

“Democratic Experimentalism”: A Separation of Powers For Our Time?

Jamison E. Colburn†

The American administrative state often looks like Hobbes’ Leviathan itself.¹ It makes and changes law on a scale and with an inscrutability that are scarcely to be believed. Its agencies at times seem rigidly bureaucratic while at others cravenly partisan and political. They are unlike anything contemplated at the Founding, yet they exist in an environment that would crush anything less powerful or pervasive. Most importantly, though, the bases of federal agencies’ legitimacy and authority have been matched in their ambiguity only by that of how our constitutional traditions tolerate them.

A new school of thought integrating different critiques of the administrative state is now seeking to revolutionize the Leviathan. It is called “democratic experimentalism” and it describes, while also trying to facilitate, new deliberative regulatory structures. It proposes to recreate a participatory democracy out of the technocratic and impenetrable pieces of the administrative state. Across diverse spheres once run by experts far remote (both physically and socially) from the citizens and localities concerned, pragmatic innovations have led to newly participatory and collaborative models. The academics who call themselves democratic experimentalists have sought to explain how certain of these instances share foundational similarities.

This article argues that much of the scholarship forming this new model misses a basic historical point about the separation of powers doctrine. It makes that point by interpreting the doctrine as an evolving discourse, exploring its historical evolution while at the same time trying to suggest what it will do to the democratic experimentalist project in the real world. This

† Assistant Professor of Law, Western New England College; J.D. Rutgers Law School; LL.M. Harvard Law School; Candidate, J.S.D., Columbia University. For terrific conversations, encouragement, and help on various drafts, I thank Libby Adler, Michael Dorf, Taylor Flynn, Archon Fung, Eric Gouvin, John Hill, Elizabeth Leong, Edward Rubin, William Simon, Peter Strauss, James Stribopoulos, Robert F. Williams, participants in the Rutgers-Camden Faculty Workshop, the Northeastern Junior Faculty Exchange, and the Tuesday Group at Columbia Law School. Comments are most welcome: jcolburn@law.wnec.edu.

1. On the identification of the modern state with Hobbes’ sovereign, see Gary Lawson & Guy Seidman, *The Hobbesian Constitution: Governing Without Authority*, 95 NW. U. L. REV. 581, 626 (2001), stating “[i]f congressional paralysis is really a mandate for disregarding constitutional commands, then constitutionalism is a bad joke.” As to administrative authority today in particular, it is instructive to note that of all the “rights” of sovereignty in Hobbes’ *Leviathan*: the authority to make “Rules” and to judge conclusively whose “Opinions” or “Doctrines” were true and consistent with the sovereign’s objectives were among the most vital. See THOMAS HOBBS, *LEVIATHAN* 96-102, 122-46 (Norton Critical Ed. 1997) (1651).

interpretation comes to this: the separation of powers is a powerful mechanism of opposing governmental innovation. It has played a profound role in shaping the administrative state. In fact, its ambivalent pieces were largely responsible for that pillar of the administrative state, the Administrative Procedure Act (APA), passed in 1946.² And this article hypothesizes that that episode is highly instructive to democratic experimentalists of today. As I argue below, the APA was at base a *détente* between two opposing theories of the separation of powers under modern circumstances, one of which was quite like democratic experimentalism today. Indeed there is reason to believe that a conflict very similar to the one behind the APA is framing the current constitutional-political agenda, cutting a now familiar arc between pragmatic and juridical affects toward governmental authority.

I. INTRODUCTION

Through several practical and philosophical constructs, democratic experimentalists are theorizing a transformation of courts, agencies, legislatures, and publics as institutions. These core constructs include: (1) problem-oriented pragmatism; (2) coordinated decentralization; (3) participatory transparency; and (4) collaboration as a premise for political action of all kinds.³ They have been hard-won:⁴ they reflect worldliness

2. Administrative Procedure Act of 1946, Pub. L. No. 79-404, 60 Stat. 237 (codified as amended at 5 U.S.C. §§ 551-706 (1994)).

3. Several texts directly consider “democratic experimentalism” or some of its components as a general, theoretical endeavor. See generally KAI N. LEE, COMPASS AND GYROSCOPE: INTEGRATING SCIENCE AND POLITICS FOR THE ENVIRONMENT (1993); ROBERTO MANGABEIRA, DEMOCRACY REALIZED: THE PROGRESSIVE ALTERNATIVE (1998); WILLIAM H. SIMON, THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT: LAW, BUSINESS, AND THE NEW SOCIAL POLICY (2001) [hereinafter SIMON, COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT]; Joshua Cohen & Charles Sabel, *Directly Deliberative Polyarchy*, 3 EUR. L.J. 313 (1997); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998) [hereinafter Dorf & Sabel, *Democratic Experimentalism*]; Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Experimentalist Government*, 53 VAND. L. REV. 831 (2000) [hereinafter Dorf & Sabel, *Experimentalist Government*]; Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 GEO. L.J. 257 (2001); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551 (1997); Susan Sturm, “Second Generation” *Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001). While it is by now equal parts constitutional law, political and social theory, and economics, each of these is motivated by its own “case study” describing features common to several local, collaborative efforts to address public problems otherwise unsolved by markets and/or the primary regulatory structures of the larger state.

4. See DEWITT JOHN, CIVIC ENVIRONMENTALISM: ALTERNATIVES TO REGULATION IN STATES AND COMMUNITIES 40-45, 125-97, 280-97 (1994) [hereinafter CIVIC ENVIRONMENTALISM]; CHARLES F. SABEL ET AL., BEYOND BACKYARD ENVIRONMENTALISM 9-16 (2000) [hereinafter BEYOND BACKYARD ENVIRONMENTALISM]. Collaborative partnerships in ecosystem restoration, for example, have come about largely as a result of the failures of centralized, command-and-control organizational forms like those predominant since the New Deal. See CIVIC ENVIRONMENTALISM, *supra*; BEYOND BACKYARD ENVIRONMENTALISM, *supra*. Likewise, market-sensitive community economic development arrangements have replaced generations of failed “gentrification” programs carried on by regulatory fiat and/or tax-and-spend

toward regulatory politics as much as any intellectual vision. Nonetheless, at their strongest they aspire to reconceive of legal authority in a “post-administrative state.”⁵ Each construct has its own rich history at all levels of governance and political thought, but for reasons of scope, this article can render only crude sketches of them.

The form of problem-oriented pragmatism can be summed in the insistence “that thought is instrumental (the truth or value of an assertion lies in what it can do for us) and contextual (assertions should be interpreted in the social circumstances in which they arise).”⁶ This is the same form of pragmatism that viewed democracy itself as a process of inquiry and learning.⁷ The second core construct, coordinated decentralization, recognizes that all citizens must act out of local knowledge (if any knowledge at all) and that the highest and best function of any centralized authority is to empower while simultaneously disciplining local authorities to better learn on behalf of and then to serve those local publics. That discipline usually takes the form of what is called “continuous monitoring” of local units by some centralized authority capable of pooling information and benchmarking performances among them.⁸ Finally, collaborative structures that allow autonomous participants to deliberate by becoming each other’s critics form the participatory linkages between the various constructs of democratic experimentalism’s vision. Without collaboration, real learning about shared ends and available means is severely hampered.⁹

The Environmental Protection Agency’s (EPA) “Toxic Release Inventory,” a program celebrated by democratic experimentalists, is supposed to exemplify each of these in producing the very sort of regulatory regime advocated. By requiring broad-based information about toxics use and release and making that

boondoggles. SIMON, COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT, *supra* note 3, at 17-54.

5. See generally Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. Rev. 875 (2003) [hereinafter Dorf, *Legal Indeterminacy*].

6. William H. Simon, *Solving Problems v. Claiming Rights: The Pragmatist Challenge to Legal Liberalism* 4 (2002) (unpublished manuscript, on file with author).

7. *Id.* See generally ROBERT H. WESTBROOK, JOHN DEWEY AND AMERICAN DEMOCRACY (1991).

8. Dorf & Sabel, *Experimentalist Government*, *supra* note 3, at 283-89, 316-23 (describing a “new form of deliberation”). This “new form of deliberation” is synthesized from decentralized and participatory partnerships that comprise larger, integrated wholes pooling experiences among units the better to improve all according to achievable benchmarks. See CIVIC ENVIRONMENTALISM, *supra* note 4, at 271-82 (describing the inherent advantages of states and localities as adaptive environmental regulators); see also Archon Fung, *Accountable Autonomy: Toward Empowered Deliberation in Chicago Schools and Policing*, 29 POL. & SOC. 1 (2001) (describing “practical deliberation” resulting when the Chicago Public Schools and the Chicago Police Department created opportunities for ordinary citizens to “participate continuously and directly in the micro-governance of two important institutions of urban life: schools and police”).

9. See Sturm, *supra* note 3, at 470-76 (describing collaborative projects between managers and employees resulting in better workplace sexual harassment policy compliance); see also CIVIC ENVIRONMENTALISM, *supra* note 4, at 165-97 (describing stakeholders in Everglades restoration project). This collaboration resulted in vastly superior progress compared to the litigation model that was pursued to a “legal stalemate.” CIVIC ENVIRONMENTALISM, *supra* note 4, at 165-97.

data widely available, searchable, and interpretable, the EPA has empowered local publics to do what it has shown itself incapable of doing: bring the right kinds of pressure to bear on polluters to innovate their own best pollution solutions.¹⁰ In theory, it anticipates a transformation of how we regulate pollution.

With fuller explanations, the constructs comprise a unified theory of regulation and freedom.¹¹ It is this “democratic experimentalist” theory which is prompting increasingly critical questions about the administrative state itself. The organizational power and impenetrability of agencies have become corrosive influences in many ways, and finding usable leverage against them while not at the same time falling victim to various pre-administrative state traps constitutes a broad-based agenda. The separation of powers has been the tool of choice in that tradition. But while the separation of powers has always been a loose collection of ideals at most, rather than some set of foundational constants, it is today subject to massive interpretive ambiguities. It produces puzzlingly inconsistent results, yet that seems to detract from its ideals’ rhetorical force hardly at all.

On this point, this article’s argument critiques the democratic experimentalist vision without criticizing the constructs. First, this article argues that the separation of powers contains no definite institutional-legal tradition. It is a collection of ideas and ideals. Second, this article argues that

10. See generally Karkkainen, *supra* note 3. Serious questions remain regarding TRI’s viability as a replacement for EPA’s other pollution control regimes. *Id.* at 360-70. But Karkkainen is persuasive that it has achieved the kind of participatory self- and local-regulation that none of EPA’s marquee, command-and-control programs have. See *id.* at 294-331.

11. See generally Dorf & Sabel, *Democratic Experimentalism*, *supra* note 3. Many precursors to the current generation of experimentalists dot the landscapes of political, social, and constitutional theory. See generally JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* (Swallow Press 1954); CAROLE PATEMAN, *PARTICIPATION AND DEMOCRATIC THEORY* (1967); RICHARD HOFSTADTER, *THE IDEA OF A PARTY SYSTEM: THE RISE OF LEGITIMATE OPPOSITION IN THE UNITED STATES, 1780-1840* (1969); JEFFREY PRESSER & AARON WILDAVSKY, *IMPLEMENTATION* (1969); JANE MANSBRIDGE, *BEYOND ADVERSARY DEMOCRACY* (1980); MICHAEL SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982); DAVID HELD, *MODELS OF DEMOCRACY* (2d ed. 1998) (providing compact exploration of “progress” of democratic theory toward participatory, “experimentalist” principles). There is also an important body of literature in the realm of social theory on the role of what social scientists now call “methodological individualism.” See generally ROBERTO MANGABEIRA UNGER, *KNOWLEDGE AND POLITICS* (1975); ALASDAIR MCINTYRE, *AFTER VIRTUE* (1982); JON ELSTER, *SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY* (1983); John Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 *PHIL. & PUB. AFFS.* 223 (1985).

Finally, Kauffman, Simon, and others have served as important precursors for democratic experimentalism. See generally HERBERT KAUFFMAN, *THE FOREST RANGER: A STUDY IN ADMINISTRATIVE BEHAVIOR* (1960); HERBERT SIMON, *ADMINISTRATIVE BEHAVIOR* (1957); MICHAEL LIPSKY, *STREET LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES* (1980); RICHARD NELSON & SIDNEY WINTER, *AN EVOLUTIONARY THEORY OF ECONOMIC CHANGE* (1982); ROBERT C. CAMP, *BENCHMARKING: THE SEARCH FOR INDUSTRY BEST PRACTICES THAT LEAD TO SUPERIOR PERFORMANCE* (1989). It must also be born in mind, though, that others may be converging (from within different traditions) on the same commitments, philosophical and otherwise. See generally JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* (William Rehg trans. 1996).

many of the underlying objectives and assumptions in democratic experimentalism are very similar to some of those which formed our modern Leviathan in the first place, that they are in essence one interpretation of an ambivalent collection of ideas and ideals. But this is a complex claim and to advance it requires that we consider three very different timeframes: (1) the emergence of the modern British Constitution and its creation of the Anglo-American separation of powers; (2) the ratification of the United States Constitution and its modernization of the separation of powers; and (3) the first half of the twentieth century and its framing of the administrative state we know. Consideration of the last timeframe is confined in this study to the shaping of the APA. But to do all that requires the introduction of several pragmatic analytical constructs (regarding rules, rulemaking, and authority both legal and institutional) requiring a substantial exegesis.

Roughly the first half of the study is devoted to the formation of the modern separation of powers in the late seventeenth and eighteenth centuries while roughly the last half is devoted to its radical overhaul throughout the twentieth century. More specifically, Part II sketches four major political ideals that will be familiar to some, what shall be referenced as “ancient” versus “modern” liberty and a rationalization of governmental functions versus a balancing of power. This article does so through an examination of the emergence of the modern British Constitution and the ratification of the United States Constitution. Part III highlights the pragmatic analytical distinctions through which an “administrative function” connects with the traditions that emerged from those two constitutional origins. Part IV traces the institutional realities of this administrative function and how it was innovated from within the traditions of the separation of powers throughout the first half of the twentieth century. Finally, Parts V and VI consider a compromise lying at the intersection of the traditional separation of powers and the administrative function and how this compromise (and others like it) constitutes the real challenge for democratic experimentalists today.

II. LIBERTY: THE SEPARATION OF POWERS AND CONSTITUTIONAL GROWTH

Common knowledge links the separation of powers to liberal political theory¹² and several constitutional theorists have linked it to civic republican political theory.¹³ Whatever philosophy or historiography ultimately arbitrate

12. See generally BERTRAND RUSSELL, A HISTORY OF WESTERN PHILOSOPHY 637 (Simon & Schuster 1972) (1945) (“[t]he doctrine that the legislative, executive, and judicial functions of government should be kept separate is characteristic of liberalism”). This doctrine “arose in England in the course of resistance to the Stuarts, and is clearly formulated by Locke, at least as regards the legislature and the executive. The legislative and executive must be separate, he says, to prevent abuse of power.” *Id.*

13. See, e.g., BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1969); GERALD STOURZH, ALEXANDER HAMILTON AND THE IDEA OF REPUBLICAN GOVERNMENT (1970) (describing features of republican

in the interminable dispute between those two, though, basic intuition couples the separation of powers to the ideas of liberty and legal change. So rather than fight another battle between two philosophical paradigms, this article will operate under the assumption that it is far more important to understand the nature of these two bodies of thought and how they relate to the separation of powers. That is the subject of Part II.

The separation of powers doctrine emerged as a core element of Anglo-American constitutional politics in the seventeenth and eighteenth centuries, at roughly the same time our conceptions of the rule of law and liberty were becoming tightly coupled. Their relationship was then becoming the now-overused maxim that the “Rule of Law” must exist for there to be secure liberty of any sort.¹⁴ But American Progressivism and Legal Realism each mounted sustained attacks on these doctrines (and on their coupling) at different points in the twentieth century. To brutally simplify those critiques for the moment, Progressives argued that the liberty the doctrine was to serve was much more complicated than had been thought, while many Realists argued that strict institutional separations in legal changes did not necessarily do well by liberty

thought in late eighteenth century generally and tracing Jeffersonian-Republican opposition to Federalist (Hamiltonian) finance); Robert E. Shalhope, *Toward a Republican Synthesis: The Emergence of An Understanding in American Historiography*, 29 WM. & MARY Q. 49 (1972); see also LANCE BANNING, *THE JEFFERSONIAN PERSUASION: EVOLUTION OF A PARTY IDEOLOGY* 21-69 (1978) [hereinafter BANNING, *JEFFERSONIAN PERSUASION*] (describing ties of Jeffersonian Republicans to opposition “commonwealth” tradition of earlier eighteenth century Britain).

14. See Richard H. Fallon, Jr., “*The Rule of Law*” as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 7-10 (1997). Compare JOHN RAWLS, *A THEORY OF JUSTICE* 235-42 (1971), with FRIEDERICH A. HAYEK, *THE POLITICAL IDEAL OF THE RULE OF LAW* 33-45 (1951). Late liberal theorists have, in fact, usually equated “the rule of law” with their very concept of liberty. See generally FRIEDERICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* (1960); A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION LV-LXVI*, 107-22, 213-67 (Liberty Fund 8th ed. 1982) (1915). Because in democracies, legitimate majorities can usually change even the most fundamental of laws at will, “the Rule of Law” for this group has come to mean some kind of *ex ante* procedural structure which must stage and validate legal changes if they are to be legitimate. Institutional/procedural hurdles like this often answer to the name “separation of powers” in one sense or another. See Jean Hampton, *Democracy and the Rule of Law*, in *NOMOS XXXIV: THE RULE OF LAW* 13, 32-42 (Ian Shapiro ed., 1994). Beyond that, the constitutional concept of “the Rule of Law” is today probably on the verge of disintegration. See Fallon, *supra* (propounding four distinct paradigms of “the Rule of Law” as a constitutional concept). What the concept even means in the administrative state is the subject of seemingly endless dispute and what its normative implications are is deeply muddled. Cf. *id.* at 4 (noting administrative agencies frustrate theories of the rule of law). In order for such frustration to be understood, it must be seen as a “regulative ideal, not a mirror of what is done.” *Id.* Professor Fallon, in teasing out four distinct “ideal types,” “emphasized conflict” among them, and even suggested several more basic “elements” from which any number of distinct visions of the concept might be constituted. *Id.* at 8-24, 36. Judith Shklar was equally wary of the concept, arguing that contemporary uses of the ideal fail because they “have no sense of what the political objectives of the ideal . . . originally were and have come up with no plausible restatement” of the concept under modern circumstances. Judith N. Shklar, *Political Theory and the Rule of Law*, in *THE RULE OF LAW: IDEAL OR IDEOLOGY* 1, 1 (Allan C. Hutchinson & Patrick Monahan eds., 1987). While Ronald Cass, a noted administrative law scholar, recently denied that the concept had become “an entirely empty vessel,” the only “core to the concept” he could muster was the “obvious point that freedom from control by the will of others is an enduring human value.” RONALD A. CASS, *THE RULE OF LAW IN AMERICA* 2-3 (2001).

or the rule of law.¹⁵ Both levelled potent criticisms of the separation of powers as they knew it: an eighteenth-century institutional tradition.¹⁶ Both had enormous repercussions.

It is fair to say that the separation of powers was completely transformed as a result. Unfortunately, it is usually said in radically over-simplified terms. Part of this article's critique of democratic experimentalism as it is developing today is a reconsideration of this transformation. This article locates the center of the transformation in the politics leading to the APA rather than in various other twentieth century legal developments that are often given that credit. Our separation of powers has remained poorly fit to the realities of modern administrative governance, because of this basic misunderstanding of the APA as a political-intellectual compromise.¹⁷ Today, as a result, the power administrative agencies wield in making and changing law goes largely unchecked while the functions of courts, agencies, Congress, and the President go largely untheorized. Much of this is because the Act was badly misunderstood virtually from its inception and that misunderstanding is one with which contemporary administrative lawyers are now grappling (albeit without much help from academia).¹⁸

15. See *infra* notes 210-21 and accompanying text.

16. This is not to say that they saw no moral dimension to the separation of powers. To the contrary, how legally protected liberties are to be rearranged and how resistant they are made to future rearrangements has always been most of the moral utility of the separation of powers. See M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 323-45 (2d ed. 1998). That is, to be morally valuable, the separation of powers must serve some first-order objective like liberty maximization or the rule of law. Otherwise it comes to nothing more than an empty vessel (under the control of the dead hand of the past), and one that seems sometimes to endanger other, undeniably first-order values like democracy and justice. See generally Frank I. Michelman, *Law's Republic*, 97 *YALE L.J.* 1493 (1988); Frank I. Michelman, *1985 Supreme Court Term—Foreword: Traces of Self-Government*, 100 *HARV. L. REV.* 4 (1986) [hereinafter Michelman, *Traces of Self-Government*].

17. I call upon two different diagnoses of the misfit between the separation of powers and the modern state in this study. Compare MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE* (1999) (arguing that judiciary does and of necessity must do most work of modern governance), with Dorf, *Legal Indeterminacy*, *supra* note 5 (arguing that courts as institutions rather crude and unlikely to generate persistently high-quality outputs).

18. This misunderstanding stems from an incomplete appreciation of the separation of powers as a rhetoric and conceptual tradition. It is an appreciation of what I shall call the “legalist” vision of the separation of powers to the virtual exclusion of the “experimentalist” one—both of which have existed in parallel and essentially as competitors at least since the end of the Progressive Era. See Parts IV, V. As a marker for this point it is true that modern administrative law as an architecture has developed rather sophisticated mechanisms for the judicial protection of individual entitlements in the midst of bureaucratic law making. See STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES* 780-885 (5th ed. 2002) (describing the numerous due process doctrines and their relationship to administrative authority more generally). But it has done far worse by the public stakes therein.

To focus this obviously broad reconstruction of the Act, Part VI considers certain of what many feel are “gaps” in contemporary administrative law—inconsequential yet ubiquitous at the same time. They are the class of bureaucratic outputs that are *exempt* from the APA-structured procedural tracks, which nonetheless determine *vastly* greater amounts of bureaucratic behavior than their covered cousins. These supposedly unimportant subjects of administrative law are actually my proof of how *wrong* the conventional model is—and what the current generation of legalists and experimentalists are actually arguing about (albeit from different

A. An Historical View of Separating Power: The Means to an Evolving Set of Ends

Liberals and civic republicans are both forceful partisans when it comes to theories of liberty and each proffers benchmarks for the value and meaning of a “separation of powers.”¹⁹ But we can bracket that debate here by using a somewhat rougher distinction between modern and ancient liberty as political/constitutional concepts.²⁰ Where ancient liberty prioritizes control

angles to this point). These instruments should be themselves significant aspects of the norms controlling bureaucratic power and authority in contemporary circumstances but because of how pervasive the prevailing interpretation of the Act is, we may refer to them as “exempt rules.” See KENNETH C. DAVIS ET AL., ADMINISTRATIVE LAW AND PROCESS § 6.4, at 307 (3d ed. 1999) (describing a class of “rules” under the APA “that can be adopted without any procedures”). Of course what they are in practical terms are unchecked exercises of power and authority by and within bureaucracies, something Part VI explores as a failing of contemporary administrative law.

19. I grant this assertion in the hopes of avoiding any engagement in those disputes here. That conflict itself is perhaps best thought of as a “social fact” like those which several contemporary constitutional theorists have sought to *assume* in reconstructing ideals of participation and justice from more recognizably “practical” premises of large, multi-ethnic societies. See John Rawls, *Justice as Fairness: Political Not Metaphysical*, in JOHN RAWLS: COLLECTED PAPERS 388 (Samuel Freeman ed., 1999). The reasons this article diverges from the firm professional disagreement among clearly talented and diligent historians, some of whom find liberal political ideals at the core of modern constitutionalism and some of whom find what is usually called “civic republican” ones in the very same spaces. Compare MICHAEL KAMMEN, SPHERES OF LIBERTY: CHANGING PERCEPTIONS OF LIBERTY IN AMERICAN CULTURE (1986) (tracing liberal, civic republican and other understandings of liberty), with GREGORY S. ALEXANDER, COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776-1970 (1997) (tracing liberal and civic republican conceptions of property). Of course the master narrative that historians of Anglo-American constitutionalism often use as a polestar is Gordon S. Wood’s, *The Creation of the American Republic*, a grand synthesis which argues, to brutally over-simplify, that if the philosophy motivating the move for independence was more civic-republican in nature then the philosophy framing the configuration of the Constitutional text was more liberal in its nature. See generally GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 (1998).

20. Dichotomizations like this can be found throughout political theory, constitutionalism, and their histories, although the most famous single source today is Berlin. See generally Isaiah Berlin, *Two Concepts of Liberty*, reprinted in THE PROPER STUDY OF MANKIND: AN ANTHOLOGY OF ESSAYS 191 (Henry Hardy et al. eds., 1997). This article devotes its energies to the concepts of liberty for simplicity’s sake, but it is clear that both republicanism and liberalism have their own interrelated conceptions of political economy, justice, and the rule of law. See generally MICHAEL SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (2d ed. 1999) (exploring liberalism’s conception). For explorations of republicanism’s, see Cass R. Sunstein, *The Partial Constitution* (1993).

A word is in order, though, about why I do not use “negative” and “positive” liberty, the most popular dichotomization of the concept. Berlin’s famous account of negative and positive liberty traces a similar line in narrative and historical terms, at different points aligning Locke, Jefferson, and Mill against Constant, Rousseau, and Marx. Berlin, *supra*, at 193-206. This more common negative/positive terminology suffers, I believe, from unnecessary indeterminacies (not to mention over- and misuse). On the one hand, what is generally referred to as “negative” liberty, the right to be “free from” governmental interference, of course, breaks down as soon as one expects government to vindicate rights of tort, property, and contract. See generally EDWARD S. CORWIN, LIBERTY AGAINST GOVERNMENT: THE RISE, FLOWERING AND DECLINE OF A FAMOUS JURIDICAL CONCEPT (1948). On the other hand, what is generally referred to as “positive” liberty, the right to exercise control over otherwise destructive members of a society, has often flirted with totalitarianism. See MILTON FRIEDMAN, CAPITALISM AND FREEDOM 108-18 (1962). This led Gerald MacCallum to posit that the two are really just semantic mirror images of one another. See Gerald C. MacCallum, *Negative and Positive Freedom*, 74 PHIL. REV. 312 (1967). For this reason I believe this dichotomy obscures more than it

over the making of the rules within which life is to be pursued, modern liberty prioritizes the freedom from as many such rules as is maximally feasible consistent with peaceable coexistence among fellow libertarians.²¹ Modern liberty as a construct is usually associated with the American Founding, ancient liberty that which is just as often labelled the “other” tradition, the conception of those with whom the Americans supposedly shared the least.²² For example, ancient liberty includes a theory of property that makes it of instrumental value to larger goods, like social virtue, societal stability, and the protection of communities from “corruption.” Modern liberty sees property as the basis of entrepreneurial expansion, wealth maximization, individual self-satisfaction, and limitless societal growth. Property’s value is whatever the individual

reveals.

Moreover, Berlin himself singled out Constant (who originated the ancient/modern distinction borrowed here) as having been the most assiduous theorist of the antagonism for analytical purposes. Berlin, *supra*, at 234. Berlin comments that:

Constant . . . pointed out that the transference of a successful rising of unlimited authority, commonly called sovereignty, from one set of hands to another does not increase liberty, but merely shifts the burden of slavery. He reasonably asked why a man should deeply care whether he is crushed by a popular government or by a monarch, or even by a set of oppressive laws.

Id. I adopt it here for pragmatic reasons, though: I believe it conveys the major point I wish to make which is that two distinct justificatory paradigms of the separation of powers doctrine were each synthesized at different times and that their major proponents were largely clustered as an historical matter. I do not, however, wish to imply that the two form anything like a rigid dichotomy or that one or another is necessarily a better fit with “modern” or “post-modern” society for historicist reasons.

21. One may employ the ancient/modern distinction for reasons unrelated to Constant. The ancient notions of liberty go much wider and deeper than just the “civil liberties” of participation in government with which we as moderns often identify the Aristotelian tradition. Participation as such is only one part of a broad *hierarchy* of ends short-handed by this notion. As Philip Pettit has argued most recently, the liberty that is linked to the *vita activa* of social and political life is a liberty of “self-determination” materializing organically from within a society or community *as a whole* and it has its origins in Roman philosophy (which, in turn, has its origins in Aristotelian philosophy). See PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 19, 283-90 (1997); see also QUENTIN SKINNER, *LIBERTY BEFORE LIBERALISM* (1999). In contrast, the liberty that prioritizes the individual and his or her satisfaction of individuated preferences—a “freedom from interference”—whatever else may broaden its ambit (and the “methodological individualism” of modern social science tends to do so), arrived in political history at a much later moment in time. See HAYEK, *CONSTITUTION OF LIBERTY*, *supra* note 14, at 11-38, 397-411; John Lawrence Hill, *A Third Theory of Liberty: The Evolution of Our Conception of Freedom in American Constitutional Thought*, 29 *HASTINGS CONST. L.Q.* 115, 121-29 (2002).

22. See, e.g., DANIEL BOORSTIN, *THE AMERICANS: THE COLONIAL EXPERIENCE* (1958); LOUIS B. HARTZ, *THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION* (1955); Berlin, *supra* note 20, at 230.

In unpacking the intellectual baggage of the dichotomies, Philip Pettit argued that Berlin’s deepest point was that “[w]hile negative liberty is an enlightenment value with which we can all now identify . . . positive liberty is the sort of ideal that appeals only to such celebrants of pre-modern times as the romantic aficionados of counter-Enlightenment.” PETTIT, *supra* note 21, at 18; cf. Berlin, *supra* note 20, at 234 (considering problems pursuant to negative individual freedom). “Constant . . . saw that the main problem for those who desire ‘negative,’ individual freedom is not who wields [sovereign] authority, but how much authority should be placed in any set of hands. For unlimited authority in anybody’s grasp was bound, he believed, sooner or later, to destroy somebody.” Berlin, *supra* note 20, at 234. Pettit argues this alienation “serves us ill in political thought,” and while I largely agree with him, my purposes in employing this particular distinction are mostly expository. PETTIT, *supra* note 21, at 18.

makes of it.²³

Theories of modern liberty coalesced in what is sometimes called the British Enlightenment beginning in the seventeenth century. Largely because of the philosophy of Hobbes, Locke, Hume, and Ferguson (and later that of Millar, Smith, Kant, and several others), a conception of liberty emerged which prioritized the freedom from governmentally imposed constraint, emphasizing the dynamism and adaptive capacities of individuals as such; their ingenuity in trading commodities as compared to their collective distribution of communal entitlements.²⁴ It sought to put government's legitimacy upon foundations of consent, of actual or implied agreement among the citizens as diverse individual stakeholders, where government acts for the fullest possible effectuation of each individual stake.²⁵

In contrast, the ancient concepts of liberty put government's legitimacy in its ability to enable virtuous self-fulfillment by its autonomous subjects, those who are rulers and ruled at one and the same time.²⁶ Participants in the political

23. See ALEXANDER, *supra* note 19, at 7-15; see also JOYCE APPLEBY, LIBERALISM AND REPUBLICANISM IN THE HISTORICAL IMAGINATION (1992). Jennifer Nedelsky argues in *Private Property and the Limits of American Constitutionalism* that private property constituted the only truly first order value for Federalists like Madison and Hamilton. JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 16-66 (1990). She complicates this with certain "republican" principles by teasing out of the speeches and writings of James Wilson and Gouverneur Morris (two other high Federalists) a certain mutual structural dependence of liberty and property upon government's ability to effectuate just redistributions periodically and on the direct, deliberative participation of the people, both affronts to Madison and Hamilton. *Id.* at 67-140, 210-22. But she remains sure that the Madisonian theory was the dominant and remains today the characteristically "American" arrangement of liberty, property, and justice. *Id.* at 3-10, 170-83, 202, 215-16.

