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THE DEPRAVITY OF THE 1930S AND THE MODERN ADMINISTRATIVE STATE

Steven G. Calabresi* & Gary Lawson**

Gillian Metzger's 2017 Harvard Law Review foreword, entitled 1930s Redux: The Administrative State Under Siege, is a paean to the modern administrative state, with its massive subdelegations of legislative and judicial power to so-called "expert" bureaucrats, who are layered well out of reach of electoral accountability yet do not have the constitutional status of Article III judges. We disagree with this celebration of technocratic government on just about every level, but this Article focuses on two relatively narrow points.

First, responding more to implicit assumptions that pervade modern discourse than specifically to Professor Metzger's analysis, we challenge the normally unchallenged premise that the 1930s was a decade of moral wisdom about governmental design that should serve as a ground for constitutional reasoning that is superior to the actual text of the Constitution. The 1930s was a thoroughly awful time, worldwide and in the United States; and while America avoided some of the very worst trends of those times (although it was a worldwide leader in others, such as eugenics), the intellectual and political foundations of that decade were a terrible ground for theories of government. We do not make the absurd claim that everything that emerged from the 1930s was therefore bad simply by virtue of that origin, nor do we make the equally absurd ad hominem claim that everyone who supports anything from the 1930s must support everything from that time. We only want to call into question the (generally implicit) premise that the governmental forms of the 1930s are sacrosanct because that decade should be seen as the real constitutional founding. The intellectual foundations of the 1780s and 1860s—the decades that led to the ratification of the actual constitutional text and the Civil War Amendments—are far superior to those of the 1930s. To be clear, we think that constitutional interpretation should be about the Constitution, not about time periods, values, or constitutional "orders," but if for some reason one wants to focus on time periods, the 1930s should be the last time period to which one looks for guidance.

Second, we offer some very modest legislative tweaks to the existing institutions of the administrative state that we believe will move American government more toward the correct constitutional baseline with only minimal changes in actual governmental functions. Major rules should be enacted using constitutional (if expedited) lawmaking procedures; all executive officers

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should, by statute if not by constitutional command, be made removable at will by the President; and all deprivations of life, liberty, and property by the federal government should be accomplished through due process of law, which means adjudication through an Article III tribunal. None of these tweaks requires abolition of any federal agency or repeal of any substantive organic statute. Adopting them will not establish constitutional government. But it will be better than abandoning the enterprise altogether in favor of rule by “experts” deemed fit, by virtue of their college degrees, to govern their unenlightened “lessers.”

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INTRODUCTION

He has made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries.

*He has erected a Multitude of new Offices, and sent hither Swarms of Officers to harrass our People, and eat out their Substance.*¹

At Justice Elena Kagan’s Supreme Court confirmation hearing, she famously said: “[W]e are all originalists.”² We think that this pithy observation is clearly true. Everyone is an originalist with respect to something. This includes the mass of scholars and judges who purport to reject originalism. They do not actually object to originalism as a method for interpretation. They only object to it as a method for interpretation and/or application of the U.S. Constitution (and perhaps of statutes that they do not like). Scholars expect their books and articles to be read in light of their original intended meanings, and judges expect their opinions to be read in light of their original intended meanings.³ The question, if the goal is successful human communication, is never whether one is seeking to ascertain original

1 THE DECLARATION OF INDEPENDENCE paras. 11–12 (U.S. 1776).

2 *The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 62 (2010) (statement of Elena Kagan, Solicitor Gen. of the United States), <https://www.gpo.gov/fdsys/pkg/CHRG-111shrg67622/pdf/CHRG-111shrg67622.pdf>.

3 One might add that legal scholars generally expect court opinions that they like to be read in light of their original intended meanings.

meaning. The questions are always *of what* one is seeking to ascertain original meaning and *from when* one is seeking to ascertain it.

Gillian Metzger's 2017 *Harvard Law Review* Supreme Court foreword, entitled *1930s Redux: The Administrative State Under Siege*,⁴ is an example of a species of unacknowledged originalism in action. Professor Metzger sees—quite correctly—a growing set of judicial and academic concerns about the constitutionality of much of the modern American government; and she is afraid that those concerns, if taken seriously by real-world legal actors, might place roadblocks in the path of her favored political agenda. She accordingly argues at great length that the vast machinery of the modern federal government, which is typically described by the shorthand label “the administrative state,”⁵ is constitutionally permissible—and is even constitutionally *mandated*.⁶ Her argument is strikingly originalist. But instead of seeking to ascertain the original meaning of the U.S. Constitution, using sources such as James Madison, Thomas Jefferson, and Alexander Hamilton, she instead tries to ascertain the original meaning of nonconstitutional ideas and institutions crafted in the 1930s, using sources such as James Landis, Louis Brownlow, and Felix Frankfurter, all of whom were either scholars or officials in Franklin D. Roosevelt's New Deal administration.

As do many modern academics and judges, Metzger starts her constitutional analysis in the 1930s. She takes the New Deal revolution as the big bang, which establishes the framework from which all subsequent legal analysis must proceed: “[W]e are seeing a resurgence of the antiregulatory and antigovernment forces that lost the battle of the New Deal.”⁷ She complains that accepting the constitutional critique of the administrative state “would

4 Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017).

5 The shorthand term “the administrative state” might actually mislead more than it clarifies, but its use is probably too pervasive to avoid. As Metzger points out on multiple occasions, *see id.* at 4–5, 8, 65, there are many dimensions to modern government, ranging from the military to Social Security to immigration controls to environmental regulation to occupational licensing. Those large categories themselves conceal enormous variation; the military includes both crack SEAL teams and bloated bureaucracies, while environmental regulation includes both toxic waste cleanups and overbearing wetlands encroachments. No one except an anarchist (which happens to describe one of us, but never mind) will oppose everything and anything contained within the enormity of the administrative state. By the same token, however, thinking that the crack SEAL teams or border enforcement against MS-13 are good things does not commit one to loving non–Article III administrative adjudication or wealth-destroying regulations. When we inveigh against the “administrative state” in this Article, we are admittedly being selective about which parts of modern government we include within that label. Indeed, our objections in this Article go more to the *form* in which modern administration is run than to its substance. We each have plenty, and often quite different, problems with much of the substance as well, but the overlapping consensus on which we base this collaboration concerns the way in which ordinary citizens are subjected to unconstitutional bureaucratic tyranny, whether or not that tyranny is, in some fashion, for their own good or for the purported good of someone else.

6 *Id.* at 86–91.

7 *Id.* at 2.

require a reformation of the constitutional order that has governed for the last eighty years.”⁸ Any deviation from post-1930s institutional or intellectual developments is evidently suspect, and even sinister.⁹

We think it is liberty and republicanism that are under siege today from a bloated, arbitrary and capricious, dictatorial, elitist, electorally unaccountable,¹⁰ and largely unconstitutional administrative state. As have progressives from the nineteenth century onward, Metzger celebrates the independence of the professionalized deep state, run by credentialed “experts,” from political control.¹¹ Her argument is merely one piece of a much wider phalanx supporting modern bureaucratic government. Professor Jon Michaels, for example, has similarly defended “the project of twentieth-century administrative governance as a normatively and constitutionally virtuous one.”¹² We consider this wrong on every possible level. We think, along with Lord Acton, that “[p]ower tends to corrupt and absolute power corrupts absolutely.”¹³ We believe in liberty and republican democracy¹⁴ and not in government by Platonic philosopher kings who call themselves experts by virtue of their self-sanctioned credentials. More fundamentally, we believe in the

8 *Id.* at 64.

9 Much of Metzger’s article emphasizes that opposition to the administrative state has long been associated with certain business interests and (the horror of it all) conservatives. *Id.* at 64–69. She even manages to bring the Koch brothers into it. *Id.* at 67–68.

10 Metzger goes to great lengths to try to show that actors within the administrative state really are accountable in many and varied ways. *Id.* at 77–85. We urge the reader to examine carefully Metzger’s discussion and to think about *to whom* the technocrats are accountable under the mechanisms that she presents. Spoiler alert: the technocrats are “accountable” to each other and to various other members of the credentialed class. Ordinary citizens are supposed to sit there, shut up, and be ruled by their better-pedigreed superiors, secure in the knowledge that the wise ones with advanced degrees will conform to self-approved norms.

11 *Id.* at 80–81.

12 JON D. MICHAELS, CONSTITUTIONAL COUP: PRIVATIZATION’S THREAT TO THE AMERICAN REPUBLIC 4 (2017).

13 Letter from Lord Acton to Archbishop Mandell Creighton (Apr. 5, 1887), reprinted in LECTURES ON MODERN HISTORY (John Neville Figgis & Reginald Vere Laurence eds., 1906) [hereinafter *Letter from Acton to Creighton*], http://oll.libertyfund.org/titles/acton-acton-creighton-correspondence#lf1524_label_010.

14 To be sure, Professor Lawson does not believe that democracy, whether republican or otherwise, can carry moral weight as a matter of first principles of political theory. See Gary Lawson, *No History, No Certainty, No Legitimacy . . . No Problem: Originalism and the Limits of Legal Theory*, 64 FLA. L. REV. 1551, 1567 n.51 (2012). He does, however, see it, in Churchillian fashion, as contingently preferable to other institutional arrangements that are currently on the available menu. It absolutely crushes rule by the present credentialed class.

More broadly, Professor Lawson generally avoids engaging in any kind of normative scholarship, preferring to confine himself to positive claims about objective legal meaning. In the spirit of a coauthored project, however, he is prepared here to sign onto some claims that he ordinarily would not make in a scholarly setting. To be clear, he is fine with all of those claims. He just ordinarily would not make them outside the context of a fully elaborated moral and political theory.

Constitution as it is written, not in a faux “constitution” dreamed up by academics, lawyers, and politicians in the dreadful era of the 1930s. We are thus advocates of what Michaels calls “rote constitutional formalism,”¹⁵ though we prefer to call it “constitutionalism.”

If one is going to engage in an originalist enterprise, as everyone does in some fashion, it is vital to make sure that one is interpreting the right thing and is doing it from the right time frame. We begin in Part I with the time frame by considering whether constitutional interpreters ought to select as their starting point the 1930s or whether they should begin reasoning from the 1780s, the 1860s, or even the post–World War II era, as we believe. We are not aware of any canonical normative defense of the 1930s as the proper time frame for grounding constitutional interpretation, except perhaps in Yale Law School Professor Bruce Ackerman’s *We the People* series of books.¹⁶ That is not surprising, because in the milieu of the legal academy, the need for such a defense would not normally be evident; the sanctity of the New Deal, and all that generated it, functions as a postulate of quasi religious significance. Nor do we think that good arguments for that choice are easily found. Indeed, if there was a worse time frame from which to begin constitutional reasoning, it does not leap to mind.

We then turn in Parts II and III to the proper object of constitutional interpretation, which is the actual Constitution. We conclude that certain features of the federal¹⁷ administrative state—namely, massive subdelegations of legislative and judicial power to appointed technocrats who are not directly accountable to the President—are unconstitutional through numerous violations of the separation of powers, that they violate Magna Carta and the Due Process of Law Clause of the Fifth Amendment, and that they are bad ideas as a matter of policy; and we offer some quite modest suggestions that might incrementally help restore the Constitution and the rule-of-law tradition on which it is founded.

The gap between our strong rhetoric in Part I and our somewhat timid suggestions in Part II fits well with Metzger’s observations about precisely that pervasive divide in scholarly and judicial objections to the administrative state, where the sound and fury of harsh rhetoric criticizing modern administration often signifies, if not quite nothing, then at least very little.¹⁸ We do not find this seeming mismatch between rhetoric and reform as noteworthy as does she. What one thinks is right as a matter of first principles and what one thinks is achievable in the here and now will not always match up well.

15 MICHAELS, *supra* note 12, at 9.

16 These books by Ackerman include: BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY* (2005); 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991) [hereinafter ACKERMAN, *WE THE PEOPLE: FOUNDATIONS*]; 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998); and 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* (2014).

17 It is very possible that a good many state and local administrative institutions are unconstitutional as well, but that is a story for another time.

18 See Metzger, *supra* note 4, at 46–51.

That is not an argument for neglecting the first principles. It is an argument for trumpeting the first principles loudly and often until they change the frontier of what is possible. Indeed, Metzger and others have noted, with some dismay, this phenomenon of changing frontiers regarding governmental structure.¹⁹ Of course, if one likes the status quo, one will naturally be resistant to anything that might change it. Metzger's article is therefore not merely originalist; it is starkly, and literally, *conservative*. There is, of course, nothing per se wrong with being conservative. Our objection is that Metzger's analysis seeks to conserve key elements of the post-1930s governmental structure that deserve to be swept away.

In sum, we think that in Metzger's article and the larger wave of scholarship that it represents, we are seeing a resurgence of the antiliberty and antirepublican forces that lost the Battle of Yorktown.²⁰

I. LOOKING TO THE 1930S?

Metzger argues that the present-day foes of the administrative state are wrongly trying to upend decisions to create, or "build out,"²¹ the administrative state which she says were conclusively made during the 1930s. They are trying, in her words, to enact "a reformation of the constitutional order that has governed for the last eighty years."²² Her argument assumes—indeed, takes as axiomatic—that the constitutional order of the last eighty years has been sound and that such a reformation would therefore be a form of heresy. That perceived soundness cannot come from conformance of that order to the actual Constitution. It must come instead from some normative underpinning that is considered superior to the Constitution itself. Metzger's argument, as do the arguments of many other contemporary legal actors, rests on the premise that the New Deal revolution of the 1930s, including its open abandonment of some of the most basic separation of powers principles in the Constitution, emerged from a fount of moral wisdom so powerful in its force and so esteemed in its pedigree that it serves as a postulate for constitutional reasoning. This premise is so deeply ingrained that the term "New Deal settlement" has become a standard part of legal discourse.²³

Even if the premise were true, it would perhaps justify seeking formal amendment of the Constitution to validate some or all of the New Deal revolution; it would not justify shifting the object of constitutional interpreta-

19 See *id.* at 68.

20 On the royalist origins of much of modern administrative law, see PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014).

21 Metzger, *supra* note 4, at 6.

22 *Id.* at 64.

23 The first appearance of the term that we find comes from Charles H. Clarke, *Supreme Court Assault on the Constitutional Settlement of the New Deal: Garcia and National League of Cities*, 6 N. ILL. U. L. REV. 39, 79 (1986). A simple Westlaw search of "'new deal' /s settle!" yielded 165 hits on July 19, 2018. The number of appearances of the term in workshop discussions and faculty lounge conversations is not precisely measurable; "lots" is a safe guess based on our experiences.

tion from the Constitution to extraconstitutional institutions and ideas. We do not doubt that many New Deal developments—Social Security and federal labor laws leap immediately to mind—would today easily secure the necessary votes for ratification if they were put forward as formal constitutional amendments. But keeping the baby does not necessarily carry the bathwater with it.

