with regulatory proceedings. As Professor Schoenbrod emphasizes, the “intelligible principle” standard for testing congressional delegations to the executive was first developed in the context of commercial relations with foreign sovereigns. Only later was this standard applied to regulatory proceedings within the core of administrative law. *See* DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* 31–46 (1993); Schoenbrod, *Delegation Doctrine*, *supra* note 128.

Although the intensity of judges’ review of administrative action varies across administrative contexts, both inside and outside administrative law’s core, the rationales for this varying treatment are different in different contexts. In taxation matters, outside administrative law’s core, scrutiny is often relaxed because of the need for government to maintain itself in the face of the natural resistance of the citizenry to taxes. By contrast, in public rights determinations, part of administrative law’s core, scrutiny is also relaxed; here, however, relaxed scrutiny is often allowed because the rights and interests at stake are thought to be of lesser moment than in regulatory licensing proceedings, or typical sovereign interest and exceptions proceedings.

Finally, in administrative exceptions proceedings, the rights and interests in issue are of equal and often greater moment than those typically at issue in regulatory proceedings. But in these peripheral contexts a military law-like “rule of men” is tolerated within defined boundaries rigidly fenced by formalized status determinations—precisely because the need is great and the context is peripheral. Contrary to received wisdoms, administrative law exceptions tribunals are not merely agencies exercising a heightened discretion sanctioned by ancient usages and/or distinct grants of constitutional authority. Rather, the constitutional basis for such discretion also includes the fact that these tribunals exercise warden-like powers lying beyond the core of the administrative state.

Given these complexities, it is unsurprising that the Supreme Court has struggled to delineate consistent boundaries and provide convincing rationales for its varying treatment of different types of administrative decisions.

<sup>141</sup> Transparency of decisionmaking is typically enhanced, albeit perhaps in some cost in efficiency, by breaking a legal decision down into components, including components such as an initial status determination and subsequent rights determination.

<sup>142</sup> The Supreme Court’s recent decision in a prominent healthcare case makes the logical point that one indicator of penal status is collateral legal consequences. In *National Federation of Independent Business v. Sebelius*, Chief Justice Roberts upheld the statute’s individual mandate as a permissible tax, because of the lack of significant collateral consequences for failing to comply with it. 132 S. Ct. 2566, 2596 (2012). In particular, the Chief Justice’s opinion emphasizes that, although the individual mandate aims to induce people to buy health insurance, neither the statute nor any other law attaches negative consequences to not buying such insurance, beyond the requirement of the payment to the IRS. The fact that paying the IRS constitutes full compliance; and that those who fail to pay do not thereby acquire a status as outlaws, was viewed as powerful evidence that these payments function as a tax, not a penalty. *Id.* This idea might be extended generally to hold that a person- or property-centered administrative determination becomes a status determination if the consequences of the determination, once finalized, are extended by operation of law beyond the initial proceeding in which the determination was made.

<sup>143</sup> One might imagine a justiciable but purely honorific status, as a counter-example to our contention that status determinations always form an ingredient of legal claims, not an entire claim. Surely, the possibility of such a status-without-consequence does not undermine the thrust of our analysis.

<sup>144</sup> *Speiser v. Randall*, 357 U.S. 513, 528 (1958) (addressing veteran status and taxation).

<sup>145</sup> *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1324 (D.C. Cir. 1996) (striking down Executive Order prohibiting award of government contracts to companies who hire permanent replacements during a lawful strike on grounds that the Executive Order conflicts with the National Labor Relations Act).

<sup>146</sup> *See infra* note 140 (discussing administrative law exceptions).

<sup>147</sup> See 80 Fed. Reg. 30,548 (May 28, 2015) (proposed rule that would impose new disclosure requirements on government contractors in connection with labor violations); see also Exec. Order No. 13673, 79 Fed. Reg. 45309, *Fair Pay and Safe Workplaces* (July 31, 2014) (requiring prospective and existing contractors to disclose past labor violations so contracting officers could consider the information before awarding a government contract). Compare *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016) (supporting proposition that status determinations regarding parcels of property should be subject to immediate judicial review).

<sup>148</sup> The rule of law's primary dimension involves principles that apply to rules for primary conduct. See Richard A. Epstein, *Linguistic Relativism and the Decline of the Rule of Law*, 39 HARV. J. L. PUB. POL'Y 583, 583 (2016) ("Nobody today on any side of the political spectrum opposes the rule of law."); see also Richard A. Epstein, *The Perilous Position of the Rule of Law and the Administrative State*, 36 HARV. J. L. PUB. POL'Y 5, 5–6 (2013). These principles are discussed in standard works of jurisprudence, see, e.g., LON L. FULLER, *THE MORALITY OF LAW* 39–40 (1964); they demand (among other things) that primary laws be clear, prospective, and evenhanded; and are constitutionally entrenched by the due process clauses.