24. Several ideological barriers were transformed through the rise and spread of the market economy in seventeenth-century England. See JOYCE OLDHAM APPLEBY, ECONOMIC THOUGHT AND IDEOLOGY IN SEVENTEENTH-CENTURY ENGLAND (1978). Various distinct causes and consequences thereof may be separated out for attention. Nonetheless, many of them share a common heritage as reactions to older theories grounding the roles of the polity and citizen in ancient (or "humanist") premises and/or feudal law and medieval divine right monarchy. See QUENTIN SKINNER, 2 THE FOUNDATIONS OF MODERN POLITICAL THOUGHT: THE AGE OF REFORMATION 113-78 (1984). The broadest result was the synthesis of the modern concept of the state, although that is beyond the scope of this study. *Id.* at 349-58.

25. "Natural" rights derived from natural law—endowed capacities to enjoy liberty and possess property—thus, were *means* for the inherently individualistic pursuit of a good life, the ultimate end. These philosophers argued that government maintained its legitimacy through a continued refinement of and adherence to such a contract. The articulation and defense of these political ideals as historical vocabularies leading up to the present are articulated in several works. See, e.g., LEO STRAUSS, NATURAL RIGHT AND HISTORY (1953); HARTZ, *supra* note 22; HAYEK, CONSTITUTION OF LIBERTY, *supra* note 14. See generally C.B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM (1962) (critiquing Strauss's version of natural rights theory); CLINTON ROSSITER, POLITICAL THOUGHT OF THE AMERICAN REVOLUTION (1963). A second generation has responded to the recent "civic republican" synthesis. See, e.g., JAMES TULLY, A DISCOURSE ON PROPERTY: JOHN LOCKE AND HIS ADVERSARIES (1980); ADRZEJ RAPACZYNSKI, NATURE AND POLITICS: LIBERALISM IN THE PHILOSOPHIES OF HOBBS, LOCKE, AND ROUSSEAU (1987); RUTH GRANT, JOHN LOCKE'S LIBERALISM (1987); STEVEN M. DWORETZ, THE UNVARNISHED DOCTRINE: LOCKE, LIBERALISM, AND THE AMERICAN REVOLUTION (1990).

26. The original roots of the "humanist" conceptions to which I refer are in ancient thought, i.e., the second and third centuries B.C. Of course, the "ancientness" of the liberty I treat (and of the "balance of power") is open to question, as an historical matter. These concepts began as early as Aristotle's time and have

collective who engage in the fundamentally social process of valuing within the organic polity, the body politic, comprise the free society.²⁷ That polity's virtue and its members' collective ability to place each others' fate in the hands of their fellow citizens was its hope for success and perpetuation, its continued independence and freedom from external domination.²⁸ Liberty of this kind is secure so long as the strength and security of the republic itself remains adequate to the dangers posed by its environment.²⁹

Recent revisions of modern history's narrative have established that both of these conceptions were, so to speak, "present at the creation" of our system of

played significant roles in various pre-modern theories of existence and apocalypse. Furthermore, these theories were pervasive throughout feudal Europe. That does not, however, mean that either of them originated in (or were inextricably bound to) feudal thought or law (whether in Europe or Britain). Those were effectively demolished throughout the sixteenth and seventeenth centuries. See generally GLENN BURGESS, *THE POLITICS OF THE ANCIENT CONSTITUTION: AN INTRODUCTION TO ENGLISH POLITICAL THOUGHT 1603-1642* (1992).

27. Where the liberty of the former is to be protected from (but also by) *the state*, the liberty of the latter begins and ends in one's union with the state, one's membership in and active constitution of the polity. Thus, the central premise of Lowi's path-breaking critique of the administrative state titled *The End of Liberalism* is that the *separation* between "state" and "society" had been eroded to such extent in the administrative state that it was no longer viable as an element of a descriptive political vocabulary. See THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* 92-126 (2d. 1979).

The older tradition of liberty (spread across a much longer period of time than the history of the United States, which was Lowi's focus) *identified* what we would call "the state" with what we would call its "society." See SKINNER, *supra* note 24, at 349-58. Its ancient beginnings are probably Aristotelian. See WOOD, *supra* note 13, at 48-53. But its medieval and early-Renaissance background is far more well limned. See generally J.G.A. POCOCK, *POLITICS, LANGUAGE, AND TIME* 80-147 (1971) [hereinafter POCOCK, *POLITICS, LANGUAGE, AND TIME*]; J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* 83-330 (1975) [hereinafter POCOCK, *MACHIAVELLIAN MOMENT*]; HANS BARON, *THE CRISIS OF THE EARLY ITALIAN RENAISSANCE* (1966); Joyce Appleby, *Republicanism in Old and New Contexts*, 43 *WM. & MARY Q.* 20 (1986).

28. The Mixed Constitution, most historians agree, conceived of citizenship in an ancient or "Polybian" way, which is to say as a political standing only insofar as one represented his or her sociopolitical order, doing so through direct participation. This theory was powered by an essentially fatalistic view of the body politic in time which foretold an apocalyptic ending in the future—to be forestalled so long as the polity remained in "balance." That ontology, ambiguous as it was (the polity remained balanced as long as it did not die), presumed the existence of various *causes* of decay and degeneration, e.g., that the "passions" endemic to each order, if left unchecked, would ultimately produce the polity's demise. See POCOCK, *POLITICS, LANGUAGE, AND TIME*, *supra* note 27, at 86-103.

29. Thus, as an instructive contrast with later forms of liberty, personal contribution to collective self-defense constituted the highest form of exercising one's liberty, a condition that was literally identified with the status of citizen in the *civitas libera* (as opposed to being an exaction the state coerces from individuals as a repayment for the security in individual freedom it delivers). PETTIT, *supra* note 21, at 35-36; SKINNER, *supra* note 21, at 7-13, 59-99. As "civic republican" theorists have powerfully argued more recently, for example, the discourse shaping the American Founding included many references to such ideals of freedom which are often fenced out of what some call "modern liberal democracy." See WOOD, *supra* note 13; CLINTON ROSSITER, *ALEXANDER HAMILTON AND THE CONSTITUTION* (1964) (tracing importance of civic republican ideology in Hamilton's writings); RICHARD BUEL, *SECURING THE REVOLUTION: IDEOLOGY IN POLITICS, 1789-1815* 8-49 (1972) (describing effects of competing ideologies of liberty on assumption of debt and foreign policy throughout 1790s). See generally FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* (1985); JACKSON TURNER MAIN, *THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION, 1781-1788* (1961).

nation-states.³⁰ Placing political association at the heart of human reason and “virtue,” theorists of the older tradition critique the newer’s detachment of rights, persons, and politics³¹ by excavating older doctrines of freedom which had found their way into the rhetoric of seventeenth and eighteenth century politics.³² Constitutions represented not contracts pulling people out of some

30. Each ends up looking rather ubiquitous throughout seventeenth and eighteenth century Anglo-American political thought. Cf. Joyce Appleby, *Republicanism and Ideology*, 37 AMER. Q. 461, 461 (1985) (remarking on current rediscovery of republicanism among historians). This rediscovery “produced a reaction . . . akin to the reaction of chemists to a new element. Once having been identified, it can be found everywhere.” *Id.* Wood, Bailyn, and Pocock are reported to have been the chief constituents of the “republican synthesis.” WOOD, *supra* note 13; BAILYN, *supra* note 13; POCOCK, MACHIAVELLIAN MOMENT, *supra* note 27; see MICHAEL P. ZUCKERT, NATURAL RIGHTS AND THE NEW REPUBLICANISM 150-64 (1994); see also H. TREVOR COLBURN, THE LAMP OF EXPERIENCE: WHIG HISTORY AND THE BEGINNINGS OF THE AMERICAN REVOLUTION (1965); J.R. POLE, POLITICAL REPRESENTATION IN ENGLAND AND THE ORIGINS OF THE AMERICAN REPUBLIC (1966); STOURZH, *supra* note 13; Michelman, *Traces of Self-Government*, *supra* note 16. The “liberal synthesis” is equally well pedigreed. See generally HARTZ, *supra* note 22. It is largely for this reason that I avoid the liberal/republican vocabulary and opt instead for the ancient/modern one. With the latter, at least the largest part of the methodological and over-analyzed liberal and republican conflict may be zoned out of this study.

31. This historiographical revolution in which the Americans’ intentions were complicated is recounted by Dworetz, although its salience has by now gone far beyond historiographical circles. DWORETZ, *supra* note 25, at 3-38. A pointed challenge to the coherence of natural right liberalism as such was mounted by Michael J. Sandel, in *Liberalism and the Limits of Justice*. MICHAEL J. SANDEL, IN LIBERALISM AND THE LIMITS OF JUSTICE (1982); see MCINTYRE, *supra* note 11. Pettit, however, discusses the variety of ways of ordering a conception of liberty and the weakness of opposing any two conceptions on etymological grounds. See PETTIT, *supra* note 21, at 21-50.

32. It should be noted that Pocock and Skinner both distinguish their subject matter, “civic humanism,” from “republicanism,” which Pocock at least implies is the more vulgar cousin. POCOCK, POLITICS, LANGUAGE, AND TIME, *supra* note 27, at 85; see I QUENTIN SKINNER, THE FOUNDATIONS OF MODERN POLITICAL THOUGHT: THE RENAISSANCE 77-79 (1978). Each outline as given, though, are strikingly similar to the logic of republicanism; for this reason I consider their accounts all of a piece with my concept of “ancient liberty.”

Civic humanism is a style of thought . . . in which it is contended that the development of an individual toward self-fulfillment is possible only when the individual acts as a citizen, that is, as a conscious and autonomous participant in an autonomous decision-taking community, the polis or republic.

POCOCK, POLITICS, LANGUAGE, AND TIME, *supra* note 27, at 85; see SKINNER, *supra* (discussing humanist use of term “liberty”).

The humanists . . . habitually use the term [liberty] to denote both independence and self-government—liberty in the sense of being free from external interference as well as in the sense of being free to take an active part in the running of the commonwealth but the “overriding merit” of a constitution is said to be that “it makes it equally possible for everyone to take part in the affairs of the Republic.”

SKINNER, *supra*. This is further evidenced in Pocock’s connections of his Florentines to Aristotle’s *Politics* and especially to certain ancient conceptions of the republic’s situation (and contingency) in time. Compare POCOCK, MACHIAVELLIAN MOMENT, *supra* note 27, at 3-9, with PETTIT, *supra* note 21, at 210. Pocock remarks that:

The republic or Aristotelian polis, as that concept reemerged in the civic humanist thought of the fifteenth century, was at once universal, in the sense that it existed to realize for its citizens all the values which men were capable of realizing in this life, and particular, in the sense that it was finite and located in space and time.

POCOCK, MACHIAVELLIAN MOMENT, *supra* note 27, at 3. Pettit, on the other hand, comments that:

The republican tradition has always taken a pessimistic view of the corruptibility of human beings in

“state of nature” where they had inherent or “inalienable” rights, but rather expressions of communities’ deepest, most formative common commitments and their best estimates of how to maintain their polity in perpetuity, fused to the participatory modes through which subsequent generations were to assume control of and reshape those commitments.³³ Individual liberty and property were both simply means to the fulfillment of *zōon politikon*’s (the political animal’s) essential humanity.³⁴

1. *The Anatomy of an Enduring Tension*

These two conceptions of ends have been in tension with one another throughout the history of the modern nation-state. Neither ancient nor modern concepts of liberty have ever fully bested one another in the history of Anglo-American constitutionalism. Indeed, it has never been proven conclusively that

positions of power, while being relatively optimistic about human nature as such. It generally downplayed the Augustinian fear of a wayward people who require strong leadership if anarchy is to be avoided. But it enthusiastically countenanced the Ciceronian spectre of a corruptible leadership which requires careful containment if there is not to be tyranny or despotism.

PETTTI, *supra* note 21, at 210.

33. See WOOD, *supra* note 13, at 47-49. Wood’s linkage of the American Whig tradition to the Renaissance and, beyond that, to the ancients. *Id.* Wood explained that his people (Americans) embodied “old republicanism,” whose essence lay in its “moral dimension” justifying and rationalizing the “sacrifice of individual interests to the greater good of the whole,” that is, to “the public good.” *Id.* at 53, 58; see *id.* at 47-68. This is clearly no *supplement* to the theory of natural law and natural rights, but rather the complete confiscation of its terrain. “Liberty” in Wood’s republicanism is “public or political liberty . . . equivalent [to] participation by the people in the government.” WOOD, *supra* note 13, at 24, 61. In this “Whig conception of politics a tyranny by the people was theoretically inconceivable because the power held by the people was liberty whose abuse could only be licentiousness or anarchy, not tyranny.” *Id.* at 62.

But if the rhetoric of the Revolution included at least some Spartan creed of organic, communitarian self-sacrifice, the rhetoric with which the Americans fashioned the Constitution was more “modern,” linked to the Federalist political science that transformed the ends of government and the concept of liberty. *Id.* at 606-10; NEDELSKY, *supra* note 23, at 16-95. That this supposedly “Lockean” liberty came to dominate the justifications of the founding, indeed, represented to Wood a dismantling of the classical political community. See WOOD, *supra* note 13. The “end of classical politics” consisted in large measure in the *replacement* of ancient with modern liberty, the belief that politics may only follow upon some prepolitical system of individual rights. “The people were not an order organically tied together by their unity of interest but were rather an agglomeration of hostile individuals coming together for their mutual benefit to construct a society.” *Id.* at 607. “The Americans,” in the decade following 1776, “transformed the people in the same way the Englishmen a century earlier had transformed the rulers: they broke the connectedness of interest among them and put them at war with one another.” *Id.* “Tyranny was now seen as the abuse of power by any branch of the government, even, and for some especially, by the traditional representatives of the people.” *Id.* at 608.

34. See THE POLITICS OF ARISTOTLE (Ernest Barker, trans. & ed., 1946) (Oxford 1958). One of the core texts of ancient liberty in the Anglo-American separation of powers, James Harrington’s *The Commonwealth of Oceana*, rests its republic’s (Polybian and Machiavellian) founding of legislative power upon the need to perpetuate “balance” among the personalities of society. POCKOCK, MACHIAVELLIAN MOMENT, *supra* note 27, at 383-400. This balance is chiefly achieved through the proper distribution of property, the basis and purpose of political standing in the republic. See *id.* This has probably been republicanism’s dominant contribution to American legal and political thought—the necessity to democracy of constraints on property arrangements out of the belief that political power follows property. See ALEXANDER, *supra* note 19, at 21-88, 211-40, 248-76 (linking political power to property rights).

the two are necessarily incompatible with one another under the circumstances in Britain or in the United States.³⁵ The stalemate itself is central to understanding the separation of powers for two main reasons: neither vision alone any longer does real work as a legal argument in American separation of powers given how contested the historical and philosophical particulars have become; and depending upon which of the conceptions of liberty one works from and which fragments of the separation of powers doctrine are emphasized, the constitutional meanings at issue change, sometimes dramatically. That is, what makes a distribution of power appropriate shifts, often to the tune of radically divergent objectives, and these shifts mark periods of constitutional changes and growth.³⁶

When they are used to justify some institutional tradition in particular, each of these conceptions of ends supplies the separation of powers with a point—and seemingly very different ones.³⁷ They change the meaning of democratic

35. See generally ROGERS M. SMITH, *CIVIC IDEALS: COMPETING VISIONS OF CITIZENSHIP IN U.S. HISTORY* 13-39, 407-506 (1997); Hill, *supra* note 21, at 135-60; *infra* notes 182-217 and accompanying text.

36. See *infra* notes 103-08 and accompanying text. While emphasis on one or the other construct can be decisive of many contested and critical questions, it is exceedingly rare to find accounts with clear suppositions and precepts regarding these major fissures. *Id.* For example, “power” in governance results not just from office, not just from law. It can, of course, be the result of privilege, talent, or wealth. The degree to which a “separation of powers” will control these types of leverage in governance depends largely upon one’s beliefs about liberty as a political concept. See *id.* Both of liberty’s theoretical faces offer competing, comprehensive justifications of contemporary legal-institutional architectures as a result, yet neither openly accepts the existence of the other. *Id.* Each generates its own supposedly complete theory of political economy (i.e., the relations of markets and rights to the structure of political society), citizenship (i.e., as a status and “civic myth” within the political community), and the rule of law. See ALEXANDER, *supra* note 19, at 360-77; SMITH, *supra* note 35, at 30-39, 473-506; Fallon, *supra* note 14, at 32-36, 53-54.

37. We distinguish between at least three senses of the doctrine as a whole: (1) the well-ordered conceptions of *ultimate* ends (ancient and modern); (2) the (empirical) beliefs that tending to the distributions and their consequent shares—whether of power, authority, or function—as obstacles to one another supplies a kind of security to political liberty; and (3) the specific *legal* prescriptions as they have been set to writing in authoritative legal texts. Each attaches a fundamentally different significance to assertions of and about “the separation of powers.” And that raises the most important point (explored in Part IV), the belief that an antagonistic rivalry between agencies is valuable and must, if it is rational, be empirically supported and be independent of the other two, which are not necessarily empirical by nature.

Regrettably, of all the discussion of the separation of powers throughout the American Founding, the very thing that probably was most closely associated with the “separation of powers” was this set of beliefs on distributing power, function, and authority and the arraying of shares as obstacles to each other as a security to liberty. Of course, it had yet to be subjected to rigorous empirical study. See LANCE BANNING, *THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC* 99-100, 133-35, 223-27, 246-47, 277-78 (1996) [hereinafter BANNING, LIBERTY]; JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 245-50 (1996); WOOD, *supra* note 13, at 150-61, 602-06.

Nevertheless, quite often contemporary doctrine and popular rhetoric identify this sense of the doctrine with the text and original meaning of the Constitution. *Cf.* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (“While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government”); *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991) (discussing different branches and agencies as competitors with one another and arguing that “[t]he ultimate purpose of this separation of powers is to protect the liberty and security of the governed”). This is unfortunate because it leaves us an inherited set of postulates which have since been cast into doubt by more rigorous,

accountability of agents of the state. The goods of civil and political standing, property, and other basic entitlements, completely transform in their significance as between modern and ancient liberty, natural rights theory and the polity of virtue.³⁸ Most important for our purposes, the legitimation of legal change, i.e., the roles of each institution, of public and private power, and the significance of the “public interest,” all change in their relationships to one another when the frame of reference shifts from modern to ancient “liberty.”³⁹

Throughout the modern history of Anglo-American political and legal

empiricized criteria of validity, i.e., have often been found substantively *irrational*. See *infra* notes 185-89 and accompanying text.

38. See HELD, *supra* note 11, at 81-88. For example, Locke’s overall endeavor, the rejection of the absolutism of divine right theory publicly championed by figures like Robert Filmer, framed his account of rights and motivated his focus on individuals’ “property” in *Two Treatises of Government*. See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 35-51 (Peter Laslett ed., 2d ed. 1969). Locke famously maintains that property is an individual right first and foremost, that it should legitimately withstand the Crown’s incursions and shape the Parliament’s role and purpose. See *id.* (discussing Locke’s premise that “[t]he great and chief end therefore, of Mens uniting into Commonwealths, and putting themselves under Government, is the Preservation of their Property”); JOHN DUNN, *THE POLITICAL THOUGHT OF JOHN LOCKE* 43-76 (1969) (discussing Locke’s focus on property); MACPHERSON, *supra* note 25, at 194-223; ZUCKERT, *supra* note 30, at 247-88. It should be said, though, that in certain parts of the *Two Treatises*, Locke implied much more with his notion of “property” than simply the possessive accumulation of physical/capital resources. See LOCKE, *supra*, § 123 (arguing men enter society for purpose of mutual “Preservation of their Lives, Liberties and Estates, which I call by the general Name, Property”). Its precise contours have been the stuff of intractable controversy among Locke scholars. See DUNN, *supra*; JULES TOWNSHEND, C.B. MACPHERSON AND THE PROBLEM OF LIBERAL DEMOCRACY 62-91 (2000); see also JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* (1988). The broader point, though, is that Locke’s project of separating powers and functions as a theory of authority is fused tightly to the particular forms of entitlement he is interested in securing against the fancy of offices/office-holders of a given time.

39. See *infra* notes 291-308 and accompanying text. For example, the “public” of the mixed constitution (out of which grew the essential features of the republicanism Americans knew), was more like a *confederation* than a body politic or unitary group of indefinite number. See POCOCK, *MACHIAVELLIAN MOMENT*, *supra* note 27, at 183-201. The “public interest” that existed, however, was simply the continued independence from foreign conquerors of the dominion. See *id.* As obviously different from the mixed government rhetoric used in America as this sounds, British political thought through the seventeenth and eighteenth centuries intertwined its debates about the origin of political authority, institutional specialization, and lawmaking with this older theory of the state. Bailyn claims that the decisive movement of American politics away from the mixed constitution toward separated functions as guarantor of popular sovereignty (and modern liberty) came only in the wake of Paine’s radical populism in the *Common Sense* pamphlet of 1776 and, ultimately, the debates framing the Constitution itself. BAILYN, *supra* note 13, at 67-77, 272-319. Wood further suggests that this transformation sets the stage for a radicalism of the opposition to the British Parliament (and ultimately to the Crown) in the colonies not previously seen in English constitutionalism. Cf. WOOD, *supra* note 13, at 58. Wood notes that:

[The] common interest [to Colonial Whigs] was not, as we might today think of it, simply the sum or consensus of the particular interests that made up the community. It was rather an entity in itself, prior to and distinct from the various private interests of various groups and individuals. As Samuel Adams said in 1776, paraphrasing Vattel, the state was “a moral person, having an interest and will of its own.”

Id. It was the subsidiarity of colonial administration to British Parliamentary legislative (meant to be “virtually-representative”) authority that ultimately forced the rhetoric to become so radical. EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 239-62 (1988).

thought, the separation of powers has always been a strategy for maximizing liberty. It has been a means to this evolving dialectic on ends. It has constantly shifted shape throughout more than three centuries of societal turmoil and growth. This article has represented all of that as a continuum from older to newer formulations of a concept.⁴⁰ But that continuum is only half of our story. Further changes in meaning occur in the separation of powers doctrine when still another fundamental distinction is introduced. This further distinction is between what we may call rationalizing functions and balancing power. Distinguishing those two splinters of the separation of powers doctrine a bit more precisely will shed better light on the internal workings of the doctrine as a whole and its relevance in the administrative state.

B. Balancing Power and Rationalizing Functions

The doctrine of the separation of powers has been prone to various confusions from its own conceptual vagueness. Depending on whether governmental functionality, power, or authority drives one's analysis, dramatic changes in meaning have occurred. Thus, it is best to distinguish here two branches of the doctrine which are often conflated. The first is a balancing of power and the second is an isolation and rationalization of function.⁴¹ Given here is that, while separation of powers as a rhetoric today switches effortlessly (even seamlessly) between the two pieces described below, an important antagonism lies at their intersection. Moreover, that intersection abuts that of the two conceptions of liberty just described, even further complicating our task. But each originated from distinct intellectual traditions regarding how and why the law of a nation-state was to be valid and authoritative, how and why it was to be legitimate. Sections II(B)(1) and (2) suggest the contours of

40. See THE FEDERALIST No. 9, at 72-73 (Clinton Rossiter ed., 1961) (Hamilton) (conceiving of separation of power doctrine explicitly in instrumental terms). Hamilton notes:

The regular distribution of power into distinct departments; the introduction of legislative balances and checks; the institution of courts composed of judges holding their offices during good behavior; the representation of the people in the legislature by deputies of their own election They are means, and powerful means, by which the excellencies of republican government may be retained and its imperfections lessened or avoided.

Id.

41. It is no help that the history of each is so thoroughly enmeshed in the other, nor that they both developed across a period of time that also witnessed the entanglement of the two theories of freedom described above. Indeed, in the hands of several commentators, these political fragments were deftly interwoven with one another. Disentangling them is therefore rather tricky, but for clarity's sake let us do so here. What can be said with some safety is that the "balance of power" and "rationalization of functions" theories emerged independently as underpinnings of the law's authority in democratic practice. Compare WILLIAM B. GWYN, THE MEANING OF THE SEPARATION OF POWERS 118 (1965) (calling the rise of concern for functions over concerns for power balances and "mixed government" one of the "most striking features" of the separation of powers), with CORINNE COMSTOCK WESTON, ENGLISH CONSTITUTIONAL THEORY AND THE HOUSE OF LORDS, 1556-1832, at 87-216 (1965) (tracing gradual decline of theory of mixed government in England in correlation with rise of variants on ideal of popular sovereignty).

these doctrinal branches.

1. *Balancing Power: The Elusive Ideal*

A “balance of power” can mean several different things. To contemporary constitutional theorists it means the system of “checks and balances” spreading over virtually every institution and/or end of government.⁴² International relations theorists consider it an equilibrium of influence among nation-states in military, economic, and technological terms. Family psychologists consider it in still different terms. Now it must be seen that the notion of “balance” in each of these probably comes to little more than a cognitive or conceptual crutch of sorts. It is a simple way to verbalize a condition which (supposedly) achieves some otherwise ineffable good.⁴³ This stems at least in part from the fact that power itself is notoriously amorphous as a concept. As just mentioned, it comes in all shapes and contexts. Power can mean something sinister or unjust, but it can also mean something necessary, even authoritative in some sense.⁴⁴

Whatever form it takes, though, power is not perfectly synonymous with authority.⁴⁵ For example, while different types of power can be “commensurately” balanced off one another, it is hard to say the same thing about different kinds of authority.⁴⁶ Authority is a form of leverage generated by a demonstrably valid *right* or justification which ought not be simplified.⁴⁷

42. See generally Cynthia Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989).

43. Cf. Aristotle, *Nicomachean Ethics*, Book II, in CLASSICS OF WESTERN PHILOSOPHY, 237 (Steven M. Cahn ed., 5th ed. 1999) (stating “[v]irtue . . . is a mean between two vices, one of excess and one of deficiency”). It is probably more than mere coincidence that the first level of analysis Aristotle gives of a “virtue of character” in the *Nicomachean Ethics* is that it must be some form of “balance” or median. *Id.*

44. See JOHN KENNETH GALBRAITH, *THE ANATOMY OF POWER* (1984). Galbraith is careful to avoid suggesting that the fact that power and authority often function as synonyms in ordinary usage indicates that they are perfectly coextensive with one another. *Id.*

45. See Joseph Raz, *Legitimate Authority*, in THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 3, 19-25 (1976) (discussing necessity of distinction to prevent “endless confusion” on questions of legitimacy).

46. This goes to the heart of the distinction between the two. It is interesting to note, thus, that the notion of “balance” fitting so readily with power but so awkwardly with authority, in one sense, can be explained quite easily. While a simple scale could “compare” apples and oranges, thereby seemingly defeating the favorite aphorism, the covering variable in the comparison (weight) is excessively minimalistic where the two objects’ significances are concerned. The properties that make oranges what they are are wholly excluded from such a comparison, thus preserving the notion that apples and oranges are in some nontrivial sense incomparable. Likewise, where balance may do well by the concept of power, it does not nearly do so well by the concept of authority.

47. It is simply contrary to the *grammar* of authority to say that a physician’s statement about the physiology of the human kidney is of an “equal” authority to that of an attorney’s statement about a future interest. We instinctively ignore the statement because the two are completely incommensurable with one another (unless fees or some such other peripheral valuation is at issue). Authority, in short, entails some kind of unique conceptual or moral veracity, a backing. I say conceptual *or* moral following Raz who differentiates between authority over persons and authority over facts, or what he distinguishes as “having an authority” from “being an authority,” but I take this to be a fairly conventional (and simplifying) definition. Raz, *supra* note 45,

Power is a potency or capability (of whatever backing), uniquely right/just or not. Most importantly, the two are almost always of a different moral significance.⁴⁸ Of course, in ordinary usage they are often interchangeable and has been the case for some time. Power and authority are often regarded in discussions of “the separation of powers” as one and the same thing. Nevertheless, they should be disentangled.

Historically, the balancing of power within the nation-state evolved amidst the existence of heterogeneous societal “orders” or classes which had by way of custom, and to a degree, *covenant*, united to form the dominion of medieval England.⁴⁹ The rise of the modern British nation-state and its authority to exact something from some member (or the whole) of one of those orders, exactions which which would work to the benefit of the others, became identified with sovereign power.⁵⁰ Yet power as a political precept is older than those that

at 12, 21, 27.

48. What is generally referred to as “power” can take an infinite number of forms, most of which have nothing to do with *legitimate authority*. Many are best described as modes of influence. See generally STEVEN LUKES, *POWER: A RADICAL VIEW* (1974). Professors Keohane and Nye posited a distinction that will be of use later: the distinction between hard and soft power. Robert O. Keohane & Joseph Nye, Jr., *Power and Interdependence in the Information Age*, 77 FOR. AFF. 81, 86-88 (1998) (distinguishing between “hard” and “soft” power). “Soft power” is an “ability to achieve goals through attraction rather than coercion.” *Id.* at 86. This kind of power, which might overlap a great deal with certain forms of authority, depends on the persuasiveness of what one has to say. *Id.* It is an ability to “get desired outcomes because others want what you want.” *Id.* This is in contrast to that form of leverage which gets others to do what one wants through threats or rewards, what they call “hard power.” *Id.* How bureaucracies exercise both of these and what the separation of powers means to them is explored below in Part VI.

49. See ZUCKERT, *supra* note 30, at 59-63; Donald R. Kelley, *Elizabethan Political Thought*, in THE VARIETIES OF BRITISH POLITICAL THOUGHT, 1500-1800 47, 50-53, 67-72-76 (J.G.A. Pocock ed., 1993); E.P. PANAGOPOULOS, *ESSAYS ON THE HISTORY AND MEANING OF CHECKS AND BALANCES XIX* (1985) (explaining difference between “separation of powers” and “checks and balances,” placing latter closer to traditions of Britain’s Mixed Constitution); see also CORINNE COMSTOCK WESTON, *ENGLISH CONSTITUTIONAL THEORY AND THE HOUSE OF LORDS 1559-1832* (1965).

There is no necessary connection here. One might hope to “balance” the constituted powers or agencies of the state independent of whatever heterogeneity within the citizenry exists (or even of the origination of the particular institutions). See J.G.A. Pocock, *Machiavelli, Harrington, and English Political Ideologies in the Eighteenth Century*, 22 WM. & MARY Q. 549, 558-59 (1965). John Adams was a famous proponent of just this theory of a “mixed and balanced” American constitution. See *infra* notes 103-08 and accompanying text (explaining Adams’ theories of liberty and constitutionalism). Historically, though, the doctrine has always been associated with the balancing of social forces and contending socioeconomic groups, specifically as they act upon and through particular agencies of government. See WESTON, *supra* note 41, at 9-15.

50. See POCOCK, *MACHIAVELLIAN MOMENT*, *supra* note 27, at 364 (noting “[t]he doctrine that king, lords and commons together constituted a marvelously equilibrated and gloriously successful distribution of powers was . . . endlessly celebrated throughout the eighteenth century”); WESTON, *supra* note 41, at 99-123; BETTY KEMP, *KING AND COMMONS 1660-1832* 7-31 (1957) [hereinafter KEMP, *KING AND COMMONS*]. The theory of legitimacy animating England’s Mixed Constitution was that, between the three “estates,” each checked one another suspending the supposedly entropic forces leading to the historically known tyrannies of the single estates/forms (and certain apocalypse). See POCOCK, *MACHIAVELLIAN MOMENT*, *supra* note 27, at 364; WESTON, *supra* note 41, at 99-123; KEMP, *KING AND COMMONS*, *supra*, at 7-31.