We want to challenge the generally unchallenged premise that accepting as given some of the developments of the 1930s²⁴ requires accepting *all* of those developments, including those that fundamentally altered the character and structure of American constitutional government. Even more deeply, we want to challenge the generally unchallenged premise that, concerning normative theories of governance, the 1930s was a great leap forward that ought to command more respect than does the Constitution itself. A full treatment of that subject would obviously require a multivolume treatise on moral and political theory, including a detailed normative assessment of each institution that emerged from each compared time. This is a relatively short law review article, and we can accordingly focus here only on one narrow piece of that much larger puzzle. Because we perceive that the legal academy—and here we are really using Metzger as a foil for wider trends that we both have observed for thirty years rather than directly engaging her or her specific arguments—has a pronounced, and to us inexplicable, fondness for the 1930s; we therefore consider the relative constitutional and normative desirability of deferring to major decisions made during three decades (with a modest detour into modern times): (1) the 1930s; (2) the 1780s; and (3) the 1860s. We conclude that it is wrong on every level to argue for deference to decisions made in the 1930s on the premise that this was an ennobling decade that ought to be the starting point for constitutional reasoning. We do not specify here which decade we are convinced was the best of times, but the 1930s was definitely the worst of times. Why anyone would *choose* that decade as the jumping-off point for constitutional reasoning, without being compelled to do so by an authoritative text, is beyond our comprehension.

To be as clear as we can possibly be: we think that the proper object of constitutional interpretation is the Constitution, not the ethos or zeitgeist of any particular time period. Constitutional interpretation is about texts, not times (or values, or constitutional “orders”); times serve only to fix the conceptual framework necessary for understanding the texts. Nor are we making the transparently stupid claim that every decision and institution that emerged from the 1930s anywhere in the world must be bad because it came from that time.²⁵ We are simply responding to the widespread, and even predominant, assumption in the legal academy that the 1930s is a time period deserving of special constitutional solicitude, such that decisions of that era about the structure of government should presumptively have a text-

24 Professor Lawson accepts some of those developments as given, in the minimalist sense that there is no prospect in his lifetime that they will ever change. As a libertarian, he does not accept them as normatively desirable as a matter of first principles.

25 Similarly, it would be transparently stupid to argue that every decision and institution that emerged from a time in which slavery was widely recognized must be bad.

trumping stature. Accordingly, our focus is not so much on the parade of horrors from that decade—which, as we will describe, is a shatteringly long and tragic parade—but on the wider, more abstract intellectual trends of the time that influenced governmental institutional design. The 1930s was not just a time of misery and human suffering. It was a time, worldwide and in the United States, of truly awful ideas about government, about humanity, and about the fundamental unit of moral worth—ideas which, even in relatively benign forms, have institutional consequences that we think should be fiercely resisted. If we are thereby refighting battles of the 1930s, we think at least some of those battles are very much worth refighting.

In the end, as we have already foreshadowed, the tweaks that we propose to the modern administrative state in Part II are very modest. Even people who subscribe to all or most of the substantive missions that the federal government has assumed in the past eighty years should, we think, be able to sign onto our concrete program. Indeed, many of our suggestions have been made independently by others, surrounded by fewer bells and whistles.²⁶ We could frankly offer that program without describing the horror—both political and intellectual—of the 1930s. But that horror bears revisiting. The 1930s was not a golden age which we should all aspire to emulate and develop. While it is certainly possible to argue that some of the institutions that emerged from that era are good, that is not enough to ground conversation-stopping claims to the effect that, “Oh, but that challenges the New Deal settlement.” The parts of that so-called settlement that we address in this Article wholly deserve to be unsettled. If it takes an all-out assault on the 1930s to get that conversation moving, so be it.

That conversation, once it starts moving, can take many forms. It can explore the appropriate roles of constitutional text and precedent in constitutional adjudication. It can examine the extent to which adjudication should be based on moral or political theory rather than the Constitution. It can consider whether certain parts of the Constitution should simply be discarded. It can even involve assessment of whether the Constitution should openly be scrapped altogether. Those are all conversations worth having. Our only concern in this Part of this Article is to counter one rhetorical move—“The 1930s was a great time from which to draw constitutional principles”—with another—“No, it really wasn’t.” Any argument that does not take as a key premise the goodness of the 1930s as a ground for constitutional reasoning has nothing to fear from our analysis.

A. *It Was the Worst of Times*

Although the roots of modern government run deep, and the foundations for much of what we see around us were laid in the late eighteenth and

²⁶ See, e.g., Michael B. Rappaport, *Classical Liberal Administrative Law in a Progressive World*, in *THE CAMBRIDGE HANDBOOK OF CLASSICAL LIBERAL THOUGHT* 105 (M. Todd Henderson ed., 2018).

early nineteenth centuries,²⁷ and even earlier,²⁸ the modern administrative state, and especially those features of it which occupy our attention in Parts II and III, really had its origin in the 1930s.²⁹ President FDR's administration and a compliant Congress created a vast array of new "expert" regulatory agencies, many of which followed the "independent" model by insulating the agency heads from at-will presidential removal, and many of which contained (and still contain) statutory authorizations to the agencies so vague as to be literally meaningless. Many of those "expert" agencies involved the national government in matters that had previously been left to the states, ranging from securities regulation to labor law to agricultural production quotas. These agencies, controlled neither by the President nor by Congress, made life-altering decisions of both fact and law subject only to deferential judicial review, often without the involvement of juries. They existed in this form because a nontrivial set of Woodrow Wilson's Progressives and FDR's New Dealers fundamentally did not believe that all men are created equal and should democratically govern themselves through representative institutions. They believed instead that there were "experts"—the modern descendants of Platonic philosopher kings, distinguished by their academic pedigrees rather than the metals in their souls—who should administer the administrative state as freely as possible from control by representative political institutions. As a Columbia professor put it in 1913, they opposed a representative system in which "the ignorant rule the enlightened and the vulgar rule the refined."³⁰ It takes little imagination to visualize who the esteemed professor thinks gets to define enlightenment³¹ and refinement.³²

To be sure, the eighteenth-century founders were not advocates of Athenian democracy. They crafted a representative scheme of constitutional government to minimize the risks of popular passions, they created the Senate with the hope and expectation that it would be filled with people more wise and sober than the norm, and they filtered presidential elections through the electoral college. They also hoped that the life-tenured members of the Supreme Court and of the inferior federal courts would protect against mob

27 See Ronald J. Pestritto, *The Progressive Origins of the Administrative State: Wilson, Goodnow, and Landis*, 24 *SOC. PHIL. & POL'Y* 16, 17–21 (2007).

28 See JOSEPH POSTELL, *BUREAUCRACY IN AMERICA: THE ADMINISTRATIVE STATE'S CHALLENGE TO CONSTITUTIONAL GOVERNMENT* 13–165 (2017).

29 See Metzger, *supra* note 4, at 51–52.

30 HAMBURGER, *supra* note 20, at 371 (internal quotation marks omitted) (quoting Professor John Burgess, Columbia University).

31 Is an advanced degree in postmodern philosophy, or modern economics, or political science, a better badge of enlightenment than years of Bible study, a careful reading of *Atlas Shrugged*, or (as with Professor Lawson's father) a nondegreed lifetime of twelve-hour days as an animal feed salesman? If so, prove it by something other than *ipse dixit*. None of this is meant to denigrate the value of advanced degrees, which both of us obviously possess. It is only to challenge the idea that those degrees ought to be a source of special political and moral privilege that marks out the favored caste.

32 The construction of a footnote parallel to note 31, *supra*, is left as an exercise for the reader.

rule. The Constitution is republican, not democratic. It does not guarantee to every state a democratic form of government; it guarantees to every state “a Republican Form of Government.”³³ Nonetheless, under the original constitutional scheme,³⁴ all persons who exercise federal legislative or executive power are electorally accountable at some point, either directly or through election of state legislatures.

The New Deal model, by contrast, contemplates a massive exercise of power by executive and independent agency officials³⁵ who are much farther removed from accountability to the electorate than was even the original Senate. Those “expert” officials³⁶ do not simply advise citizens and legislators, as a doctor might advise a patient. The officials have formal legal power to make significant, and even life-and-death, decisions. Their role under the New Deal model is not to serve as wise counselors to autonomous individuals and elected representatives; it is to serve as guardians for servile wards. It is fair to say that the New Deal fundamentally transformed both the scope and the form of modern government by largely replacing representative democracy with a government of “experts.”

We think it is trivially true that this transformation of the national government was not authorized by the Constitution.³⁷ Nor was the Constitution amended in the 1930s to authorize the creation of an extraconstitutional administrative state. The Constitution provided in the 1930s, as it does today, for a separation of legislative, executive, and judicial power, in which depriva-

33 U.S. CONST. art. IV, § 4.

34 We are here describing the Constitution before the Seventeenth Amendment extended popular election to the Senate. The ratification of the Seventeenth Amendment, and the numerous post-1865 amendments expanding voting rights, strengthens our point about the republican character of the Constitution.

35 See Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 417–19 (2007).

36 Some of those officials might well be bona fide experts. Others might be partisan hacks, incompetent, entirely lacking in judgment beyond their narrow sphere of learning, or some combination thereof. We often employ quotation marks in this article around the term “expert” as a reminder that labels are not always accurate. But sometimes they are, so we will not use the quotation marks in every instance.

37 See Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994) [hereinafter Lawson, *Rise of the Administrative State*]. At this point, the voice of Adrian Vermeule interjects that the modern administrative state has been repeatedly democratically ratified by the consistent election of representatives who created, sustained, and expanded it: “We have an administrative state that has been created and limited by the sustained and bipartisan action of Congress and the President over time; that is supervised and checked by the President as it operates; and that has been blessed by an enduring bipartisan consensus on the Supreme Court.” ADRIAN VERMEULE, *LAW’S ABNEGATION: FROM LAW’S EMPIRE TO THE ADMINISTRATIVE STATE* 46 (2016). All true. That may even, as Vermeule avers, confer a measure of democratic legitimacy on the enterprise. *Id.* But it does not confer republican—meaning constitutional—legitimacy upon it. That could only come from valid ratification of constitutional amendments. Perhaps some of the institutions to which we object could secure such ratification today. We will never know until the advocates of those institutions give it a try.

tions of life, liberty, and property require due process of law. Many aspects of the administrative state, as it existed in the 1930s and as it presently exists, violate this constitutional separation of powers and due process tradition, as we will explain in more detail in Parts II and III. Metzger wisely does not attempt to ground the legality of modern institutions in the original meaning of the constitutional text. That cannot be done. Nor is there an authoritative text from the 1930s on this topic which today binds legal actors who profess fidelity to the Constitution.

Lacking a text from which to work, Metzger implicitly appeals to the zeitgeist of the 1930s, which she seems to believe was what Bruce Ackerman has called a “constitutional moment”³⁸ that can displace the actual Constitution as the primary object of interpretation. We do not doubt that Metzger has correctly identified the original meaning of the general thrust of legal and political elite opinion in the 1930s which gave rise to modern government, with its dislike of representative control of government and its preference for “expert” decisionmaking. She has accurately ascertained the original intentions of James Landis’s *The Administrative Process*.³⁹ We do, however, doubt whether that original meaning is a better guide to governance than is the original meaning of the U.S. Constitution. Even if one does not much like the U.S. Constitution (and James Landis’s dislike of the instrument shines forth from every page of his 1938 book), replacing it with the zeitgeist of the 1930s is a dreadfully bad idea.

The period from 1930–1939 was clearly the worst decade of the last 100 years and is one of the worst decades in the history of mankind. It began with the Great Depression and it ended with the start of World War II. In between, Americans saw the proliferation of just about every vile form of government that has plagued the planet over the past century. There were broad intellectual currents that underlaid—even if they did not determine or make inevitable—the horrific events of that decade. To the extent that aspects of the American state partook of these global intellectual currents—and that extent is larger than many people today are comfortable acknowledging or even entertaining as a hypothesis—it was a terrible development.

The decade was bad from the start. In 1933, Germany elected a parliament, which chose National Socialist German Workers’ Party, or “Nazi” Party, leader Adolf Hitler to be the Chancellor of Germany.⁴⁰ On March 24, 1933, the German parliament delegated all of its legislative powers to Hitler and his National Socialist German Workers’ Party Cabinet in the Enabling Act of 1933.⁴¹ Articles I and II of the Enabling Act provided:

38 See ACKERMAN, *WE THE PEOPLE: FOUNDATIONS*, *supra* note 16, at 34–57.

39 JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938).

40 We recognize that any mention of German national socialism in the 1930s is likely to raise hackles. But discussing the currents of the 1930s without reference to German national socialism is like discussing the Civil War without reference to slavery. Avoiding discussion of Nazism in this context is intellectually irresponsible.

41 Gesetz zur Behebung der Not von Volk und Reich, v. 24.3.1933 (RGBl. I S.141). For a discussion of how a lack of restraint on legislative delegation in Germany provided a

Article 1: In addition to the procedure prescribed by the constitution, laws of the Reich may also be enacted by the government of the Reich. This includes the laws referred to by Articles 85 Paragraph 2 and Article 87 of the constitution.

Article 2: Laws enacted by the government of the Reich may deviate from the constitution as long as they do not affect the institutions of the Reichstag and the Reichsrat. The rights of the President remain undisturbed.⁴²

When the President of Germany, Paul von Hindenburg, died in August 1934, Hitler used his delegated powers to declare himself to be the Führer of the Third Reich, and liberal constitutional democracy in Germany came to an end.

One of the first things Hitler did when he came to power in March 1933 was to pass a German-style eugenics law, modeled on the many then-existing American state eugenics laws,⁴³ which provided for the compulsory sterilization of those deemed to have a “mental deficiency” so they would not pollute the gene pool of the Third Reich.⁴⁴ In the United States, six years earlier, the Supreme Court had, quite wrongly, in *Buck v. Bell*⁴⁵ upheld the constitutionality of compulsory sterilization in an eight to one decision, with the majority opinion written by Justice Oliver Wendell Holmes. Holmes infamously wrote: “The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.”⁴⁶ Sixty thousand Americans were compulsorily sterilized until *Skinner v. Oklahoma ex rel. Williamson*⁴⁷ helped put an end to the practice in the 1940s.⁴⁸ Twenty thousand of those people were sterilized in the 1930s—more than three times as many as had been sterilized in the 1920s.⁴⁹

prior legal grounding for the Enabling Act, see Peter L. Lindseth, *The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s–1950s*, 113 *YALE L.J.* 1341, 1364–71 (2004).