<sup>149</sup> HART, *supra* note 54, at 131.

<sup>150</sup> See *Bowen v. Geo. Univ. Hosp.*, 488 U.S. 204, 208–09 (1988).

<sup>151</sup> This analogy is very close in the context of private-rights conferrals, regulatory-licensing decisions, administrative-exception jurisdictional determinations, and review of decisions made by administrative exceptions tribunals. The analogy is perhaps less exact, because decision making is less binary, in the context of public-rights determinations. The analogy works even in that context, however, because all non-ministerial public-rights determinations, like other administrative determinations, involve application of general statutory authority to concrete circumstances.

<sup>152</sup> Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 997–98 (2011).

<sup>153</sup> *Universal Camera Corp. v. Nat'l Labor Relations Bd.*, 340 U.S. 474, 490 (1951).

<sup>154</sup> *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 41–42 (1983).

<sup>155</sup> *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

<sup>156</sup> *State Farm*, 463 U.S. at 43 (citation omitted).

<sup>157</sup> *Gasperini v. Ctr. for Humanities, Inc.* 518 U.S. 415, 418–19 (1996); see also *Clemons v. Mississippi*, 494 U.S. 738, 748–49 (1990) ("It is a routine task of appellate courts to decide whether the evidence supports a jury verdict . . .").

<sup>158</sup> See Aditya Bamzai, *supra* note 33, at 70–71. It follows that both *Chevron* deference and implementing the APA's provision for arbitrary-and-capricious review of all "final agency action" without varying the intensity of review according to context is insupportable. Critically, however, it follows that rectifying *Chevron* without rectifying the APA, either judicially or legislatively, could potentially be counter-productive. For recent proposals to amend and clarify the APA, see Separation of Powers Restoration Act of 2016, H.R. 4768, 114th Cong. (2016); Separation of Powers Restoration and Second Amendment Protection Act, S. 2434, 114th Cong. (2016).

<sup>159</sup> Michael S. Greve & Ashley C. Parrish, *Administrative Law Without Congress*, 22 GEO. MASON L. REV. 501, 504 (2015) (addressing problem of administrative "shell games").

<sup>160</sup> Successful implementation of this paper's proposals could steer American administrative law closer in some ways to its European counterparts. Organizing administrative law around the categories proposed in this article, or a similar scheme, would likely point in the direction of more specialized proceedings, including more contexts calling for de novo judicial review of law and fact, with liberal opportunities for supplementing an agency's factual record.

<sup>161</sup> See EPSTEIN, *supra* note 59.

<sup>162</sup> A prime example of this dilemma is seen in *United States Telecom Ass'n v. Fed. Comm'n*, 825 F.3d 674, 689 (D.C. Cir. 2016).

<sup>163</sup> See, e.g., Major Thomas R. Folk, *The Administrative Procedure Act and the Military Departments*, 108 MIL. L. REV. 135, 136–37 (1985) (discussing the generally applicability of the Administrative

Procedure Act to military departments and its exemptions); Mila Sohoni, *Agency Adjudication and Judicial Nondelegation: An Article III Canon*, 107 NW. U. L. REV. 1569, 1584–89 (2013) (discussing traditional distinction between public and private rights).

<sup>164</sup> Something of this attitude can be discerned, perhaps, in the more heated criticisms leveled at the Supreme Court’s ruling that the Affordable Care Act’s individual mandate be regarded as a tax, based on substance and for constitutional purposes, notwithstanding its statutory designation as a “penalty.” Typically, these sorts of criticisms contend that the Court’s opinion “rewrote” the penalty provision as a tax (when in fact it relabeled the provision); contend that there is an either/or division between taxes and penalties (when in economics one finds a third category known as Pigouvian taxes); and downplay the black-letter law holding that statutory labels frequently give way to substance for purposes of constitutional analysis. This latter principle was unanimously applied by the Court in *Dep’t of Transp. v. Ass’n. of Am. R.R.s*, 135 S. Ct. 1225, 1231 (2015).

<sup>165</sup> See, e.g., *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981) (challenge to allegedly irrational classification under Equal Protection Clause will fail so long as question is at least debatable and regardless of whether the rational basis on which the law is upheld was in fact the legislative motivation for the law’s enactment); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (“The Court will not pass upon a constitutional question although properly presented by the record, if there is also some other ground upon which the case may be disposed of.”); *Richmond Screw Anchor Co. v. United States*, 275 U.S. 331, 346 (1928) (noting it is Court’s “duty in the interpretation of federal statutes to reach a conclusion which will avoid serious doubts of their constitutionality.” (citing *Phelps v. United States*, 274 U.S. 341 (1927))).