It was from within this conception of the constitutional, thus, that claims of “tyranny” were leveled against what we would regard as democratization. As the House of Commons began absorbing more and more

make up the usual language of the “separation of powers.” Notions like “sovereignty” and “the state” came around only with the Renaissance,⁵¹ perhaps explaining why Britain’s “Mixed Constitution” was understood by so many through the texts of Aristotle’s *Politics* and Polybius’s *Histories*.⁵²

In this regard, the elusive ideal of balancing power, an ideal that played major roles in both the British Constitution and in the ratification of the American Constitution,⁵³ was based upon an antiquated political science.⁵⁴ Take the British experience first. In the British Constitution’s “matchless,”

authority throughout the eighteenth century, the British State began to look increasingly like the state with which moderns are familiar. ISAAC KRAMNICK, *BOLINGBROKE AND HIS CIRCLE: THE POLITICS OF NOSTALGIA IN THE AGE OF WALPOLE 17-55* (1968); JOHN BREWER, *THE SINEWS OF POWER: WAR, MONEY AND THE ENGLISH STATE, 1688-1783*, at 64-85, 221-49 (1989). See generally BETTY KEMP, SIR ROBERT WALPOLE (1976). It was therefore a conception of the constitution quite *antagonistic* to the notion of popular sovereignty with the latter, in fact, playing a key role in its collapse. See generally MORGAN, *supra* note 39; WESTON, *supra* note 41, at 179-216.

51. Cf. Quentin Skinner, *The State*, in *POLITICAL INNOVATION AND CONCEPTUAL CHANGE* 90, 102-26 (Terence Ball et al. eds., 1989).

52. See ARISTOTLE, *THE POLITICS*, *supra* note 34, at xxxvii-lix; see also FRANCIS D. WORMUTH, *THE ORIGINS OF MODERN CONSTITUTIONALISM* (1949). *The Politics* posits a six-category universe of constitutions as: monarchy/tyranny | aristocracy/oligarchy | democracy/anarchy. ARISTOTLE, *THE POLITICS*, *supra* note 34, at xxxvii-lix; WORMUTH, *supra*. Aristotle’s humanistic political-philosophic methods, though, lock his understandings of constitutional necessity and temporal virtues (of the sort that defined these systems as being one or another) into his own particular cultural context. See JOHN HERMAN RANDALL JR., *ARISTOTLE* 244-56 (1960).

Perhaps even more frustrating are the failings of Polybius’s “political science.” The *Histories* intuited that every constitution—every polity—was locatable in time as one of the forms or another and that Aristotle’s taxonomy was actually a *developmental sequence* marking constitutions by immutable cycles of decay, decomposition, and renewal. See KURT VON FRITZ, *THE THEORY OF THE MIXED CONSTITUTION IN ANTIQUITY: A CRITICAL ANALYSIS OF POLYBIUS’ POLITICAL IDEAS* (1954). Polybius, the stoic Greek exile of the second century B.C., declared in his history of Rome “any state, unless prevented, must pass through each of these forms in turn and in the order stated, and from anarchy must return to monarchy and begin the cycle again.” POCOCK, *MACHIAVELLIAN MOMENT*, *supra* note 27, at 77 (commenting on balance of three forms of government.) Pocock notes that “[t]he only stable system would be one which had escaped the cycle . . . it would resemble Aristotle’s polity in being a blend or balance of the three numerically defined forms of government—monarchy, aristocracy, and democracy.” *Id.* Keeping the powers comprising the state “balanced,” i.e., not allowing any one of them to overgrow or atrophy and thereby reducing it to one of the three “despotisms,” became the consuming objective.

Randall states that

[A] large part of the *Politics* . . . sets forth a conception of political science which is much less in the spirit of the moral physician of the soul, and much more in the spirit of the *physikos*, the natural philosopher observing and analyzing nature’s way with human governments, the natural processes of the generation and the destruction of organized human societies.

RANDALL, *supra*, at 256, 259-67. Randall also notes that it nevertheless reflects a certain “biological and functional naturalism,” a necessitarian attitude toward the evolution and fate of constitutions. *Id.* The most basic difference between this and more recognizably “modern” doctrines might be symbolized by the ancients’ cyclical conception of *time* and of the *politeia*’s position therein. Aristotelian conceptions of liberty are, I believe, nonetheless susceptible to being disentangled from ancient conceptions of time, although it is admittedly a difficult proposition. See POCOCK, *MACHIAVELLIAN MOMENT*, *supra* note 27, at 66-80.

53. RAKOVE, *supra* note 37; DAVID F. EPSTEIN, *THE POLITICAL THEORY OF THE FEDERALIST* 137-45 (1984).

54. RANDALL, *supra* note 52, at 256-71 (exploring relevant texts of *The Politics* and Aristotle’s fixation upon “unstable equilibrium” of democracies and oligarchies and their “natural processes of degeneration”).

supposedly systemic balance, with its aspects of monarchy, aristocracy, and democracy, the competing systems of three totally different constitutional theories supposedly checked one another. This Matchless Constitution was comprised of a House of Commons, the “agency” representing and being constituted from the people, which competed with a House of Lords (that of the nobility) and the Crown (that of the monarch and its extended “estate”).⁵⁵ They each checked each other from their own excesses.

55. In England the orders had arranged themselves in relation to one another over several centuries of political conflict. With the Act of Union of 1707 and the incorporation of Scotland this even became a quasi-federal arrangement. Its rather pragmatic evolution was captured for the mixed constitution in the notion of the “King-in-Parliament,” a supposedly corporate entity whose constituent elements’ collective but oppositional membership motivated the conception of “government by king, lords, and commons [which] represented a combination and blending of the simple forms of government—monarchy, aristocracy, and democracy; and to this *triple* mixture political thinkers attributed what they regarded as the peculiar virtues of the English system.” WESTON, *supra* note 41, at 10.

Vile traces the inter-penetration of the theory of the Mixed Constitution and the separation of functions from about 1640, continuing for roughly two centuries thereafter, seeing this relationship essentially as one of conflict. *See* VILE, *supra* note 16, at 107-30. Its ultimate conclusion was with the declaration of the Mixed Constitution’s eclipse and the end of the metaphorical reign of “balance.” *See id.* But if its eclipse would ultimately make way for the rise of the rationalization of functions, it was probably not without its disjunctive interregnum. *Cf. id.* at 59 (dealing with major problem in reconciliation of separation of powers theory). Vile states that:

A major problem in the reconciliation of the theory of mixed government with the doctrine of the separation of powers lay in the fact that in its initial formulations during the Commonwealth period, the latter had been expressed in the vocabulary of the prevailing legislative-executive division of functions, whereas the theory of mixed government, which dealt principally with the agencies of government, propounded a threefold division in King, Lords, and Commons.

Id. Gwyn finds a similar rift. *See* GWYN, *supra* note 41, at 116 (describing “gulf” separating seventeenth and eighteenth century proponents of separation of powers).

Unfortunately, Vile in places seems (inexplicably) to link the theories underlying the Mixed Constitution and its trinity with those underlying the rationalization of functions and its very different trinity. *Cf.* VILE, *supra* note 16, at 15-16, 58-61 (identifying the triadic model of John Sadler (1649)). Vile argues that, while we “may not take the scriptural authority that [he] propounded as the basis for a threefold division” because “something of a mystical quality seems still to surround this method of organizing the agencies of government,” we may nevertheless think of the two trinities as historically continuous through the writings of the Reverend George Lawson (1657, 1660). *Id.* *But see id.* at 13 (distinguishing balances of power within Mixed Constitution from separations of function/offices); M. Elizabeth Magill, *The Real Separation in the Separation of Powers*, 86 VA. L. REV. 1127, 1155-67 (2000) [hereinafter Magill, *The Real Separation*] (arguing two theories, separating and balancing power, discontinuous).

Professor Weston traces the theory of mixed government’s structuring of the legislative authority—and specifically how it became a matter of securing the concurrence of each estate prior to the enactment of any standing law—to its maturation as a theory structuring the whole of the authority of the state, and ultimately its complete eclipse, roughly contemporaneous with the Great Reform Bill of 1832, radically reducing the authority of the House of Lords. *See* WESTON, *supra* note 41, at 9-43, 87-141, 217-57. The critical variable in that narrative was the House of Lords whose place in the Constitution underwent the most pronounced transformation (from Polybian aristocracy to Machiavellian *guardia della libertà*, to titular repository of inertia if not wisdom). *See* POCOCK, MACHIAVELLIAN MOMENT, *supra* note 27, at 364. Pocock interprets this transition as the confluence of Aristotelian thought, Florentine (mostly Machiavellian) recalibrations thereof, and English custom and practical politics throughout the same period—leading to the rise of the modern separation of functions, and ultimately its recent collapse in the United States. *Id.* at 361-422, 526-52; *see* BARON, *supra* note 27 (discussing rise of civic humanism (and classicism more generally) in Florentine thought throughout the fifteenth century).

Significantly, though, the fullest elaboration of this theory, and its supposedly perfect balance, came only amidst massive *changes* in the political and economic structure, indeed in the social fabric of British society and its state. The theory of the modern British Constitution crystallized with the aid of various Renaissance writings in response to terrific growth in the power of the House of Commons. That growth came through the emergence of public credit, professionalized state finance, imperialistic Whig foreign policies, and various charismatic and determined leaders in the lower House. The Commons' growth naturally came at the expense of the Lords and the Crown (making any pretense of balance quite undone).⁵⁶

This was more than mere coincidence. The connection between the Matchless Constitution's fullest articulation and the Whig recreation of the state with modern finance, public credit, and the emergence of what Professor Brewer has called the "fiscal-military state," was probably causal.⁵⁷ Whether it

56. See generally BREWER, *supra* note 50. The mixed constitution began to fail symbolically and analytically as an increasingly powerful House of Commons and state bureaucracy—and an increasingly imperialistic public policy—simultaneously ratcheted the pressure on the tax roles and upon constitutional theory to derive some concept of a British "public" wherein all three orders (King, Lords, and Commons) shared equally in the benefits and burdens of British liberty. See *id.* Newer, less tangible (and thus more malleable) forms of property became perhaps the major catalyst within the legal system. See J.G.A. Pocock, *The Mobility of Property and the Rise of Eighteenth Century Sociology*, in VIRTUE, COMMERCE, AND HISTORY: ESSAYS ON POLITICAL THOUGHT AND HISTORY, CHIEFLY IN THE EIGHTEENTH CENTURY 103 (1985) (discussing newer and less tangible forms of property as major catalyst within legal system). Although political theorists probably had a wider set of concerns in mind as they attempted to fill the larger vacuum. See *id.* See generally Henry Horwitz, *Liberty, Law, and Property*, in LIBERTY SECURED? BRITAIN BEFORE AND AFTER 1688, at 265 (J.R. Jones ed., 1992).

57. See generally BREWER, *supra* note 50 (arguing Britain emerged as world power in eighteenth century because of several advances in public finance, bureaucratic administration, and vigilant public accountancy in House of Commons). The ideological fault lines of this period are often signified by the division between "Court" and "Country." See generally J.R. JONES, COUNTRY AND COURT: ENGLAND, 1658-1714 (1978). Pocock deftly summarized the structure of the ideologies that drove the Court/Country contest as follows: the ideology of the Country "was founded on a presumption of real property and an ethos of the civic life, in which the ego knew and loved itself in its relation to a *patria, res publica* or common good, organized as a polity, but was perpetually threatened by corruption operating through private appetites and false consciousness." POCOCK, MACHIAVELLIAN MOMENT, *supra* note 27, at 486. To save personality, it urged an ideal of virtue which at times reached unreally "[s]toical heights of moral autonomy," and the holding of enough property in land so as to be independent of others. *Id.* In contrast, the ideology of the Court was:

[F]ounded on an acceptance of credit as a measure of economic value and of a psychology of imagination, passion, and interest as the mainsprings of human behavior. In the place of virtue, it stressed the ego's pursuit of satisfaction and self-esteem, and was beginning to explore theories of how the diversities of passionate and self-interested action might be manipulated and coordinated, or might magically or mechanically coordinate themselves, into promoting a common good no longer intimately connected with the inner moral life of the individual.

Id. at 487. Where the Country regarded "government as founded upon principles of virtue," the Court "readily accepted that men were factious and interested beings" and "proposed to have them policed by a strong central executive." *Id.*

Later, in the hands of high Federalists like Hamilton, the Court's ideology merged into a "need to create among the nation's leadership an influential class tied to the federal government and capable of counterbalancing the many influential figures [then] tied to the states." The threats to the republic and to an "enduring and effective central government required the union of the general government's resources with

was or not, though, by its conclusion whatever constitutional “balance” there had once been between King, Lords, and Commons had been completely transformed (along with virtually everything else in British society).⁵⁸

Note, however, that that was not a failure of the ideal. The elusive ideal eventually failed because the “Matchless Constitution” as a subject of rhetoric, politics, and custom pertained almost entirely to the legislative authority. It mediated the power-broking of legislators throughout the seventeenth and eighteenth centuries, but did little else.⁵⁹ That is to say, balance of power thought included almost no functional differentiation between legislating and executing or executing and adjudicating. Furthermore, it relied heavily upon

those of a monied and officeholding class directly dependent on that government for the promotion of its economic interests.” BANNING, *JEFFERSONIAN PERSUASION*, *supra* note 13, at 36; *cf.* Lance Banning, *Some Second Thoughts on Virtue and the Course of Revolutionary Thinking*, in *CONCEPTUAL CHANGE AND THE CONSTITUTION 199-201* (Terence Ball & J.G.A. Pocock eds., 1988) (arguing many Framers thought “public virtue” largely synonymous with willingness to obey duly enacted laws in absence of coercion).

58. *See generally* PETER G.M. DICKSON, *THE FINANCIAL REVOLUTION IN ENGLAND: A STUDY IN THE DEVELOPMENT OF PUBLIC CREDIT, 1688-1756* (1967); JEREMY BLACK, *A SYSTEM OF AMBITION?: BRITISH FOREIGN POLICY 1660-1793* (2d ed. 2000). The financial revolution that occurred throughout the late seventeenth and early eighteenth centuries announced the dawn of what would become the British Empire. *See* DICKSON, *supra*; BLACK, *supra*. It almost perfectly coincided with the richest, most impassioned articulations of the Matchless Constitution. Indeed, what seemed to begin as the framework of an opposition ideology later transitioned into a generalized claim that the Whig innovations of the eighteenth century were “unconstitutional.” *See* CAROLINE A. ROBBINS, *THE EIGHTEENTH-CENTURY COMMONWEALTHMEN* (1959); KRAMNICK, *supra* note 50, at 56-83, 137-87; Horwitz, *supra* note 56, at 276.

More specifically, as Kramnick argues, much of the opposition “Country” ideology that developed during this period (opposing British imperial expansion, the creation of property rights in credit markets, and the raising and trading of company stock) was voiced basically as a nostalgic jeremiad against the increasingly centralized and urbanized business of managing this transforming political economy. KRAMNICK, *supra* note 50, at 56-83, 137-87. The authority of the House of Commons and the ministry, as well as the state’s capital-raising capacities sufficient to support massive, permanent enterprises of its own, made many in the landed classes, who possessed older forms of wealth, resentful. *See generally* *Id.*; JEREMY BLACK, *WALPOLE IN POWER* (2001). Soon enough it became what many have labeled an all out “Harringtonian” assault on the newer constitutional structures. *See* KRAMNICK, *supra* note 50; Horwitz, *supra* note 56, at 272, 288-98. More “mobile,” intangible forms of property that accompanied the system of public credit and its complex financial structures, the identifiable accoutrements of the innovations, became the economic reality of modern British society. *See* KRAMNICK, *supra* note 50; Horwitz, *supra* note 56, at 272, 288-98.

59. *See* WESTON, *supra* note 41, at 2 (presenting what is perhaps the best summation of the mixed constitution’s “purpose”). Weston states the following:

[T]he English government represented a combination, blending, and balancing of the three main types of government that political theorists derived from Aristotle—monarchy, aristocracy, and democracy; and to the combination English thinkers attributed the peculiar excellence of their government. . . . It was their singular good fortune, Englishmen reasoned, to have established a mixed government, in which the virtues of the pure forms of government were retained while their vices were eliminated.

Id.; *see* VILE, *supra* note 16, at 108 (analyzing two respective theories). Vile notes the “two theories . . . formed a pattern of constitutional theory for the two hundred years following 1640, linked to each other in a curious relationship of mutual attraction and repulsion.” VILE, *supra* note 16, at 108. This further underwrites the point made earlier that a “public interest” beyond the barest notion of independence from foreign domination was quite difficult to construct in a system where there were different orders or organic groups to be represented separately but equally. *See supra* notes 49-50 and accompanying text (differentiating between and analyzing “checks and balances” and “separation of powers”).

archaic axioms about the political “one,” “few,” and “many”—what the ancients believed were innate tendencies of persons in such settings.⁶⁰ The balance of power never developed (indeed probably suffered in the long run from) other ideals justifying the authority of the state in its multitude of “agencies.”⁶¹ The Matchless Constitution never implied what agencies there ought to be or why.⁶² It simply arrogated legitimacy to the covenant between

60. See generally SHELLEY BURTT, *VIRTUE TRANSFORMED: POLITICAL ARGUMENT IN ENGLAND, 1688-1740* (1992) (arguing rhetoric underwriting Mixed Constitution became increasingly futile under conditions of eighteenth century Britain). Burttt reasons that this futility propagated because citizens who have big private stakes that were susceptible to loss, dependent on political outcomes, will find arguments that they must be “virtuous,” naïve, or impractical. *Id.* In short, it had behind it the rather primitive Aristotelian political psychology and, for that reason alone, was probably going to fail eventually. *Cf. id.*

Bear in mind that much of the supposedly “matchless” constitution was highly invidious by our standards. For example, it was believed that the nobility held an exclusive *right* to control one half of the Parliament because only it could serve the function of “mediator[] between the Crown and Commons.” WESTON, *supra* note 41, at 88 (arguing such postulates integral to Augustan constitutional theory). This points out a broader problem for “civic republicans” today, and another reason why I have adopted the ancient/modern distinction, instead of entering the liberal/republican fray. Many invidious, “exclusivist” premises dot the history of these two comprehensive conceptions. Republicanism’s equality norms, for example, were for centuries quite nominal—in virtually all forms of republicanism preceding the twentieth century. See PETTIT, *supra* note 21, at 110-20 (distinguishing contemporary theory of republicanism from “premodern varieties” on grounds it amends with several “inclusivist” premises).

61. See POCOCK, *MACHIAVELLIAN MOMENT*, *supra* note 27, at 329-30. Pocock intriguingly argued that this probably revealed a defect in the Aristotelian tradition itself, one that perhaps is what prevented Florentine Renaissance thinkers from deriving any theory of the state’s plurality of functions/agencies and how they might be justified or “rationalized” singly and as a whole. *Id.* Pocock argues that:

a body of political theory exclusively concerned with how the citizen is to develop his human capacities by participating in decisions aimed at the subjection of private to public goods is unlikely to develop a concern for, or a vocabulary for dealing with, government as a positive or creative activity.

Id. at 329-30.

62. See DICKSON, *supra* note 58; see also ROBBINS, *supra* note 58, at 103-05. It is worth tracing a parallel here with the explosion of public credit that produced a state apparatus and political economy previously unknown to Britons, and how it played so large a part in that era’s rich constitutional dialectic. See DICKSON, *supra* note 58. Similar indeed is the introduction of the national debt—both by the federal assumption of war debts and in the greater availability of many forms of credit—which would come to constitute a vital element of the opposition in the new American nation a century later. See EDWIN J. PERKINS, *AMERICAN PUBLIC FINANCE AND FINANCIAL SERVICES, 1700-1815* 85-265 (1994). Yet neither dialogue ever resolved exactly what all the credit and spending were for or not for; nor even did it much consider such questions. As Pocock points out, deficit spending and other

institutions of the new finance, of which the Bank of England and the National Debt came to be the most important, were essentially a series of devices for encouraging the large or small investor to lend capital to the state, investing in its future political stability and strengthening this by the act of investment itself, while deriving a guaranteed income from the return on the sum invested. With the aid of the invested capital, the state was able to maintain larger and more permanent armies and bureaucracies—incidentally increasing the resources at the disposal of political patronage—and as long as its affairs visibly prospered, it was able to attract further investments and conduct larger and longer wars.

POCOCK, *MACHIAVELLIAN MOMENT*, *supra* note 27, at 425, 453. It is safe to say, though, that with the government so abundantly intertwined in so many spheres of economic life, its success or failure could not but become of pivotal importance to those with any significant wealth at stake in government’s choices. The “independence” of the traffickers in various forms of debt was thus thought to be compromised in this

the orders of British society and the institutions they had inherited by viewing it all as a kind of constitutional Big Bang. Of course, the abstraction of a “balance of power” would form much of the conceptual paradigm within which the very concept of a republic and a sovereign populous would germinate in the English-speaking world as a whole.⁶³ It is that fact which makes understanding the other half of the doctrine, the rationalization of governance functions, so difficult.

2. Rationalizing Functions

Whatever the failings of the balance of power, it played a significant role in the American Revolution and, ultimately, in the ratification of the United States Constitution.⁶⁴ Its gradual decline throughout and following the Glorious Revolution of 1688 was slow. This is precisely what allowed it to frame the rise of the other principal branch of the separation of powers doctrine, the “rationalization” of governance functions.⁶⁵ This was a turn in constitutional

important sense. Cf. BANNING, *JEFFERSONIAN PERSUASION*, *supra* note 13, at 135-60 (detailing Republican attacks on federal assumption of revolutionary war debts and usage of writers such as Davenant, Bolingbroke and Cato). Moreover, how “independent” any particular *institution* reliant upon (or institutionalization of the function of managing) public credit/spending can truly be from the “taxing power,” under circumstances like those following the rise of fiscal-military states, has become at least as much an empirical question today as it is a philosophical one.

63. WESTON, *supra* note 41, at 87-178; MORGAN, *supra* note 39, at 55-77; KEMP, KING AND COMMONS, *supra* note 50, at 83-90 (discussing Montesquieu’s argument). Kemp and others argue that, while Montesquieu offered both the rationalization of functions and the balance of power as distinct fragments of the English Constitution, the balance of power long remained the construct with which many more people were concerned. KEMP, KING AND COMMONS, *supra* note 50, at 83-90; GWYN, *supra* note 41, at 116-26 (describing John Adams’s fascination with concept of balance and his use of it throughout a long career as analyst of separation of powers in America).

64. As popular sovereignty gained traction as an ideal, becoming viable as a political and constitutional rhetoric, the balance of power slipped increasingly into the category of historical relic. WOOD, *supra* note 13, at 344-89. Notwithstanding its ancient (and sometimes feudal) suppositions about law and liberty, while the balance of power tradition withered, it never died. Moreover, its eclipse would take the balance of the eighteenth century, the very era responsible for the change in concepts and public will necessary to the eventual evolution of the nation-state and its legal authority into the more “modern” position in which it currently sits.

The chief historical (and historiographical) dispute is where this *will* came from, precisely. Where some scholars credit it to the rise of natural rights theory such as Locke’s doctrines of property and legitimate resistance, others emphasize the neo-Harringtonian/Country opposition to Whig taxes, mercantilistic imperialism, public credit, and other state-growing innovations throughout the eighteenth century. See, e.g., DUNN, *supra* note 38, at 165-86, 265-67; KRAMNICK, *supra* note 50, at 171-77, 243-60; POCOCK, *POLITICS, LANGUAGE AND TIME*, *supra* note 27, at 134-47.

In this connection, though, it should be reiterated that any dichotomy will be highly imperfect and that the ancient/modern distinction used here is meant solely as a heuristic. Real disputes continue over, for example, whether the more “modern” vision achieved itself only as a result of America’s complete lack of a feudal past and thus its willingness to experiment with political and legal institutions unrelated to that history. See ALEXANDER, *supra* note 19, at 44-59; ROBERT A. FERGUSON, *LAW AND LETTERS IN AMERICAN CULTURE* 14 (1984). Moreover, in the simplest, intuitive sense, figures like Harrington were quite “modern” in their practical concerns, as were the “republican” or “commonwealthman” agendas of the period. See ZUCKERT, *supra* note 30, at 166-70; PETTIT, *supra* note 21, at 129-47, 200-05.

65. Cf. GWYN, *supra* note 41, at 9-15 (dating appearance of separate functions and offices of legislators

focus because it considered many distinct operations of the state and how they could be managed independently of one another.⁶⁶ Where a balance of power ends as a constitutional vocabulary, the functional specialization of governance begins. Think of it in terms of normative ideals: one can seek parity of power between constituted agencies as the ideal conditions under which lawmaking occurs. But to do so would be doing something significantly different from seeking to ensure that individuated organs of government specialize in their own particular functions and that those functions are exclusively vested in those respective organs.⁶⁷

The theorists and publicists who proposed a rationalization of government functions did the latter. They created the first specialist agencies by asking how governance could be carried out to its best means/ends functionality.⁶⁸

and executives in middle of seventeenth century).

There have been classifications of governmental functions since antiquity but the separation of powers, although based upon an analysis of governmental functions, is not taxonomic. It is a theory which purports to show that to achieve certain extremely valuable ends, legislative activity should not be carried on by the same persons executing the laws.

Cf. id. at 8-9; GERHARD CASPER, *SEPARATING POWER: ESSAYS ON THE FOUNDING PERIOD* (1997). Casper describes in particular the Essex Result, a critique of the 1778 draft Massachusetts Constitution—then the most advanced reflection of the separation of the agencies of government from each other—as a denunciation of that constitution for its “lack of ‘proper’ executive authority but also disapprov[ing] of the intermingling of executive, legislative, and judicial powers.” CASPER, *supra*, at 14-15. The “Glorious Revolution” of 1688, the bloodless coup ending James II’s tenure in favor of William and Mary, set the agenda in both England and America for eighteenth century radicals intent on keeping the Executive and Legislature separate. See JOHN MILLER, *CROWN, PARLIAMENT, AND PEOPLE, IN LIBERTY SECURED? BRITAIN BEFORE AND AFTER 1688* 53 (J.R. Jones ed., 1992).

66. It is critical to understanding these two as distinct traditions of thought to keep in mind the differences between power (in all of its dimensions) and authority as kinds of leverage in the processes of legal change. See WOOD, *supra* note 13, at 446-63; MORGAN, *supra* note 39, at 85-93, 144-48. It is also critical to keep in mind the differences between an abiding faith in right-reason within tangible human reality and a faith in the super-rational power of tradition, as in the more prescriptive dimensions of conservatism. See generally UNGER, *supra* note 11; HAYEK, *CONSTITUTION OF LIBERTY*, *supra* note 14, at 54-70; RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW* 41-61, 114-31 (1998).

67. The balance of power as a structural objective is oriented toward stasis. But the rationalization of functions is predicated upon dialogue and reiteration. The very notion of “balance” implies equilibrium or at least progress toward equilibration. But in the world of the disaggregated nation-state—the world of multi-agency states—as public expectations of government gradually change, so too do its specialized agencies. Also, as those agencies change, the power that they exercise inevitably evolves and presents previously unimagined problems. See Anne-Marie Slaughter, *Agencies on the Loose?: Holding Government Networks Accountable*, in *TRANSATLANTIC REGULATORY COOPERATION: LEGAL PROBLEMS AND POLITICAL PERSPECTIVES* 521, 525-35 (George Bermann et al. eds., 2000) (proposing methods for holding “trans-governmental networks” accountable by isolating and rationalizing the shared functions of their members and asking how they improve functioning of host institutions). As new publics form, new agencies of those publics do too. See SIMON, *COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT*, *supra* note 3 (describing rise of new organizational forms linking local, state, and national constituencies together in collaborative political and economic enterprises). This political-economic evolution continued apace in America after the 1780s notwithstanding the creation of the written constitutions purporting to freeze all structural legal-institutional relationships in place.

68. See WOOD, *supra* note 13, at 446-53. This theory suffered a shortcoming similar to the balance of power tradition: it too lacked a durable theory justifying the state as a whole. The functions that ought to be

Their inquiry turned from controlling the legislators to asking, if legislating and executing were both elements of any *politeia*, how their legitimate domains might be arranged so as to maximize the utility of each.

In short time this intellectual transformation had distributed the segregable phases of legal change according to various temporal, procedural, and institutional milestones. That is, it had distinguished different phases of lawmaking from each other and suggested that they be permanently separated so as to best ensure liberty.⁶⁹ This would become the most ubiquitous analysis offered under the name “the separation of powers” in the latter half of the eighteenth century. But on its own, the analysis has always been awkwardly incomplete, especially when it is presented as a rejection of the rest of the tradition.⁷⁰ “Liberty” and its maximization remained the abiding (if

discharged by the state—a matter of no little debate and change throughout modern history—is prior to any decision about distributing the authority to carry them out. But as Weber observed, historically this has been a very fluid consensus: “there is no conceivable end which *some* political association has not at some time pursued.” MAX WEBER, *ECONOMY AND SOCIETY* 55 (Guenther Ross & Claus Wittich trans. & eds., 1967). Worse, the obverse of this is probably true as well. Cf. JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 347 (2d ed. 2000). As Wilson maintains, “[t]ry to think of a government activity that has never been done or is not now being done by a private firm operating in a more or less competitive market. It’s not easy.” *Id.*

69. See GWYN, *supra* note 41, at 28-36 (arguing exponents of doctrine of seventeenth century tended to reduce multiplicity of political functions to two—the legislating and executing of laws); *id.* at 128 n.1 (calling this “rule of law version” of rationalization of functions tradition “the purest version of the separation of powers doctrine” in circulation during Founding).

70. The nation-state did other things besides make law and clearly the eighteenth century analysts were not ignorant of them. JOHN PHILIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: ABRIDGED EDITION* 26-48 (1987) (discussing the authority to tax); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 196-218 (1996) (discussing historical evolution of authority to involve nation in war). The most noted eighteenth century exponent of this aspect of the doctrine was probably Montesquieu, although his influence is mitigated by the ambiguity of his text on the point. VILE, *supra* note 16, at 83-106. Indeed, he is an especially good example of why the traditional arrangement of the legislature opposite the executive, as the whole of the doctrine, is so radically incomplete. For while Montesquieu does occupy himself to a great extent with an analysis of the differentiated fractions of “lawmaking” as an incident of government, his idealized separation of powers encompasses many other incidents of government not at all related to lawmaking. *Id.* at 94-105; see David Lowenthal, *Montesquieu*, in *HISTORY OF POLITICAL PHILOSOPHY* 513, 516-26 (Leo Strauss & Joseph Cropsey eds., 3d ed. 1987). Montesquieu further recognized that possession of the authority to discharge such other functions could result in leverage(s) within the process of lawmaking. VILE, *supra* note 16, at 94-105; see Lowenthal, *supra*.