42 *Text of the Enabling Act 1933*, HIST. LEARNING SITE, <http://www.historylearningsite.co.uk/nazi-germany/text-of-the-enabling-act-1933/> (last visited Feb. 18, 2018). Articles 85 and 87 of the Weimar Constitution dealt with budgetary laws.

43 In 1933, twenty-seven states had sterilization laws. See VICTORIA F. NOURSE, IN RECKLESS HANDS: *SKINNER V. OKLAHOMA AND THE NEAR TRIUMPH OF AMERICAN EUGENICS* 20 (2008). By 1935, only a dozen states did not have eugenics laws in force or pending. See *id.* at 20–22.

44 See 5 OFFICE OF U.S. CHIEF OF COUNSEL FOR PROSECUTION OF AXIS CRIMINALITY, NAZI CONSPIRACY AND AGGRESSION 880–83 (1946).

45 274 U.S. 200 (1927).

46 *Id.* at 207 (citation omitted).

47 316 U.S. 535 (1942).

48 For a compelling account of *Skinner* and the events that led to it, see NOURSE, *supra* note 43, at 13–16. The figure of 60,000 may be low, as accurate data on forced sterilizations in this country was not always available. See EDWIN BLACK, *WAR AGAINST THE WEAK: EUGENICS AND AMERICA’S CAMPAIGN TO CREATE A MASTER RACE*, at xvi (2003).

49 See THOMAS C. LEONARD, *ILLIBERAL REFORMERS: RACE, EUGENICS & AMERICAN ECONOMICS IN THE PROGRESSIVE ERA* 117 (2016); see also NOURSE, *supra* note 43, at 31, 211 n.23.

The German Reich's eugenics law resulted from "a sustained engagement with America's eugenics movement,"⁵⁰ and the "Nazis even looked to the United States as a 'model.'"⁵¹ Yale Law School Professor James Q. Whitman writes compellingly about America's romance with eugenics and its influence on Germany in his book, *Hitler's American Model: The United States and the Making of Nazi Race Law*.⁵² Investigative journalist Edwin Black has produced a comprehensive intellectual and political history of American eugenics.⁵³ Princeton Professor Thomas Leonard has also trenchantly written about the pervasiveness of eugenics-based ideas in the United States in the New Deal and pre-New Deal era.⁵⁴ Eugenics dominated the intellectual landscape for decades up to and through the 1930s to a degree that is hard to fathom in modern times,⁵⁵ finding enthusiastic support from influential people such as Theodore Roosevelt⁵⁶ and Margaret Sanger.⁵⁷

Two related principles drove the worldwide push to eugenics. One principle was the idea of caste: some people, and some whole classes of people denominated races,⁵⁸ were considered to be categorically inferior to others.⁵⁹ The point of eugenics was to prevent the "bad" races from breeding or intermixing with the "better" races to avoid contamination of the gene pool. Eugenics represented a profound, widespread, and intellectually prevalent rejection of the basic principle of human equality. Professor Victoria Nourse eloquently summarizes the dominant ethos of eugenics in the first third of the twentieth century:

It was not only the openly racist Aryan-lovers who wrote of the "iron law of inequality" and touted racist aristocracy. Eugenic pioneers such as Charles Davenport had written that all men were "*bound* by their protoplasmic makeup and *unequal* in their powers and responsibilities." Geneticists like Harvard's Edward M. East wrote that equality was a fraud: the "*cult of égalité . . . is a pose.*" Henry Fairfield Osborn, the president of the American

50 JAMES Q. WHITMAN, *HITLER'S AMERICAN MODEL: THE UNITED STATES AND THE MAKING OF NAZI RACE LAW* 8 (2017).

51 *Id.* (quoting STEFAN KÜHL, *THE NAZI CONNECTION: EUGENICS, AMERICAN RACISM, AND GERMAN NATIONAL SOCIALISM*, at xii (1994)); *see also* HARRY BRUNIUS, *BETTER FOR ALL THE WORLD: THE SECRET HISTORY OF FORCED STERILIZATION AND AMERICA'S QUEST FOR RACIAL PURITY* 283–86 (2006) (describing American influence on German eugenics).

52 WHITMAN, *supra* note 50.

53 BLACK, *supra* note 48.

54 LEONARD, *supra* note 49; *see also* JEFFREY S. SUTTON, *51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW* 84–132 (2018).

55 *See id.* at 110 ("In the first three decades of the twentieth century, eugenic ideas were politically influential, culturally fashionable, and scientifically mainstream.").

56 *See* BLACK, *supra* note 48, at 46, 99.

57 *Id.* at 127–44.

58 The idea of a "race" at that time extended far more broadly than does the modern use of that term. Aryans, Irish, Italians, and Jews, among numerous others, were all considered "races." *See* NOURSE, *supra* note 43, at 35–36, 170. Indeed, there were fine-grained theories of race that, for example, broke down Jews into discrete categories based on countries of origin. *See* BLACK, *supra* note 48, at 190.

59 *See* LEONARD, *supra* note 49, at 111; NOURSE, *supra* note 43, at 15.

Museum of Natural History, publicly derided the claim that all men were created equal as “political sophistry.” The eugenics popularizer Albert Wigam insisted that men were “irremediably and ineradicably *unequal*.” The zoologist S.J. Holmes summed it all up: “If there is any one thing which has been thrown absolutely out of court by the advances of biology and psychology, it is the dogma of the natural equality of man.”⁶⁰

The second, and related, principle underlying the fascination with eugenics was that the basic unit of value was a collective: the nation, the race, or the tribe. Individuals were simply cells in an organic whole rather than ends in themselves.⁶¹ Reproduction was not a choice that could be left to individuals. Reproductive capacity, as with all other kinds of human capacity, was seen as a social resource to be deployed or not by the collective for collective purposes. These ideas permeated intellectual life in the 1930s. Eugenics was simply a concrete manifestation of these deeper ideas about people, their relationship to others, and their relationship to government. Some people are fit to reproduce and/or govern; others are just fit to be sterilized and/or governed. The profound antiegalitarianism that underlies eugenics suggests, if it does not strictly entail, a model of governance that places as much power as possible in the hands of those deemed (generally by themselves and their peers) fit to exercise it. The same disbelief in human equality and democracy which grounded the eugenics laws grounded ideas about government, which was to be run by “experts” who would make the trains run on time. Ordinary people simply could not handle the complexities of modern life, so they needed to be managed by their betters. All for the greater good, of course.

The 1930s was not just a decade that saw the triumph of Hitler, national socialism, and eugenics laws. It was also a decade of fascism both in Italy and in the United States.⁶² Italian Prime Minister Benito Mussolini during the 1930s took over all of Italian industry in a program that was then emulated by

60 NOURSE, *supra* note 43, at 83.

61 See *id.* at 125. On the widespread endorsement of the organic theory of the state in this era, see LEONARD, *supra* note 49, at 101–07.

62 We use the word “fascism” in its descriptive political-economic sense, rooted in early twentieth-century Italian politics from which the word comes, rather than (as it is often employed) as a vague epithet to describe anything that one does not like. Perhaps the most detailed definition of fascism, which we do not agree with in every particular but which captures the key elements of the ideology, was provided by John Flynn in the midst of World War II:

[Fascism] includes these devices:

1. A government whose powers are unrestrained.
2. A leader who is a dictator, absolute in power but responsible to the party which is a preferred elite.
3. An economic system in which production and distribution are carried on by private owners but in accordance with plans made by the state directly or under its immediate supervision.
4. These plans involve control of all the instruments of production and distribution through great government bureaus which have the power to make regulations or directives with the force of law.

FDR in the National Industrial Recovery Act (NIRA) of 1933,⁶³ the legislative centerpiece of FDR's first one hundred days, in which Congress effectively subdelegated its legislative power to FDR and his Cabinet. Under the NIRA, all industries were to be governed by a criminally enforceable code of conduct drawn up by committees of corporate managers and labor union chiefs and then approved or promulgated by FDR himself. Sections 2 and 3 of the NIRA provided:

SEC. 2. (a) To effectuate the policy of this title, the President is hereby authorized to establish such agencies, to accept and utilize such voluntary and uncompensated services, to appoint, without regard to the provisions of the civil service laws, such officers and employees, and to utilize such Federal officers and employees, and, with the consent of the State, such State and local officers and employees, as he may find necessary, to prescribe their authorities, duties, responsibilities, and tenure, and, without regard to the Classification Act of 1923, as amended, to fix the compensation of any officers and employees so appointed.

(b) The President may delegate any of his functions and powers under this title to such officers, agents, and employees as he may designate or appoint

. . . .

SEC. 3. (a) Upon the application to the President by one or more trade or industrial associations or groups, the President may approve a code or codes of fair competition for the trade or industry or sub-division thereof, represented by the applicant or applicants, if the President finds (1) that such associations or groups impose no inequitable restrictions on admission to membership therein and are truly representative of such trades or industries or subdivisions thereof, and (2) that such code or codes are not designed to

5. They involve also the comprehensive integration of government and private finances, under which investment is directed and regimented by the government, so that while ownership is private and production is carried on by private owners there is a type of socialization of investment, of the financial aspects of production. . . .

6. They involve also the device of creating streams of purchasing power by federal government borrowing and spending as a permanent institution.

7. As a necessary consequence of all this, militarism becomes an inevitable part of the system since it provides the easiest means of draining great numbers annually from the labor market and of creating a tremendous industry for the production of arms for defense, which industry is supported wholly by government borrowing and spending.

8. Imperialism becomes an essential element of such a system where that is possible—particularly in the strong states, since the whole fascist system, despite its promises of abundance, necessitates great financial and personal sacrifices, which people cannot be induced to make in the interest of the ordinary objectives of civil life and which they will submit to only when they are presented with some national crusade or adventure on the heroic model touching deeply the springs of chauvinistic pride, interest, and feeling.

JOHN T. FLYNN, *AS WE GO MARCHING* 160–62 (1944).

⁶³ National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933), *invalidated* by A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy of this title: *Provided*, That such code or codes shall not permit monopolies or monopolistic practices: *Provided further*, That where such code or codes affect the services and welfare of persons engaged in other steps of the economic process, nothing in this section shall deprive such persons of the right to be heard prior to approval by the President of such code or codes. The President may, as a condition of his approval of any such code, impose such conditions (including requirements for the making of reports and the keeping of accounts) for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest, and may provide such exceptions to and exemptions from the provisions of such code, as the President in his discretion deems necessary to effectuate the policy herein declared.

(b) After the President shall have approved any such code, the provisions of such code shall be the standards of fair competition for such trade or industry or subdivision thereof. Any violation of such standards in any transaction in or affecting interstate or foreign commerce shall be deemed an unfair method of competition in commerce within the meaning of the Federal Trade Commission Act, as amended

. . . .

(d) Upon his own motion, or if complaint is made to the President that abuses inimical to the public interest and contrary to the policy herein declared are prevalent in any trade or industry or subdivision thereof, and if no code of fair competition therefor has theretofore been approved by the President, the President, after such public notice and hearing as he shall specify, may prescribe and approve a code of fair competition for such trade or industry or subdivision thereof, which shall have the same effect as a code of fair competition approved by the President under subsection (a) of this section. . . .

. . . .

(f) When a code of fair competition has been approved or prescribed by the President under this title, any violation of any provision thereof in any transaction in or affecting interstate or foreign commerce shall be a misdemeanor and upon conviction thereof an offender shall be fined not more than \$500 for each offense, and each day such violation continues shall be deemed a separate offense.⁶⁴

“There was hardly a commentator who failed to see elements of Italian corporatism in Roosevelt’s managed economy under the National Recovery Administration”⁶⁵ The original director of the NIRA, among other early New Dealers, was an open admirer of both Mussolini—or, as President Roosevelt called him, “that admirable Italian gentleman”⁶⁶—and the Italian governance model.⁶⁷ “Mussolini’s own response to this aspect of the NIRA

64 *Id.* §§ 2–3.

65 WOLFGANG SCHIVELBUSCH, *THREE NEW DEALS* 23 (2006).

66 *Id.* at 31.

67 See James Q. Whitman, *Of Corporatism, Fascism, and the First New Deal*, 39 AM. J. COMP. L. 747, 747–48 (1991).

scheme was ‘Ecco un ditatore!’—‘Behold a dictator!’”⁶⁸ The Nazis were similarly admiring of the dictatorial aspects of the New Deal.⁶⁹

The NIRA was challenged on constitutional grounds as being, among other things, an unconstitutional subdelegation of legislative power.⁷⁰ The Supreme Court unanimously agreed with this challenge in *A.L.A. Schechter Poultry Corp. v. United States*.⁷¹ We must emphasize that liberal Supreme Court Justices Louis Brandeis, Benjamin Cardozo, and Harlan Fiske Stone all agreed that the New Deal Congress’s and FDR’s fascist⁷² law was an unconstitutional subdelegation of power. If we are to look at all at the 1930s for guidance, it is to the unanimous opinion in *Schechter Poultry* and its full-throated rejection of uncontrolled subdelegations of legislative power that we should look, rather than to the later-sustained subdelegations that weakened the liberty-preserving separation of powers.⁷³

Farther to the east, communism had fully taken root in the Soviet Union in the 1930s under the leadership of Joseph Stalin. We will never know for sure how many people died, and how many more had their lives ruined beyond repair, by communist oppression in the 1930s, but the number has to be in the millions, and possibly in the tens of millions. At their time, “Stalin’s massacres were probably the worst in history.”⁷⁴

Thus, the 1930s was the worldwide heyday of the political ideologies of national socialism (Germany), fascism (Italy and the United States), and communism (the Soviet Union).⁷⁵

In America, aside from taking Mussolini as a model, and the resulting grinding poverty of the 1930s,⁷⁶ in the South it was yet another decade of Jim

68 *Id.* at 766.

69 See SCHIVELBUSCH, *supra* note 65, at 18 (“The National Socialists hailed the emergency relief measures undertaken during Roosevelt’s first hundred days in office as fully consistent with their own revolutionary program. On May 11, 1933, the main Nazi newspaper, the *Völkischer Beobachter*, offered its commentary in an article with the headline ‘Roosevelt’s Dictatorial Recovery Measures.’”); WHITMAN, *supra* note 50, at 6 (“We have long known the strange fact that the Nazis frequently praised Franklin Roosevelt and New Deal government in the early 1930s. FDR received distinctly favorable treatment in the Nazi press until at least 1936 or 1937, lauded as a man who had seized ‘dictatorial powers’ and embarked upon ‘bold experiments’ in the spirit of the Führer.”).