<sup>166</sup> Doctrinal derivations are within reach so long as we recall that fidelity, regularity, and transparency are pre-conditions for republican accountability; we keep due process and republican accountability conceptually distinct; and we construe the Constitution in light of the Framers’ deliberate choice to embody rule-of-law principles more in constitutional structure than text. Recent work by Professors Chapman and McConnell rightly reminds us that the Constitution’s separation of governmental powers represents an ancient component of Anglo-American constitutionalism, closely tied to the guarantee of due process of law. See Chapman & McConnell, *supra* note 60, at 1682–83. Likewise, other work recognizes administrative law as constitutional in an important sense, while struggling to see exactly how this administrative-constitutional law ties in with the written Constitution. See Bremer, *supra* note 41, at 1234–35. Finally, the profession recognizes that the Constitution’s legislative, executive, and judicial powers are mutually exclusive, such that there can be no standalone separation-of-powers violation. See, e.g., John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1994–95 (2011). But it often fails to see that this mutual exclusivity is based, not on logically preclusive text, but on textually entrenched logic. See *infra* Part I.

<sup>167</sup> See *Welsh v. United States*, 398 U.S. 333, 339–40 (1970) (arguably incorporating natural law into the Free Exercise Clause by exempting conscientious objectors from the draft based on sincere beliefs not rooted in deistic religion).

<sup>168</sup> If contemporary lawyers find deriving administrative law difficult, one reason may be as simple as the explosive growth in knowledge since the Framers’ day. Today’s bar, in contrast with the Framers, is mostly unaware of the non-legal, logical world that surrounds them. Lawyers don’t naturally see a difference between a substantive advance in knowledge and a logical advance in knowing. We find it hard to keep up, as the Framers did, with developments in adjacent disciplines and the logical underpinnings of the natural and social sciences. As a result, we often overlook ways in which the logic of the Vesting Clauses is of a piece with Western logic’s ancient foundations and recent manifestations.

<sup>169</sup> Mila Sohoni, *The Administrative Constitution in Exile*, 57 WM. & MARY L. REV. 923, 931–34 (2016).

<sup>170</sup> See, e.g., David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 225–26 (2001); Sidney A. Shapiro, *Why Administrative Law Misunderstands How Government Works: The Missing Institutional Analysis*, 53 WASHBURN L.J. 1, 1 (2013); Ralph S. Tyler & Karen Stakem Hornig, *Administrative Law: Rules to Results*, 44 MD. B.J. 44, 44 (2011); Edward W. Warren &

Gary E. Marchant, *"More Good Than Harm": A First Principle for Environmental Agencies and Reviewing Courts*, 20 *ECOLOGY L.Q.* 379, 429 (1993).

<sup>171</sup> CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 143 (1990).

<sup>172</sup> Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 *HARV. L. REV.* 421, 477 (1987) ("Judicial review is valuable in bringing about both conformity to statute and procedural regularity.").

<sup>173</sup> Sohoni, *supra* note 169, at 942; *see also* Cass R. Sunstein, *Financial Regulation and Cost-Benefit Analysis*, 124 *YALE L.J. FORUM* 263, 275 (2015) (arguing that "regulators should be candid about what they do not know, and should identify the assumptions on which their regulation might be justified[,] and noting "[t]hat approach promotes transparency and accountability, and also creates an incentive to acquire additional information") (footnotes omitted); Cass R. Sunstein, *The Limits of Quantification*, 102 *CAL. L. REV.* 1369, 1372 (2014) ("To the extent feasible, agencies should adopt a highly structured approach, aspiring to maximize both quantification and transparency.").

<sup>174</sup> To be sure, some scholars who admire Professor Hamburger's work may read it to call in question the constitutional legitimacy of regulatory licensing proceedings. We submit, however, that any such constitutional interpretation goes too far; regulatory licensing's antecedents, unlike administrative regulations binding private conduct, are found as early as the mid-nineteenth-century. *See* 10 Stat. 61 (Aug. 30, 1852). Likewise, at least one Justice wonders whether the scope of licensing criteria should be limited to factual determinations. *See* *Dep't of Transp. v. Ass'n of Am. R.R.s*, 135 S. Ct. 1225, 1247–50 (2015) (Thomas, J., concurring) (discussing *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928), and *Field v. Clark*, 143 U.S. 649 (1892), and suggesting that both cases permitted agencies to make "factual determination[s]" and did not sanction delegations of legislative power). Again, we think this goes too far. *See* JAMES BRADLEY THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* 2 (1898); Robert R. Gasaway & Ashley C. Parrish, *The Problem of Federal Preemption: Toward a Formal Solution*, in *FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS* 219, 229 (Richard A. Epstein & Michael S. Greve eds., 2007) (distinguishing between relational and factual); James Bradley Thayer, *"Law and Fact" in Jury Trials*, 4 *HARV. L. REV.* 147, 147 (1890) (discussing the difficulty of maintaining the fact-law distinction).