This makes it all the more puzzling that insofar as *The Federalist* is identified with the separation of powers, this is usually regarded as its only meaning. See EPSTEIN, *supra* note 53, at 126-46 (arguing “fundamental meaning of the separation of powers as such” in *The Federalist* is division of responsibility and legal authority between executive and legislative); see also LAURENCE H. TRIBE, 1 *AMERICAN CONSTITUTIONAL LAW* § 2-6, at 140 n.25 (3d ed. 2000) (calling this a “primary separation of powers concern”). While it illustrates how powerful was the influence of the rationalization of functions theory with the Founders, it tends to obscure the wider debate that was rationalization of functions thought. See BANNING, *LIBERTY*, *supra* note 37, at 114-21, 214-19. See generally SPURLIN, *infra* note 75; GWYN, *supra* note 41, at 37-55 (describing different surrounding boundaries and purposes of institutions being “rationalized” as between means and ends); POCOCK, *MACHIAVELLIAN MOMENT*, *supra* note 27, at 493-99 (discussing meaning and effects of Hume’s essays *That Politics May be Reduced to a Science* (1741) and *Idea of A Perfect*

ambiguous) objectives in efforts to specialize and rationalize governance functions. And the familiar problems of specifying the kind of liberty came with it. That the rationalization of functions tradition was begun in parallel to the balance of power tradition meant that the two were usually in competition with each other.⁷¹ Thus, it should come as no surprise that the rationalization of functions also largely presupposed an array of existing institutions. It presupposed that some “ultimate” and independent end of state authority existed and would guide the disaggregation and parcelling out of that authority to distinct offices.⁷² In short, standing alone, it was massively under-specified.

Indeed, that is a feature all four components of our separation of powers share. It is how neither the balance of power nor the rationalization of functions was ever tied to any particularized set of institutions in England or America. They were both always ambiguous enough to pair with highly evolved (and continuously evolving) institutional arrangements. It is also how each of those crafted versatile relationships to the two kinds of liberty. Given the right circumstances, all four pieces of the tradition serve some function in Anglo-American constitutionalism. Indeed, they do so even today. That is what has allowed them all to endure; being underspecified means being versatile.

The key *difference* between the power balancing and rationalized function constructs, though, is that only the latter viewed political decision-making authority as something which could be engineered to take account of predictable breakdowns. The rationalization of functions as a theory of government legitimacy began to view lawmaking authority as not strictly

Commonwealth (1752)).

71. Confusingly, the two intersected one another along with the two competing traditions of liberty in the same windows of time to which contemporary scholars of Anglo-American constitutionalism so often refer. See PETTIT, *supra* note 21, at 51-79, 95-109 (describing blending of ancient and modern conceptions of liberty throughout eighteenth century); GWYN, *supra* note 41 (describing balance of power blending and rationalization of functions thinking throughout roughly same time frames); J.C.D. CLARK, *THE LANGUAGE OF LIBERTY, 1660-1832: POLITICAL DISCOURSE AND SOCIAL DYNAMICS IN THE ANGLO-AMERICAN WORLD* (1994) (critiquing consensus on various homogeneities of political concepts). Professor Clark argues that:

[s]ome of the Americans who rebelled in 1776 sought to found a new and timeless social order . . . in which material prosperity would naturally attend moral and religious purity, in which peace and righteousness would be, without further exertion, the inheritance of their descendants, in which human nature would be freed from its ancient disease and released into a new age of creative fulfillment and innocent emancipation.

CLARK, *supra*.

72. See GWYN, *supra* note 41, at 37-63. (discussing apparent justification behind Leveller assaults on Parliament by and with separation of powers doctrine and popular sovereignty). Gwyn argues that this justification involved the “supremacy of neither the legislature nor the judiciary but of the fundamental law as it reflected the right reason of the people” and tracing several other highly abstract justifications for the separation of powers advanced by various Leveller authors. *Id.* The Levellers exemplified this tendency inasmuch as their attacks on mixed monarchy and the Long Parliament, though clearly in pursuit of a “functional” system of roles for England’s institutions, remained studiously aloof as to the precise hierarchy of ends that they should serve individually or collectively. *Id.* at 37-63.

limited to tradition or the *realpolitik* of citizen power.⁷³ Two key developments aided this shift. First, by the middle of the eighteenth century the Commons' dominance of policymaking had become the norm. Second, and roughly simultaneously, several British enlightenment philosophers revolutionized the very ideal of "rationality," setting it apart as the highest humanly achievable condition of thought and action.⁷⁴ Thus, lawmaking authority itself became steeped in instrumental-rational debate. With the passing of the Glorious Revolution came an era intent on engineering distinct agencies of government whose only shared function was to serve the populace. This shortly emerged as the favored strategy for limiting exercises of governmental authority and ensuring that the fundamental limitations on government would endure.⁷⁵ Different theorists portrayed the distinct functions as the sole legitimate modes

73. The means available for participating in and holding accountable the agents of the state's legislative, executive, and adjudicative bodies/processes only came to be at the center of the separation of functions theory in the last half of the eighteenth century. Cf. REID, LEGISLATE, *infra* note 101, at 63-110 (describing conception of authority that colonists understood to limit Parliament's power to legislate and tax); WOOD, *supra* note 13, at 453-63 (describing conception of judicial authority and its limits formed in wake of several episodes in late 1760s, 70s and 80s); RAKOVE, *supra* note 37, at 247-48, 249-56 (arguing Bolingbroke's *The Idea of a Patriot King* (1738) shaped American ideals of executive power). Bolingbroke's work, "shaped American ideals of executive leadership by prescribing a model of governance in which the king would rise above party turmoil to embody a disinterested notion of the public good," but that checking such an executive was a matter of central concern in the Convention. RAKOVE, *supra* note 37, at 247-48.

Even prior to Bolingbroke, thinkers attempting to isolate, and thereafter allocate, discrete governmental functions were reflecting on how better to rationalize the totality of the functions to the supposed ends of the state. See ALEXANDER BROADIE, THE SCOTTISH ENLIGHTENMENT: THE HISTORICAL AGE OF THE HISTORICAL NATION 86-94 (analyzing Adam Ferguson's *An Essay on the History of Civil Society* (1767)). Broadie suggests that *An Essay on the History of Civil Society* has, at its core, a skeptical inquiry into the actual dynamics of courts and legislatures that critiqued the theory of the "division of labour" as justification for the distinctions between the two. *Id.*

74. See generally ROY PORTER, THE CREATION OF THE MODERN WORLD: THE UNTOLD STORY OF THE BRITISH ENLIGHTENMENT (2000) (describing an extended colloquy among British scientists and philosophers in eighteenth century that led to unprecedented string of advances in human knowledge); BROADIE, *supra* note 73, at 61-75 (describing Hume's advances in the philosophy of history); T.M. DEVINE, THE SCOTTISH NATION: A HISTORY 1700-2000 (1999) (arguing reasons behind Scots' success). The Scots enjoyed such successes because of a cosmopolitanism and willingness to venture to the major centers of Europe to benefit from and propagate an intellectual diaspora. DEVINE, *supra*.

75. While the different historical currents comprising this era came from constitutional and political innovations that spanned at least three centuries, the beliefs behind the rationalization of functions owe much of their shape to the "Glorious Revolution" of 1688, what has been called the "British Enlightenment," and—with the aid of iconoclasts like Montesquieu, Publius, and Paine—to the founding of the American Constitution. BAILYN, *supra* note 13, at 23-27; MORGAN, *supra* note 39, at 49-54, 263-87; PAUL MERRILL SPURLIN, MONTESQUIEU IN AMERICA, 1760-1801, at 138-222 (Octagon Books 1969) (1940); VILE, *supra* note 16, at 3-7; WOOD, *supra* note 13, at 150-61, 409-29; William B. Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474, 477-81 (1989) [hereinafter Gwyn, *Indeterminacy*]. See generally PORTER, *supra* note 74.

It is a complex of beliefs, comprised of equal parts—political philosophy, science, and law—and its specifics can be detached from the muddled separation of powers doctrine and examined in their own right in any of those three ways. Indeed, the beliefs underlying the distribution of functions have been independently scrutinized and sculpted, most notably in the politics and social-science of Progressivism, showing remarkable endurance even while the state itself underwent massive changes. See *infra* Parts IV, V, VI.

of government's coercive power; within their own spheres these agencies pursued the ends of freedom.⁷⁶ Theorists worked to articulate accounts of agency by rules and principles that could be set *ex ante*. This way, the lawmakers themselves would be hemmed by laws. The theorists offered modes of accountability by which legitimate governmental force could be restrained and thereby rendered legitimate.⁷⁷

In concert, these new constructs erected barriers within the processes of legal change. The legislature formulated laws; the executive coerced obedience to them; and the judiciary, once it too was finally theorized, conclusively adjudicated the law of a particular "case." With each agency assured that its jealous regard for its own role was in the public interest, all were equally justified in obstructing the others when the occasion arose. Where the impetus

76. See LOCKE, *supra* note 38, at 3-11 (Laslett Introduction); VILE, *supra* note 16, at 58-106; GWYN, *supra* note 41, at 66-99. Locke's *Two Treatises*, circulated beginning in about 1690, together with Montesquieu's *De L'Esprit des Loix*, comprise the two central texts leading to the ascendance of this conception of legal authority. See LOCKE, *supra* note 38, at 3-11 (Laslett Introduction); VILE, *supra* note 16, at 58-106; GWYN, *supra* note 41, at 66-99. "Legitimate" government, as opposed to theistic, "virtuous," customary, or *de facto* government, was a political vocabulary *invented* or at least dramatically enhanced through these and similar texts in the late seventeenth and early eighteenth centuries. As Laslett argued, the *Two Treatises* (and *Leviathan* before them) were importantly *ahistorical* as arguments (note both Hobbes's and Locke's use of the hypothetical "state of nature"), and touched off a progression of political thinkers often regarded as the first "skeptics." LOCKE, *supra* note 38, at 79-92 (Laslett, Introduction); see Robert S. Hill, *David Hume*, in HISTORY OF POLITICAL PHILOSOPHY, *supra* note 70, at 535, 537-48, 552-56. In this respect, Locke's theory of right was importantly removed from the customs and contingencies—accidents of history—that had previously clouded considerations of political right. With this, "an analytical argument demonstrating the grounds for and extent of political rights and duties from the premise of all men's equal natural right to preservation," the vocabulary of political/constitutional thought expanded appreciably. GRANT, *supra* note 25, at 22.

77. See GRANT, *supra* note 25, at 64-88. More often than not, however, the theories of agency, accountability, and legitimacy sprung from the specific institutional traditions with which the writer was familiar (and/or the construct of liberty they and their countrymen preferred). *Id.* Professor Grant explains that Locke's justification of "political power"—his account of political right leading to the authority to legislate—rests entirely on his assumptions about natural right. *Id.* He imagined that right was naturally derived from absolutely valid freedom and equality (among "men") as expressed in certain innate powers of self-preservation, i.e., the physical assertion of these equal freedoms consistent with those of others. *Id.* Locke's very distinction between "arbitrary" (or "despotic") power and legitimate "political power" consisted in a government's actual *use* of its constituted agencies (primarily a legislature) to the end of effectuating (even enhancing) individual freedom and security. *Id.* The conceptual integrity of those freedoms themselves served to both delimit and legitimate the agent's authority over time. *Id.* Thus, the concept of a governmental function itself is derived of these natural freedoms—whatever they are—and they become a benchmark of the liberty (and/or property) rights the agencies define, distribute, and redistribute over time. *Id.* The accountability of the agents discharging that function to the rights-holders, derived from the rights-holders' natural powers of self-preservation, became a necessary concomitant to that. See *id.* at 75 (discussing avenues of appeal open to subjects of power).

[A]n avenue for an appeal must be open to the subjects even against the actions of the government. This requires both that executive officers be responsible for their actions and that the legislative and executive functions be placed in separate hands. . . . Locke's position that political society requires a common judge between rulers and ruled and that the law serves as that judge seems identical to the claim that the law is itself the sovereign power, that which is by right to be obeyed.

Id.

for legal change was not sufficient to countermand the mutual jealousies, changes in the law would be held up; the exercise of power would be regarded as illegitimate.⁷⁸ In this way, the *status quo ex ante*, both as to the sorts of functions the state discharged and as to their effects on the pre-existing forms of entitlement, held a presumptive validity. An idea became a constitutional nucleus: that laws, standing and fixed, are the stronghold of liberty and property.⁷⁹

Theorists constructed these individuated functions and gave them distinct shapes. None of them, though, were fully formed as of the American

78. See GRANT, *supra* note 25, at 142-78; STOURZH, *supra* note 13, at 50-70. Of course, the continuously evolving “public interest” to be intuited from this theory of the state—the continued security and enlargement of every consenting member’s natural freedoms—turns out to be its most puzzling facet. Compare POCOCK, MACHIAVELLIAN MOMENT, *supra* note 27, at 436, with LEO STRAUSS, NATURAL RIGHT AND HISTORY (1953). Pocock found it “tempting to conclude that [for Locke] government . . . had no more to do than to administer exchange relationships, and that the individual took part in such a government merely to see that the exchange value of his property was maintained. Strauss argues that the improvement and security of exchanges between rights-holders was the principal and ingenious purpose of Locke’s authority to legislate. See MACPHERSON, *supra* note 25 (critiquing this reading of Locke from neo-Marxist perspective). Without some *other* theory justifying the *particular* institutions, particular distributions of liberty and property rights—the particular forms of economic exchange that are regarded as valid—the very legitimacy even of the legislative authority remains perpetually open to question.

79. Now of course many state functions even in the seventeenth and eighteenth centuries had nothing to do with lawmaking as such—although virtually any imaginable human conduct can be set forth in a “law” to be put into “execution” accordingly. Gwyn intermittently traces this point through several such functions and their role in the doctrine’s development beside the concept of liberty. See GWYN, *supra* note 41, at 11-22, 29-32 (describing impeachments, money-coining, taxing, raising and commanding of armies, punishment of criminals, and making of treaties). Each of these forms an important part of whatever “balance of power” analysis remains viable in the wake of the rationalization of functions. See VILE, *supra* note 16, at 162-92. It is also what facilitates running the two together as a single analysis. See, e.g., Magill, *The Real Separation*, *supra* note 55, at 1165 (arguing Constitution “famous fusion” of two ideas.); *Clinton v. City of New York*, 524 U.S. 417, 452 (1997) (Kennedy, J., concurring).

More importantly, though, Gwyn specifically dates the emergence of the core “rule of law” version of the doctrine he finds separating the agency and function of legislation from those of execution by linking it to the concern that “corrupt influences” would otherwise jeopardize the integrity of the operations themselves. He cites the Leveller John Lilburne, whose pamphlet *England’s Birth-Right* appeared in 1645, as the first to have argued that “while Parliament had the power to make, annul and declare a law,” it operated illegitimately and outside the bounds of its office when it or any of its members acted outside of its own previously issued laws. GWYN, *supra* note 41, at 37-39. Gwyn traces this construction of the separation of powers into the late eighteenth century including, to a degree, the American Founding. *Id.* at 82-128 (discussing role of separation of powers in Locke, Montesquieu, Adams, and others).

In Lilburne’s belief, the sole province and extent of parliamentary *authority* was to enact general laws and it was that authority’s focus and structure which was its most potent discipline. Leaving the execution of laws to others would ensure the integrity of the Parliament’s function. Lilburne’s justification was instrumental, what Gwyn goes on to call the “common interest version” of the doctrine holding that the separation of agencies “assure[s] that members of legislative assembly will look to the common interest rather than to their private interests in the performance of their ‘function.’” *Id.* at 39. Hamilton would later adopt a similar understanding of the doctrine, as would Adams. See STOURZH, *supra* note 13, at 60-66; cf. STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788-1800, at 103-31 (1993). Elkins and McKittrick describe Hamilton’s constitutionalism as possessing divergent elements some of which relied heavily upon the concept of functionally separated “executive” and “legislative” authorities. See *infra* notes 102-23 and accompanying text.

Founding.⁸⁰ They had developed incrementally and largely from practical exigencies, reacting to the forces of political culture and economic (and world) power throughout the seventeenth and eighteenth centuries.⁸¹ Much was left to be developed. That and other dimensions of the process are what made the American Founding so fraught with internal conflict. Only in its conclusion were these functions formed into the trinity which we see in the Constitution.⁸² Indeed, the framers' means/ends debates on the strategic value of the separation of powers are illustrative of means/ends rationality in collective action generally: it depends upon an almost perpetual dialogue about objectives and institutions.⁸³

It is also imperative to not underestimate the importance of early American experience to this evolution. Colonial administration and the colonies' innovations beyond English political and managerial methods consisted in no small part in their independent constitution, rationalization, and reconstitution

80. Coke and Blackstone are both often credited with having fully theorized the separated and balanced institutions of the American Constitution. This is far from the mark, though. See J.G.A. POCKOCK, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY* 42-55 (2d ed. 1987).

81. For example, though "republican" broadly speaking, Montesquieu's executive functions deal with "contingencies" arising out of the "natural motions of human affairs" which are by their nature inaccessible to the legislative will. See HARVEY C. MANSFIELD JR., *TAMING THE PRINCE: THE AMBIVALENCE OF MODERN EXECUTIVE POWER* 239 (1989). Foreign threats are an especially poignant example. *Id.* "Foreign danger keeps government tense and in motion, and Montesquieu insists that the army depend immediately on the executive power, since by its nature it involves more action than deliberation." *Id.*

But they are not alone. The office of the Exchequer—a favorite subject of eighteenth century constitutional criticism—gradually became a modern department of treasury throughout the eighteenth century, becoming increasingly detached from the personal retinue of the crown. During this same period it took on a wealth and diversity of functions as revenue, tariff, and other needs enveloped the government. See BREWER, *supra* note 50, at 64-69, 86-87. Most importantly, though, the Exchequer's association with the "Executive" (which had, of course, itself changed from the Monarch to the ministry) underwent radical changes as it became a bureaucratized department, discharging its functions according to the dictates of bureaucratic administration and legislated policy (instead of as a sinecure or fiscal attaché of the Executive's party).

82. See GWYN, *supra* note 41, at 37-99. The appearance of *De L'Esprit des Lois* is often regarded as a turning point for the trinity as we know it. See *id.* at 101. "[I]t was Montesquieu's analysis of governmental power into legislative, executive, and judicial functions which brought those categories the great popularity which continued down into this century." *Id.* But Montesquieu's account owes much to the more than two decades of personal research, drafting, and redrafting that he did leading up to the completion of his text. See DONALD LUTZ, *THE ORIGINS OF AMERICAN CONSTITUTIONALISM* 146 (1988). "Where Blackstone saw mixture, Montesquieu saw separation. Drawing upon Bolingbroke's erroneous analysis, Montesquieu produced a model of the English constitution in which the three branches were in fact kept separate." *Id.* But, besides his factual errors of description, Montesquieu's separationism was quite orthodox. See Mansfield, *supra* note 81, at 214-15.

He announces no great "philosophical" principle . . . such as Descartes' *cogito*, Hobbes' state of nature, Locke's and Hume's empiricism. Instead, Montesquieu's philosophy is political because he allows it to manifest itself in the politics, morals and manners of the diverse nations that appear in his book as characters of a sort.

Id.

83. This has become a core argument of the democratic experimentalists today: the necessity to democracy of a continuously adaptive institutional imagination. See generally Dorf, *Legal Indeterminacy*, *supra* note 5.

of various governance functions. They did all that to better cope with the geographic, economic, and managerial realities of North American colonization.⁸⁴ Indeed, from our vantage point, actual separation of the functions looks more like the metaphorical “balance” than it does definite principle or true description.⁸⁵ Moreover, as an evolutionary process (of specialization and rationalization between means and ends), it must be said that it continued long after the drafting and ratification of the Constitution.⁸⁶ Most importantly, it drove the legal and constitutional politics of the New Deal and post-New Deal eras of the twentieth century.⁸⁷

84. See, e.g., Edward S. Corwin, *The Progress of Constitutional Theory, 1776-1787*, 30 AM. HIST. REV. 514 (1925); Christine A. Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1381 (1998); VILE, *supra* note 16, at 131-69. This British experience was but one local piece of a larger Western shift toward *rational specialization* in governance, much like that then occurring in the private economy. It signaled the rise of instrumental rationality as the connective tissue between institutions and “public” objectives. But while the history of the separation of functions emphatically is *not* one featuring heterogeneous societal elements nor some balance of power or “virtues” between them, neither is it one with its own account of the absolute ends of political society, i.e., the good to be pursued by and through government. For what is a “rational” public objective, of course, depends on that public’s “ends.” For that, the doctrine would ever be coupling and decoupling with *other* doctrines—although more often than not with various doctrines of natural right. Cf. GWYN, *supra* note 41, at 128. Gwyn argues that, given its many different iterations by many different writers of diverse political-philosophical bents, to “criticize the separation of powers intelligently” would “require an assessment of the key concepts of liberty, tyranny, human nature, and the public interest as they were understood by the proponents of the doctrine.” See VILE, *supra* note 16, at 405-20.

85. Virtually every theorist and virtually every constitution that professed to “separate” discrete functions into dedicated offices/agencies actually commingled them in any number of ways. See *generally* VILE, *supra* note 16; GWYN, *supra* note 41, at 8-10, 100-28. Even within the process by which a general prescription becomes law under Publius’s system, for example, the bicameral requirement is balanced by the presentment requirement, splitting the “legislative Powers herein granted” almost equally between the House, Senate, and President. U.S. CONST. art. I, § 7.

Every Bill which shall have passed the House of Representatives and Senate, shall, before it become a Law, be presented to the President of the United States; If he approves he shall sign it, but if not he shall return it with his Objections to that House in which it shall have originated. . . .

Id.

86. See, e.g., Paul M. Bator, *Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233 (1990). Throughout just the debates on ratification, moreover, discourse about this separation of functions was, if anything, *diverse*. Its thrust changed from state to state and its highest good often changed from advocate to advocate. In some state conventions it was viewed as a cure for a “democratic despotism” that had resulted from the revolutionary constitutions. See RAKOVE, *supra* note 37, at 134-42. In other states, it comprised the rhetorical backdrop for the enhancement of the judiciary’s power and prestige and the innate goodness of a system that included individual hearings and sober assessments of the law as it applied to each person and how the courts should function, to that end, as an essential check on legislatures and executives. See RICHARD B. MORRIS, *THE FORGING OF THE UNION, 1781-1789* 305-22 (1987); RAKOVE, *supra* note 37, at 297-338. In still others it was regarded as a safeguard against the internal, degenerative forces of republics, both ancient and modern. See Peter S. Onuf, *The Small Republic in the New Nation, in RATIFYING THE CONSTITUTION* 171, 178-90 (Michael Allen Gillespie & Michael Lienesch eds., 1989). For a tracking of this rhetorical tradition into the first two generations of the United States, see Drew S. McCoy, *The Elusive Republic* (1980).

87. See *infra* Parts IV, V.

3. *Fusing the Two: The American Founding*

What unites the two essentially different doctrines of balancing power and rationalizing functions into what we recognize as “separation of powers” is their interrelated history in America. They share the turmoil of many transformative events and ideas. It is not that one or the other is more characteristic of a particular theory or intensity of governance,⁸⁸ but rather that each represents a tradition of thought staging and measuring the validity of legal changes within the nation-state.⁸⁹ Their fusion in the American Constitution has ensured an unending source of structural tension within our jurisprudence. Given these conceptual tensions within the separation of powers tradition, we should not be surprised to find that fragments of the doctrine can be put at cross-purposes with one another. Indeed today’s most sophisticated analysts usually take their contradictions (and stalemates) as given, even normal.

Thus, in *INS v. Chadha*,⁹⁰ rational reconstruction of the “legislative function,” bolstered by several explicit connections of its structure to security for affected persons, was enough to lead to the demise of the so-called “legislative veto.”⁹¹ Yet only a few years later the irrelevance of fixable structure and individual right were heralded by the Court’s single-minded preoccupation with the (relatively undisturbed) symmetry of power among courts and agencies, notwithstanding an agency’s authority to adjudicate certain state law created claims wholly independent of the “the Judicial Power of the United States.”⁹² The cases only illustrate the elasticity of the separation of powers.

It does not flatter the Constitution, though, simply to respond that both visions of liberty animate our inherited culture or that both power and authority

88. Even the “rule of law” separationists were often heard to support governments with “energy.” Cf. ROSSITER, *supra* note 25, at 188. “Hamilton’s overriding purpose was to build the foundations of a new empire rather than to tend the campfires of an old confederation.” *Id.*

89. While their overlapping parts are often used rhetorically to render the concepts of power, function, and authority interchangeable as fragments of the doctrine, within the domain of both the balance of power and rationalization of functions, the fragmentation of legal authority has unquestionably been the mediating objective between each and the concept of liberty. This has had important ramifications for the doctrine in the twentieth century as the *methods* of political science, philosophy, and history have changed. See *infra* Parts III, IV.

90. 462 U.S. 919 (1983).

91. *Id.* at 946-52. Arguing that if separation of powers is to be more than “an abstract generalization,” courts must enforce the bicamerality and presentment requirements whenever Congress takes action that may be deemed “legislative.” *Id.*

92. CFTC v. Schor, 478 U.S. 833 (1986) (upholding Commodities Exchange Act’s vesting of “Judicial power” in CFTC); see *Morrison v. Olson*, 487 U.S. 654, 670 (1987) (upholding creation of an independent prosecutor). “We do not mean to suggest that an analysis of the functions served by the officials at issue is irrelevant. But the real question is whether the removal restrictions are of such a nature that they impede the President’s ability to perform his constitutional duty” *Morrison*, 487 U.S. at 670; cf. *Chadha*, 462 U.S. at 1002 (White, J., dissenting) (calling majority’s holding in *Chadha* “a profoundly different conception of the Constitution than that held by the Courts which sanctioned the modern administrative state”).

are real concerns in our separation of powers.⁹³ The more meaningful question is whether the integrity of *any* constitutional conception of liberty, the rule of law, and separated power/authority is viable today in the face of these long enduring antagonisms. The practical answer is “of course.” The separate elements of the doctrine just reviewed are usually treated in constitutional practice in such eroded forms as to render their similar but distinct concepts synonymous, thereby running the four constructs (ancient and modern liberty; balance of power/rationalization of functions) together.⁹⁴ But the differences between them, as described above, are critical to making sense of the modern Leviathan and how it was created.

C. *The Four Constructs: Related But Distinct Traditions*

The continuing chaos of the doctrine in the face of these questions is

93. Recently, more sophisticated historiographical work finds *each* of these distinct traditions marbling our history, especially the Founding. But while the separation of powers was debated with recourse to each of the fragments throughout the Revolutionary and Founding periods, and while that debate failed to produce a resolution of which conception of liberty was to have priority and whether it was power or function that mattered most to that end, the question still holds profound ramifications for the meaning of the separation of powers—to say nothing of the rule of law—in the modern state. See Michelman, *Traces of Self-Government*, *supra* note 16, at 17-66 (arguing fragments of American political thought valuing deliberative democracy and reconciliatory politics generally stem exclusively from republican thought); FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE AMERICAN CONSTITUTION* 9-55, 185-224 (1985) (tracing competing theories as “the ends of the state” throughout varied “intellectual origins” of Constitution); see ROSSITER, *supra* note 25, at 356-439 (same); WOOD, *supra* note 13, *passim*.

94. See *Schor*, 478 U.S. at 855. The Court answered in the negative the question whether the Commodity Exchange Act “authorized the adjudication of Article III business in a non-Article III tribunal”—thereby threatening the “institutional integrity of the Judicial Branch”—by instead finding that the Act did not create a “phalanx of non-Article III tribunals equipped to handle the entire business of the Article III courts” and that it was thus not an unconstitutional threat to “judicial control saved to the federal courts.” See *generally Chadha*, 462 U.S. 919. The Court ignored arguments that legislative veto provisions were coping mechanisms congress favored so heavily in the administrative state as a defense to Executive hegemony and instead finding that the separation of powers would be “an abstract generalization” unless the Court held that such action was prohibited “legislation” that had not been through the bicameral and presentment processes required by Article I. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). There, the Court argued that the President’s “inherent authority” to take actions like the seizure of private property to ensure the Nation’s capacity to wage war “is at its lowest ebb” not just in the absence of legislation specifically authorizing such action, but when the Congress also appears to frown upon such action, while not necessarily specifically prohibiting it. *Id.*

This is probably attributable to a confluence of several distinct causes for which I shall not attempt to account. Perhaps the best explanation comes in the form of Bailyn’s famous synthesis of a “liberty versus power” dynamic in the writing and advocacy leading to revolution. See BAILY, *supra* note 13, at 77, 95, 102, 121-22, 144-48. As the legitimacy of the entire British government collapsed for the colonists (King, Lords, and Commons), no particular agency (whether King or Parliament)—and thus no particular *theory* of agency—was any less offensive than another. And, as Morgan has shown, that vacuum was deftly filled with a new theory of agency at peace with an emancipated society from its very beginning: the theory of popular sovereignty. The generality and versatility of the concept of *power* became a rhetorical necessity as the colonial claim grew from one of freedom from arbitrary taxation to one of complete severance from the British Empire. See MORGAN, *supra* note 39, at 151-233; REID, *supra* note 70, at 222-45; John M. Murrin, *Political Development*, in *COLONIAL BRITISH AMERICA: ESSAYS IN THE NEW HISTORY OF THE EARLY MODERN ERA* 408, 432-47 (Jack P. Greene & J.R. Pole eds., 1984).

dilemmatic. On the one hand, the muddled whole is marked by the lack of a clear point.⁹⁵ As was said, neither half of the separation of powers was ever all that successful at producing a robust, unambiguous justification all its own and neither held to a lasting, articulate reason to have “strict” divisions of any kind. Modern political authority has always rested on eclectic foundations and the separation of powers forms at most but a piece thereof. Both conceptions of liberty as a political end have held connections to the two branches of the modern separation of powers doctrine and each of those have shifted in shape several times. So fusing the four heads of these traditions together produces very different permutations. It is therefore crucial to keep the crevices in mind to avoid being manipulated into thinking that no rhetorical sleight of hand has occurred in some particular controversy.

On the other hand, the contemporary life of the separation of powers as a legal doctrine has taken the form of arguments that (1) arbitrarily dictate some two-bit combination, e.g., modern liberty/rationalization of functions; (2) selectively marshal historical materials to “prove” that such combination was definitively *chosen* by some unity known as “the Founders”; and (3) pretend to “translate” its dictates into the vastly different world in which we find ourselves, a world of different liberties and property, different state functions, and different publics.⁹⁶ The dilemma here is that, as a matter of constitutional structure and history, such claims are easily disproven. Indeed, they represent a certain artificiality of constitutional law, one that is today isolating it from what is principled about political and constitutional thought more generally.⁹⁷ It will

95. Professor Magill has drawn this conclusion too. See Magill, *The Real Separation*, *supra* note 55, at 1164-69. This vacuum has fostered a cleavage between the class of justifications offered and the separation of powers prescriptions per se and it is this cleavage that has made the doctrine so versatile (and thus so durable) throughout American legal history, permitting it to couple with highly disparate justifications. See *infra* notes 214-34 and accompanying text (describing synthesis of “legalist” and “experimentalist” thought throughout twentieth century).

96. The list of sources that assemble the separation of powers in this fashion would be extremely long; one especially apt example is Raoul Berger, *Government By Judiciary* (1977). Of course, it would be dwarfed by the list of those that selectively marshal doctrinal interpretations to similar ends. Sophisticated comparisons of the precedents highlighting their internal conflicts with respect to these disparate traditions are possible, though. See TRIBE, *supra* note 70, §§ 2-3, 2-4, 2-5.

97. Even when such work is done well (which is probably not a majority of the time), it tends to remain highly vulnerable to persuasive refutations. See generally Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995) (criticizing several efforts to use historical materials in constitutional argument as being naively selective); Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 132. “[A]n examination of the history set forth in the number of the activist opinions of recent decades demonstrates rather well that the ‘liberal history’ of the present Court is not much better than the business-minded vested rights ‘history’ of Chief Justice Fuller. . . .” Kelly, *supra*, at 132. An example where the historical record was treated quite carefully is Steven Dworetz’s book, *The Unvarnished Doctrine*. After perhaps the most ambitious attack yet on the “republican synthesis” of the Founding, Dworetz parries his account of American Lockeanism and comes to deeply ambivalent conclusions. See DWORETZ, *supra* note 25, at 191. “American republicanism in the Revolutionary years was a distinctively *liberal* republicanism because it was embedded in a political and intellectual tradition which included a vital and essential Lockean-liberal component. Republicanism and liberalism coexisted at the founding, and coexistence

pay off in the end to more fully specify this artifice.