70 See, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

71 *Id.*

72 Again, we use the term in its descriptive political-economic sense, not as an undefined epithet.

73 The similarities between American and German subdelegations of legislative power in the 1930s are noted in SCHIVELBUSCH, *supra* note 65, at 18.

74 BRIAN CROZIER, *THE RISE AND FALL OF THE SOVIET EMPIRE* 43 (1999). Mao Zedong claimed the top spot in body count from Stalin several decades later. See *id.*

75 Professor Lawson adds that the 1930s saw the triumph of positivism in philosophy, the rise of Keynesianism in economics, and the ascendance of antiformalism in jurisprudence. He considers all of these developments wrong, pernicious, or both.

76 At least one economic model suggests that the New Deal might have prolonged the Great Depression by as much as seven years. See Harold L. Cole & Lee E. Ohanian, *New Deal Policies and the Persistence of the Great Depression: A General Equilibrium Analysis*, 112 J. POL.

Crow segregation. FDR's New Deal coalition was a union of ethnic groups in the Northeast and Midwest and southern segregationists in the South.⁷⁷ Many members of FDR's cabinet and administrative team were southern segregationists. It was not until the end of the 1940s, when President Harry Truman desegregated the armed services of the United States, that Jim Crow as administrative policy began to be questioned.⁷⁸

We emphasize to tedium and beyond that the point of this historical excursion is *not* to argue that the American administrative state of the 1930s incorporated or represented all of the evils of its time. America, administrative state and all, remained in the 1930s, as it had been for quite some time and continues to be today, the world's shining city on a hill. There was no Federal Department of Eugenics (that was all done at the state level),⁷⁹ and Americans devoted blood and treasure to combatting some of the worst elements of one of humanity's worst decades. The point is simply that the 1930s is a presumptively awful decade from which to seek guidance today, in 2018. The intellectual currents of that time, even in this country, were terrible. America survived the 1930s, but to see that decade as something of a second founding—much less as something that supersedes the real founding—is utterly perverse. We cannot begin to understand those who find something appealing about the 1930s.

But weren't there ideas, themes, and institutions from the 1930s that most Americans today would find appealing? Of course there were. Otherwise, we would not have the government that we do, and we would probably not be writing this Article. That is not the point. All that we are trying to demonstrate is that it is not self-evident that "We did that in the 1930s" trumps "We did that in the Constitution." One should not let a halo effect from some favored institutions shield everything that emerged from a very dark period in human history.

ECON. 779, 813 (2004). We are in no position to evaluate this model, but its conclusions conform to our amateur intuitions about the likely consequences of New Deal economic interventions.

77 See WHITMAN, *supra* note 50, at 7. To be sure, the story is more complicated than this simple observation. Nonetheless, in 1932, the Democrats made major gains in the Midwest, and in 1936 they added, inter alia, gains in significant portions of the Northeast. See David Darmofal, *The Political Geography of the New Deal Realignment*, 36 AM. POL. RES. 934, 940–43 (2008). Democrat vote margins in the South were overwhelming in both 1932 and 1936. See 1932, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/statistics/elections/1932> (last visited Oct. 31, 2018); 1936, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/statistics/elections/1936> (last visited Oct. 31, 2018).

78 *Desegregation of the Armed Forces*, HARRY S. TRUMAN PRESIDENTIAL LIBR. & MUSEUM, https://www.trumanlibrary.org/whistlestop/study_collections/desegregation/large/index.php?action=BG (last updated 2017).

79 Federal involvement in eugenics was indirect, mostly involving the Department of Agriculture. See BLACK, *supra* note 48, at 47, 71–72, 97.

To try one final time to reduce the possibility of any misunderstanding of our point⁸⁰: we are not saying that everything from a bad time is bad and everything from a good time is good. Good ideas can emerge from bad times and bad ideas can emerge from good times. Nor are we making a ludicrous ad hominem argument to the effect that all New Dealers were or are Nazi eugenicists or that every single idea that emerged from that decade is tainted.⁸¹ It is quite possible to think that, for example, Social Security is a good idea without also thinking that Mussolini was an “admirable Italian gentleman.”⁸² Professor Wolfgang Schivelbusch explains:

[T]o compare is not the same as to equate. America during Roosevelt’s New Deal did not become a one-party state; it had no secret police, the Constitution remained in force, and there were no concentration camps; the New Deal preserved the institutions of the liberal-democratic system that National Socialism abolished.⁸³

And as John Flynn eloquently put it in 1944, the American variant of fascism “will be a very genteel and dainty and pleasant form of fascism which cannot be called fascism at all because it will be so virtuous and polite.”⁸⁴

Our point, rather, goes to the ground for constitutional reasoning. Because there is no authoritative constitutional text emanating from the 1930s, any reasons for treating that decade as interpretatively sacrosanct must focus on the moral goodness of the ideas that grounded that period. Many of the intellectual currents that dominated the 1930s were, frankly, very bad. As a starting point for thinking about human affairs, one’s first instinct should be to run as far away from that decade as quickly as one can. More fundamentally, the bad ideas of the 1930s that specifically drove the construction of certain parts of the modern administrative state—belief in omnipotent government by socially superior experts under broad subdelegations of legislative power, with a formal (or rote) separation of powers seen as an anachronistic hindrance to modern scientific management of people, who are not ends in themselves but simply means to the accomplishment of collective nationalist or tribalist ends—are at the intellectual core of just about everything bad that occurred during that decade. Perhaps, when all is said and done, one might conclude that, all things considered, even those features of the modern administrative state are best preserved. But if one reaches that conclusion, one should do so grudgingly, with full acknowledgment of its significance, and with the aim of minimizing rather than maximizing the impact of that decision on fundamental provisions of the

80 We can only try to reduce, not eliminate, the possibility of misunderstanding. Intellectually dishonest or lazy people are capable of misunderstanding anything.

81 We leave ad hominem to others. *Cf.*, e.g., Metzger, *supra* note 4, at 65 (“Accounts of the Tea Party . . . identify the close interweaving of economic conservatism and racial and ethnic resentment in the group’s anti-administrative views.”).

82 SCHIVELBUSCH, *supra* note 65, at 31.

83 *Id.* at 11; *see also* FLYNN, *supra* note 62, at 170 (making the same point).

84 FLYNN, *supra* note 62, at 255.

Constitution. Those features are nothing to celebrate, even if they turn out to be something to tolerate.

The specific features of the administrative state that we address in Parts II and III of this Article—and we emphasize that we are addressing in this Article specific features and not the entirety of the modern state apparatus—are not a shining beacon through the dark times of the 1930s. They are an instantiation of some of the worst ideas of that time, even if their implementation in this country was, and continues to be, “virtuous and polite.”⁸⁵ And if one is bound and determined to look to times rather than texts as grounds for constitutional interpretation (and, again, we prefer texts to times), we have a much better candidate for a decade to which one can look for sound guidance about human affairs. That decade did not yield the administrative state. It yielded the U.S. Constitution.

B. *The Time of the Constitution*

The 1780s was one of the most important and best decades of the last 250 years. It started with Americans winning their independence at the Battle of Yorktown, and the decade ended with a relatively peaceful (by the standards of revolutions) French Revolution, which aspired to bring American constitutional democracy and the end of feudalism to France. The 1780s were the culmination of the Age of the Enlightenment—a period during which feudalism was rejected, the Constitution was written, and the Northwest Ordinance banning slavery in all of the then-federal territories was passed.⁸⁶ Influential people of that time believed, in the words of the Massachusetts Constitution of 1780, that “[a]ll men are born free and equal, and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.”⁸⁷

The vicious ideologies that dominated the 1930s had not yet taken wide hold, and prominent intellectuals (at least in western Europe and North America) widely agreed that men were “born free and equal,”⁸⁸ thus putting

85 *Id.*

86 An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio art. VI (1787) (“There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes whereof the party shall have been duly convicted.”). To be sure, the Ordinance also included a precursor to the Fugitive Slave Clause: “Provided, always, that any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original states, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor or service as aforesaid.” *Id.*

87 MASS. CONST. of 1780, pt. 1, art. I.

88 Needless to say (or, rather, it *should* be needless to say but is unfortunately needless to say), to be “born free and equal” refers to formal equality under the law. It does not speak to equality of circumstances, equality of wealth, equality of satisfaction, equality of height, equality of facial hair, or equality of anything other than the basic—dare we say natural?—rights of persons. That people are born free and equal means simply that no

an end to feudalism under which aristocrats and commoners were fundamentally unequal. The language quoted above from the Massachusetts Constitution of 1780 appears in some form in seven of the fourteen state constitutions in place in 1791 when the federal Bill of Rights, with its Ninth Amendment, was ratified; and fifty-nine percent of all Americans then living lived in states with “born free and equal” clauses.⁸⁹ By 1868, when the Fourteenth Amendment was ratified, twenty-seven out of thirty-nine states had “born free and equal” clauses in their state constitutions, and today thirty-nine of the fifty state constitutions have such clauses.⁹⁰ The “born free and equal” clause language is also the language that Thomas Jefferson artfully employed in the Declaration of Independence in which he wrote that: “We hold these truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness.”⁹¹

The “born free and equal” idea was overwhelmingly dominant in intellectual circles in the 1780s both in France and in the United States. It is evident in the first articles of the French Revolutionary Declaration of the Rights of Man and Citizen, which said that:

1. Men are born and remain free and equal in rights. Social distinctions may be founded only upon the general good.

2. The aim of all political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression. . . .

. . . .

4. Liberty consists in the freedom to do everything which injures no one else; hence the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the same rights. These limits can only be determined by law.

5. Law can only prohibit such actions as are hurtful to society. Nothing may be prevented which is not forbidden by law, and no one may be forced to do anything not provided for by law.⁹²

This Declaration of Rights was written and introduced in the French National Assembly by the Marquis de Lafayette, who had served in the American Revolution under George Washington, with whom he became a close

one has a right to rule over others by virtue of birth, caste, or having received the “correct” degrees from the “correct” institutions of higher learning.

89 Steven G. Calabresi, Sarah E. Agudo & Kathryn L. Dore, *State Bills of Rights in 1787 and 1791: What Individual Rights Are Really Deeply Rooted in American History and Tradition?*, 85 S. CAL. L. REV. 1451, 1522–23 (2012).

90 Steven Gow Calabresi, James Lindgren, Hannah M. Begley, Kathryn L. Dore & Sarah E. Agudo, *Individual Rights Under State Constitutions: What Rights Are Deeply Rooted in a Modern-Day Consensus of the States?*, 94 NOTRE DAME L. REV. 49, 127 (2018).

91 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

92 Déclaration des Droits de l’Homme et du Citoyen [Declaration of the Rights of Man and Citizen], arts. 1–2, 4–5 (Fr. 1789).

friend.⁹³ Lafayette had read the many American state bills of rights, which had “born free and equal” clauses in them.⁹⁴

The main political events of the 1780s were the writing and ratification of the U.S. Constitution, the writing of the *Federalist Papers* to persuade Americans to ratify the Constitution, the writing of the Northwest Ordinance banning slavery in federal territories, and the French Revolution, which initially replaced absolute monarchy with a constitutional monarch and a unicameral legislature called the National Assembly. While the French Revolution eventually degenerated into a Reign of Terror and a Napoleonic liberal dictatorship, these deplorable events occurred in the 1790s and not in the 1780s. The zeitgeist of the 1780s is captured by the “born free and equal” clauses, with their libertarian and egalitarian commitments to replace European feudalism with something new and better.

Of course, the 1780s yielded its own parade of horrors, as the intellectual idea of “born free and equal” was, as a practical matter, dishonored in the breach. In the United States, the moral abomination of African-American slavery was still in place, at least partially ratified by the U.S. Constitution, which permitted the slave trade for two decades,⁹⁵ extended the legal effect of slavery to states that did not recognize it as a matter of positive law,⁹⁶ and allowed slave states partially to count slaves for purposes of representation in Congress and the electoral college.⁹⁷ Native Americans were being grossly mistreated in a fashion to which the word “genocide” is uncomfortably apt; Hitler was very admiring of the Americans’ brutal treatment of the native population.⁹⁸ Worldwide, women were not accorded full status as persons. In France, the kidnapping of King Louis XVI and his forced return from Versailles to Paris in October 1789 foreshadowed dangers to come. We do not claim that the 1780s were anything remotely resembling a paradise or that the “born free and equal” ideal was actually implemented.⁹⁹ We are saying only that the broad intellectual trends in that decade, and the political movements and institutional developments generated by those trends, were largely in the right direction. On December 31, 1789, King Louis XVI’s problems were only a storm cloud on the horizon, and, in the United States, a great many intellectuals agreed that slavery was immoral and that it should be abolished. The states of Massachusetts, Rhode Island, and (later) Vermont all abolished slavery. The Northwest Ordinance of 1787 was passed by the Continental Congress, and it abolished slavery in the land that would

93 See Mary Stockwell, *Marquis de Lafayette*, GEORGE WASHINGTON’S MOUNT VERNON, <https://www.mountvernon.org/library/digitalhistory/digital-encyclopedia/article/marquis-de-lafayette/> (last visited Oct. 7, 2018).

94 *Id.*

95 U.S. CONST. art. I, § 9, cl. 1; *id.* art. V.

96 *Id.* art. IV, § 2, cl. 3, *amended by* U.S. CONST. amend. XIII.

97 *Id.* art. I, § 2, cl. 3, *amended by* U.S. CONST. amend. XIV, § 2.

98 See WHITMAN, *supra* note 50, at 9.

99 See HAMBURGER, *supra* note 20, at 369 (“Prior to the Civil War, although the theory was one of consent, the reality was that elites often excluded much of the people from being represented.”).

become the states of Ohio, Indiana, Illinois, Michigan, Wisconsin, and Minnesota. Certainly this was not nearly enough, but it was more than human experience to that point gave much hope of expecting; slavery has been a stain on human civilization for most of recorded history. In the 1780s, however, there were glimmers that slavery might be on the way out in America, and it was not until the invention of the cotton gin by Eli Whitney in 1793 that American slavery got a new lease on life.

One of the core intellectual ideas of the 1780s was a belief in the importance of the separation of powers, as it was described by the French political philosopher Montesquieu in his treatise entitled *The Spirit of the Laws*.¹⁰⁰ Montesquieu argued for a separation of legislative, executive, and judicial powers because he believed, as Lord Acton would later say, that “[p]ower tends to corrupt and absolute power corrupts absolutely.”¹⁰¹ All of the American state constitutions in the 1780s provided for a separation of powers, and the Federal Constitution of 1788 does so as well.