<sup>175</sup> *Ass'n of Am. R.R.s*, 135 S. Ct. at 1252 (Thomas, J., concurring).

<sup>176</sup> *See* *Missouri v. Holland*, 252 U.S. 416 (1920).

<sup>177</sup> The most important myth is the idea that the Framers left the administrative state out of the Constitution. In fact, the administrative state as such is no more a constitutional omission or innovation than are the Departments of State, Defense, and Justice, all of which go unmentioned in constitutional text but have operated in some form since the 1790s. *See generally* Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 *YALE L.J.* 1362, 1374–78 (2010). *See also, e.g.*, Gary Lawson, *The Rise and Rise of the Administrative State*, 107 *HARV. L. REV.* 1231, 1231 (1994) ("Faced with a choice between the administrative state and the Constitution, the architects of our modern government chose the administrative state, and their choice has stuck."); Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward A Constitutional Theory of the Second Best*, 80 *CORNELL L. REV.* 1, 2–3 (1994); Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 *CHI.-KENT L. REV.* 1039, 1103 (1997) ("The administrative state has always existed in tension with the framework of government established by the Constitution").

<sup>178</sup> *See generally* VERNON L. SMITH, *RATIONALITY IN ECONOMICS: CONSTRUCTIVIST AND ECOLOGICAL FORMS* (2008).

<sup>179</sup> For such proposals to receive proper consideration would require a sequencing of cases and skill in presenting them unknown in the natural litigation habitat. The challenge of litigating, all at once, constitutional first principles, basic administrative-law doctrine, applications of new principles to particular factual and legal contexts, and unprecedented remedial problems would quickly assume mastodonal proportions.

<sup>180</sup> *See, e.g.*, Brief of Constitutional Law Scholars as Amici Curiae in Support of Petitioners (Minimum Coverage Provision) at 19, *Department of HHS v. Florida*, decided *sub nom* Nat'l Fed. Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (No. 11-398), 2012 WL 135050, at \*19; Brief for Professors Thomas

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W. Merrill, et al. as Amici Curiae Supporting Respondents at 6–7, *King v. Burwell*, 135 S. Ct. 2480 (2015) (No. 14-114), 2015 WL 426257, at \*6–7; *see also* *Util. Air Regulatory Grp. v. Env'tl. Pro. Agency*, 134 S. Ct. 2427, 2441 (2014) (embracing a “felicitous[]” argument regarding the reading of key Supreme Court precedent, as articulated in amicus brief submitted by administrative law professors).

<sup>181</sup> *See* Greve & Parrish, *supra* note 159, at 502. Experience also shows that any “Administrative Law Without Congress” will be rife with controversy.

<sup>182</sup> This is possible under our classifications precisely because the jurisdiction-discretion boundary would be well marked and defended.

<sup>183</sup> For an extended discussion of a more far-reaching proposal along these lines, *see* WILLIAM G. HOWELL & TERRY M. MOE, *RELIC: HOW OUR CONSTITUTION UNDERMINES EFFECTIVE GOVERNMENT—AND WHY WE NEED A MORE POWERFUL PRESIDENCY* 145 (2016).

<sup>184</sup> Adrian Vermeule, *Our Schmittian Administrative Law*, 122 *HARV. L. REV.* 1095, 1096–97 (2009).

<sup>185</sup> *Id.* at 1142.

<sup>186</sup> This assumes that “all our constitutional stories . . . have . . . happy ending[s].” Michael S. Greve, *Constitutional Moments* (Oct. 1, 2012), <http://www.libertylawsite.org/liberty-forum/constitutional-moments/> (last visited Oct. 31, 2016). The alternative is that the present administrative law tale ends uniquely unhappily, and our administrative law converges less with Anglo-American constitutionalism and more with the administrative practices of modern China or Russia.

<sup>187</sup> The Supreme Court’s corresponding artwork is, if anything, even more symbolically questionable. It simply places Blackstone and Marshall in a chronological ordering with sixteen other figures deemed worthy of an Academy award for achievement in legal endeavor.