1. Separation of Powers as American Constitutional Argument: The Case of John Adams

Armed with a wealth of experience under the British Constitution, Americans began their own dialogue about institutions, authority, power, and liberty. That dialogue culminated in the debates surrounding ratification of the Constitution. This section considers what our argumentative tactics were then and what they have since become.

Most participants in the ratification debates had a tendency to confuse their descriptions of the English Constitution with apologetic idealizations of certain of its features and explanations of its specific “corruption” by Parliament justifying the revolt.⁹⁸ Others tended to commandeer whole veins of rhetoric that had been created for entirely different purposes than revolution or state-building.⁹⁹ Many confused their accounts of the mixed constitution with comparisons of it to others, all jumbled about in a brew of quasi-empirical description, interested political advocacy, and pedantry, not unlike our own time.¹⁰⁰ And, of course, writers disputed one another about genuine

must have modified both points of view.” *Id.*

As any survey of the massive historical literature on ratification would show, marking useably precise contours around our two competing concepts of liberty and two different strands of separation of powers doctrine—and their purchase among the different state electorates (while also attempting to establish a one most-widely-seen face of the doctrine as a philosophy, science, or history of politics and legal change) makes conceiving of logical differences between power and authority look like child’s play.

98. John Adams was sometimes regarded as having done just this. See BANNING, LIBERTY, *supra* note 37, at 444 n.44.

99. See GWYN, *supra* note 41, at 116-17. Gwyn notes the great admiration John Adams held for Bolingbroke’s “constitutional writings” and how instrumental Bolingbroke was to Adams’s incorporation of the judiciary into his system of “balance.” *Id.* The best documented of such confusions, though, were many of the borrowings from Country ideologues—opposition writers of the early eighteenth century—by Federalists and Antifederalists *alike*. Country ideology was a body of writing stricken with its own confusions of competing political doctrines and self-interested polishing of troublesome contradictions and its reemergence in the New World was no more orderly. See BAILYN, *supra* note 13, at 33-54. An exploration of its origins which details what was at stake and the different political traditions that were begged, borrowed, or stolen from by the Country opposition to Walpole and the “innovations” of his ministry is Kramnick. See KRAMNICK, *supra* note 50.

100. *Cf.* VILE, *supra* note 16, at 13.

A major problem in an approach to the literature on the doctrine of the separation of powers is that few writers define exactly what they mean by the doctrine, what are its essential elements, and how it relates to other ideas. Thus the discussions about its origins are often confused because the exact nature of the claims being made for one thinker or another are not measured against any clear definition.

Id.; see CASPER, *supra* note 65, at 7-22. “Unfortunately, many political writers, Montesquieu included, tended to amalgamate (and thus obscure) separation of powers notions with another possible condition of liberty, or at least of good government: the institution of “mixed” government, which was aimed primarily at balancing different classes or interests.” CASPER, *supra* note 65, at 9. So-called “Federalist political science” on tyrannies of the majority, natural aristocracy and the Mixed Constitution’s solutions therefore, were often at the very heart of what Anti-Federalists criticized in the proposed Constitution, many of whom considered it a

interpretations of precedent and what facets of past events rose to the rank of the fundamental or “constitutional.”¹⁰¹ Indeed this was the peculiar “blessing” of the English Constitution after 1688: it was remarkably flexible.¹⁰²

Of this John Adams, a character featured in Professor Gordon Wood’s famous study as being out of step with the American experience,¹⁰³ is an exemplar *par excellence*. Adams, thanks in part to the popularity of Wood’s account, has “become the symbolic defender of mixed government during the founding period.” But this is actually not a full accounting of his thought or public political speech.¹⁰⁴ “Adams was indeed a defender of mixed and

recipe for aristocracy. See HERBERT J. STORING, *WHAT THE ANTI-FEDERALISTS WERE FOR* 48-52 (1981).

101. See Gwyn, *Indeterminacy*, *supra* note 75, at 477-81; GWYN, *supra* note 41, at 3-10 (setting forth five versions of separation of powers commanding adherents throughout seventeenth and eighteenth centuries); BANNING, LIBERTY, *supra* note 37, at 99-107, 111-37, 198-233 (describing depth and diversity of Madison’s thinking on separation of powers and discrimination between prudential and constitutional doctrines); BANNING, LIBERTY, *supra* note 37, at 396-402 (describing ambiguities in separation of powers as treated in *The Federalist*); WOOD, *supra* note 13, at 260-61.

Most eighteenth century writers . . . could not conceive of the constitution as anything anterior and superior to government and ordinary law, but rather regarded it as the government and ordinary law itself, as “*that assemblage of laws, customs and institutions which form the general system; according to which the several powers of the state are distributed, and their respective rights are secured to the different members of the community.*”

WOOD, *supra* note 13, at 260-61. Much of this thinking still had yet to be done—indeed would be done for the first time in the midst of the framing of the Constitution, setting apart the American conception of a constitutional separation of powers from that of earlier British experiences. See *id.* at 261-66. See generally JOHN PHILIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY TO LEGISLATE* (1991) [hereinafter REID, LEGISLATE].

As a question of purely British legal/political doctrine, though, the theories of mixed government and checks and balances—but especially as each functioned to limit the Crown’s prerogative—date at least to the fifteenth century and the writings of the jurist John Fortescue. See WESTON, *supra* note 41, at 1556-1832, 9-43 (detailing development of mixed government and its cognates in this period); REID, LEGISLATE, *supra*, at 63-68 (describing growth of parliamentary sovereignty over crown as rise of constitutionalism, logic of popular sovereignty). Although a robust usage of the notions did not arise and become the subject of everyday political-discursive practice until the reign of Charles II. See WESTON, *supra* note 41, at 98-99.

102. Montesquieu’s *De l’Esprit de Lois* evidences this perfectly in its opaque complexity: it arguably embodied each of these shortcomings and it was clearly regarded throughout the Founding period as one of the most authoritative secular texts on the separation of powers. Professor Vile concluded that, while “the influence of Montesquieu cannot be ascribed to his originality . . . [it can be] to the manner and timing of the doctrine’s development in his hands.” See VILE, *supra* note 16, at 83. In *The Federalist Papers* alone, Montesquieu’s summa is invoked as authority no less than four times—in numbers 9, 43, 47, 78—on the separation of powers in history. Ironically, it was also the most widely cited secular source among Anti-Federalists. See LUTZ, *supra* note 82, at 145-46; *id.* at 141-45 (tables); RAKOVE, *supra* note 37, at 209. “Foremost among the [authorities] was “the celebrated” or “excellent” Montesquieu, whose treatise *De l’esprit des lois* was repeatedly cited by Anti-Federalists on two crucial points: the optimal size of republics, and the true meaning of the doctrine of separation of powers.” RAKOVE, *supra* note 37, at 209.

103. See WOOD, *supra* note 13, at 48-51, 567-92. Wood variously describes Adams as having “misunderstood the meaning of the Constitution,” as having “never really comprehended what was happening to the fundamentals of political thought in the years after 1776,” and as having evidenced the “bewilderment of a man whom ideas had passed by.” *Id.* at 48, 567-68. He is, though, by no means alone in his derision of Adams. See McDONALD, *supra* note 93, at 185 (calling Adams “doctrinaire ideologue” and saying it was “fortunate[] for the country” Adams was in London in 1787).

104. C. BRADLEY THOMPSON, *JOHN ADAMS AND THE SPIRIT OF LIBERTY* 216 (1998).

balanced government, but only in the context of the modern doctrines of natural rights, representation, and, most importantly, separation of powers.”¹⁰⁵ The point which has been so often used by posterity to link Adams to the outmoded theory of the mixed regime was that, for him, the separation of functions by itself was something of a “hollow doctrine,” “a theory built on a philosophical construct (isolated individuals in the state of nature) that was not altogether grounded in the day-to-day realities of political life.”¹⁰⁶ And what were those “realities”? The “social, religious, political, and economic divisions, hierarchies, and rivalries that exist in most communities.”¹⁰⁷ Adams, that is, believed in the inevitability of competition and massive power imbalances in society, building his theory of liberty, representation, and the separation of powers around them.¹⁰⁸ Adams’s theories of human nature, theories of ambition and “natural aristocracy,” led him to an idiosyncratic mishmash of doctrines tied together by his belief that “mixed government and separation of powers could be employed as overlapping and mutually reinforcing principles.”¹⁰⁹

The history of political thought, since Adams’s time, has overwhelmingly rejected his philosophy of natural aristocracy.¹¹⁰ His objective is, however, at

105. *Id.* at 216. Adams’ own synthesis, to be pieced together from a voluminous body of writings throughout his life, perfectly evidences the inter-penetration of modern and ancient and mixed and separated theories of liberty and constitutionalism. *See id.* at 202-28.

106. *Id.* at 216; *see* ELKINS & MCKITRICK, *supra* note 79, at 531-37.

107. THOMPSON, *supra* note 104, at 216. Adams’s theory of natural inequality—also a major departure from the Lockean or liberal philosophies of many of his contemporaries—was, according to Thompson, based on a twofold premise. First, Adams was inured of the ancient (Aristotelian/Polybian) maxims on the “superiorities of influence in society which grow out of the constitution of human nature.” *Id.* at 169. This connection to the Aristotelian belief system, leading to the classification of societies, regimes, and theories of the good by the one, the few, and the many, pushed Adams to his so-called “realistic” belief in natural aristocracies. *Id.* at 161-73. This was the source of his famous dispute with Turgot and the other philosophers. *Id.* at 166-68. Adams certainly did urge formal legal equality, but even after an arduous exploration of past republics (ancient and modern), he could find “no nation in history and could imagine none in the future where ‘individuals were all equal, in natural and acquired qualities, in virtues, talents, and riches.’” *See id.* at 167. “That all men are born to equal rights is true.” *Id.* (quoting 4 JOHN ADAMS, THE WORKS OF JOHN ADAMS 392 (Charles Francis Adams ed., 1850-56)).

Second, Adams was convinced along with Harrington and other Machiavellians that property was the real source of *power* in politics. *Id.* at 209-11. Although it should be noted that he rejected Machiavelli’s doctrine of “republican virtue,” Adams very much believed that property was not simply a *means* of fulfilling some insatiable individualistic want, but rather the very foundation of a citizen’s ability to render his “enlightened consent” and that it lay at the base of theories like Harrington’s “Balance of Power in Society” following the “Balance of Property in Land.” *Id.* at 189-95, 210 (describing Adams’s contempt for Montesquieu’s use of virtue in his construction of the ideal constitution).

108. Perhaps not unjustly in this light, Federalist political economy has been identified with tendencies toward aristocracy and wealth privilege. *See* ELKINS & MCKITRICK, *supra* note 79, at 77-131, 531-37, 581-607 (contrasting Hamilton’s “mercantile utopia” with Adams’ leanings toward monarchy and aristocracy).

109. *See* THOMPSON, *supra* note 104, at 217. “In fact,” Thompson concludes, “the theory of mixed government was actually a subsidiary principle subsumed by Adams under the umbrella of separation of powers.” *Id.*

110. Today a legal or political *philosophy* of natural aristocracy is much more extraordinary (and dubious) than a *positive* or “political scientific” theory that asserts the *regularity or inevitability* of elite control.

least intelligible; he wished to synthesize the newer discourse rationalizing functions like the phases of lawmaking (chiefly to ensure the “representativeness” and integrity of the decisions therein) with the older theories of “balance,” public virtue (and, with that, the acknowledgement of aristocracy), shared liberty, the impossibility of deliberative decision-making except among “peers,” etc.¹¹¹ In other words, he expressed none of our four traditions as mutually exclusive. Rather, he sought to integrate ancient and modern liberty and the rationalization of functions and balances of power into a distinctly *American* theory of liberty and legal change.¹¹² Adams saw no fundamentally unavoidable choice posed within the separation of powers.¹¹³

Positive, predictive constructions of such regularities, indeed, are a staple of political analysis today and in fact form important underpinnings for many highly influential theorists including the democratic experimentalists. *See infra* notes 185-90 and accompanying text. Perhaps coincidentally, rehabilitations of Adams’s popular image seem to have wide appeal lately. *See* DAVID MCCULLOUGH, JOHN ADAMS (2001).

111. Unfortunately, while his objectives may be intelligible, I remain unpersuaded by Thompson that all of his specific doctrines are (or were). It is at least worth acknowledging, though, that Adams held quite sophisticated views on the checking of what we might call “deliberative” or “soft” power in legislative bodies, for example, the corruptions of demagoguery and vote-trading, many of which are of a distinctly “modern” character in democratic theory. *Cf.* JOHN R. HOWE, JR., THE CHANGING POLITICAL THOUGHT OF JOHN ADAMS 59-98 (1966) (exploring Adams’s “rule of law” republicanism as palliative to such breakdowns). But then it must be acknowledged that they were probably views he derived entirely from Machiavellian and Enlightenment sources and by which he eventually sought to “check” whole agencies of government inasmuch as they represented classes of society in order to keep them from destroying what he perceived to be the organic “balance” of the polity—a clearly out-moded ultimate end pursued by borrowed means. *See* THOMPSON, *supra* note 104, at 156-57.

112. Opinions vary as to his success. *Compare* THOMPSON, *supra* note 104, at 203 (calling Adams’s “a unique and powerful synthesis” of the ideas), *with* WOOD, *supra* note 13, at 580 (finding Adams’s writings “contrary to the central thrust of constitutional thought in 1787”). It is at least ironic that Adams’s “American” theory, premised on his sciences of politics, history, and human nature and set out in the turgid three volumes of *A Defence of the Constitutions of Government of the United States*, went largely *unnoticed* in his own generation. Indeed, it drew its only significant reaction from John Taylor of Caroline decades later in 1814 (which Wood regards as having leveled a devastating critique). WOOD, *supra* note 13, at 587. Chief among Taylor’s attacks were those upon Adams’s theory of natural aristocracy and its place in a constitution. *Id.* at 589.

[T]he kind of aristocracy that was “capable of being collected into a legislative chamber,” was impracticable in America, where education and commerce had diffused knowledge and wealth among so many. Inequalities and distinctions of superiority, Taylor admitted, would inevitably exist; but in America, he argued, they were so numerous and fluctuating that they could never be gathered together and confined in the upper houses of the legislatures.

Id.

Indeed, later in his life, both immediately before and during his presidency, Adams was given to emphasizing humanity’s general selfishness, venality, and untrustworthiness—decidedly *unrepublican* premises of politics and the individual. *See* HOWE, *supra* note 111, at 133-55, 193-251; ELKINS & MCKITRICK, *supra* note 79, at 535.

113. Howe contends that “[i]n writing of an American aristocracy, Adams [consistently] insisted that he was not referring to formalized class distinctions or privileges sanctioned by law,” but rather the “philosophical arguments for a ‘natural aristocracy.’” HOWE, *supra* note 111, at 137-38. Yet, where other, perhaps superior thinkers in the Atlantic Republican tradition endeavored to reason out truly systemic arrangements of such “philosophical arguments,” Adams (ever the true American) contented himself simply to admit that his meritocratic aristocracy was usually ousted in the real world by the aristocracy of the “rich and the wellborn.” *Id.* at 140. This was the conceit that landed him in such ill repute with Republicans later in life. *Id.* at 202-41.

He, along with several of his contemporaries,¹¹⁴ used elements of all of them.¹¹⁵ The problem is that nailing down Adams's own specific theory means detaching him from the larger public process of ratification, the relevant political event giving the Constitution its legal force.¹¹⁶

It has always been plausible to think that individual public figures like Adams understood themselves when making the structural Constitution as exhaustively cataloguing the modes of legitimate "jurisgenesis."¹¹⁷ The

114. Stourzh in places makes much the same point about Hamilton. See STOURZH, *supra* note 13, at 38-55. He goes on, though, to identify Hamilton's own hybrid philosophy as a "rule of law" republicanism and puts his separation of powers in the tradition of Lilburne and the other Levellers. Cf. HOWE, *supra* note 111, at 160-68 (tracing Adams' reliance upon rule of law as security against faction and constant competitions of majorities and minorities); *infra* note 126 and accompanying text.

Hamilton bears special note here. Synthesized not just from his numbers of *The Federalist*, but also from his writings in the early 1780s and during his tenure as Washington's Treasury Secretary, Stourzh's account of Hamilton is of a republicanism built upon certain "enduring and general principles of reason and justice that remain true and valid regardless of popular approval or disapproval." See STOURZH, *supra* note 13, at 60. These principles, over and above such structural norms as the bans on *ex post facto* laws and bills of attainder, included the notion that the "essence of the legislative authority" (whatever its ultimate source) was to enact "laws" marked by a "generality inherent in the nature of a rule," such that its scope was "impartial" and "equal." *Id.* at 61. But it appears that even Hamilton was quite aware that the protectiveness of generality—however elegant in the abstract—became highly manipulable in practice and that it was virtually parasitic upon the purposes to which the legislative power was to be put. *Id.* at 62-70.

115. While more deft and path-breaking than either Adams or Hamilton, Madison—the Constitution's architect-in-chief—exhibited similar tendencies. *The Federalist* No. 10 has Madison grounding his "new science" of structurally harnessing individually self-interested passions toward the improvement of government for the general good upon an ideal of a multiplicity of *differentiated functions* (and constituencies) all against the constant pulls of "faction." See BANNING, LIBERTY, *supra* note 37, at 76-96, 202-33; WOOD, *supra* note 13, at 593. Yet in most respects—and in most numbers of *The Federalist*—Madison equated legislatures with faction and faction with *evil*, identifying it, that is, *not* with the probabilistic ("scientific") inescapability of what we call interest group liberalism (as Robert Dahl once famously argued), but rather with the very social forces that our constitutionalism was supposedly developed to inhibit. See Daniel Walker Howe, *The Political Psychology of The Federalist*, 44 WM. & MARY Q. 502, 504 (1987); ROBERT DAHL, A PREFACE TO DEMOCRATIC THEORY (1956); cf. BANNING, LIBERTY, *supra* note 37, at 208-14 (arguing Madison's republicanism and separation of powers interlaced with his theories of federalism and faction); EPSTEIN, *supra* note 53, at 59-110, 154-61 (finding that much of *The Federalist* could be labeled "anti-democratic" on this point).

116. Convenient for our purposes is that Adams himself was not a participant in the writing or ratification of the Constitution. But from our perspective his thinking is representative of that process in its own right. Especially given the complexities of trying to reconstruct actual consensuses through the ratifying electorates, the apparent contradictions in Adams's writings are suggestive of what "the Founders" probably experienced as a community. See, e.g., Forrest McDonald, Foreword, in RATIFYING THE CONSTITUTION ix (Michael Allen Gillespie & Michael Lienesch eds., 1989) (marking on "labyrinthine complexity" of process of ratification if purpose is to trace ideological or conceptual choices); William B. Gwyn, *The Indeterminacy of the Separation of Powers in the Age of the Framers*, 30 WM. & MARY L. REV. 263 (1989). "Most late eighteenth-century American accounts of the separation of powers doctrine were very superficial. Rarely does one find an explanation for why such a separation is desirable beyond the vague references to its necessity in achieving 'liberty' and avoiding 'tyranny,' two highly emotive words dear to eighteenth-century Anglo-American rhetoric."

117. Robert Cover's use of this concept, though it encompassed (indeed featured) those aspects of jurisgenesis *outside the state*, is quite functional for my purposes. See Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 11-40 (1983). He argued that the irreducible pluralism of legal and constitutional meanings, "the problem of the multiplicity of meaning,"

problem is that it has always been equally plausible to think that the public as a whole did not do that. And it has also been plausible enough to think that the twentieth century confronted the idea of exclusivity and rejected it. As will be argued below, what the innovators of administrative forms actually did was assemble components of a multifaceted, ambivalent tradition into a permutation not previously emphasized by any particularly well-known publicist.¹¹⁸ They

mandated a discourse-oriented conception of jurisgenesis that transcended *any* formal processes, and denied that any subset of its agents were or could be a “source of privileged precept articulation.” *Id.* at 16-17 n.44. This captures important aspects of law making in an administrative agency where pivotal concepts and authorities are so often matters beyond traditional legal processes and categories and where authority and grounds of validity assume a fluidity not known to the traditional legal schematic. *See infra* notes 213-29 and accompanying text.

118. Our timeframe is understood by the standard theory in terms of multigenerational, incremental constitutional changes (and perhaps by a few “moments” of extraordinary change), accumulating and developing into a body of convention. *Compare* GARY LAWSON, *FEDERAL ADMINISTRATIVE LAW* 48-186 (2d ed. 2001) (describing shift from trinitarian to administrative state as one of gradual, intergenerational change), *with* BRUCE ACKERMAN, 2 *WE THE PEOPLE: TRANSFORMATIONS* 279-382 (1998) (arguing New Deal was tantamount to constitutional amendment and 1936 presidential election was locus of popular ratification thereof). Thus, critics throughout the second half of the twentieth century derided independent regulatory agencies as an illegitimate “headless fourth branch,” but almost never suggested a substitute that could even plausibly pursue the ideals of public-regarding laws through more democratic means. *FTC v. Ruberoid Co.*, 343 U.S. 470, 487-88 (1952) (Jackson, J., dissenting).

Indeed, such criticisms only infrequently highlighted particular precedents or principles as peculiarly unjustified, as peculiarly without constitutional warrant. Not that this would be impossible. It was rather because, taken individually, no one of these precedents was especially out of step with the separation of powers as a whole rhetorical tradition. For example, Supreme Court rulings precluding the President from removing officials of independent agencies (or upholding statutory requirements of “cause,” “good cause,” a hearing, and the like)—ever the bane of the originalist’s existence—were always marked by a closeness of competing justifications. *Compare* *Myers v. United States*, 272 U.S. 52 (1926), *with* *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 626-32 (1935). For virtually opposite conceptions of the relationship of the “administrative” to the executive and legislative, compare Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 *YALE L.J.* 541 (1994), with Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 *COLUM. L. REV.* 1 (1994).

The Adamsian diversity and breadth of the tradition has always been just as readily available to support institutional innovations as to attack them. Moreover, the precedents in this genre were often notable for their *highly* problematic use of historical evidence bearing upon the so-called original meanings at issue. *See* CHARLES A. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* 52-70, 193-201 (1969). In fact, they have continued to serve as fertile ground for such disputes not just between the Congress and President—but between both branches (on behalf of “the public”) and the judiciary. *Cf.* *Morrison v. Olson*, 487 U.S. 654, 671 (1988). The Court linked a refusal to establish bright lines between Executive and Legislative power to be policed by the judiciary to a desire to leave the question open for public debate. *But cf.* *Bowsher v. Synar*, 478 U.S. 714, 721-34 (1986). For the separation of powers is but one instance of a much larger eclecticism: that of constitutional interpretation itself. *See* PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* (1991) (arguing sustained use of “modalities of constitutional argument” itself legitimates constitutional change by succeeding generations). Habermas identifies as a central condition on the legitimation of legal change within the public political sphere the existence of a “shared practice of communication” the content of which consists in reasons freely recognized as valid among the communicants party to the practice. HABERMAS, *supra* note 11, at 360-87. Because the standard theory explains so little of the macro-political assumptions about change that were made at the Founding, *whether* some particular innovation actually is a “discontinuity” and therefore presumptively unconstitutional remains perpetually unsettled even as an historical matter. *Cf.* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 *HARV. L. REV.* 885 (1985) (arguing conventional account of originalism over-simplified when compared to what founders expected would happen).

followed Adams's example and *that* frames the enduring analytical and historical questions posed by the structure of the "administrative function," its relationship to the judicial and political systems, and the constitutional separation of powers.

2. Contemporary Uses of the Founders' Words

Throughout the institutional creativity and intellectual foment of the American Founding, the separation of powers ceased even to resemble "a theory of government" that provided "an adequate basis for an effective, stable political system,"¹¹⁹ its history in turn becoming a "panorama of the complex evolution of an idea."¹²⁰ While it today remains "definitely of a normative character,"¹²¹ the doctrine's greatest salience since the Founding has been its rhetorical force, taking up its place as one among many "theoretical influences" upon the American system.¹²²

A rich irony here is that Adams's eclecticism comes closest descriptively to what the federal judiciary has actually made of "the separation of powers" in its constructions of the doctrine over the last two centuries.¹²³ The jurisprudence is perhaps best described as the *collision* of modern into ancient liberty¹²⁴ and of alternating judicial concern for power, function, and authority.¹²⁵ In short,

119. VILE, *supra* note 16, at 2.

120. VILE, *supra* note 16, at 10.

121. GWYN, *supra* note 41, at 8.

122. GWYN, *supra* note 41, at 126.

123. Between Stourzh's Hamilton, Thompson's Adams, and Wood's "end of classical politics," it becomes possible to discern the thrust of a separation of powers like that on display in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). In that mid-twentieth century case, the Court took the opportunity to consolidate several basic principles of the doctrine. See *Youngstown Sheet*, 343 U.S. at 579. By a fractured majority, it held that in areas such as the war power where national authority was evenly divided between the President and Congress, any standing statutory pronouncements on a question trumped extemporary preferences of the President, even if the two did not necessarily conflict. See *id.* at 587-88. The holding echoes the Hamiltonian ideal that the security to liberty that attaches from the difficulties of enacting legislation were inherently important to the system created by the Constitution. Cf. *id.* at 631-32 (Douglas, J., concurring). Of course, how easily *circumvented* this structural rule becomes with a plethora of standing laws, a sprawling military-industrial complex, and a determined (ambitious?) executive was soon enough demonstrated in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), and continues to illustrate its weaknesses today. In *Dames & Moore*, the Court essentially abstained from interpreting the law and held that it was the Congress's prerogative actually to *prohibit* executive actions taken against liberty and property when and if it so chose. Cf. TRIBE, *supra* note 70, § 4-7 (describing shift from *Youngstown* to *Dames & Moore*). But *Youngstown* is perhaps most notable for Justice Jackson's concurrence expressing frustration with the historical record on the question of Executive versus Legislative authority, finding it essentially conflicted and of very little use to judicial decisionmaking. *Youngstown Sheet*, 343 U.S. at 634. That is a sentiment which has been repeated by other courts. See *Clinton v. Jones*, 520 U.S. 681, 695 (1997).

124. Cf. C. Edwin Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741 (1986); James E. Fleming, *Constructing the Substantive Constitution*, 72 TEX. L. REV. 211 (1993); Michel Rosenfeld, *Metro Broadcasting Inc. v. FCC: Affirmative Action at the Crossroads of Constitutional Liberty and Equality*, 38 UCLA L. REV. 583 (1991).

125. See Magill, *The Real Separation*, *supra* note 55, at 1157-97; *id.* at 1131. "Not only is it a mistake to treat [rationalization of functions and balance of power doctrines] as if they easily relate to one another, but that

the separation of powers doctrine in its most eclectic, *Adamsian* form is what American jurisprudence as a whole has been. Adams is thus oddly representative of a *tendency* in American constitutional law and politics: the tendency to use the rhetorical power of dividing and diluting power and authority to changing and often highly specific ends.¹²⁶

This is not to say that history's oscillations have been without form or pattern. Much of the nineteenth century was marked by modern liberty's "institutionalism," a shrunken notion of strictly divided legislative and executive offices, which equated that division with "the rule of law."¹²⁷ It set absolute priority on the separation of legislative from executive business by viewing the resultant inefficacies of each as a security to (modern) liberty.¹²⁸ While this was indeed the vision of certain founders, most prominently Hamilton,¹²⁹ it was hardly the consensus.¹³⁰ Hamilton's doctrines were merely

mistake has meant that neither of the conceptions has been subjected to critical analysis." *Id.*; cf. TRIBE, *supra* note 70, at 137. "[T]he Constitution does not itself define "legislative," "executive," or "judicial" powers, and the functions assigned to each branch belie any suggestion that [it] establishes a strict separation." TRIBE, *supra* note 70, at 137 n.4. "History provides no dispositive test by which the different types of authority may be confidently distinguished." *Id.* §§ 2-2 to 3-2 (discussing precedents from *Hylton v. United States*, 3 U.S. 171 (1796) to Clinton Impeachment); see Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984) (proposing analysis of agency governance situated between various judicial precedents since founding); notes 310-15 and accompanying text.

126. I trace this rhetoric's role in the forming of the APA in Parts IV and V.

127. See 1 FRIEDRICH A. HAYEK, *LAW, LEGISLATION AND LIBERTY: RULES AND ORDER* 124-44 (1973); 3 FRIEDRICH A. HAYEK, *LAW, LEGISLATION AND LIBERTY: THE POLITICAL ORDER OF A FREE PEOPLE* 20-39, (1979). For clarity's sake, I shall call this the Hamiltonian model. On Hamilton's holding a similar view, see ROSSITER, *supra* note 25, at 186-225; also see note 113, *supra*. Hamilton is probably the most appropriate eponym for this model as an American constitutional matter, although several more prominent political thinkers did more for its development. The origins of the distinction are as early as Hobbes. See Richard Flathman, *Liberalism and the Suspect Enterprise of Political Institutionalization: The Case of the Rule of Law*, in *THE RULE OF LAW* 297, 304-23 (making exception for Hobbes as truly "liberal" theorist of rule of law).

128. Hamilton and the later Adams share a certain cynicism toward the functioning of a "legislative" authority on a routine basis which is evident in late liberal theorists like Hayek. See *supra* note 113. Thus did this model hold such sway throughout the nineteenth and early twentieth centuries even while the nation underwent massive changes in the nature of property, economic enterprise, and legal entitlements more generally. This arrangement of the doctrine views positive "lawmaking" as necessarily arising out of a highly disciplined process in which legislators must write and live with clear and definite rules, executives must act upon and only through those rules, and judges are constrained merely to apply and interpret those rules and only those rules in finely individuated cases. HOWE, *supra* note 111, at 90-101; GWYN, *supra* note 41, at 71-73, 116-26 (tracing this notion in Locke's Second treatise and Adams's thought). The mutually reinforcing tensions that are generated are supposedly a result of steadfast enforcement of the tethers that attend any such distribution of lawmaking authority. But the problems for this theory have always been practical. See *infra* Parts III, IV.

129. I will refer to the "rule of law" formulation of the doctrine as "Hamiltonian," conceding this is an oversimplification. See *supra* notes 113-14, 125 and accompanying text. I explain its collapse below in Part III.

130. For example, Epstein teases out several differences between Publius's separation of powers and that generally attributed to Locke (or what Gwyn attributed to Lilburne, see note 78, *supra*), i.e., the separation of executive from legislative authority to ensure office-holders' fidelity to their functions in pursuit of a "public" interest. See EPSTEIN, *supra* note 53, at 152-61. In the end, Publius seems more concerned with power than with authority, though. Wood echoes this characterization of the Founding more generally, seeing an

one idealization advanced among many. Moreover, by the twentieth century and the advent of the administrative state, it was massively eclipsed by other synthesized doctrines. Progressivism reprioritized the older ideals of freedom (what we have called ancient liberty) while Legal Realism sought the “true” grounds of legal authority.¹³¹ Social, economic, and political evolution in the United States constantly affixed new meanings to the separation of powers doctrine’s four pieces, situating them in the middle of battlegrounds between contending societal forces. This process moved at a rapid pace throughout most of the twentieth century. Part III explores the kind of authority/power that was synthesized from the tradition by those events and why.