American constitutionalism instantiates a system of checks and balances, as James Madison famously highlighted in *The Federalist Nos. 47 to 51*.¹⁰² Thus, the American Constitution gives the President a share of the legislative power by giving him the veto power;¹⁰³ and it gives the Senate a share of the executive power by giving the Senate the power to confirm presidential nominations and to ratify presidentially negotiated treaties.¹⁰⁴ Madison defended his system of checks and balances in the following famous excerpt from *The Federalist No. 51*, which bears constant repetition in modern times:

To what expedient then shall we finally resort, for maintaining in practice the necessary partition of power among the several departments, as laid down in the constitution? The only answer that can be given is, that as all these exterior provisions are found to be inadequate, the defect must be supplied, by so contriving the interior structure of the government, as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places. . . .

. . . .

It is . . . evident, that the members of each department should be as little dependent as possible on those of the others, for the emoluments annexed to their offices. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other, would be merely nominal.

But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others. The provision for defence must in this, as in all other cases, be made commensurate to the danger of attack.

100 See generally 1–2 CHARLES LOUIS DE SECONDAT, BARON DE MONTESQUIEU, *THE COMPLETE WORKS OF M. DE MONTESQUIEU* (1777).

101 *Letter from Acton to Creighton*, *supra* note 13.

102 See generally THE FEDERALIST NOS. 47–51 (James Madison).

103 U.S. CONST. art. I, § 7, cls. 2–3.

104 *Id.* art. II, § 2, cl. 2.

Ambition must be made to counteract ambition. The interest of the man, must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government, which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

This policy of supplying by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power; where the constant aim is, to divide and arrange the several offices in such a manner, as that each may be a check on the other; that the private interest of every individual, may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the state.

But it is not possible to give to each department an equal power of self-defence. In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is, to divide the legislature into different branches; and to render them by different modes of election, and different principles of action, as little connected with each other, as the nature of their common functions and their common dependence on the society will admit.¹⁰⁵

This governmental framework¹⁰⁶ brilliantly accommodates the claims of representative democracy with a realistic vision of human nature. The republican institutions of the Constitution are designed to mediate the need for popular control of government and the dangers of factions that spring from the variety of human interests, as the two of us discussed a quarter-century ago.¹⁰⁷ To call this scheme a work of genius does not begin to communicate its importance for human flourishing. It creates a structure to focus and channel popular control of government without putting a caste of creden-

105 THE FEDERALIST NO. 51, at 397–99 (James Madison) (John C. Hamilton ed., 1866).

106 We emphasize, because the point is far too often overlooked, that this framework is formal. While that formal framework has functional consequences, such as a system of checks and balances, those consequences do not have independent constitutional status. One does not adhere to the Constitution by drawing up alternative institutions that one thinks (even correctly) will have similar, or even superior, functional consequences. One can, of course, prefer and propose alternative institutions to the Constitution, but it is hard to see the intellectual justification for calling those alternative structures “the Constitution.”

107 See Steven G. Calabresi & Gary Lawson, *Foreword: Two Visions of the Nature of Man*, 16 HARV. J.L. & PUB. POL’Y 1 (1993).

tialed mandarins in charge of people's lives.¹⁰⁸ Importantly, the intricate scheme of the Constitution makes it more likely that important decisions will be grounded on a nationwide, rather than a regional or class-based, consensus. Technocrats have to convince other people, and not just each other, that their ideas are good before they become law.

Unlike the 1930s, the 1780s is a very good place in which to find normatively appealing ideas—and by that we mean ideas which, over the long term and in the large run of cases are likely, if consistently pursued, to promote a wide degree of human flourishing—from which to ground theories of government. The zeitgeist of the 1780s was the “born free and equal” clauses and a political commitment to separation of powers, while the zeitgeist of the 1930s was filled with antiequality eugenicists, totalitarianism, and rule by self-identified credentialed experts. These two decades of human history could not be more different.

One very important part of the Constitution, of course, did not emerge during the 1780s but was added eight decades later. We thus take a brief detour into one other time period that is crucial for understanding the original meaning of the present-day Constitution.

C. *“Mine Eyes Have Seen the Glory”*: *The Zeitgeist of the 1860s*

The 1860s in the United States—or at least in parts of the United States—were much more like the 1780s than they were like the 1930s. Twenty-four out of thirty-seven states in 1868, when the Fourteenth Amendment was ratified, had a “born free and equal” clause in their state constitutional bills of rights.¹⁰⁹ The big event of the decade was the American Civil War and the long-overdue abolition of African-American slavery through the adoption in 1865 of the Thirteenth Amendment.

Ideologically, the Civil War was fought over the issue of whether the “born free and equal” clause idea applied to African Americans.¹¹⁰ The Vice President of the Confederate States, Alexander Stephens, in his infamous Cornerstone Speech given in March 1861, directly and openly challenged the “born free and equal” idea in the following language:

The prevailing ideas entertained by [Thomas Jefferson] and most of the leading statesmen at the time of the formation of the old constitution, were that the enslavement of the African was in violation of the laws of nature;

108 We thus agree with the conclusions, even if we do not agree with all of the methodology, of JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, *ORIGINALISM AND THE GOOD CONSTITUTION* (2013).

109 ARNOLD T. GUMINSKI, *THE CONSTITUTIONAL RIGHTS, PRIVILEGES, AND IMMUNITIES OF THE AMERICAN PEOPLE* 173 (2009).

110 Yes, we are aware that President Lincoln's rationale for the Civil War was as much or more nationalist as it was antislavery. We are not historians, but we simply do not believe that most Americans who fought for the North were motivated by unadulterated nationalism rather than antislavery sentiments. We do not believe that “The Battle Hymn of the Republic” was a paean to a fixed set of borders in an atlas. If we are historically wrong about that, we stand corrected.

that it was wrong in *principle*, socially, morally, and politically. It was an evil they knew not well how to deal with, but the general opinion of the men of that day was that, somehow or other in the order of Providence, the institution would be evanescent and pass away. This idea, though not incorporated in the constitution, was the prevailing idea at that time. The constitution, it is true, secured every essential guarantee to the institution while it should last, and hence no argument can be justly urged against the constitutional guarantees thus secured, because of the common sentiment of the day. Those ideas, however, were fundamentally wrong. They rested upon the assumption of the equality of races. This was an error. It was a sandy foundation, and the government built upon it fell when the “storm came and the wind blew.”

Our new government is founded upon exactly the opposite idea; its foundations are laid, its corner-stone rests upon the great truth, that the negro is not equal to the white man; that slavery—subordination to the superior race—is his natural and normal condition.

This, our new government, is the first, in the history of the world, based upon this great physical, philosophical, and moral truth. This truth has been slow in the process of its development, like all other truths in the various departments of science. It has been so even amongst us. Many who hear me, perhaps, can recollect well, that this truth was not generally admitted, even within their day. The errors of the past generation still clung to many as late as twenty years ago. Those at the North, who still cling to these errors, with a zeal above knowledge, we justly denominate fanatics. All fanaticism springs from an aberration of the mind—from a defect in reasoning. It is a species of insanity. One of the most striking characteristics of insanity, in many instances, is forming correct conclusions from fancied or erroneous premises; so with the anti-slavery fanatics; their conclusions are right if their premises were. They assume that the negro is equal, and hence conclude that he is entitled to equal privileges and rights with the white man. If their premises were correct, their conclusions would be logical and just—but their premise being wrong, their whole argument fails.¹¹¹

Abraham Lincoln responded to Alexander Stephens in the Gettysburg Address:

Four score and seven years ago our fathers brought forth on this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal.

Now we are engaged in a great civil war, testing whether that nation, or any nation so conceived and so dedicated, can long endure. . . .

[W]e here highly resolve that these dead shall not have died in vain—that this nation, under God, shall have a new birth of freedom—and that govern-

111 Alexander H. Stephens, Vice President of the Confederacy, *The Corner Stone Speech* (Mar. 21, 1861), in HENRY CLEVELAND, *ALEXANDER H. STEPHENS IN PUBLIC AND PRIVATE: WITH LETTERS AND SPEECHES BEFORE, DURING, AND SINCE THE WAR* 717, 721–22 (1866).

ment of the people, by the people, for the people, shall not perish from the earth.¹¹²

It is for this reason that, after the South lost the Civil War and the slaves were freed, the South still tried again in 1865 to legislate what were called “Black Codes,” imposing second-class citizenship on African Americans.¹¹³ Congress outlawed such codes, and all other systems of caste, in the Civil Rights Act of 1866.¹¹⁴ The Fourteenth Amendment provided a clear constitutional foundation for this legislation in 1868—and, we would argue if we had the space here, invalidated many of those state laws of its own force. The Fourteenth Amendment forbade not only the Black Codes, but also European feudalism and the traditional Hindu caste system.¹¹⁵ The Fourteenth Amendment made the “born free and equal” idea the supreme law of the land.

Senator Charles Sumner of Massachusetts, a key figure in the writing of the Fourteenth Amendment, responded to Alexander Stephens as follows:

The Rebellion began in two assumptions, . . . first, the sovereignty of the States, with the pretended right of secession; and, secondly, the superiority of the white race, with the pretended right of Caste, Oligarchy, and Monopoly, on account of color. . . . The second showed itself at the beginning, when South Carolina alone, among the thirteen States allowed her Constitution to be degraded by an exclusion on account of color¹¹⁶

In fact, for Sumner, slavery was a system of caste:

A Caste cannot exist except in defiance of the first principles of Christianity and the first principles of a Republic. It is Heathenism in religion and tyranny in government. The Brahmins and the Sudras in India, from generation to generation, have been separated, as the two races are now separated in these States. If a Sudra presumed to sit on a Brahmin’s carpet he was punished with banishment. But our recent rebels undertake to play the part of the Brahmins, and exclude citizens, with better title than themselves, from essential rights, simply on the ground of Caste, which, according to its Portuguese origin, *casta*, is only another term for race.¹¹⁷

Sumner went as far as to propose legislation banning all systems of caste, class, and monopoly in the Senate in 1866. The language he used for the proposed statute was extremely broad:

There shall be no Oligarchy, Aristocracy, Caste, or Monopoly invested with peculiar privileges and powers, and there shall be no denial of rights, civil or political, on account of color or race anywhere within the limits of the

112 Abraham Lincoln, President of the U.S., The Gettysburg Address (Nov. 19, 1863).

113 See Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers*, 65 FLA. L. REV. 909, 924 (2013).

114 Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981–1982 (2012)).

115 See Calabresi & Salander, *supra* note 113, at 934–61.

116 CONG. GLOBE, 39th Cong., 1st Sess. 686 (1866) (statement of Sen. Charles Sumner).

117 *Id.* at 683.

United States or the jurisdiction thereof; but all persons therein shall be equal before the law. . . .¹¹⁸

Representative Norton Townshend, a Democrat from Ohio, spoke out against slavery in the following terms on the House floor:

I protest against all these interpolations into the Democratic creed, and against any such interpretation of Democracy as makes it the ally of slavery and oppression. Democracy and slavery are directly antagonistic. Democracy is opposed to caste, slavery creates it; Democracy is opposed to special privileges; slavery is but the privilege specially enjoyed by one class to use another as brute beasts and take their labor without wages; Democracy is for elevating the laboring masses to the dignity of perfect manhood; slavery grinds the laborer into the very dust. . . . [S]lavery is but the extreme of class legislation. . . . [S]lavery is nothing more than the privilege some have of living out of others¹¹⁹

Another representative, associated at times with the Democratic Party but who allied himself with the Radical Republicans, John F. Farnsworth, said:

As a moral being, as a man, I hate slavery in the States of this Union as I hate serfdom in Russia—which, by the way, is about to be abolished in that Empire, while we are quarrelling over the extension of slavery in this—just as I hate caste in India; just as I hate oppression everywhere.¹²⁰

The bottom line is that the Fourteenth Amendment constitutionalized the “born free and equal” idea of the Declaration of Independence and of the Gettysburg Address, and it rejected as false Alexander Stephens’s Cornerstone Speech asserting that modern science had shown that African Americans were born inferior to other Americans.

The decade of the 1860s thus began with Stephens’s challenge to the “born free and equal” idea, and it ended with the triumph of that idea both in the Federal Constitution and in the state constitutions. The Thirteenth and Fourteenth Amendments helped operationalize the “born free and equal” ideal of the 1780s and thus removed one of the most appalling structural defects in the original Constitution. It would take another half century to extend that ideal further by guaranteeing the vote to women, but this process involved the removal of defects from a basic structure that is grounded in sound observations about the human condition rather than a rejection of the basic principles of representative democracy and separation of powers. This is a long-winded way of saying that the Constitution, as corrected by some amendments, especially those of the 1860s, is a very good way to run a government if a government one must have.

In Europe, the 1860s were ushered in with the 1859 publication of John Stuart Mill’s *On Liberty*.¹²¹ Mill’s book had a huge impact in the United

118 *Id.* at 674.

119 CONG. GLOBE, 32d Cong., 1st Sess. app. 713 (1852) (statement of Rep. Norton S. Townshend).

120 CONG. GLOBE, 36th Cong., 2d Sess. app. 120 (1861) (statement of Rep. John F. Farnsworth).

121 *See generally* JOHN STUART MILL, *ON LIBERTY* (1859).

States, in the British Empire, and in Continental Europe. Many Europeans in the 1860s were classical liberals, and the United Kingdom, France, and the German states were all moving in a classical liberal direction. Feudalism and absolute monarchy were dead or were on the way out almost everywhere in Western Europe. This was a rejection of the idea of caste and an acknowledgment that all men were created equal.

To be sure, there were intellectual storm clouds on the horizon. Racialist thinking, which culminated in the eugenics craze, was about to get a big pseudoscientific push from absurd misapplications of Darwinian teaching, and great-power imperialism would lead European countries, and eventually the United States as well, to “Take up the White Man’s burden,”¹²² in Rudyard Kipling’s infamous phrase, to govern what were supposedly inferior races of people.¹²³ And the status of women as second-class citizens would remain unresolved for many decades.