III. WHAT MAKES AN AUTHORITY “ADMINISTRATIVE”?

What makes a constituted agency or the authority (power) it exercises “administrative” instead of legislative, adjudicative, or executive? As to law and legal change, it is fairly self-evident that “legislating” pertains to the making of rules, principles, and policies and that “adjudicating” pertains to their interpretative application to individuated particulars. The big variable is how “execution” fits in. If we focus on rules and rulemaking for the time being, the “legislation” involved in legal change would be the first formulation of the rule. This implies an agent with the appropriate authority to formulate the rule, but it is otherwise fairly straightforward. The rule as formulated, to be subsequently applied by some adjudicative agent to decide what the law means to some particularized controversy. The dilemma that ended up producing administrative agents is the space between these two jurisgenerative events. The conceptual and political hallmarks distinguishing them from each other are clear enough, but the problematic excluded middle (the act of “executing” the rules or principles) has always been institutional. Depending upon the internal organization of the institution, all of the boundaries between these events can seem indeterminate—even though separating the three into neat compartments was a big part of the American Founders’ collective vision of “the separation of powers.” It was their “rule of law” arrangements of the separation of powers’ pieces, indeed, that constituted the single most important target of Progressivism’s innovations within the traditions. In this Part, I offer a theory of how various thinkers in the Progressive era built on the separation of powers traditions and what the Founders’ intentions meant to them.

“enhancement of the judiciary” as instrumental to the Federalists’ “revision of the separation of powers” and that as instrumental to the “ultimate act of the entire Revolutionary era,” the creation of a “new continental republic that cut through the structure of the states to the people themselves and yet was not dependent on the character of that people.” WOOD, *supra* note 13, at 446-67, 475. Missing from this conception of the doctrine, of course, is any theory motivating the authority of “the people” assembled, a deficiency generally repeated throughout Federalist political thinkers. See NEDELSKY, *supra* note 23.

131. See *infra* notes 209-34 and accompanying text.

A. Controlling the Lawmakers: The Margins of Federalist Political Analysis

The “rule of law” arrangement of the separation of powers was linked in *The Federalist Papers* and elsewhere at the time to the notion that law’s generality was the best security against the “arbitrary will” of the office-holding class of despots.¹³² Laws, unlike the extemporary preferences of office-holders, were supposed to be general. They reasoned further that the “impetuous vortex” of an unlimited authority to make laws was a potent threat to this security, largely because legislators might begin to favor themselves with cagily drafted, self-regarding laws and thereby defeat even a generality requirement.¹³³ What *The Federalist* argued they would not be able to do under the Constitution is achieve direct implementation of their will all in one moment of majoritarian fury. To actually rearrange some set of individuated freedoms, several temporally separated events would have to be orchestrated with the cooperation of different types of office holders. Publicity would be ensured, representativeness made more likely. That was supposed to reduce the chances

132. This is usually credited as the “meaning” of the opposition of the “government of men” to the “government of laws” supposed to have originated with Harrington. See PETTI, *supra* note 21, at 173; cf. CASS, *supra* note 14, at 2-3. “The essence of [this] opposition . . . is that something other than the mere will of the individuals deputized to exercise government powers must have primacy.” CASS, *supra* note 14, at 2-3. Of course, *Publius* in several places assumes that legislators may come to form a “distinct interest from the rest of the community.” EPSTEIN, *supra* note 53, at 130. Counteracting that possibility became associated with the separation of legislative from executive authority as soon as thinkers began positing that legislators would, out of a fear for their own safety/security, enact only “just” laws by which the authority of executives not controlled by the legislature might be adequately curbed. See *supra* notes 113, 125-26 and accompanying text. Madison and Hamilton’s collaboration on this point marks a congruence between *Publius*, Montesquieu, and Locke, see EPSTEIN, *supra* note 53, at 130-32, albeit one that breaks down once the precise reasons of each are considered. While *Publius*’s remarks on the nature of this security are “cryptic at best,” they point to the conclusion that “governments can and should govern by laws,” i.e., that “general enactments, announced in advance, which apply to all cases” ought to prevail in as many circumstances of governmental action as possible. EPSTEIN, *supra* note 53, at 128; BANNING, LIBERTY, *supra* note 37, at 126-37.

This generality preference and the *temporal irreversibility* inherent in the notion of writing a law at time T_1 , executing it at time T_2 and adjudicating someone’s rights under it at time T_3 , appear in *The Federalist* to be the essence of legality and the principal security to “justice.” EPSTEIN, *supra* note 53, at 126-46. The necessary *publicity* of key purposes motivating a law and attending its enactment was understood as incidental security against illicit or otherwise arbitrary will/intentions. See *id.* at 1290; see also LOCKE, *supra* note 38, § 137, at 406.

When combined with the pinnacle of Adams’s separation of powers, the ideal of a “balanced” law-making system, one that “kept out of the hands of either the aristocratic or democratic interests” the requisite authority to act without the other’s cooperation, the Hamiltonian model becomes a clear prescription for the straitjacketing of legislative power. See HOWE, *supra* note 111, at 90-92, 167-68; see also THOMPSON, *supra* note 104, at 207. Adams in particular linked the *legitimation* of law by the separation of powers to its ability to incapacitate the “legislative power” as fairly as possible through the use of the predictable sociopolitical tensions in society, pitted against one another “like two wrestlers whom an equal degree of strength renders motionless.” See HOWE, *supra* note 111, at 167.

133. See THE FEDERALIST NO. 48, *supra* note 40, at 309 (Madison). Of course, the answer to this vortex was most fully theorized by Madison’s “compound republic” wherein different collections of legislators would be the best opponents of other, equally ambitious or privately-minded legislators. See THE FEDERALIST NO. 47, 48, 49, 50, 51, *supra* note 40, at 300-25 (Madison); EPSTEIN, *supra* note 53, at 136-41; ALBERT FURTWANGLER, THE AUTHORITY OF PUBLIUS: A READING OF THE FEDERALIST PAPERS 112-45 (1984).

that any particularly “arbitrary” law could be enacted.¹³⁴

Given this temporal nucleus of the Federalist analysis, the “administrative process”¹³⁵ has always faced two basic questions. The first goes to the publicity, transparency, and participatory openness of administration as compared to the political and judicial processes.¹³⁶ The second goes to the meaning of “arbitrary” in the context of legal change. Both of these questions go directly to the authority of an agency that makes and changes law through what are essentially bureaucratic means. So it may come as a surprise that neither has ever been given a very good answer. Indeed, each is usually used to answer the other: because of the incapability of legislatures and courts to pursue the public interest (and not that of some arbitrarily preferred faction),

134. Cf. THE FEDERALIST NO. 48, *supra* note 40, at 316-17 (Madison) (arguing separation of powers serves to assure “reason” instead of “passion” drives legal change to fruition); THE FEDERALIST NO. 71, *supra* note 40, at 432 (Hamilton). “When occasions present themselves when the interests of the people are at variance with their inclinations, it is the duty of the persons whom they have appointed to be the guardians of those interests to withstand the temporary delusion in order to give them time and opportunity for more cool and sedate reflection.” THE FEDERALIST NO. 71, *supra* note 40, at 432 (Hamilton). It may be assumed that this element of *The Federalist* reflects a regard for what we have called modern liberty without doing any harm to our other conception’s place within the Founding.

135. I refer throughout to the “administrative process” and the “administrative function” virtually interchangeably, at least inasmuch as they differ from the Hamiltonian or “rule of law” model. The process in which administrative outputs are assembled, though, is obviously distinct from the functions that administrative agencies serve. I explore the basics of each below in Part III.B through what I call the “pragmatic logic of rules.”

136. Administrative law scholarship usually casts this question as the normative infrastructure separating an agency’s *legal* rules—outputs which supposedly may only be adopted by an agency pursuant to some prefixed procedural path in its proposal, formulation, and adoption—from all its other bureaucratic outputs (which need not be). But when the contemporary administrative agency generates a torrent of rules through deeply internalized processes lacking *any* publicity or regularized participatory routine in their production which nevertheless exert massive influences over various legal entitlements and processes, this characterization tends to fail quite spectacularly. See KENNETH C. DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE §§ 6.1-6.3 (3d ed. 1994).

The legal rules that agencies generate pursuant to the APA, call them “regulations,” are supposedly the only general outputs meant to be measured in the dimensions of law. See PETER L. STRAUSS, AN INTRODUCTION TO ADMINISTRATIVE JUSTICE IN THE UNITED STATES 15-20 (2d ed. 2002). They are in many ways equivalent in force to a federal statute passed by both houses of Congress and signed by the President, and they are supposedly subjected to its procedural rigors *in order* to be legitimate. See, e.g., DAVIS & PIERCE, *supra*, §§ 6.1-6.3, at 225-48; RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS § 6.4.4, at 308 (3d ed. 1999) [hereinafter PIERCE, TREATISE]; *Chrysler Corp. v. Brown*, 441 U.S. 281, 303-11 (1979). That is usually said in the same breath in which they are considered “legislative” in some sense. Ten-fold as often as this sharp distinction is drawn, though, actual bureaucratic behaviors defeat it in practice. For while the non-regulation rules fall into a kind of cavity in administrative law, one optimistically referred to as a “spectrum,” they are most realistically characterized as a jumble, several elements of which are highly interchangeable with the regulations. See *Am. Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987); Tom J. Boer, *Does Confusion Reign at the Intersection of Environmental and Administrative Law?: Review of Interpretive Rules and Policy Statements Under Judicial Review provisions Such as RCRA Section 7006(a)(1)*, 26 B.C. ENVTL. AFF. L. REV. 519, 531-48 (1999) (analyzing D.C. Circuit Court’s approach to distinguishing between “rules,” “policy statements” and “interpretative rules”); *infra* note 306 and accompanying text. Moreover, what marks a bureaucratic behavior as the sort of “adjudication” entitling affected individuals to rights of defensive intervention prior to its execution is just as unclear. See *infra* notes 292-94 and accompanying text.

the structures of rules, rulemaking, and adjudication had to be relocated into permanent offices with fixed hierarchies and responsibilities, and impersonal bases of decision. Of course, it is no help that bureaucracies completely intermingle the phases of legal change; nor does it help that bureaucracy was relatively unknown to Federalist theories of liberty and legal change.

The fact that such basic questions are given circular answers is perhaps the most important and most neglected aspect of the administrative state.¹³⁷ Why is it so neglected and why have the two questions been left essentially unanswered? As specialization in the functions of lawmaking continued beyond the Federalist model (the Hamiltonian model) of the eighteenth and nineteenth centuries, the paths to power grew exponentially more numerous and complex. So did the bases of “authority.” Bureaucratization meant different kinds of authority, different forms of rules, and different structures of power. Bureaucracy replaced “execution,” a crisp and finite episode, with a continuing and evolutive process; a collection of phenomena. This was the result of American separation of powers’ gradual discovery and assimilation of what I shall call the pragmatic logic of rules. For us, this pragmatism is an affect or attitude toward rules and rulemaking. Understanding it historically is indispensable to understanding the administrative agency and the emerging democratic experimentalist critique thereof.

B. *The Pragmatic Logic of Rules*

The nature of prescriptive rules and how they relate to legitimate authority is a matter of incredible depth. Much of academic jurisprudence tends in some way to return to (or deliberately ignore) their puzzles.¹³⁸ The two are a lot like the chicken and the egg: from where does authority grow if not from some antecedent norm?¹³⁹ Perhaps not surprisingly, this puzzle of legal philosophy turns up throughout the seventeenth and eighteenth century separation of powers doctrine. But unlike the eighteenth century separation of powers as an institutional tradition, it continues right into the present. Much of what might

137. See Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 387-402 (1989).

138. Compare RONALD DWORKIN, *LAW’S EMPIRE* (1986) (defending theory of law legitimating judicial use of “principles” and moral reasoning in construction of legal rules), with H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994) (defending centrality of rules to concept of law); compare Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) (crediting pervasiveness of conflict between rules and standards with domination of many contemporary legal disputes), with NEIL MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* (1978) (arguing recognized forms of legal argument constitute and shape meaning of legal rules).

139. Admittedly, if it is a norm it might or might not be a rule, but it would have to have a *source* of some sort. See Scott J. Shapiro, *On Hart’s Way Out*, in HART’S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW 149, 154 (Jules Coleman ed., 2001). For any legal norm *n* to govern a situation, it must have been created by one who possessed a legitimate authority to promulgate *n*. But then, who created the authority (or the norm) authorizing them to create *n*? *Id.*

be called one's jurisprudence today turns on how he or she thinks rules and legal authority relate to each other as such.¹⁴⁰

Where these two bodies of thought intersect is in the analysis of the concept of a rule as a type of norm distinguishable from other normative mechanisms. Critically, that intersection did not occur until the twentieth century, until Progressivism and other political-intellectual forces demanded it. Indeed, the assimilation of this pragmatism toward rulemaking represents much of the philosophical divide separating the Founders' version of the doctrine from ours. For it was exactly Progressivism's sort of thinking about distributing power and authority which proved the limitations of the Hamiltonian/Federalist model. To situate this disjunction for our purposes a quick sketch of the modern, "pragmatic" analysis of rules distinguishing them from other normative tools is necessary. After that, this pragmatism's role in the assault on Federalist political thought can be examined.

1. Normative Mechanisms in a Complex World: The Case of Rules

At a basic level the formal concept of a rule in law opposes it to a standard or a principle, prescriptive assertions of like linguistic structure which are markedly different in the kind and/or degree of *discretion* they cede to the

140. Cf. Dorf, *Legal Indeterminacy*, *supra* note 5, at 918-29 (contrasting a Hartian theory of law as the union of primary and secondary rules with the Dworkinian theory of law as integrity, i.e., legal rules interpreted in the best moral light by which an adjudicator may work).

The first origin of legitimate legislative authority is always the trickiest part of any philosophical account of the separation of powers. A good example is Locke's *Two Treatises* which finesse the question. The consensus seems to be that Locke's account of the origin of political authority is of secondary importance to his account of its use and legitimacy as a going concern. See GRANT, *supra* note 25, at 64-98 (describing Locke's concept of "trust" as continuing basis of legislative authority); see also DUNN, *supra* note 38, at 79-80. For while Locke's ahistorical "state of nature" does such prominent work in the *Second Treatise*, so too does the peculiar institution of the prerogative, an historical relic of the mixed regime. See MANSFIELD, *supra* note 81, at 191.

Locke combined royalist and commonwealth notions with a success that has eluded previous compromisers. . . . Locke's political science is very difficult to grasp because he seems to follow a path of convenience that sometimes coincides with that of reason, sometimes with that of custom, and sometimes with both.

Id. Dunn locates the logical structure of Locke's prerogative relative to the other categories of legitimate power in its foundations within established, pre-existing constitutional practice; that is, Locke was smuggling pre-existing institutions' legitimacy in through the back door. DUNN, *supra* note 38, at 149. Locke's own text seems to support this conclusion, "[p]rerogative can be nothing, but the Peoples permitting their Rulers, to do several things of their own free choice, where the Law was silent, and sometimes too against the direct Letter of the Law, for the publick good; and their acquiescing in its when so done." See LOCKE, *supra* note 38, § 164.

In reality, Locke's derivation of the power to legislate premised the creation of authoritative rules on the rule maker's continuous enlargement of the liberty and property of all subjects, often by a means that fudged the clarity of the model. Cf. *id.* §§ 143-58; DUNN, *supra* note 38, at 96-147. Thus, even within one of the seminal texts of the modern (or "natural rights") liberty tradition, there was an understanding that norms were malleable instruments subject to considerable adjustment and readjustment over time. As private stakes changed, they could be more efficiently harmonized with each other, implying (by his use of the Prerogative) that much of the lawmaking process took place according to no particular theory of agency per se.

agent who must apply or “interpret” them.¹⁴¹ While all contain generalizations envisioning a set of operative facts specifying their scope, and while all have purposes (justifications) motivating their formulation, only rules divide all cases to which they apply into those that *comply* and those that do not.¹⁴² One cannot “comply” with a standard or principle in the same sense that one can comply with a rule, whatever their orientation toward the justification(s) behind them.¹⁴³

141. Cf. Kathleen Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992).

A legal directive is rule-like when it binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts. Rules aim to confine the decisionmaker to facts, leaving irreducibly arbitrary and subjective value choices to be worked out elsewhere. . . . A legal directive is “standard”-like when it tends to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation.

Id. (internal citations omitted)

I bracket here the discussion to be had about the differences between legal rules and “legal principles” as Dworkin constructs them.

142. See FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISIONMAKING IN LAW AND IN LIFE* 3-37 (1991); LARRY ALEXANDER & EMILY SHERWIN, *THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW* (2001). The rules/standards distinction is concededly a matter of degree. See Margaret Jane Radin, *Presumptive Positivism and Trivial Cases*, 14 HARV. J.L. & PUB. POL’Y 823 (1991). But my definition places decisive weight on the language used by a rule and one’s philosophical commitments with respect to rule-following in language more generally. See BRIAN BIX, *LAW, LANGUAGE, AND LEGAL DETERMINACY* 7-61 (1993); G.P. BAKER & P.M.S. HACKER, *WITTGENSTEIN: RULES, GRAMMAR AND NECESSITY* (1985); SAUL KRIPKE, *WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE* (1982). For obvious reasons of scope I mean not to entangle us in *that* question but rather just (perhaps naïvely) to assume that the distinction is intelligible.

143. Cf. GERALD J. POSTEMA, *BENTHAM AND THE COMMON LAW TRADITION* 447 (1986). “[R]ules achieve clarity, certainty, and determinateness, at the price of including either more or fewer cases in the legal categories defined by the rules than the rationale underlying the rule calls for . . .” *Id.* As I use the term here, the justification that underlies a rule is a formal, stipulative term. Rules may have justifications that are, all things considered, morally unjust. I simply mean to construct a logical distance between the rule and its reason(s) for being. To suppose that the administering authority is capable of learning about that relationship is to suppose that it might be enhanced from within the very processes of administration. BEYOND BACKYARD EXPERIMENTALISM, *supra* note 4, at 14-16, 41-46; Dorf & Sabel, *Democratic Experimentalism*, *supra* note 3, at 345-56, 388-98, 428-29.

Rules, in this way, have an irreducible element of *imprecision* relative to their normative missions. Rules as *generalizations* are simultaneously over and under-inclusive: they simultaneously apply and control cases to which their justifications do not extend and fail to extend to some cases for which their justifications would otherwise prescribe outcome(s). SCHAUER, *supra* note 142, at 23-34. A tongue-in-cheek comparison of rules and other normative mechanisms along these lines is Mark Kelman, *A Guide to Critical Legal Studies* 40-45 (1987). A rule can only be as normatively valuable (whether to democracy, justice, or efficiency) as the generalizations it deploys. Cheap generalizations make bad rules. This is often considered a reverse of the lay understanding of rules as the instruments of precision in decision-making. But, as Professor Schauer has argued, “the essence of rule-based decision-making lies in the way that rules, as generalizations, suppress differences that in the circumstances of application are then relevant.” SCHAUER, *supra* note 142, at 136. It is in this connection that “[r]ules . . . speak to types and not to particulars. Unless we mean to describe for multiple instances or prescribe for multiple actions it is simply mistaken to use the word ‘rule.’” *Id.* at 18. The entrenchment of these generalizations is what “enables a rule to resist the impetus to modify in the face of recalcitrant experiences,” or instantiations that challenge the rule as an implement of its justification. *Id.* at 62. The unavoidable imprecision of generalizations—structures of language that become entrenched in rules as such—dictates this relationship between rules and their underlying justifications.

It is just this structural feature of rules and rule making that highlights administration as the “function” which replaced “execution,” along with its bases of authority. To be effective as a rule, to be well tailored to effectuate the ends or purposes justifying the rule’s use, the generalizations which are entrenched therein must be “rational” from some substantive decisional perspective. Yet with a variety of competing objectives there exists a peculiar set of necessities in the tailoring of rules meant to effectuate, and therefore prioritize, them. In order to prioritize with any precision, in other words, other rules become necessary or at least further parts to a subject rule do. It is thus that the administration of one rule so frequently entails the use (or creation) of various connected, or what may be called *auxiliary* rules. This cascading of rules and coupled objectives creates its own possibilities of imprecision as the expansion of any system does.¹⁴⁴ Most of all, however, it seriously complicates the boundaries separating legislating from executing.

Rules formulated with generalizations which are then enforced as means to others’ ends generate compound interactions between the rules themselves and the justification(s) behind or beneath them. Whether an end is feasible or not is a question that can only be answered if the end is pursued, and sometimes only if it is pursued by several different means. Especially given the existence of rational and self-interested addressees (who often seek not to be ruled), rules and justifications interact with each other through and among multiple

When rule-based decision-making prevails, what increases is the incidence of cases in which relevantly different cases are treated similarly, and not the incidences of cases in which like cases are treated alike. . . . [I]f cases are actually alike under a substantive theory of decision, we do not need rules to treat them similarly. And if cases are unlike under a substantive theory of decision, then not only do we not need rules to treat them as unlike, but the existence of rules may prevent us from doing so.

Id. at 137.

144. The cascading of rules creates its own issues in the realization of any one rule as a rational means pursuing an objective in a complex world. See Peter H. Schuck, *Legal Complexity: Causes, Consequences and Cures*, 42 DUKE L.J. 1, 9 & n.28 (1992) (citing NICHOLAS GEORGESCU-ROEGEN, *THE ENTROPY LAW AND THE ECONOMIC PROCESS* (1971), and TALCOTT PARSONS, *THE SOCIAL SYSTEM* (1951)). It is in this sense that the making of normatively effective rules entails their co-adjustment with connected or layered rules at more than one moment in time and it is this feature of the pragmatic conception that separates it from the eighteenth century’s rationalization of functions. Thus, “complexity” in its many forms motivates democratic experimentalists to assert that means and ends must be “reciprocal,” i.e., in a “continual state of disequilibrium.” Dorf, *Legal Indeterminacy*, *supra* note 5, at 10; see also BEYOND BACKYARD EXPERIMENTALISM, *supra* note 4, at 9-16; Simon, *supra* note 6, at 13-18.

It is much the same thing with which legal doctrine copes as its grows in richness through iterative judicial processes. See Richard H. Fallon, Jr., *The Supreme Court—1996 Term, Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56 (1997); Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975). The difference is that democratic experimentalism, through the four major commitments described above and its reinterpretation of legal and political authority, “names an organized, considered alternative to a haphazard mixture of metaphysical nonsense and ungrounded speculation about empirical matters.” See Dorf & Sabel, *Democratic Experimentalism*, *supra* note 3, at 457. Of course rule cascades as a reflection of complexity were unknown to the Founders’ separation of powers: one rule produced one execution at two discrete moments in time, full stop. See *supra* notes 113, 125-26 and accompanying text.

generalizations in the real world.¹⁴⁵ This means that those interested in the effectuation of the ends behind the rules are taught by experience how the cascading rules diverge from their underlying justification(s). In this way, the “administration” of rules assumes a dialogue of sorts between the enforcing authority and the addressees of the rules.¹⁴⁶

Thus, the proliferation of rules and related justifications entails at least some investment in the provisionality of rules. This implies that the concept of administration is like “learning by doing,” at least if “administration” is meant to improve the means/ends rationality of public political action.¹⁴⁷ These

145. As the generalizations are given to show their own peculiar imprecision(s), they point up their obsolescence—they occasion their own replacement. Yet they also exert pressures on the justifications and their generalizations. See Dorf & Sabel, *Democratic Experimentalism*, *supra* note 3, at 315-23.

146. To generalize, after all, is to invite falsification and to project generalizations in service of some definite objective is to invite the future illumination of their relationship. Pragmatists view this level of the processes of abstraction and generalization as that at which experimentalism truly begins. Cf. JOHN DEWEY, RECONSTRUCTION IN PHILOSOPHY 132-60 (Beacon 1957) (1920).

[A]bstraction is indispensable if one experience is to be applicable in other experiences. Every concrete experience in its totality is unique; it is itself, non-reduplicable. Taken in its full concreteness, it yields no instruction, it throws no light. What is called abstraction means that some phase of its is selected for the sake of the aid it gives in grasping something else. . . . [V]iewed teleologically or practically, it represents the only way in which one experience can be made of any value for another—the only way in which something enlightening can be secured.

Id. at 149-50.

147. See Dorf & Sabel, *Democratic Experimentalism*, *supra* note 3, at 356-73 (describing “rolling best practices” regulation in three areas and how agencies either failed to learn-by-doing and became regulatory laggards or succeeded and became regulatory leaders); see also Schuck, *supra* note 144, at 17-20.

There are two quite distinct models of rationality as a collective ideal, especially with respect to organizations. The first we may call simple and the second complex. *Simple* rationality looks quite like arithmetic and can be described as “belief-neutral,” because it enters the decisional picture only after beliefs have been given. Weber, for example, employed this conception of rationality—what Jon Elster has called a “parametric” conception—by assuming the rationality of held beliefs instead of incorporating possibilities for rationality failures within the processes of belief formation. See Jon Elster, *Rationality, Economy and Society*, in *THE CAMBRIDGE COMPANION TO WEBER* 33-36 (Stephen Turner ed., 2000). “Weber ignores that since the rationality of action depends on the rationality of the beliefs on which it is based, a theory of rational behavior must include a theory of rational belief formation and of optimal information-acquisition.” *Id.*

Simple rationality is of little critical worth, therefore, because it provides little power to one who must check the work of another: belief formation is pivotal to the rationality of any enterprise. Thus, today’s “standard model” of rationality includes possibilities for failure in the formation of beliefs and thus we may call it *complex*. It can be summed for present purposes with the notion that actors “do as well as they believe they can” and that the beliefs they act on are rational “if they are formed by procedures that (are believed to) produce more true beliefs in the long run than any alternative procedure.” *Id.* at 29-20.

Weber at different times hinted that he recognized the shallowness of simple rationality, although he repeatedly confused the “objective notion of rationality as success with the subjective notion of rationality as (roughly speaking) *acting* for good reasons.” *Id.* at 23-24, 28. His confusion is important to us in at least three respects. First, it is possible that a “non-standard causal chain” describes the intent and the outcome. Here, behavior that turns out to be rational is actually caused by irrational processing (erroneous calculation or reasoning process) of beliefs and opportunities. See ELSTER, *supra* note 11, at 3-4 (describing various coincidences of intention and result, interrupted by causation-severing events). Second, beliefs and desires cannot be reasons for action unless they are, in fact, *consistent*. Consistency conditions are empirical and consistency criteria are usually highly contextual, bound to the specific goals at issue—complicating things when beliefs are *lightly held*—and likely to be failed. *Id.* at 5-10. Finally, modern rational choice theory

investments will entail structuring and normalizing the acquisition and analysis of the information about the interactions between rules and justifications amidst real behaviors.¹⁴⁸ It will also entail understanding the effective power of the regulators relative to their addressees: ignorant or figurehead regulators typically write rules easily circumvented by addressees. In short, rules and justifications interact in complex ways and that complexity only compounds with the further instantiation of the rules and the acquisition of data about them.¹⁴⁹ Many kinds of complexity contribute here. For example, rules necessarily presuppose pre-existing rules and such interconnected rules are often pivotal to interpretation.¹⁵⁰

There is, thus, a “coordinated decentralization” inherent in the pragmatic conception of rules and rulemaking. As individuals learn about the rules directly affecting them, they come to know just those rules and the

incorporates at least some evaluation of *value* (in addition to belief) formation. See Jon Elster, *Emotions and Economic Theory*, 36 J. ECON. LIT. 47 (1998).

148. See Bradley C. Karkkainen, *Collaborative Ecosystem Governance: Scale, Complexity, and Dynamism*, 21 VA. ENVTL. L.J. 189, 200-04 (2002). Karkkainen describes the iterative processes at work in several ecosystem-management initiatives which rely upon “flexible decision-making . . . [and] mechanisms to continuously improve our knowledge and information base, the ensure that future rounds of decision-making are as well-informed as possible.”

149. “Entrenched” generalizations are not always found within the explicit text of a given rule (or even that of a body of rules). Of course, that does not necessarily make them any less a part of that rule’s positive structure. Rules are (and, unless they are merely the contours of a game, of necessity must be) generated against a background of preexisting rules, most of which have their own exceptions, justifications, reactive behaviors, *etc.* (and *disputes* about all of these). This “layering” of rules illustrates a crucial point about how rules, justifications, and other generalizations relate to and affect one another. A generalization that is no part of an explicitly formulated (or formulatable) rule might form some part of its justification. See SCHAUER, *supra* note 142, at 73-74; JOSEPH RAZ, *PRACTICAL REASONS AND NORMS* 58-84 (Oxford 1990) (1975). In this sense, the logic of rules permits (even encourages) the *layering of justifications* similar to that of rules and justifications. For any justification we may ask why it is to be valued, whether something “deeper exists as the justification for this justification” and thus “appreciate that what is a justification with respect to *its* instantiation is usually itself also the instantiation of a deeper justification.” SCHAUER, *supra* note 142, at 73. But neither of these two layering relationships necessarily requires the formulatability/canonicity of either a rule or a justification. *Id.*; cf. DENNIS PATTERSON, *LAW AND TRUTH* 132-38 (1996) (calling this possibility of “infinite regress” in justification).

150. The generalizations entrenched in a rule from which another builds might be used to exert just as much force as those actually posited in the later rule. Thus, they can create just as many costs of over- or under-inclusion and can occlude the underlying justifications at issue just as easily. Thus, learning of them and their effects upon a given rule becomes a necessary element of effective administration.

For another thing, rational actors will seek to exploit ambiguities in rules covering their behavior to whatever advantage they can. Learning about these behaviors can highlight necessary changes in the rules or even reprioritization of the objectives/justifications behind them. Dorf and Sabel use as one of their principal examples the Forest Service of the 1940s and 1950s—as described by Kaufman in his classic study, *The Forest Ranger: A Study in Administrative Behavior*. They conclude that the Service was actually a pioneer of coordinated decentralization, comprised not of hierarchies but of loosely federated “work teams” organized chiefly by rules of exchange and systems of “concurrent engineering,” “information pooling,” and internal organizational deliberation. Dorf & Sabel, *Democratic Experimentalism*, *supra* note 3, at 367-70. These organizational linkages were vastly superior in fostering actual learning-by-monitoring, rolling best-practices rules, and other experimentalist techniques, than hierarchical, top-down, once-and-for-all rules would have been. *Id.* at 369-70.

combinations and interactions relevant to them.¹⁵¹ It is they who reflect back the dynamics that occur in the real world between rules, justifications, generalizations, and persons. They do so through their behaviors.¹⁵² Of course, how they do so and whether anyone is watching can have profound significance within our conception(s) of liberty and the separation of powers.¹⁵³

2. *The Logic of Rules and Collective Rationality*

Rules are just means to an end and that makes them objects of instrumental rationality. The cascade of rules (the creation of rules *about* antecedent rules, i.e., how they are to be interpreted, enforced, supplemented), makes each of the

151. They do so that they may calculate their own behaviors and balance their own benefits and costs. In the process they *create* information valuable to an inchoate public that has neither the time nor the capacity to do all that learning itself. Rule writers and administrators who collaborate with the addressees in the collection of this information and its proper aggregation are performing a basic service to that public. Cf. SIMON, COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT, *supra* note 3, at 113-41 (considering different forms “community as agent” might take in facilitating economic development); CIVIC ENVIRONMENTALISM, *supra* note 4, at 21-45. John demonstrates how traditional regulatory forms often overlook critical opportunities for filling in massive information gaps because they neglect to monitor their own activities and how members of their regulated communities *react* to those activities. CIVIC ENVIRONMENTALISM, *supra* note 4, at 21-45.