But, on balance, the zeitgeist of the 1860s in the United States was best characterized by the triumph of the “born free and equal” idea, which is part of the original meaning of the 1868 Fourteenth Amendment, over the racist idea of the inferiority of African Americans advanced by Alexander Stephens. The most poignant observation we can make of that time is that the 1860s was the decade of “The Battle Hymn of the Republic.”¹²⁴

D. *The Present Day*

The “present day” begins for us on December 10, 1948, when the U.S. Ambassador to the United Nations, Eleanor Roosevelt, appointed by President Truman, secured the ratification by the United Nations of the Universal Declaration of Human Rights.¹²⁵ Eleanor Roosevelt was then FDR’s widow and Theodore Roosevelt’s niece. In other words, she represented the American elite. The Universal Declaration of Human Rights was adopted in light of the revulsion and horror generated when the victorious Allied Armed forces crushed Hitler and the Nazis only to discover that Hitler had killed, inter alia, six million Jews in the Holocaust. The Declaration begins as follows:

Article 1

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

122 Rudyard Kipling, *The White Man’s Burden*, McCLURE’S MAG., Feb. 1899, at 290.

123 On the flagrant unconstitutionality of denying constitutional rights to inhabitants of American territories, a practice which took hold in the early 1900s, see GARY LAWSON & GUY I. SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY* 121–50 (2004).

124 JULIA WARD HOWE, *The Battle Hymn of the Republic* (1862).

125 *Drafting of the Universal Declaration of Human Rights*, UNITED NATIONS, <http://research.un.org/en/undhr> (last updated Aug. 22, 2017).

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 3

Everyone has the right to life, liberty and security of person.

Article 4

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.¹²⁶

Quite obviously, these articles of the Declaration of Human Rights are a global affirmation of the continuing goodness of the “born free and equal” idea of the Enlightenment, of the 1780s, and of the Thirteenth and Fourteenth Amendments adopted in the 1860’s. It is an explicit repudiation of the 1930s and of the belief in that era in eugenics and government by experts. Of course, if a constitutional text had been enacted in the 1930s which incorporated the antirepublican ideas of that era, then the only recourse for a constitutionalist would be to seek to change the Constitution or, perhaps, to abandon it for an alternative form of governance. No such text was enacted. None of the institutions that represent the worst elements of the modern administrative state was validated by constitutional amendment. Nor do those institutions reflect the Constitution of 1788 or the Constitution of 1868, as we now proceed to demonstrate.

II. THE ADMINISTRATIVE STATE AND THE SEPARATION OF POWERS

The U.S. Constitution, as did all of the state constitutions of the founding era, rests on a division of governmental authority into the categories of legislative, executive, and judicial powers. “All legislative Powers herein granted” are vested in the Congress, and the “executive Power” and “judicial Power” are vested, respectively, in the President and the federal courts.¹²⁷ None of the founding-era constitutions provided technical definitions of these three heads of power. That is not because there was no expectation of disagreement or conflict. As James Madison wrote:

Experience has instructed us, that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces, the legislative, executive, and judiciary Questions daily

126 G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

127 U.S. CONST. art. I, § 1; *id.* art. II, § 1; *id.* art. III, § 1.

occur in the course of practice, which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science.¹²⁸

Nonetheless, as one of us has written:

That adept-puzzling obscurity . . . did not stop Madison from categorically declaring that various powers of government are “in their nature . . . legislative, executive, or judiciary.” Nor did it stop John Adams from stating that the “three branches of power have an unalterable foundation in nature; that they exist in every society natural and artificial . . . ; that the legislative and executive authorities are naturally distinct; and that liberty and the laws depend entirely on a separation of them in the frame of government.” Nor did it prevent many state constitutions of the founding era from including separation-of-powers clauses that expressly distinguished, again without express definitions, legislative, executive, and judicial powers. Nor did it prevent the United States Constitution from basing its entire scheme of governance on the distinctions between those powers. However difficult it may be at the margins to distinguish the categories of power from each other, the founding generation assumed that there was a fact of the matter about those distinctions and that one could discern that fact in at least a large range of cases. The communicative meaning of the Constitution of 1788 cannot be ascertained without reference to some such distinction, even if legal scholars or political scientists (adept or otherwise) find the distinction unhelpful or confusing.¹²⁹

The text of the U.S. Constitution does not create a headless fourth branch of unaccountable administrative agency experts, possessed of the “administrative” power,¹³⁰ but it does embody a textual commitment to the separation of powers that implements the Madisonian system of checks and balances. It is well known that many modern regulatory agencies blend together in one agency the exercise of the legislative, executive, and judicial power.¹³¹ We will argue that this is unconstitutional, unnecessary, and unwise. We think we can have a *better* administrative state¹³² if we adhere to the separation of powers in the way that we will argue for in this article.

Our concerns are inspired by article XXX of the Massachusetts Constitution of 1780, which provides that:

In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers,

128 THE FEDERALIST NO. 37, at 286 (James Madison) (John C. Hamilton ed., 1866).

129 Gary Lawson, *Take the Fifth . . . Please!: The Original Insignificance of the Fifth Amendment's Due Process of Law Clause*, 2017 BYU L. REV. 611, 623–24 [hereinafter Lawson, *Take the Fifth*] (footnotes omitted).

130 See Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 560–68 (1994).

131 James Landis knew it and celebrated it. See LANDIS, *supra* note 39, at 1–2, 10–12.

132 Professor Lawson adds: “if an administrative state one must have.”

or either of them; to the end it may be a government of laws, and not of men.¹³³

Separation of powers clauses like the one above were present in twenty-nine out of thirty-seven state constitutions in 1868 when the Fourteenth Amendment was ratified, and such clauses can be found today in forty out of fifty state constitutions.¹³⁴ In both time periods, more than three-quarters of the States—an Article V consensus—contained separation of powers clauses in their state constitutions.¹³⁵ James Madison tried to include such a clause in the U.S. Constitution,¹³⁶ only to be told it was unnecessary because it was so obvious already that the U.S. Constitution was committed to the separation of powers through the Vesting Clauses of Articles I, II, and III.¹³⁷ The separation of powers is and always has been a key part of the U.S. Constitution.

The federal constitutional separation of powers, unlike some pure theoretical models that were not in fact adopted as part of the constitutional text, does not require a hermetic separation of functions among the legislative, executive, and judicial actors. It does, however, require that actors perform *only* those functions for which they have an enumerated power or which are incidental to performance of an enumerated power. Members of Congress or the Attorney General cannot preside over a criminal trial because their enumerated powers do not include that particular function.¹³⁸ Congress cannot confer that power by statute, because the Necessary and Proper Clause only authorizes laws that confer *incidental* powers that are “necessary and proper for carrying into Execution” principal powers, and a law purporting to let a non-judge preside over a criminal trial would be none of the above.¹³⁹ Federal judges can perform that function because they are granted the enumerated “judicial Power.”¹⁴⁰ For the same reason, federal judges cannot enact laws. The judicial power does not include that function, no other power is directly given to federal judges by the Constitution, and a congressional statute purporting to confer that power under the Necessary and Proper Clause would be trying to confer a principal rather than incidental power (and to boot would fail to be “necessary and proper for carrying into Execution” other federal powers).

The administrative state makes hash out of this basic allocation of constitutional powers. Everybody knows this. A quarter century ago, one of us catalogued some of the most obvious ways in which the administrative state is

133 MASS. CONST. of 1780, pt. 1, art. XXX.

134 See Calabresi et al., *supra* note 90, at 141, 143.

135 See *id.*

136 See 1 ANNALS OF CONG. 453, 448 (1789) (Joseph Gales ed., 1834).

137 See *id.* at 789.

138 See Gary Lawson, *Appointments and Illegal Adjudication: The America Invents Act Through a Constitutional Lens*, 26 GEO. MASON L. REV. (forthcoming 2018) [hereinafter Lawson, *Appointments and Illegal Adjudication*].

139 U.S. CONST. art. I, § 8.

140 *Id.* art. III, § 1.

unconstitutional,¹⁴¹ and we frankly do not believe that anyone seriously thinks that the Constitution of 1788's original meaning can validate the full scope of the modern administrative state. That is just too clear for extended argument, and so we do not argue it here. Instead, in this Article, we seek to accomplish three goals. First, we identify what we have learned in the past twenty-five years about the constitutional infirmities of the administrative state; scholarship has shed some important new light on old arguments. Second, we show how the administrative state not only violates the constitutional separation of powers but also violates norms of due process of law that infuse the Constitution and that find textual confirmation in the Fifth and Fourteenth Amendments. Third, we offer some practical suggestions for relatively modest reforms that will alleviate at least some of the grave constitutional defects in the administrative state, with few consequences for the actual scope of modern government.¹⁴²

A. *Administrative Agency Incursions on Legislative Power*

The most blatant way in which the administrative state violates the constitutional separation of powers is the vast subdelegation of legislative authority that permeates modern government. As the law presently stands, both executive and independent administrative agencies engage heavily in formal and informal policymaking, through both rulemaking and adjudication, even on major issues such as how to respond to claims of global warming or whether there is or is not such a thing as clean coal. Congress has subdelegated enormous power to make law and policy over matters like these to the executive department and independent agencies (and indirectly, to a modest extent, to the courts, which can review agency policymaking to determine whether it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”¹⁴³). All of these agencies, even those that are formally independent, are dominated by presidential personnel. Thus, when President Trump replaced President Obama, there was, in effect, a huge change in the law without a single member of Congress casting a vote.

This is the result of decades of Congress enacting vacuous statutes and thereby subdelegating to the agencies the power to make law. The Federal Communications Commission (FCC), for example, has the power to grant broadcast licenses “if public convenience, interest, or necessity will be served

141 See Lawson, *Rise of the Administrative State*, *supra* note 37, at 1233.

142 The most obvious problem with the modern federal government is that it engages in activities that *no* institution or combination of institutions of the national government is constitutionally authorized to perform. We do not address that problem in this Article. Here, we focus on matters of *form*, reflected in the separation of powers and due process of law. We propose reforms that we think can and should be accepted even by people who believe that all of the present functions of the national government should be maintained.

143 5 U.S.C. § 706(2)(A) (2012).

thereby.”¹⁴⁴ This law is representative, not extraordinary. While the NIRA was found unconstitutional in 1935,¹⁴⁵ smaller, more localized versions of the institution, with equally open-ended statutory authorizations, have been consistently upheld over the past eight decades. Since its heroic stand in *Schechter Poultry* in 1935, the Supreme Court has uniformly rejected nondelegation doctrine challenges to organic statutes like the Communications Act of 1934 because it thinks that judicial enforcement of the nondelegation doctrine would enmesh the federal courts in the making of policy decisions about which subdelegations go too far and which do not go far enough.¹⁴⁶

Agencies like the FCC regulate net neutrality one way under Obama and entirely the other way under Trump. This erodes business confidence in investing because the law can change 180 degrees every time we elect a President. Businesses and investors want certainty, and the current system does not provide that. More to the point, these vacuous statutes are rather blatantly unconstitutional. The case for this obvious claim has been made numerous times from several overlapping directions. “Indeed, there are few propositions of constitutional meaning as thoroughly overdetermined as the unconstitutionality of subdelegations of legislative authority.”¹⁴⁷ We knew this twenty-five years ago, and we know it today. But today we know a bit better why this is so.

One can find subdelegation unconstitutional by looking to inferences from structure,¹⁴⁸ by seeing subdelegation as a threat to the larger constitutional principle of representative democracy,¹⁴⁹ or by interpreting the Necessary and Proper Clause to view subdelegation of legislative authority as improper.¹⁵⁰ All of these arguments have something to commend them, but we have learned in recent years that they all are subsumed within a larger argument that more firmly establishes the impermissibility of legislative subdelegation. This argument stems from major scholarship emanating from Robert Natelson and Philip Hamburger, and one of us has spent a lot of energy trying to develop their insights.

The Constitution is best seen as a kind of agency instrument. The book-length argument for this proposition is found in a recent work coauthored by one of us.¹⁵¹ For purposes of subdelegation analysis, the precise form of

144 47 U.S.C. § 307(a) (2012). For more on the sheer scope of delegation in the modern administrative state, see Gary Lawson, *Representative/Senator Trump?*, 21 CHAP. L. REV. 111, 114 (2018) [hereinafter Lawson, *Representative/Senator*].

145 See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935).

146 See *Mistretta v. United States*, 488 U.S. 361, 372–74, 378–79 (1989); *id.* at 415–16 (Scalia, J., dissenting).

147 Lawson, *Representative/Senator*, *supra* note 144, at 119.

148 See Gary Lawson, *Discretion as Delegation: The “Proper” Understanding of the Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235, 263 (2005) [hereinafter Lawson, *Discretion as Delegation*].

149 See MARTIN H. REDISH, *THE CONSTITUTION AS POLITICAL STRUCTURE* 136–37 (1995).

150 See Lawson, *Discretion as Delegation*, *supra* note 148, at 249–67.

151 See GARY LAWSON & GUY SEIDMAN, “A GREAT POWER OF ATTORNEY”: UNDERSTANDING THE FIDUCIARY CONSTITUTION (2017). The book was inspired, and helped along immeasur-

agency instrument that best describes the Constitution does not matter.¹⁵² It was settled agency law in the eighteenth century that delegated discretionary powers in an agency instrument—any relevant agency instrument—could not be subdelegated absent a specific authorization in the instrument.¹⁵³ The Constitution contains no such authorization for Congress to subdelegate, so no such power exists. Members of Congress must personally exercise their delegated legislative power, just as stewards or guardians must personally exercise the authority with which they have been entrusted. None of this solves the difficult problem of determining when legislation entrusts such a kind or quality of discretion to executive (or judicial) actors that it amounts to subdelegation of authority,¹⁵⁴ but it grounds the basic principle against subdelegation firmly in the Constitution's very character as a legal instrument.¹⁵⁵ Once one sees the Constitution through the lens of agency, "[t]he rule against subdelegation of legislative authority is among the clearest constitutional rules one can imagine."¹⁵⁶

Beyond being unconstitutional, there is a huge cost to our republican institutions that results from Congress having given the agencies *carte blanche* to legislate. Part of that cost is that Congress has given up too much of the legislative power to presidential appointees and so Congress is too weak vis-à-vis Presidents who have learned to use the agencies' rulemaking powers as their own. This weakens our constitutional democracy, weakens Congress, and leads to a kind of hyper-presidentialism, which we think is unhealthy—if only because it raises the stakes in presidential elections to levels that the original constitutional design never contemplated.¹⁵⁷ Regulatory law lurches sharply in one direction under President Obama and sharply in another direction under President Trump. These sudden lurches are not good for individuals or for people trying to start or run a business and who are eager to know "what the law is," and they lead to an "us vs. them" mentality in presidential elections from which nothing good can come.

The Supreme Court has decided not to enforce the constitutional principle against subdelegation, but there is a legislative effort now afoot in Congress to reclaim some of the power that Congress has subdelegated to

ably, by Rob Natelson, who really uncovered for modern eyes the agency character of the Constitution that was taken for granted by the founding generation and then was somehow lost to modernity.