152. The innate dynamism, complexity, and vulnerability of ecosystems make these processes especially tangible in settings like ecosystem restoration which typically have a large diversity of stakeholders, extremely imperfect information, ambiguous legal rules, and overlapping public authorities.

Increasingly, we are coming to recognize that we cannot really “manage” ecosystems in the sense of controlling them. But we may be able to constrain or influence (and in that sense “manage”) human behavior in ways that will affect the whole ecosystem, even though we will not ever be entirely certain precisely what effects our management efforts will have. This, too, has led ecosystem managers to emphasize “adaptive” approaches . . . [in which] policy measures are understood as provisional and subject to modification in light of scientific advances and the results of rigorous monitoring.

Karckainen, *supra* note 148, at 202-03.

153. Rule makers barred from such consultations—barred from collaborating with enforcers and adjudicators and experimenting with (and grasping the meaning of) different formulations of interconnected rules—often perform their services ineffectively. They confront the choice of delegating to the future the authority to perfect the generalizations (whether it is their future selves or someone else) or not making effective, rational rules. This too becomes primarily a temporal matter because the “delegation” that occurs where some legislative authority is barred from authorizing some other official to do the necessary discovery and rule adjusting runs to some future legislator. Cf. LOCKE, *supra* note 38, §§ 143-44. Locke argues that “there is no need, that the Legislative should be always in being, not having always business to do” and proposing that legislative power be brought to order when it is occasionally “necessary” to make laws of a “constant and lasting force” or until repealed by a later legislature. *Id.* It only becomes of *more* than temporal significance if one assumes that legislatures are incapable of producing certain rules—for whatever reason. Of course, that would be incompatible with the doctrine of popular sovereignty. Cf. *infra* note 313 and accompanying text (on the assumptions legalists make about legislatures).

The modern administrative agency began as an institutional innovation to allow different ranks of rulemakers to collaborate, often through a shared pool of expertise in some particular sphere of life, to the end of avoiding or at least delaying this unsavory choice. In this sense, the “execution” of a rule—its being “put into effect”—whether by President or by bureaucrat is its realization as a rule of law. The emergence of a political office and a conception of the state that drew this function out of its precursors in monarchy and amateur judging led to an identifiable historical period of its consolidation and formalization. See MANSFIELD, *supra* note 81, at 28-44, 121-246; VILE, *supra* note 16, at 28-32, 45-48, 60-65; GWYN, *supra* note 41, at 30-32, 100-28.

dynamics described above of pivotal importance to administrative rationality. Auxiliary rules often vitally affect the meaning of the primary rules.¹⁵⁴ Thus, pragmatists assume that rules are written to be adapted to their justifications over time and that it is largely just a question of *scale*, of specific timeframes and institutional removes.¹⁵⁵ Pragmatists assume administration of rules will lead to their being improved over time.

Regulators often lack the ability to be pragmatic toward their environments, though.¹⁵⁶ They often face normative obstacles (such as existing legal or constitutional rules) or institutional imperatives hampering such pragmatism.¹⁵⁷ When this is the case and when, as a result, costs mount because rules and their

154. In this sense, the entrenchment of generalizations in rules is relative: rules can be about the generation of later rules or the supplementation of existing rules, and, ultimately, there can be rules about *these* rules. No matter where temporally, linguistically, or institutionally an entrenchment occurs, though, the fact of its occurrence can be utterly decisive of legal meaning. Understanding and controlling these very fluid and temporally extruded cascades often requires substantial investments of time and work. Learning about the subjects being regulated by the rule system (and their own, preexisting rules)—learning about the effective power of the regulators themselves relative to that of the regulated, for example—are prerequisites to the successful intervention into any real environment and thus to the functionality of any rule—based decisional architecture meant to alter that environment. Now this is not to say, of course, that such investments are always made. Particular architectures of jurisgenesis can epitomize instrumental irrationality. Congress, of course, passes many statutes that are, in this sense, “irrational.” At a collective plane, though, assessing “irrationality” becomes more difficult by an order of magnitude. Individuals would experience such an investment and any effects of not having made it psychologically. For example, the term “snow” might be viewed as a generalization—as a “shop-worn but still serviceable example, the numerous words in the Inuit and their language for different types of snow,” illustrates. See SCHAUER, *supra* note 142, at 42. “Once we learn from the Inuit and their language (or from elsewhere) that there *are* various sorts of snow, we recognize that our word ‘snow,’ equally applicable to all kinds of snow, is a generalization, gathering up different types of snow and suppressing differences among them.” *Id.* Although even at the collective plane this investment is probably reflective of the organization’s identity (if it is not an Inuit organization, “snow” might not be a generalization at all), it might also be a reflection of collective choice problems. See *infra* notes 199-201 and accompanying text. In either case, though, the making of auxiliary rules and the delegation of authority associated with rule administering would be an important locus of decisional discretion. See *infra* notes 260-62 and accompanying text.

155. This marks one of the principal departures from Federalist political science by contemporary political thought: its concept of the “arbitrary.” While both are keyed to the same basic concepts of ultimate ends (the two visions of liberty), only the post-Progressive, pragmatic concept of the “arbitrary” combines means and ends with the complex account of the rational. See *supra* note 149. Thus, a view of rulemaking as the creation of effective normative mechanisms—providing the solution to some “public problem” (or the failure to do so)—opposes the ideal of being public-regarding (rather than the existence of rules) to that which is “arbitrary.” See generally Simon, *supra* note 6; G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* 94-125, 198-236 (2000) [hereinafter WHITE, *NEW DEAL*].

156. See Michael C. Dorf, *Supreme Court, 1997 Term—Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 26-60 (1998). In other words, the processes of their belief formation can be, themselves, irrational, either as a matter of individual or collective choice. See ELSTER, *supra* note 11, at 2-42; JON ELSTER, *SOLOMONIC JUDGMENTS: STUDIES IN THE LIMITATIONS OF RATIONALITY* 26-35 (1989) (describing strategies for overcoming failures of collective rationality in poorly designed organizations).

157. Cf. RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 227-310 (1999) (critiquing existing legal theory as discouraging informative investigations by judicial rule makers); *infra* Part IV. Such problems have been best analyzed with respect to the crafting of constitutional rules/doctrine. A deft analysis of these challenges as they currently confront the federal appellate courts is Richard H. Fallon Jr., *Implementing the Constitution* (2001).

administrators progressively fail to adapt and remain effective architectures, normative, and/or institutional instability occurs. The costs of rules, their over- and under-inclusion of subjects or events compared to their underlying justifications, render adaptations necessary to the rational actualization of the collective's "self" interests.¹⁵⁸

3. *Mounting the Assault on the Federalist Vision of Lawmaking*

Contemporary legal thought well understands these realities insofar as judicial rule making and the institutions in which it is embedded are concerned. The "forms and limits" of adversarial adjudication and opinion writing as a jurisgenerative architecture are familiar terms upon which these costs and efficiencies are debated.¹⁵⁹ But neither constitutional nor administrative law has ever quite comprehended them with respect to agency governance and its processes. Rule cascades inside bureaucracies have been left largely misunderstood by the legal doctrine of the modern separation of powers. Indeed, for the most part, the rule cascades within agencies have been ignored or denied.¹⁶⁰

This is partly a descriptive failure and partly an ideological one. As to the

158. Every rule—and institutional—architecture is a reflection of these choices. Each balances costs better or worse than it might have had a different investigation been undertaken and/or a different set of generalizations been entrenched within it or had been associated with its justification(s). In this connection, the makers of rules:

draw on then-relevant similarities and *project* those similarities in time and space beyond the particulars which served as archetypes for the construction of the generalization. Conversely [they] suppress potentially relevant differences, projecting these suppressions as well. To the extent that generalizations become entrenched, the inclusions of past generalizations facilitate dealing with the future when it is like the past, but the suppressions of past generalizations impede dealing with the future when that future departs from our prior expectations.

SCHAUER, *supra* note 142, at 43; see ALEXANDER & SHERWIN, *supra* note 142, at 54.

159. For example, in the context of mass tort litigation the innovative use of "special masters" and even ad hoc professional staff for the impartial investigation of large-scale factual issues (such as that in the Agent Orange litigation in the Eastern District of New York) have today taken on a certain legitimacy. See PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* (2d ed. 1987). Increasingly, such institutional additions to the judiciary are viewed as necessary *institutional* progress—a fact-finding prosthesis of the courts' compensating for various institutional limitations. *Id.* at 255-97; LINDA MULLENIX, *MASS TORT LITIGATION: CASES AND MATERIALS* 2-34 (1996). Of course, supple as the separation of powers tradition is, they can *also* be viewed as the illegitimate restructuring of the judicial process, i.e., as the alteration of the mechanics of party control over the finding/presentation of facts. See FEELEY & RUBIN, *supra* note 17, at 308-11. They describe fact finding and compliance monitoring by special masters in prison reform litigation and the existence of arguments that such add-ons to the office of judge are in violation of Article III.

160. *But cf.* United States v. Mead Corp., 533 U.S. 218 (2001). The *Mead* Court found that a "letter ruling" issued by the Customs Service was not entitled to the sort of judicial deference afforded agencies under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See also Edward L. Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 140-43 (2003). Bureaucratic administration means special kinds of rule cascades and special grounds of the authority linking rules together as coherent, valid normative mechanisms. In this respect, the rise of administration has meant distinct challenges for the separation of powers at the conceptual level, several of which are considered in Parts V and VI.

latter, the pragmatic conception of rules and rule-makers is in starkest contrast to the “Hamiltonian” arrangement of the separation of powers doctrine. According to that doctrine, courts were merely to “interpret” the outputs of the real “lawmakers.”¹⁶¹ Judicial authority could be made to seem essentially passive.¹⁶² Throughout the period of American history where that philosophy reigned, the judicial function was usually envisioned *opposite* the processes of jurisgenesis.¹⁶³ Yet as the society matured throughout the nineteenth century, the separation of powers tradition enlarged to its modern proportions. It became a much subtler, more dynamic attitude toward the making and remaking of legal rules. Moreover, Legal Realism demolished the idea that courts and judges took no active part in “lawmaking.” And the separation of powers became something Federalists like Hamilton never expected, dramatically altering the shape of the institutions and publics which formed around the processes of legal change.¹⁶⁴

The descriptive failure is a bit more nuanced. At least since Madison’s 47th *Federalist*, separation of powers arguments have been dominated by the notion that a state structure like the administrative function is the “very definition of tyranny.”¹⁶⁵ Yet that has always seemed a lot like what reform-minded people so passionately sought and, to some extent, achieved throughout the first half of the twentieth century.¹⁶⁶ “The public” was supposedly in dire need of just such

161. See EPSTEIN, *supra* note 53, at 186-92.

162. Judicial rulemaking—the uses of opinions to craft doctrines wholly prospective in effect—is a well-analyzed phenomenon of American judicial power. See, e.g., Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455 (1995); Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2000-40 (1994); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). It was not much less so in the era of the New Deal. See Max Radin, *Case Law and Stare Decisis: Concerning Prajudizienrecht in Amerika*, 33 COLUM. L. REV. 199 (1933). Nor was it unknown to those who took an active part in structuring the APA. See *infra* notes 234-89 and accompanying text.

163. Legal realism largely discredited such premises, however rooted in the actual tradition they may or may not have been. Nonetheless, many liberal-legalist scholars today maintain that some such order strictly dividing the authority to write laws, to coerce obedience to them, and to decide finally the fact of disobedience, necessarily captures the essence of a separation of powers. See BARNETT, *supra* note 66. Indeed, the argument is often heard that this is the essence of liberty itself. See *id.* at 63-83. See generally HAYEK, CONSTITUTION OF LIBERTY, *supra* note 14. But this elides the distinction between rules and laws. Where the traditional trinity viewed “laws” as the products of legislative processes, the boundaries of executive processes, and the raw materials of judicial processes, the pragmatic account of the jurigenerative process instead has as its basal unit rules and their rational relationship to any underlying justification(s). The virtue of the pragmatic account is its flexibility: any number of institutions possess the authority to make or act upon existing rules (to the end of making law). See Part VI.

164. See *infra* Parts III, IV, V.

165. THE FEDERALIST NO. 47, *supra* note 40, at 301 (Madison). “The accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.” *Id.*

166. Indeed, one analyst pins all of the twentieth century’s criticisms of the traditional doctrine on Woodrow Wilson’s *Congressional Government: A Study in American Politics* (1885). She claims that Wilson’s largely outmoded political science is to blame for most of our estrangement from the Founders, a political science she argues was characteristic of Progressive political thought. See JESSICA KORN, THE POWER OF SEPARATION: AMERICAN CONSTITUTIONALISM AND THE MYTH OF THE LEGISLATIVE VETO 18-26, 116-23

an “agent,” just such a functional agency.¹⁶⁷ This then begs the question: what legitimated this “administrative function” if it was not one of our two traditional constructs of liberty or those on the checking of power/authority in lawmaking? Any answer is bound to ring hollow absent at least some description of the broad-gauged historical turn itself. That begins from the insight, also (somewhat ironically) a part of Federalist political doctrine, that the bare writing of a general rule can only be the start of its constitution. The lion’s share of a rule’s being “liquidated” into its environment, according even to *Publius*, comes only *after* that initialization.¹⁶⁸ That has always been the wellspring of legitimacy for the administrative function.

C. *The Public and Its Agencies: Continuous Monitoring Emerges*

As society grew more complex, two things happened. First, the “public interest” grew subtler in nature. Second, the information demands on legislators spiraled out of control. When legislatures could no longer discover

(1996). I reject this because I think the political-scientific bases of Wilson’s theory were only minor influences in the Progressive critique of the traditional separation of powers doctrine. See *infra* notes 216-30 and accompanying text.

167. Mashaw sets the standard in summarizing this twentieth-century agenda. JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 4-105 (1997) [hereinafter MASHAW, GREED, CHAOS, AND GOVERNANCE].

[P]rogressive political science was unlikely to persuade unless it could somehow explain that the new institutional arrangements it advocated need not abandon democratic ideals. The Progressives and New Dealers were as equal to this challenge as the Federalists had been. Moreover, their arguments bear a strong resemblance: Democracy was at base a system of governance so designed that the people got what they wanted. And what people most wanted, Progressive and New Deal theorists claimed, was “good government”—government that pursued the true long-term interests of the polity. Once it had been demonstrated that a government bound by antiquated notions of property rights and beholden to vicious part mechanisms for legislative policy choice could not provide good government, and that direct democracy led straight to irrational policy choice or authoritarianism, it was but a short step to the claim that managerial government was the government desired by the populace.

Id. at 7.

168. See THE FEDERALIST NO. 37, *supra* note 40, at 229 (Madison). “All new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meanings be liquidated and ascertained by a series of particular discussions and adjudications.” *Id.*

A note is in order on this “skeptical digression” in the middle of what is an otherwise “rather confident” polemic on the nature of the jurigenerative process because it would ultimately delve into the very foundations of *Publius*’s “republicanism.” It is what separates *The Federalist* from both Montesquieu and Rousseau because it goes to the basic tenets of republicanism as a theory of politics and political personality. *Publius* finds that “human beings are capable of opining and choosing, but does not look for a happy empire of perfect wisdom and perfect virtue,” the facets others had hoped would guarantee the “public-spiritedness of those opinions and choices.” EPSTEIN, *supra* note 53, at 117-24. As with other Federalists, though, *Publius*’s faith in the wisdom of the multitude is guarded at best. In fact, it is perhaps this particular dimension that most commends *Publius* for serious consideration today inasmuch as “a critical stance towards the undemocratic character of our institutions does not require a naïve image of the innate virtue of ‘the people.’ We need not abandon Madison’s insight that not only perfidious men in office but the people themselves can be the source of unwise and unjust measures.” NEDELSKY, *supra* note 23, at 149.

or minister the information necessary to legislate public-regarding rules, the more tangible became the need for another kind of institutional authority.¹⁶⁹ For to the extent rule architectures rely upon under-informed or otherwise imperfect generalizations, they assure greater imprecision in their regulatory bite (whether in the form of over- or under-inclusion). They operate in ways that depart from their underlying justifications and impede learning about the relationships between the two.¹⁷⁰ The actors who most often profit from such mismatches are the persons the rules are meant to control. In these settings, a rule system's addressees must become the object of the attention of an expert agent of the public.

Throughout the Progressive era, the truly public endeavor for lawmakers became that which sought the continuous ratcheting together of rules and justifications. Public-regarding regulation was that which sought to infuse the public's priorities with realistic assessments of the possible and to do so on a rolling basis.¹⁷¹ This conceptual (and political-institutional) foundation of the administrative function was predicated upon the permanence of such a process, the relevance of continuous monitoring and learning-by-doing to other, more

169. At least as their offices were interpreted and structured by the nineteenth century judiciary. It is in this connection that the separation of powers precedents most closely associated with the advent of the administrative state are those where the courts first rejected and then acquiesced to broad grants of rule making authority to the agencies. See generally *FTC v. Gratz*, 253 U.S. 421 (1920); *J.W. Hampton Jr. & Co. v. United States*, 276 U.S. 394 (1928); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943); *FPC v. Hope Natural Gas*, 320 U.S. 591 (1944); *Yakus v. United States*, 321 U.S. 414 (1944); *American Power & Light Co. v. SEC*, 329 U.S. 90 (1946); *Lichter v. United States*, 334 U.S. 743 (1948). For it was in such cases that the breadth and eclecticism of the doctrine I have ascribed to Adams came to overshadow the simplicity and structure of the arrangement I have ascribed to Hamilton.

170. The irreducible plurality of private intentions and expectations is precisely the dimension of human behavior with which an administrator must cope in enforcing or implementing any rule system. This holds in even the sparsest of legal philosophies. Indeed the very utility of rules might be conceived in terms of how well they cope with this basic reality. See Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. L. STUD. 257 (1974).

Whether the addressees are market actors, inferior courts, or subservient bureaucrats, the rule writer/administrator must include in her calculus the potential routes through which her rule system may be circumvented and, given that integral, the possibility that she will witness not circumvention-as-hostility toward the underlying justification(s), but circumvention-as-innovative-disentrenchment of old generalizations. See *infra* Part VI.

171. Professor Purcell traces a distinct idealization of "the public" chiefly by Dewey and his successors, which, though incident to a general attack on absolute objectivity, nonetheless emphasized "systematic inquiry" or what Dewey often referred to as "method" in relation to social problems. EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* 26-30, 200-16 (U. Press Kentucky 1973) [hereinafter PURCELL, *DEMOCRATIC THEORY*]. This method was incrementalist and skeptical, but would become predominantly institutionalist throughout the New Deal. Cf. EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH CENTURY AMERICA* 285-308 (2000) [hereinafter PURCELL, *PROGRESSIVE CONSTITUTION*] (tracing similar assumptions in Brandeis); BARRY D. KARL, *EXECUTIVE REORGANIZATION AND REFORM IN THE NEW DEAL: THE GENESIS OF ADMINISTRATIVE MANAGEMENT, 1900-1939*, at 211-65 (1963).

discrete public objectives. Progressives conjectured that great things could be done for democratic self-governance if these dynamics were incorporated into the jurisgenerative process itself.¹⁷² The public could benefit from private actors' own creativity where their interests and behaviors were concerned. In this connection, the politics of Progressivism began what was to be a long reinvention of the public/private divide.¹⁷³ It did so in part by hypothesizing that if enough was learned and incorporated into the law-making enterprise, there was no necessary distinction between the two, at least not one that was stable.¹⁷⁴

The dimensions of administration as a rationalized "function" of government were thought to consist in: (1) the distinction between laws and rules; (2) the conception of rules as generalizations subject to improvement over time contingent upon deliberative or experimental advances in knowledge of means and ends; (3) the entailment of rule cascades amidst complexity (and the role of rules as coordinating devices inside organizations); and (4) the function of public *learning* about justifications and rules and the infusion of that learning into future governance choices as the metric of success in public problem-

172. See WHITE, *NEW DEAL*, *supra* note 155, at 103-25, 198-233. White traces this strand of experimentalism from progressivism to a "crisis in adaptivity" at the outset of modern administrative law during the New Deal. *Id.*; see WIEBE, *infra* note 175, at 164-95.

It was the expert who benefited most directly from the [Progressive] framework of politics. The more intricate such fields as the law and the sciences became, the greater the need for men with highly developed skills. The more complex the competition for power, the more organizational leaders relied on experts to decipher and to prescribe. Above all, the more elaborate men's aspirations grew, the greater their dependence upon specialists who could transcribe principles into policy.

Id.

173. This complex predicate was not one with which the Founders as a generation grappled. Or if they did, they did so only privately. As Professor Kramer recently worked to demonstrate, much of what individual founders/framers as astute as Hamilton or Madison thought and talked about often went unappreciated by their peer group as a whole. Larry D. Kramer, *Madison's Audience*, 112 HARV. L. REV. 611, 640-71 (1999). Nor was it one with which Antebellum politics much grappled. The *education* of the public as prior to its formation and coherence of purpose, prior to its legitimacy, was a facet of political liberty not extensively analyzed by either of the competing concepts of liberty nor in either of the two halves of the separation of powers doctrine to be found even in the eclecticism of a figure like Adams. But, as I try to show in Part IV, it was this very predicate that was understood to validate authority growing from *within* administrative processes, for it was this predicate that justified the administrative function's separation from the trinity in the first place. Not surprisingly, it is this predicate to which democratic experimentalists are increasingly addressing themselves today. See *infra* Part VI.

174. Professor Sandel finds two divergent impulses within Progressive thought on this point, one "decentralist" in method, the other nationalist and technocratic. MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 211-27 (1996). For our purposes here, though, it is enough to treat them both as "Progressive" in the standard sense. Much of the centralization that was occurring during the period in question was market-driven, as corporations and collective ownership reinvented the economy. Much of that was what paced the reinvention of governmental organization, itself demonstrating the larger point. Cf. MARTIN J. SKLAR, *THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890-1916*, at 184 (1988). "The first federal executive agency established to monitor industry, as distinguished from transportation and banking, was designated not a bureau of industry but, significantly, the Bureau of Corporations." *Id.*

solving. Relating this to the “more permanent branches,” the principal task of the jurisprudence of the administrative state began and has largely remained a matter of power equilibration, notwithstanding the larger society’s being motivated by the self-perpetuating rationalization of functions.

The abbreviated historical sketch in Part IV starts from the premise of ineffective (and venal) Congresses and Presidents attempting to investigate and create rule structures. It grants that they were virtually incapable of governing the market and political exchanges of the post-agrarian society. But Part IV also argues that that historical progression barely scratches the surface of the eventual institutionalization of the administrative function as an agent of legal change.¹⁷⁵ And it does not legitimate it. Its legitimation comes from certain political-scientific observations of the social and/or cognitive realities of rulemaking by legislatures. Part IV situates the disjunction between that time and ours in the failings of Federalist political science.

IV. LEGISLATIVE AND JUDICIAL DYSFUNCTION: THE RISE OF ADMINISTRATIVE “TRIBUNALS”

The political system fostered by the Hamiltonian model was at least in part responsible for the pattern of outcomes that dominated nineteenth century politics. Minority (often sectional minority) vetoes of national legislative initiatives locked federal legal structures in place until inter-regional deals or courts altered them. The adaptation of legal rules in this context was left largely to the processes of adjudication, to the courts. The institutional innovation of professionalized bureaucracy staffed by subject-matter experts offered the first viable alternative, and it was one which publics and legislators were only too happy to grab. The furtive term of “tribunal” was often used to name these concoctions; their increasing popularity led to the Hamiltonian model’s collapse even while a concentrated elite persistently denounced them with the vocabulary and rhetorical force of the separation of powers.

Prior to Reconstruction, there seemed little reason to question the attractiveness of the “modern” conception of liberty. But thereafter it began to appear as if it was fostering no more than erratic economic and political growth.¹⁷⁶ This became the problem it did because, beginning in

175. Cf. ROBERT H. WIEBE, *THE SEARCH FOR ORDER, 1877-1920*, at 111-95 (1967) (describing emergence of “new middle class” seeking to rebuild state with “continuous involvement” in socially-constructed spheres); *infra* Part IV.

176. Thus, what distinguished the antebellum United States from its peers within the “Atlantic Republican” tradition was a helpless central jurisgenerative apparatus. Tocqueville was only the most famous of observers to point this out. See ALEXIS DE TOCQUEVILLE, *1 DEMOCRACY IN AMERICA* 59-75 (Vintage Books 1945) (1830). The demand for “internal improvements” and thus for the governmental infrastructure that was needed to supply them tended to remain sporadic throughout the first six decades of the constitutional system. But this only proved up the irony of Hamilton’s “rule of law” separation of powers: it only worked well on a relatively small scale with a relatively simple, homogenous economy. The dramatic growth in railroads throughout the 1850s—creating national markets (in certain foodstuffs and manufactures)—in tandem with various

Reconstruction, the nation started differentiating itself into social and economic splinters. American society became increasingly complex, heterogeneous, and interconnected thanks in large part to an unprecedented industrial and agricultural expansion.¹⁷⁷ Yet for several decades the government remained one of an earlier era, insufficiently drawn to the unfolding circumstances of industrial capitalism, the emergence of national markets, and the beginnings of a culture of mass consumption and long distance communication.¹⁷⁸ With the growth of massive transboundary economic enterprises throughout the last decades of the nineteenth century came haltingly complex relationships the effective regulation of which necessitated huge investments in long-term observation, study, and analysis.¹⁷⁹ With that came the start of a fifty year transformation in the separation of powers and the rule of law.

A. *Discovering the Logic of Rules: An Institutional Evolution*

The tasks of lawmaking (the making and implementing of legal rules of various types) became increasingly technical and information-oriented in the late nineteenth century. The political system, even had it been comprised of the mythically virtuous yeoman, was becoming just as incapable as the judicial

technological breakthroughs began a process that would lead to its ultimate eclipse. *See generally* CLARENCE H. DANHOF, *CHANGE IN AGRICULTURE: THE NORTHERN UNITED STATES, 1820-1870* (1969); STUART BRUCHEY, *THE ROOTS OF AMERICAN ECONOMIC GROWTH, 1607-1861* (1965).

While clearly related to the rhetorical power of Jeffersonian political economy (and thus to the institution of slavery as an “invisible” support propping up that system), no causal explanation could likely capture all of the factors explaining why this industrial-governmental revolution took a century longer here than in England. *See* ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* (1970). *See generally* McCoy, *supra* note 86.

177. *See generally* STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NEW ADMINISTRATIVE CAPACITIES, 1877-1920* (1980); WIEBE, *supra* note 175, at 11-43.

178. *See* LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW 439-66* (2d ed. 1985); LEONARD D. WHITE, *THE REPUBLICAN ERA, 1869-1901*, at 211-14 (1958). These forces predated the Civil War, to be sure. Indeed, it is a comment on eighteenth century republican political economy and its vision of the Constitution that its chief architect lived just long enough to see the dawn of its obsolescence. *See generally* DREW R. MCCOY, *THE LAST OF THE FATHERS: JAMES MADISON AND THE REPUBLICAN LEGACY* (1989).

179. Railroads, banking, and Standard Oil were but harbingers of the much larger reinvention of private enterprise that began in the last decades of the nineteenth century. *See generally* ALFRED D. CHANDLER, JR., *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* (1977). The agencies that grew to manage them were but harbingers of what was to come in the second half of the twentieth century. *See* ROBERT E. CUSHMAN, *THE INDEPENDENT REGULATORY COMMISSIONS* (1941); MARVER H. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION 19-20* (1955). The earliest commissions were more like ad hoc committees (looking like legislative committees) constituted by the legislature to investigate and report. CUSHMAN, *supra*, at 22. “The early commissions . . . were created to aid the legislature in dealing with certain *ad hoc* situations, and to give it necessary information which it could not secure by its own efforts.” *Id.* This form quickly evolved and took shape as an organizational innovation for the investigation of particulars the better to propose rules thereon, a technology created to overcome the trappings of the legislature’s veto-favoring environments. *See id.* at 23-27 (describing emergence of “strong” commission, “commission having legal power to fix rates and to enforce orders” in “Mid-West”). “When the Interstate Commerce Commission was created in 1887, ten states had set up ‘strong’ commissions . . . possessing actual rate-making powers.” *Id.* at 26.

system. Neither could effectuate the public's ends.¹⁸⁰ Thus, the more frequently demands were put to the lawmakers, the more frequently they demonstrated their own functional limits. These circumstances were the incubator of Progressivism and its constitutional critique: as the political culture increasingly adjusted itself to the pragmatic logic of rules, many structural realities came into focus.¹⁸¹

Given the internal norms and consequent power structures of the legislature as an organization, legislative power kept itself "in check," keeping itself from generating public-regarding rules, usually by sheer force of party and the transaction costs associated with complex deals.¹⁸² The Hamiltonian arrangement worked its peculiar magic all too well: legislative jurisgenesis remained rare; judicial jurisgenesis remained party-driven and juricentric.¹⁸³

180. How the operation of a railroad could be rendered safer, more efficient, and more pervasive across the widely variable circumstances of the United States was as far beyond the ken of the part-time legislator as it was that of the generalist judge. Of course, political parties' domination of legislative agendas and the judiciary's tunnel vision perceiving only the (elite) parties before it often meant that neither of the institutional ideals were attained—nor that the objective of "public-regarding" rules was even pursued. See *infra* notes 196-234 and accompanying text.

181. See WIEBE, *supra* note 175, at 133-63; MASHAW, GREED, CHAOS, AND GOVERNANCE, *supra* note 167, at 6-7.

182. Even as of Bryce's writing in 1888 he could think his treatment of the "central government" complete with no more than a few thematic sketches of the "cabinet" and its relationship to the President and Congress. JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 76-87 (Liberty Classics 1995) (1941 reprint of 2d ed. 1910). His discussion of the parties, party "machines," and their control of the public policy agenda at both the state and federal level, on the other hand, was extensive. See *id.* at 683-904.

Intellectually and culturally, of course, there persisted even into the rise of the administrative state a tradition of thought (and a concentrated and powerful political faction) committed to a "Jeffersonian," agrarian political economy and state structure. See DONALD DAVIDSON, *REGIONALISM AND NATIONALISM IN THE UNITED STATES: THE ATTACK ON LEVIATHAN* (Transaction 1991) (1938). With it, the Machiavellian/Harringtonian conception of public "virtue" stressing propertied *independence* from others as a precondition on genuine political standing (of both office-holders and electors), though moribund, remained alive—as did the Jeffersonian skepticism of public finance, commerce, and urbanization. PAUL K. CONKIN, *THE SOUTHERN AGRARIANS* (1988). Yet, while it lay somewhere between modern and ancient liberties, it was always an opposition tradition at most, probably because exactly which concept of liberty was the true "classic" had become blurred by the early twentieth century at precisely the time when "money power" was unequivocally defeating agrarianism. Compare FRIEDERICH A. HAYEK, *THE ROAD TO SERFDOM* AT XXII-XXIII (Chicago 1994) (1944) [hereinafter HAYEK, *SERFDOM*] (identifying *laissez faire* with "classical nineteenth century liberalism"), with STOURZH, *supra* note 13, at 67. Stourzh quotes a letter from Jefferson to Madison of December 20, 1787, that republicanism was in jeopardy from commercialization and urbanization because "[w]hen we get piled upon one another in large cities, as in Europe, we shall become corrupt as in Europe." STOURZH, *supra* note 13, at 67; see ALEXANDER, *supra* note 19, 72-88.