152 For other purposes, it might matter whether the Constitution is seen as more like a power of attorney than, for example, a corporate charter. For purposes of subdelegation analysis, the precise characterization makes no difference.

153 See LAWSON & SEIDMAN, *supra* note 151, at 113–17.

154 This problem was recognized by Chief Justice John Marshall at an early date, see *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43, 46, (1825), and the problem has not gotten easier with age. See Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 378–91 (2002) [hereinafter Lawson, *Delegation and Original Meaning*].

155 For a much longer version of this argument, see Lawson, *Discretion as Delegation*, *supra* note 148, at 263–64.

156 LAWSON & SEIDMAN, *supra* note 151, at 117.

157 See Lawson, *Representative/Senator*, *supra* note 144, at 113–14.

agencies. The current vehicle is the Regulations from the Executive in Need of Scrutiny Act (“REINS Act”), which would require Congress to assume some measure of responsibility for enactment of so-called “major” rules.¹⁵⁸ A version of this statute passed the House in 2011¹⁵⁹ and again in 2017.¹⁶⁰ This is at least a baby step in the right direction, though the 2017 version contains an unconstitutional legislative veto provision.¹⁶¹ Accordingly, we believe that Congress should instead pass an Administrative Procedure Act of 2018, which would require that any formal or informal rule that the Congressional Budget Office (CBO) finds would have an effect on the national economy of \$100 million a year or more¹⁶² be presented to the House of Representatives and the Senate for consideration on a fast track calendar, whereby each House would vote the rule up or down, with no Senate filibuster allowed, within thirty days of the rule’s referral to Congress. If either House votes the proposed regulation down, it will die. If both Houses approve the rule, it shall be presented to the President, and it shall become law either if he signs it or if it is passed by a two-thirds vote of both Houses of Congress over the president’s veto. In other words, major rules can only become law through a normal (though procedurally expedited) Article I, Section 7 lawmaking process.

This statute would allow interstitial regulatory rulemaking as to small matters, while returning to Congress and the President the power to legislate as to all big matters. This proposal would help put Congress back into business as the chief lawmaking entity instead of having that role being played by executive-controlled personnel in the agencies.

It is also worth considering whether the federal courts should use an impact on the national economy of more than \$100 million a year (however that impact is measured¹⁶³) as a benchmark for determining whether there has been an unconstitutional delegation of power by Congress to an agency, which would give our proposed policy prescription a measure of constitutional status. On the one hand, that dollar amount is a poor proxy for the true constitutional rule, which must look holistically at the character and quality of the discretion granted to the executive agents in light of the spe-

158 H.R. 26, 115th Cong. (2017).

159 For discussion of the 2011 version, see Jonathan H. Adler, *Placing “REINS” on Regulations: Assessing the Proposed REINS Act*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 1 (2013) (arguing that the bill was both constitutional and reasonable); Jonathan R. Siegel, *The REINS Act and the Struggle to Control Agency Rulemaking*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 131 (2013) (arguing that the bill was constitutional but bad policy).

160 See 163 CONG. REC. D15 (daily ed. Jan. 5, 2017), <https://www.congress.gov/congressional-record/2017/01/05> (noting “[t]he House passed H.R. 26”).

161 H.R. 26, § 801(b)(1)–(2).

162 The REINS Act gives this function to the Office of Information and Regulatory Affairs in the Office of Management and Budget. H.R. 26, § 804(2). We prefer the CBO because it is an arm of Congress, and Congress should not farm out the job of determining its own legislative obligations. Why else does one have a CBO?

163 Courts could choose to defer to the CBO.

cific statutory scheme involved.¹⁶⁴ On the other hand, any change in the law that has that big of an effect on the economy probably ought by definition to be made by Congress; the monetary benchmark will surely be underinclusive rather than overinclusive of those actions that, as a matter of original meaning, violate the subdelegation doctrine. And for those, such as the late Justice Scalia, who worry about the lack of judicial standards for applying a constitutional principle against subdelegation,¹⁶⁵ the \$100 million a year benchmark would give the Supreme Court the bright line it needs to police the subdelegation doctrine in a neutral and nonpartisan way. The line is concededly arbitrary, but it is not obvious to us why an underinclusive arbitrary line is worse than no line at all.

To be sure, this is far from a perfect solution even apart from its possible failure to match perfectly, or even match well, with the objectively correct constitutional principle. As others have noted with great sophistication in precisely this context,¹⁶⁶ the devil is in the details. For example, many agencies can make policy through adjudication as well as through rulemaking, so it is possible that our proposed statute would push those agencies more toward adjudication. Whether that is a positive or negative development depends on many factors, but it is a possible development. It is also possible that agencies will engage in gamesmanship by breaking up rules into small components so that no single rule crosses the CBO threshold¹⁶⁷ or will strategically bundle rules together to make congressional rejection less likely (equivalent to the congressional practice of omnibus bills).¹⁶⁸ Again, the consequences of such a development are not obvious. Finally, our proposal gives a good measure of power to the CBO, which can presumably find ways to manipulate the process of calculating economic impacts. We are not proposing a cure-all solution to the problem of subdelegation. We offer this statute as a very modest first step. If some of the possible eventualities occur, Congress can reassess whether a simple dollar limit on rules is an effective way to restore some measure of legislative responsibility.

There is also the small problem that we are calling upon Congress to reclaim some of its authority when that selfsame Congress is the entity that created the subdelegation problem in the first place. To be sure, subdelegation requires the complicity of the executive and the judiciary to be effective, but no subdelegation happens unless Congress initiates it. Why would we think that Congress would suddenly change its practices? We are by no means sure that it will. In fact, it probably will not. But right now, we are facing a rare moment when it is at least conceivable. We have a President who ran against both parties. The establishment of both parties dislikes him intensely. If there is ever going to be a time that is propitious for a modest revival of congressional responsibility, perhaps even along bipartisan lines,

164 See Lawson, *Delegation and Original Meaning*, *supra* note 154, at 376–77.

165 See *Mistretta v. United States*, 488 U.S. 361, 415–16 (1989) (Scalia, J., dissenting).

166 See Rappaport, *supra* note 26, at 122–23.

167 See *id.* at 125.

168 See *id.* at 127.

this may be it. We should be giving it every form of encouragement while the moment lasts.

We think this modest approach is preferable to the full-blown surrender proposed by Professor Metzger. She assumes that massive legislative subdelegation is a foregone conclusion.¹⁶⁹ From that premise, she argues that a vast, technocratic, 1930s-style administrative state is actually a *constitutional requirement*: “[T]he modern national administrative state is the constitutionally mandated consequence of delegation.”¹⁷⁰ Her claim is that if Congress subdelegates authority, we must all restructure the entire scheme of governance in order to make that subdelegation as effective as possible.¹⁷¹ In other words, because there has been a breach in the wall of separation of powers, one has to tear down the entire wall. (Does this also mean, we ask in all seriousness, that the brute fact of subdelegation requires—constitutionally requires—that only technocrats be allowed to vote? If not, why not? Would that not improve the effectiveness of the post-subdelegation government?) This is entirely backwards. If subdelegation is a constitutional error, as we think it rather obviously is, we should be looking to minimize its impact rather than maximize it. If one is going to make second-best arguments for the deliberate creation of offsetting errors, the new errors should be offsetting rather than error enhancing. They need to move toward the constitutional baseline rather than further away from it.¹⁷² For example, one can perhaps make a second-best argument for an unconstitutional legislative veto, because it enhances the role of Congress in the legislative process,¹⁷³ but just saying, “Well, Congress messed up, so let’s turn everything over to the technocrats,” makes no sense.

We do not doubt that if Metzger, or James Landis, or Felix Frankfurter, were in charge of drafting a new constitution, it would include provisions for a robust subdelegation of legislative power to the administrative state. No such document has been drafted, proposed, and ratified. The Constitution

169 See Metzger, *supra* note 4, at 88–89. Metzger claims that “very few anti-administrativists [her term for people who have legal and policy views that she doesn’t like] are willing to call . . . delegation[s] of power into serious constitutional question.” *Id.* at 7. Really? She needs to get out more.

170 *Id.* at 89.

171 *Id.* at 7.

172 To be fair to Metzger, this point is not as obvious as it might seem. The whole point of second-best theory is that if one is not already at the equilibrium point, moves that do not fully reach equilibrium have indeterminate effects. It might be the case that a specific move “away” from equilibrium actually gets one “closer” to the equilibrium than a specific move “toward” it. See GARY LAWSON, *EVIDENCE OF THE LAW: PROVING LEGAL CLAIMS* 139–41, 145–46 (2017). But the equilibrium on which Metzger focuses is not the structure of the Constitution. It is something called “effective governance.” See Metzger, *supra* note 4, at 85–87. We have searched in vain for the “effective governance” clause on which to ground a constitutional revolution—or for a definition of “effective governance” sufficiently fixed in eighteenth-century natural or positive law to serve as a preconstitutional norm.

173 See 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, 23–40 (1994).

that we have contains instead a robust principle against legislative subdelegation. Even if courts choose not to enforce that principle, nothing says that Congress cannot take steps, even small steps, toward reclaiming its proper authority. And, of course, nothing says that the executive has to go along with Congress's decision to subdelegate if that decision is unconstitutional.¹⁷⁴ Does Metzger think that it would be unconstitutional for the President to veto a bill on the grounds that it unconstitutionally subdelegates legislative power? That it would be unconstitutional for the President to allocate enforcement resources toward constitutional statutes and away from unconstitutional subdelegating statutes? That it would be unconstitutional for the President to appoint Supreme Court Justices who are inclined to enforce a subdelegation doctrine? If the Constitution were amended to contain an explicit subdelegation clause, the answers to all of these questions might be yes. Until that happens, the choice is whether or not to try to follow the Constitution. Metzger has chosen "not." That is an entirely defensible choice if one thinks—as one might very well think—that the Constitution is outdated or normatively undesirable. But then one should have the courage of one's convictions and just say so.

B. Agencies and Presidential Power

Much of separation of powers law and scholarship over the past half century has focused on presidential control of the administrative machinery. Perhaps no subject in this area has consumed as much attention as the question of presidential removal of executive officials. To what extent can Congress statutorily insulate certain officials from presidential dismissal? Modern doctrine has not prescribed precise limits on the kinds and forms of for-cause removal provisions that Congress can enact for executive officials, though it is reasonably clear that some degree of insulation for at least some officials—primarily heads of multimember regulatory agencies—will be sustained by a majority of the current Supreme Court.¹⁷⁵ As a matter of original meaning, Professor Calabresi thinks it is clear that the President has untrammelled constitutional authority to remove any subordinate executive official (save the Vice President, whose tenure is constitutionally determined). He believes this because George III and all thirteen of the colonial governors who served from the founding of Jamestown in 1607 until American independence in 1776 could have legally removed any nonjudicial subordinate officer and prior to 1776 any judicial officer. There were quite simply no independent agencies in seventeenth- or eighteenth-century England or North America. Professor Lawson is *dubitante*—as he was a quarter century ago.¹⁷⁶

We know a great deal more than we did twenty-five years ago about the history and tradition of presidential control over the executive machinery.

174 See Lawson, *Appointments and Illegal Adjudication*, *supra* note 138, at 39 (urging President Trump to resist legislative subdelegations).

175 See *Morrison v. Olson*, 487 U.S. 654, 696–97 (1988).

176 See Lawson, *Rise of the Administrative State*, *supra* note 37, at 1244 n.74.

We know that preconstitutional executives uniformly had the power of removal. We know that there is no settled tradition of presidential acquiescence in legislative attempts to divide executive power.¹⁷⁷ We know that presidential control of the executive dates to the founding era.¹⁷⁸ And we know that some judicial precedents upholding limits on presidential control of subordinates that formerly seemed unassailable now show at least some small cracks.¹⁷⁹ These are all significant developments in our understanding of Article II. Professor Calabresi believes that this learning confirms that the Constitution vests in the President the unlimited power to remove subordinate executive officials. Professor Lawson is still not entirely sure about that. He fully agrees that the Constitution requires that the President control all exercises of executive power, but he believes that this means that the President has the formally-greater-than-removal, if perhaps practically-less-useful-than-removal, power to nullify any action by a subordinate that is contrary to presidential directives. The President might even have the power directly to assume any discretionary power vested in a subordinate official. Professor Lawson is just not certain about a power of removal as the constitutionally required mechanism for implementing that directorial power.

But even if presidential removal is not constitutionally mandated—and Professor Lawson is not by any means ruling out that prospect, as there is a very good historical argument that the executive power just includes, as a matter of original meaning, a power to remove subordinates—it is a good idea. Agency heads who are “independent” of the President are, by virtue of that fact, independent of the voters as well. Such heads are surely “accountable” in a sense to their peers, but creating a self-perpetuating, self-regulating caste of credentialed experts is precisely what we are trying to avoid.

Officials are only independent if statutes make them so. Accordingly, we think that Congress should specify by statute that all executive department officers are removable at will by the President. Congress should so state in an Administrative Procedure Act of 2018. This would legislatively overturn the Supreme Court’s foolish decision in *Humphrey’s Executor*.¹⁸⁰ Alternatively, the Court could say, or Congress could make clear by statute, that refusal to follow a presidential order is itself “good cause” for removing an executive branch officer under the many statutes requiring a finding of “good cause” for removal.¹⁸¹

177 See STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* 22–29 (2008).

178 See SAIKRISHNA BANGALORE PRAKASH, *IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE* 10–11 (2015).

179 See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 483–84 (2010).

180 *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 629 (1935). Even if Professor Lawson ultimately concludes that the Constitution does not require a presidential removal power, he would reach that conclusion through a very different path than did the Court in the nonsensical *Humphrey’s Executor* decision.

181 While direct authority is thin, it is widely assumed that statutory “good cause” provisions do not permit presidential removal of an official for mere policy disagreements. See

To be sure, this would have the effect of increasing presidential power, which, thanks to legislative subdelegation, has expanded beyond any plausibly desirable boundaries. But in the case of legislative subdelegation, the increased presidential power comes at the expense of Congress. In the case of internal executive administration, it comes at the expense of bureaucrats. Given that choice, we choose the electorally accountable (and more readily impeachable) President as the lesser evil.¹⁸²

In short, we think that all of the so-called “independent” regulatory agencies should be recognized as fully a part of the executive department. The United States of America is a democratic republic in which everyone is born free and equal. There should be no “experts” who can wield power that is not directly controlled by the President, Congress, and the federal courts. It is to agency interaction with the courts that we now turn.

C. *Adjudication in Administrative Law*

A quarter century ago, one of the most difficult constitutional questions was the extent to which administrative actors could adjudicate disputes. Article III vests the judicial power in federal judges who have tenure during good behavior and guarantees against diminishment of salary while in office. But what falls within the exclusive function represented by exercise of the judicial power? Much activity that is obviously executive in character involves application of law to fact. Even some legislative activity takes that form. Which classes of disputes must be adjudicated by Article III judges?

A quarter century ago, one of us tentatively and hesitantly suggested that an exercise of judicial power might be constitutionally necessary in order to effect a deprivation of life, liberty, or property—allowing Congress to leave to executive (or legislative) adjudication the determination of interests that do not fall within those categories.¹⁸³ Today, we assert that claim with much more confidence. The lengthy case for requiring federal judicial action for deprivations of life, liberty, or property is made elsewhere,¹⁸⁴ and we say a bit more about it later in this Article. To pursue that issue in depth, however, would take us very far afield. Instead, we focus here on a much narrower problem.

We are very troubled by the current practice of adjudication in administrative law whereby agencies hire statutory administrative law judges (“ALJs”),¹⁸⁵ who share the same building and office space with agency law

Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 27–28 (2010).

182 Congress could, of course, impeach and remove individual officers, but that is an ungainly way to maintain popular control over the executive machinery.

183 See Lawson, *Rise of the Administrative State*, *supra* note 37, at 1246–47.

184 See Lawson, *Appointments and Illegal Adjudication*, *supra* note 138, at 19–20.

185 See 5 U.S.C. § 3105 (2012). The Supreme Court has correctly held that these ALJs are constitutional “Officers” who must be appointed by the agency heads, acting as “Heads of Departments,” U.S. CONST. art. II, § 2, cl. 2, rather than by agency staff members. See *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018).

enforcement and prosecutorial personnel, and who initially hear administrative law cases, subject to review by the agency that made the rule and that prosecuted the case it now adjudicates, subject to deferential review by the Article III courts. To us, this violation of separation of powers principles is simply not a good idea whether or not it is constitutional.

Other great Western democracies such as the Federal Republic of Germany, the French Republic, and the Italian Republic all have a separate system of ALJs serving in their own building and enjoying the equivalent of tenure during good behavior. Comparative constitutional law thus suggests that the U.S. administrative law system is primitive and underdeveloped.

We therefore propose that all the current ALJs assigned to agencies whose actions deprive a person of life, liberty, or property be defunded and that Congress should appropriate funds to create new Article III Administrative Law Courts, the judges of which should be nominated by the President and confirmed by the Senate.¹⁸⁶ These new Article III judges should be called “Federal Administrative Law Judges,” and they should be given tenure during good behavior and Article III salary guarantees. Funds should be appropriated to build a new Federal Administrative Law courthouse where those judges will not rub shoulders with prosecutors in the cafeteria, as is presently the case. We would pay the Article III ALJs the same salary as is paid to current statutory ALJs, and we would also give them the same support staff of clerks and secretaries. But we would limit their jurisdiction to only hearing cases coming from the commission or board or cabinet department from which they originally came.¹⁸⁷ As vacancies occur when ALJs retire or die, we would rely on presidential nomination and senatorial confirmation to pick new ALJs.

Our proposal would not apply to the hundreds of statutory ALJs and hearing examiners who decide Social Security or disability cases or who rule on tax and immigration claims. The ALJs who we would turn into Article III judges would be initially those in the EPA, the NLRB, the FCC, the FTC, FERC, the SEC, and OSHA. This would add only about 200 new federal judges to the current Article III structure. Given that Western democracies like Germany, France, and Italy all have a separate civil-service-protected administrative law judiciary, which is not in communication with prosecutors or rulemakers, and which differs from the ordinary civil and criminal law courts, we think this reform borrows something valuable from European administrative law.

We think an argument can be made that the right to civil jury trial should, *as a policy matter*, be available in administrative law cases where the government is bringing an enforcement action, even though the Supreme Court ruled this was not necessary in *Atlas Roofing Co. v. Occupational Safety &*

186 For a similar proposal, see Rappaport, *supra* note 26, at 142.

187 Professor Rappaport advocates a more generalist approach, in which Article III administrative judges could hear cases from any agency as long as it was within the judge’s specialized expertise. *See id.* at 142–43. This particular devilish detail definitely merits further discussion.

Health Review Commission.¹⁸⁸ Civil jury trial is most important not in civil suits between two private persons, but in civil enforcement actions where the government is bearing down hard, and perhaps justifiably, on an individual or a business.

We are acutely aware of the fact that jury trial in American civil and criminal law cases is now being overwhelmingly replaced by arbitration and settlement on the civil law side and by plea bargaining on the criminal law side. Ninety-five percent of all American criminal law cases are now decided by plea bargaining.¹⁸⁹ In light of these facts, we think it would be a mistake as a policy matter to use traditional common-law twelve-person juries to decide facts in administrative law. We propose instead to use a mixed bench of one United States Administrative Law Judge and two administrative law jurors. The jurors should be laypeople, who do not work for the government at any level and who are suggested by the agency whose work is being reviewed or by the litigants as having expertise in the relevant field of law. The United States Administrative Law Judge should conduct voir dire to determine that the proposed lay judges are impartial and are qualified to be a lay judge in the field of law which is under review. There should be no use of preemptory challenges.

We would allow a verdict of damages or an injunction to be appealed from the new Article III Administrative Law Judges directly to the relevant federal circuit court of appeals, sidestepping the current system of the agency judging cases that arise out of a rule it made and which its prosecutors enforced. To us, the current administrative law process makes the agencies judges in their own cause, contrary to the rule of *Dr. Bonham's Case*.¹⁹⁰

While we have presented our proposal as a policy prescription, at least part of this proposal for reforming the system of ALJs is constitutionally mandatory, as we now explain.

III. THE ADMINISTRATIVE STATE AND MAGNA CARTA

The American Constitution constructs a regime governed by the due process of law. This is evident in the Fifth Amendment, which provides that no person shall “be deprived of life, liberty, or property, without due process of law.”¹⁹¹ The principles represented by these words were part of the Constitution of 1788; the December 15, 1791 ratification of the Bill of Rights confirmed but did not create them.¹⁹²

Perhaps the most important, or at least the most basic, of these principles is the *principle of legality*, which says that executive and judicial actors can only act in accordance with preexisting law. This idea goes back at least as far

188 430 U.S. 442, 460–61 (1977).

189 LINDSEY DEVERS, BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, PLEA AND CHARGE BARGAINING I (2011).

190 *Dr. Bonham's Case* (1610) 77 Eng. Rep. 646; 8 Co. Rep. 113b.

191 U.S. CONST. amend. V.

192 For a lengthy argument to this effect, see Lawson, *Take the Fifth*, *supra* note 129, at 616–17.

as Magna Carta, a charter of liberty signed by King John at Runnymede in 1215 and repeatedly reissued later, most notably in 1225. Article 39 of Magna Carta reads as follows: “No free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgement of his peers or by the law of the land.”¹⁹³ The influential 1225 reissuance of this provision said:

No Freeman shall be taken, or imprisoned, or be disseised of his Freehold, of Liberties, or free Customs, or be outlawed, or exiled, or any otherwise destroyed; *nor will we not pass upon him, nor condemn him*, but by lawful Judgment of his Peers, or by the Law of the Land. We will sell to no man, we will not deny or defer to any man either Justice or Right.¹⁹⁴

This is a strong denial of executive authority to act in the absence of law. As interpolated by Edward Coke, by the seventeenth century this was understood as a guarantee that no person shall be deprived of life, liberty, or property without due process of law.¹⁹⁵ Coke’s ideas were widely popular in Puritan New England and among the American revolutionaries.

What is due process of law under the U.S. Constitution? It is a proceeding before a life tenured Article III judge who has been nominated by the President and confirmed by the Senate, with the judge being advised by enough lay people so that litigants will feel they have had the judgment of their peers. Only a judge with those qualifications, and under those constraints, can adjudicate a federal¹⁹⁶ deprivation of someone’s life, liberty, or property.

How do we know this? Where does the Constitution say it? We know it because that is just what terms like legislative, executive, and judicial power meant in 1788. We know it because of a millennium-long tradition of “due process of law” that limited both legislative and executive adjudication of private rights, especially vested property rights. . . . The whole point of dividing up governmental power among discrete institutions is to create distinct roles for each actor. The heart and soul of the judicial role is the adjudication of private rights. There are reasons why the Constitution gave the President “executive” but not “judicial” power and gave the Congress various “legislative” but not “judicial” powers. The Constitution did not define the precise contours of those powers because it assumed that readers would try to read the document honestly, and that any honest reader would know darned well that certain things just had to be done by courts, others by executives, and others by legislatures.¹⁹⁷

The modern notion that “due process of law” concerns *what procedures* federal executive agents must employ when making deprivations of constitutionally protected interests is one of the most basic and fundamental of all

193 J.C. HOLT, *MAGNA CARTA* 461 (2d ed. 1992).

194 9 Hen. III, ch. 29 (1225).

195 See Lawson, *Take the Fifth*, *supra* note 129, at 620.

196 Whether precisely the same principles inform the Due Process of Law Clause of the Fourteenth Amendment is a very difficult question that we do not address.

197 Lawson, *Appointments and Illegal Adjudication*, *supra* note 138, at 19–20.

twentieth-century constitutional mistakes. Due process of law “concerns what the ‘executive Power’ can do, not how or by what procedures it can do it.”¹⁹⁸ If there is law, the executive must comply with it. If there is no law, the executive cannot deprive people of life, liberty, or property, no matter how impressive is the set of procedures that the executive actors choose to provide or that Congress chooses to prescribe.¹⁹⁹ When dealing with executive deprivations of rights, “procedural due process,” not “substantive due process,” is the oxymoronic phrase.

Obviously, the government can cut off or reduce one’s welfare or Social Security benefits without giving you a trial and a judgment of your peers. We find the modern equation of welfare benefits with constitutionally protected property to be quite laughable and wrong.²⁰⁰ Most of the more than 2000 ALJs and hearing officers who work in the government deal with government benefits programs and thus can remain as they are without being elevated to Article III status. But as soon as a government official deprives someone of life, liberty, or property, that person needs to be part of the Article III judicial system.

When the administrative state allows executive actors to dispose of people’s lives, liberty, and property without full—and this means *de novo*—review by Article III judges, it is violating some of the most deeply rooted and fundamental precepts of the Anglo-American legal tradition. Those precepts inform, underlay, and drive the American Constitution. The administrative state, to the extent that it authorizes executive deprivations of life, liberty, and property, is an affront to Magna Carta, the Constitution, and the principle of legality.²⁰¹ We propose that all federal deprivations of life, liberty, or property be adjudicated by proper Article III tribunals.

CONCLUSION

We thus conclude with what many will consider more of a whimper than a bang. We think we can better reconcile the administrative state with the separation of powers while deflating our current system of hyperpresidentialism and eliminating many conflicts of interest that now exist. We are not calling for the elimination of *any* executive branch or independent agencies, nor are we calling for any repeal of an organic agency statute. We are simply calling for applying the spirit of article XXX of the Massachusetts Constitution of 1780—from an era that celebrated basic humanity rather than graduate degrees—to administrative law.

198 Lawson, *Take the Fifth*, *supra* note 129, at 626. For a detailed discussion of this point, see *id.* at 626, 631–44.

199 Congress can prescribe *more* procedures for executive agents to follow than the Constitution requires.

200 See Lawson, *Appointments and Illegal Adjudication*, *supra* note 138, at 18.

201 In making this claim, we stand proudly with those who made similar claims in the 1930s. See Schiller, *supra* note 35, at 406.

Intellectuals in the 1780s believed fervently in the idea that “[a]ll human beings are born free and equal,”²⁰² and in the 1860s in the United States most American intellectuals agreed with Abraham Lincoln’s statement in the Gettysburg Address that the United States was “conceived in liberty and dedicated to the proposition that all men are created equal.”²⁰³ Unfortunately, by 1900 most intellectuals in the United States and Europe no longer believed in that idea, at least in part because of the corrosive influence of social Darwinism.²⁰⁴ This explains the post-1883 rise of Jim Crow segregation in the United States. After the Holocaust and World War II, most intellectuals again came to believe in the eighteenth-century idea that “[a]ll human beings are born free and equal,”²⁰⁵ as is made evident by the Universal Declaration of Human Rights and, in the United States, by Martin Luther King, Jr.’s “I Have a Dream” speech.²⁰⁶ The original meaning of the Constitution in the 1780s and of the Fourteenth Amendment in 1868 is thus morally superior to the evolved meaning of those texts prior to *Brown v. Board of Education*.²⁰⁷

We are thus seeking to complete a full circle. From the founding of the United States through the Civil War, the “born free and equal” idea progressively, if sometimes too slowly, advanced. Following the Civil War, however, and exploding into the early twentieth century, the intellectual climate degraded into antirepublican, pro-statist ideology, which culminated in the political developments of the 1930s. After World War II, we—perhaps too optimistically, but time will tell—see the resurgence of proupublican, proliberty ideas. The 1930s should thus be viewed as a trough on the graph of human progress, not as an ideal to be “built out” by modern institutions.

We think we are proposing a progressive reform, which expands individual rights, especially rights to due process of law, and which puts Congress back in the business of making major policy. We think we are bringing the zeitgeist of the Enlightenment, the founding, and the Fourteenth Amendment into an administrative state which routinely violates individual liberty and equality because all too much of it was forged during the despicable era of the 1930s.

202 Universal Declaration of Human Rights, *supra* note 126.

203 Lincoln, *supra* note 112.

204 To be sure, the term “social Darwinism” was not commonly employed until after the 1940s, when Richard Hofstadter published his influential 1944 book *Social Darwinism in American Thought*. See Thomas C. Leonard, *Origins of the Myth of Social Darwinism: The Ambiguous Legacy of Richard Hofstadter’s Social Darwinism in American Thought*, 71 J. ECON. BEHAV. & ORG. 37, 39–40 (2009). We are using the term to describe a family of theories that seek to draw morally and politically salient distinctions across persons on bases other than those persons’ choices, whether or not those theories strictly trace their origins to (mis)interpretations of Darwinian biology. There is no doubt that some such family of theories profoundly influenced the Progressive Era. See *id.* at 37.

205 Universal Declaration of Human Rights, *supra* note 126.

206 Martin Luther King, Jr., Remarks at the March on Washington: “I Have a Dream . . .” (Aug. 28, 1963), <https://www.archives.gov/press/exhibits/dream-speech.pdf>.

207 347 U.S. 483, 488 (1954).