183. Empty (or quixotic) demands for public-regarding behavior by agents of private transactions showed Congress was effectively powerless to generate the legal rules that might positively rearrange various private stakes and thereby resolve public problems. Cf. ROBERT A. DAHL, *MODERN POLITICAL ANALYSIS* 71-73 (1963) (describing conditions of legislative "deadlock"). See generally WILLIAM H. RIKER, *THE THEORY OF POLITICAL COALITIONS* (1962).

As modern political thought came to view legislatures through this lens, it increasingly attacked the very ideal of a legislature like that found in Leo Strauss's Locke described above in notes 25 and 38. It posited that self-interested electors seeking to protect their own "natural rights" from other-regarding incursions would simply perpetuate factional conflict and cyclical self-deals. See LOWI, *supra* note 27. Within "civic

Such outputs became the hallmark of partisan lock-ups of a jurisgenerative process all too easily seized or commandeered by minority blocs ideological or sectional in origin.¹⁸⁴ As societal problems accumulated, the political system's capacity to grasp them, negotiate their boundaries, and shape their solutions with definitive rules of conduct, proved dreadfully inadequate. It was suffused within a procedural structure that catered to minority vetoes and behaved accordingly. Thus, legislative authority itself began to look impotent, questioning the very possibility of truly "public" political action.¹⁸⁵

Several other western nations developed immense state bureaucracies to overcome this snare early in the nineteenth century. They were sufficiently professionalized and insulated from "influence" to assume "delegated" responsibilities then foreign to representative democracies. But the United States foundered throughout the first decades of its industrialization, throughout the middle half of the nineteenth century, creating what has been called a "governmental vacuum."¹⁸⁶ It was a vacuum that fostered partisan conflict,

republican" thought today the questions have shifted to whether such procedural environments as those found in legislatures are structured so as always to induce faction and the shutdown of candid, "deliberative" discussions. See Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71 (2000).

184. See OWEN M. FISS, *TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910*, at 3-21 (1993); BERNSTEIN, *supra* note 179, at 13-47 (linking emergence of independent regulatory agencies to paralysis of legislatures). Long-standing sectional divides only exacerbated this effect. On their effects on national political events of the period, see Richard Franklin Biesel, *Sectionalism and American Political Development, 1880-1980* (1984). An earlier account with a slightly different interpretation of sectionalism is V.O. Key, *Politics, Parties and Pressure Groups* (1964).

Contemporary "positive" political theory's explanation of the bottling up of legislative processes, especially as those dynamics are driven by the power of concentrated legislative constituencies, can be found in David B. Truman, *The Governmental Process* (1951); James M. Buchanan & Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* 233-62 (1962); Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (1965); and Robert E. McCormick & Robert D. Tollison, *Politicians, Legislation, and the Economy: An Inquiry into the Interest Group Theory of Government* (1981). Interestingly, most of these accounts presume a modern concept of liberty and a substantially "unencumbered," independent political self.

185. Cf. BUCHANAN & TULLOCK, *supra* note 184, at 236. Approving of a bicameral legislature where the constituencies are composed according to competing principles as one appropriately entailing "significantly greater" "decision-making costs." *Id.*; see William H. Riker, *The Merits of Bicameralism*, 12 INT'L REV. L. & ECON. 166, 167-68 (1992). "[T]he effect of breaking the unicameral house into a tricameral body is about the same as going from simple-majority to supermajority rule in the unicameral body, namely delay and stability." *Id.* More recently, empirical analysis expresses gridlock probabilistically in terms of the "law"—be it a rule, body of rules, or logroll—assembled and whether a supermajority supports it. See KEITH KREHBIEL, *PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING* (1998). Keith argues that the legislative power is typically invoked only when a supermajority can be assembled for an aggregated bill and that in the absence of a supermajority gridlock predominates. *Id.*

186. SKOWRONEK, *supra* note 177, at 27; see LEONARD D. WHITE, *THE JACKSONIANS* 347-62 (1954). Britain's massive socioeconomic expansion in the eighteenth century led to a governmental expansion orchestrated by its Whig Party (and especially the first "Prime Minister," Robert Walpole) that rivaled America's in scale—a full century and a quarter earlier. See BLACK, *supra* note 58, at 66-137. Describing the rise of public credit, the use of office-granting patronage as a tool of political management, and other state building efforts. *Id.*; see BREWER, *supra* note 50. Weber's analysis of the German civil service—his identification of the German state with hierarchy, impersonality, rationality, the integrity of offices, and rule-

cycles of patronage appointments (and their inevitable failures), and a failed governmental-institutional evolution.¹⁸⁷ Though the states and some private collectives responded in certain spheres with administrators of their own, the vacuum at the federal level tended to invite the judiciary into the role of administering public-regarding regulation.¹⁸⁸ The judiciary thus came to regard itself as the rough-and-ready policymaker the times demanded, and judicial administration came to a fever-pitch.¹⁸⁹

With the political system bottlenecked, this “state of courts and parties” allowed the constitutional essentialism of the era—the natural rights, “modern

oriented behavior—traces the course of German politics throughout its massive industrialization in the late nineteenth century. See WEBER, *supra* note 68, at 26-30, 220-23; Sven Eliaeson, *Constitutional Caesarism: Weber's Politics in Their German Context*, in THE CAMBRIDGE COMPANION TO WEBER, *supra* note 147, at 131. Indeed, political economists now identify the professionalization of the civil service as a developmental milestone for a government. See SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM 69-88 (1999).

187. Where the political parties came to function as the puppet-masters of a spoils system, the courts viewed themselves as neutral oracles of “general legal principles”—usually premised upon metaphysical separations of law from politics. Courts and lawyers encouraged each other to expand common law doctrines as far as the legal imagination would reach and the only real means/ends institutional dialogue (like that begun in the eighteenth century’s “rationalization of functions”) maintained was focused upon the courts. The two systems came to be viewed as opposing *spheres*, transforming the separation of powers into a sort of regulating interface. See MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 200 (1977) [hereinafter HORWITZ, TRANSFORMATION I]; PURCELL, PROGRESSIVE CONSTITUTION, *supra* note 171, at 11-38; FRIEDMAN, *supra* note 178, at 355-63.

Thus were the lines drawn for the twentieth century. On the one hand lay the purposive creation of a rationalized, professionalized organizational solution to the collective action problems brought on by industrialization. On the other lay a continued adherence to the bargain that legitimated the judicial/partisan political one. The enactment of the Interstate Commerce Act and the creation of the Interstate Commerce Commission served as the formal commencement of the struggle to finally break that bargain. See SKOWRONEK, *supra* note 177, at 121-62. Skowronek describes the “fusion of ideology and institutional imperialism” that marked the “competition” between the Interstate Commerce Commission and the Supreme Court in the two decades following passage of the Interstate Commerce Act of 1887. *Id.*; see THOMAS M. MCCRAW, PROPHETS OF REGULATION 57-80 (1982); FRIEDMAN, *supra* note 178, at 439-54; MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1865-1960, at 216 (1994) [hereinafter HORWITZ, TRANSFORMATION II]. Cushman records the twenty year struggle to enact legislation establishing the ICC as a permanent regulatory body with standing jurisdiction and law-making authority. See CUSHMAN, *supra* note 179, at 40-41. “Between 1868 and 1886 more than 150 bills were introduced in Congress providing for some variety of federal control over railroads. The idea that this control should be exercised by some sort of federal commission appeared as early as 1871. . . .” *Id.* The appearance of the law in 1887 marked the turning point at which a legislating majority was able to enact such an investiture of authority in a commission. Not until three years later, in the passage of the Sherman Act, would it again be possible. *Id.* at 45-58 (describing voting blocs and arguments leading to passage of Interstate Commerce Act). The notably spare content of these two statutes, though, is perhaps their most characteristic feature.

188. See, e.g., SOLON J. BUCK, THE GRANGER MOVEMENT 205 (1913); BERNSTEIN, *supra* note 179, at 19; LOUIS HARTZ, ECONOMIC POLICY AND DEMOCRATIC THOUGHT (1948); Jonathan Lurie, *Commodities Exchanges as Self-Regulating Organizations in the Late 19th Century: Some Parameters in the History of American Administrative Law*, 28 RUTGERS L. REV. 1107 (1975); JONATHAN LURIE, THE CHICAGO BOARD OF TRADE, 1895-1905: THE DYNAMICS OF SELF-REGULATION (1979).

189. SKOWRONEK, *supra* note 177, at 28; G. Edward White, *The Path of American Jurisprudence*, 124 U. PA. L. REV. 1212 (1976); HORWITZ, TRANSFORMATION I, *supra* note 187, at 30.

liberty” bias mentioned above—to blossom as a full-blown regulatory model.¹⁹⁰ It is thus plausible to think that legal elites saw the separation of powers and the rule of law as the ultimate opportunity to expand their influence.¹⁹¹ But as economic and political activity widened and deepened, the subjects of the economy multiplied and their interactions multiplied and complexified with them, increasing in contingency at the same time they magnified in value.¹⁹² Regulation took the form of judicial doctrine produced by generalist judges whose power could be exerted only through an authority to resolve isolable (largely bipolar) disputes, and that generally under the auspices of an emerging corporate-legal elite.¹⁹³ Pursuit of a public interest by the positive processes of governance remained dubious because courts only resolved disputes between elites and what little did emerge from the political process was often pure partisan self-dealing.¹⁹⁴

1. Agency Administration Begins: The Interstate Commerce Commission

The creation of independent bureaus seemed the only answer. Yet initially opposition remained strong enough to require them to function much like the courts. From its inception, the Interstate Commerce Commission (“ICC”) was managed to fit (and was attacked when it did not fit) an adversarial-judicial model of decision-making.¹⁹⁵ It could call a fact “true” only if litigants had

190. EDWARD A. PURCELL, JR., *LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870-1958*, at 61-86 (1992) [hereinafter PURCELL, *LITIGATION & INEQUALITY*]; FRIEDMAN, *supra* note 178, at 439-63; WIEBE, *supra* note 175, at 11-43.

191. See HORWITZ, *TRANSFORMATION II*, *supra* note 187, at 222. While judicial and legalist rhetoric presented the illusion of the court system as being no central state at all (an illusion opponents of Progressivism and the New Deal would later commandeer, see Part V, *infra*), doctrines of freedom of contract, constitutional “privileges and immunities,” prohibitions on “delegating” authority, protections of the right to transact interstate commerce unencumbered by local or state “jealousies,” and the sanctity of common law property all served to regulate to a striking extent. See PURCELL, *LITIGATION & INEQUALITY*, *supra* note 190;

192. SKOWRONEK, *supra* note 177, at 31-34; JOHN KENNETH GALBRAITH, *THE NEW INDUSTRIAL STATE* 11-71 (1967); SKLAR, *supra* note 174; CHANDLER, *supra* note 179 (tracking this as rise of “managerial capitalism”).

193. PURCELL, *PROGRESSIVE CONSTITUTION*, *supra* note 171, at 46-63 (exploring synergies between legal elites and corporatized economy through career of Justice Brewer); see SKLAR, *supra* note 174, at 402-30 (describing Progressivism’s détente with corporate power through thought and career of Woodrow Wilson).

194. See MCCRAW, *supra* note 187, at 1-56; BERNSTEIN, *supra* note 179, at 35-37.

195. The ICC’s first chair, judge and constitutionalist Thomas Cooley, became the regulatory commission’s best example of administration-by-adjudication. Cooley often and loudly expounded the virtues of judicious reasoning and proceduralized decisionmaking. See BERNSTEIN, *supra* note 179, at 32-35. Bernstein argues that, in his four year tenure, Cooley “dominated the Commission” and “never gave up his conception of the judicial process as a guarantor of free government, and he succeeded in establishing a judicial pattern of operation for the ICC which has never been basically altered.” *Id.*; see CUSHMAN, *supra* note 179, at 65 (arguing Cooley sought “judicialization of the commission’s procedure and the development of a body of case law embodied in carefully written opinions”). This, in turn, would lead to the ICC’s becoming a darling of the courts’ relative to counterparts which proceeded with comparatively lax procedural guarantees to affected parties. ICC became a model commission to the judiciary whose commitment to the validity of individuated procedure as a protection of private stakes (as “liberty” and “property”) was undaunted. Cf. SKOWRONEK, *supra* note 177, at 41. “By the 1890s, the Supreme Court had articulated principles of nationalism, substantive

quarreled over it. ICC authority came to resemble that of a political boss under the fetters of judicial propriety and process, an “innovation” which would become an increasing disappointment to its evolving public.¹⁹⁶

In time, virtually because of its identification with constitutional interpretation as authority, so-called modern liberty, and the adversarial model of the judicial process, the Federalist/Hamiltonian vision gradually emphasized its own faults.¹⁹⁷ The political system could generate laws but not *rules*, while

due process, and constitutional laissez-faire that both extended and consolidated [a] traditional hold over governmental operations.” *Id.*; see FISS, *supra* note 184, at 53-74; HORWITZ, TRANSFORMATION I, *supra* note 187, at 253-66 (describing rise of legal formalism and correlating with ensuing era of substantive due process jurisprudence).

Industrial corporate capitalism had remade the very concepts of political power and property by the last decade of the nineteenth century, yet the so-called Hamiltonian arrangement of the eclectic separation of powers remained one venerated by many conservatives within the judiciary well into the twentieth century. See SKLAR, *supra* note 174, at 43-127.

196. Hence, Dewey’s construction of “the public” by 1927 becomes stunningly subtle in its departures from “private” or otherwise individuated subjects. In *The Public and Its Problems*, Dewey argued that the discovery and pursuit of truly public interests—those that were capable of meaningfully uniting partisans—could only occur through a sustained commitment to “effective and organized inquiry,” that is, that genuinely public policy could only be formed and “does not exist except where there is systematic, thorough, and well-equipped search and record.” DEWEY, *supra* note 11. Other progressives left their idealizations of the public purely negative in form. See RICHARD HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO F.D.R. 260-61 (1955). “In a great deal of Progressive thinking the Man of Good Will was abstracted from association with positive interest; his chief interests were negative. He needed to be protected from unjust taxation, spared the high cost of living, relieved of the exactions of the monopolies and the grafting of the bosses.” *Id.* Hofstadter’s history of the rise of corporate capitalism and its sociopolitical framing effects on the structural debate remains one of the best. It was this transition and the nostalgic reactions it prompted that led him to hypothesize his famous “status politics” explanation of Populism and Progressivism holding that people act not just out of pure “economic” self-interest in politics but also out of concern for their social standing. See *id.* at 94-214. For an accounting of the bureaus created during this transformation and the treatment their decisions received at the hands of courts and political elites, see SKLAR, *supra* note 174, at 260-90, 324-32, 405-10.

197. FISS, *supra* note 184, at 155-84. Fiss discusses *Holden v. Hardy*, 169 U.S. 366 (1898); *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899); *Northern Securities Co. v. United States*, 193 U.S. 197 (1904); *Johnson v. Southern Pacific Co.*, 196 U.S. 1 (1904); *Lochner v. New York*, 198 U.S. 45 (1905); *Adair v. United States*, 208 U.S. 161 (1908); *Employers’ Liability Cases*, 207 U.S. 463 (1908); *Muller v. Oregon*, 208 U.S. 412 (1908); and *Coppage v. Kansas*, 236 U.S. 1 (1915). *Id.*; see Herbert Hovenkamp, *Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem*, 97 YALE L.J. 1017, 1032-35 (1988); WILLIAM E. NELSON, THE ROOTS OF AMERICAN BUREAUCRACY, 1830-1900, at 113-55 (1982); PAUL KENS, JUDICIAL POWER AND REFORM POLITICS: THE ANATOMY OF *LOCHNER V. NEW YORK* 26-78 (1990).

General as the Constitution’s texts are, it gradually became evident that what was really driving the judicial process was not some fixed, determinate set of constitutional rules, but rather extemporary judicial preferences. Hamiltonian arguments had been for a long time sufficient to frustrate the legislative creation of rules that were both effective and public-regarding in the post-agrarian society. To the degree a rule or rule system had to emerge from the legislative process articulated and rationalized between its terms and justifications to thereafter be “executed” writ simple, the *extra-judicial* jurisgenerative process was easily arrested or confined to the making of rules that were of marginal practical importance. This meant that the “delegations” would go either to the courts or to no one.

Meeting the informational and decisional challenges at the same time the forces of party, section, and faction collided usually proved insuperable to the political process alone, but that only further fueled the inclination toward bureaucratization. See FISS, *supra* note 184, at 75-184; cf. DAVID EPSTEIN & SHARYN O’HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS 237 (1999).

the judiciary could generate rules but not adequately rationalized, public-regarding ones.¹⁹⁸ Unlike both courts and legislatures, bureaus were organizationally unitary, professionalized, insulated from partisan political influence (to a degree),¹⁹⁹ and increasingly empowered to craft rules as they saw fit. Faster than political factions or legal elites could bottle them up, congresses and presidents could create independent regulatory bureaus while

In an era where public policy becomes ever more complex, the only way for Congress to make all important policy decisions internally would be to concentrate significant amounts of authority in the hands of powerful committee and subcommittee leaders, once again surrendering policy to a narrow subset of its members. From the standpoint of floor voters, this is little better than the complete abdication to executive branch agencies.

EPSTEIN & O'HALLORAN, *supra*.

The whole period, known somewhat ironically as the Gilded Age, would later undergird one of the classic polemics against the capacities of the Federalist or "Madisonian democracy" as a truly representative form of governance. See JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY (George Allen 1976) (1942). Schumpeter argues that electoral processes are necessarily subject to manipulation by elites and that therefore the outputs of bodies like legislatures are virtually always of marginal utility to larger economic realities unless and until the right elites take control. *Id.*

198. Positive political (a/k/a "public choice") theory predicts that such outcomes are, all things considered, most likely. The prediction is based in part on "Arrow's Theorem," an influential twentieth-century proof of the incompatibility of privately interested, rational legislators and the maximization of collective or social welfare. This theorem, in turn, seems best proven by the political history of the Gilded Age. Arrow posited that, without violating some basic democratic premise like the prohibition on dictatorship, no method exists for combining diverse individual preferences to arrive at a social choice genuinely reflective of the *group's* preferences. See KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 9-91 (2d ed. 1963). The literature about it is extensive. See DENNIS MUELLER, PUBLIC CHOICE II 384-99 (1989).

The most important aspect of this theorem for our purposes is the phenomenon known as "cycling," the use of irrelevant alternatives in choices between two options to rig majorities that prefer A to B, B to C and then C to A, ending in paradox. See WILLIAM RIKER, LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE (1982); MASHAW, GREED, CHAOS, AND GOVERNANCE, *supra* note 167, at 12-21. It is so widely debated because of its devastating implications for processes of collective choice that are structured and executed in an environment of imperfect voter information. It is in such environments that blocs of voters may be manipulated through the sequencing of choices but where they can not perceive that they are being manipulated (like in a legislature). Indeed, even outside such environments, where information is "perfect" (in a stipulative sense), "discussion may harden, not ameliorate, conflict." MASHAW, GREED, CHAOS, AND GOVERNANCE, *supra* note 167, at 41. "Whether one views tastes as shaped by factors endogenous to political choice or characterizes votes as considered judgments about the goodness of proposed candidates or policies, the Arrow Theorem holds so long as there are three alternatives and three voters." *Id.*

The Founding generation knew of such thinking if at all as Condorcet's theorem, and derivatively—yet far more popularly—as Montesquieu's marquee justification for a separation of powers. *Id.* at 11. "Arrow's contribution to voting theory owes much to the marquis de Condorcet . . . who was Madison's contemporary and whose work may have been known to the drafters of the Constitution." *Id.*; see THE FEDERALIST NO. 47, *supra* note 40, at 301-04 (Madison) (citing Montesquieu, *Spirit of the Laws*, on the notion of dividing legislative power to protect citizens as individual persons by minimizing the circumstances in which the power will be exercised at all); BANNING, LIBERTY, *supra* note 37, at 217-19.

Yet Condorcet's (later Arrow's) theorem was but a fraction of the positivization of political analysis that took place throughout the twentieth-century. See HELD, *supra* note 11, at 233-73. It constructed an entire set of new connotations for the separation of powers which should not be under-estimated in situating the administrative authority of agencies. See Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 106-41 (1998).

199. See generally *United States v. Perkins*, 116 U.S. 483 (1886).

expressing confidence in their capacities as authoritative public problem-solvers.²⁰⁰

Perhaps most importantly, though, it took no deep agreement among contending legislators (or their bosses) to produce this kind of “solution” to the public’s problems.²⁰¹ Especially as to bureaus authorized only to propose rules to the legislature at a later date, a vote against looked like opposition to the very enterprise of public-regarding regulation, which was a good way to attract electoral contempt.²⁰² Legislators became locked into a vicious circle wherein responsibility was broadly alienated through the creation of dedicated establishments with the funding and effective power to outlast even career partisans. The institutional evolution restarted, but this time it was in the face

200. See generally NELSON, *supra* note 197; EPSTEIN & O’HALLORAN, *supra* note 197, at 9-33. Bureaus can be fashioned by terms, empowered to investigate and produce public information on complex questions exposing different elites’ stakes, simplifying them to vocabularies that allow the articulation of means and ends which an indefinite audience can understand and with which any number of them might identify. Bureaus can be authorized to draw conclusions or even just publicize findings, supplying pivotal information that might shift party lines or factions and, eventually, to write the rules themselves. They began, in short, as an institutional/legal technology capable of dissolving some of the barriers to public political action that many theorists of the eighteenth and early nineteenth centuries had thought insuperable. See *infra* note 204.

201. Cf. NELSON, *supra* note 197, at 113-55. “[R]eformers [sought] to transform the process of governmental decisionmaking from one in which those in power simply allocated the spoils of office among the party faithful into one that compelled administrators to act in accordance with autonomous, abstract standards.” *Id.* at 122. Why would legislators alienate their powers? Even partisans with little or no common ground eventually will agree to a lottery if the pressure to do *something* is great enough—especially if their accountability lies in an ill-informed electorate and the lottery can be made to look like an actual solution to the public’s problem. “Rules” in our sense are juxtaposed with cruder allocations of authority. On the role of administrative agencies as legislators’ “lotteries” (as well as the importance of their independence from any one of the individual legislators party to the deal that constructs the lottery). See William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992); Morris Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 PUB. CHOICE 33 (1982).

202. Late liberal theory of this period is often associated with the postulate that individual preferences are not just heterogeneous, but also utterly immutable. But it is not so clear that *early* liberal theory thought so. For example, in Condorcet’s *Esquisse d’un tableau historique des progrès de l’esprit humain*, “[l]ike Hume, Condorcet sees introspection as the most agreeable of domestic activities.” EMMA ROTHSCILD, *ECONOMIC SENTIMENTS: ADAM SMITH, CONDORCET AND THE ENLIGHTENMENT* 218 (2001) While the “shortcomings of the liberal economic order” he maintained, included the fact that “individuals seek to pursue their own economic interests by political means,” which is to say they “seek regulation, political influence, and protected monopoly,” constitutionalized procedures might be used to take advantage of “the universality of simple moral sentiments,” such that certain conflicts might be dissolved through discoveries of hidden harmonies among the heterogeneous preferences that develop out of those sentiments. See *id.* at 209, 219. For that endeavor, Condorcet’s optimal decisional procedures are:

those that correspond to the decision making of a single individual. The individual weighs up different grounds for choice, he discovers new grounds, he changes his mind, he tries to be as scrupulous as he can. It is this conception of indecisive choice which Condorcet sought to generalize to political life.

Id. at 204-05. “He thought that decisions which would restrict any individual’s rights should be adopted only with a very great majority; in difficult cases, it is always best, when possible, to ‘put off the decision.’” *Id.* at 205. This, obviously, is a very different position from those advanced by public choice scholars holding democratic deliberation or discovery impossible and who then deduce from that that collective action is unavoidably despotic.

of a concentrated elite and judicial opposition.²⁰³

2. Backlash: The Judicial Reaction to Agency Administration

The courts could not effectively manage the kinds and volumes of conflicts which continuously arose in the rapidly industrializing society, no matter how authoritarian or creative with traditional legal concepts they became.²⁰⁴ Technocratic authority gained energy from the stifling failures of the political and judicial systems to serve “the People,” notwithstanding the Hamiltonian vision of the “separation of powers.” The polycentricity of the new economy’s conflicts and the richness of its questions bewitched the judicial process, locked as it was, and is, to the theory of two-party adjudication and the protection of individuated stakes.²⁰⁵ Its solutions were often decidedly under-informed and second-best to interested publics.²⁰⁶ The reaction to this failing was nurtured in

203. CUSHMAN, *supra* note 179, at 146-228 (detailing the creation of the Federal Reserve Board and the Federal Trade Commission in 1913-1914); PURCELL, PROGRESSIVE CONSTITUTION, *supra* note 171, at 165-91. “Independence,” thus, was a key factor in the viability of agencies as *political outputs*, lest one faction (not then in control of the part of the trinity in question) surrender discretion to some institution which would later simply institute a partisan agenda.

Though the judiciary had been given (or took for itself) *jurisdiction* enough to regulate the new economy, it had nothing like the sufficient *institutional capacity* to do so effectively. By the 1910s, it had become clear not only that courts were being kept from hearing controversies and learning facts in coherent order, and not only that they were too slow afoot procedurally and too hampered by their own inabilities, such as to self-start their adjudications, but also that their very *authority*—the legitimating grounds and parameters of the judicial power itself—was what was preventing them from altering these realities. See, e.g., HERBERT CROLY, PROGRESSIVE DEMOCRACY 366, 368 (Transaction 1998) (1914) (emphasizing courts “cannot be sure of being confronted by the real facts or all the facts” and “common-law judge,” disabled from becoming a “satisfactory or a sufficient servant of a genuinely social policy”); WALTER LIPPMANN, DRIFT AND MASTERY 93-94 (William E. Leuchtenburg ed., 1961) (1914); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908); Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909).

An interesting aside is that this strand of left/progressive thought seems to echo itself rather regularly in American intellectual life. See Edward A. Purcell, Jr., *Learned Hand: The Jurisprudential Trajectory of an Old Progressive*, 43 BUFF. L. REV. 873, 884-96 (1995) (arguing many Progressives interpreted work of constitutional scholars as advancing extremely theories of judicial review); cf. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1993) (arguing courts institutionally incapable of effectuating social justice over long term).

204. SKLAR, *supra* note 174, at 431. “The new market and property relations also generated movements for the alteration of government roles in social and economic affairs, that is, new governmental functions and administrative structures.” *Id.* The consolidation of federal control over the railroads and banking—but especially the richness and technicality of information necessary thereto—portended these developments to astute observers in other fields. See JAMES LIVINGSTON, ORIGINS OF THE FEDERAL RESERVE SYSTEM: MONEY, CLASS, AND CORPORATE CAPITALISM, 1890-1913 (1986); David M. Gische, *The New York City Banks and the Development of the National Banking System, 1860-1870*, 23 AM. J. L. HIST. 21 (1979). See generally K. AUSTIN KERR, AMERICAN RAILROAD POLITICS, 1914-1920 (1968).

205. The canonical account of these limitations is Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978). See Colin Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 403-08 (1981) (describing adjudication as irreducibly incrementalist approach to policymaking). For a critique of the economic code the judiciary fashioned in its age of vacuum policymaking out of the recurrent bipolar controversies among the then-emerging corporate elite, see SKLAR, *supra* note 174, at 154-75.

206. Croly drew attention to how effective courts had been in adapting the Constitution to changing economic realities for as long as they had—but he did so in the context of a general impeachment of that

large part by the breadth of the eclectic separation of powers tradition, its Adamsian nature. But that very aspect of the tradition would also soon generate numerous new permutations on separated power, authority, and functionality.

The backlash soon became an effort to “judicialize” administrative action through mandatory hearings with cross-examination, the creation of proof burdens, record requirements, and guaranteed rights of appeal to the federal courts. Of course, that move soon enough came under its own scrutiny. By the turn of the century, this reaction was portrayed as the very thing that was obstructing government’s continuous adaptation and delivery of effective, public-regarding rules at the turn of the twentieth century. Its failure was manifest in the many form shifts of bureaus throughout the 1910s and 1920s. As agency theory grew, it assumed an express purpose of circumventing both the partisan legislative logjams and the institutional judicial traps by means of professionalizing and expertizing the making and implementing of legal rules.

B. The Pragmatism of Expertise: Developing an Expert Authority

The internal contradictions of “popular sovereignty” and natural right judicial review had been adequately papered-over by the Federalists of the nineteenth century. So by the time the shift of authority to agencies away from courts became evident, real questions arose over the legitimacy of vesting such great power in mere bureaucrats.²⁰⁷ At the core of that endeavor in legitimation was the rise of the theory of expertise throughout the Progressive era. It was a

capability in the wake of the massive nationalization and industrialization the nation underwent in the last half of the nineteenth century. See CROLY, *supra* note 203, at 179-81. Sklar illustrates this with a wealth of hindsight and expertise in explaining the dynamic exchanges of the political, legal, and economic systems brought about by massive corporatization and the vastness and diversity of American markets. See SKLAR, *supra* note 174, at 179-285.

Bureaus, astute Progressives perceived, could engage in extended periods of study before constructing *any* rules and often indulged in long periods thereof uninterrupted by half-baked deals or partisan stratagems to derail fuller investigation into the root causes of conflict. See CROLY, *supra* note 203, at 295-302, 372-77, 415-30. Furthermore, the “commissions” were unconstrained by rules of evidence or procedure in how or to what they directed their attention. They were not beholden to the immediate parties before them for their materials of deliberation and discovery. Thus, ironically, courts and parties themselves increasingly illustrated their incapacity to generate a public-regarding architecture of any kind, and the “less appropriate that structure became.” SKOWRONEK, *supra* note 177, at 42.

For many years leading up to the legal realism of the New Deal, Congress and the President had not been legislating rule systems so much as they had been ducking questions with platitudes and parables to the agencies about doing the public good. Indeed, this remains a key justification of agency forms by progressives today, notwithstanding the intervening six decades of actual practice with them. Cf. BRUCE ACKERMAN & WILLIAM T. HASSLER, CLEAN COAL/DIRTY AIR 5 (1980). “By restricting itself to the role of Polonius, Congress [gave] evidence of its institutional incompetence. Instead of imposing a hard and fast solution to a complex and changing problem, the legislature [w]ould invite the agency to organize the expert knowledge required for intelligent regulation.” *Id.*

207. Cf. HORWITZ, TRANSFORMATION II, *supra* note 187, at 222. “If the central problem of legal legitimacy in nineteenth-century America focused on the power and authority of judges, in the twentieth century the issue of legitimacy has centered on the authority of administrators and bureaucrats.” *Id.*

theory directly aimed at debunking various Federalist premises of law and society.²⁰⁸ Progressive politics consisted in no small part of showing that the courts were institutionally incapable, whatever the virtues of individual judges, of learning about and then crafting and implementing sound regulatory structures in the industrializing economy. They argued that, in the political and behavioral environments produced by industrialization, corporate capitalism, and mass production/consumption, courts as institutions were virtually insensate.²⁰⁹ They argued that courts were incapable of achieving the very objectives they had set for themselves. There was to certain Progressive (and later certain Legal Realist) minds the need for a revolution in the culture's modes of specifying and justifying law to fit the society's continuously evolving public agenda.²¹⁰ Their pragmatism countermanded (in their own

208. See WIEBE, *supra* note 175, at 145-84 (discussing theory of expertise). The amassing of expertise was early on suffused within the messy practice of bureaucracy, of ministering information about society's rule architectures and the rules to be constructed. *Id.* at 149. "Arriving around 1900 and gaining momentum after 1910, the bureaucratic orientation did not reach its peak of success until the nineteen twenties. Partly because its climax lay in the future, partly because its ideas lent themselves to piecemeal adoption, the bureaucratic revolution came rather quietly, almost surreptitiously . . ." *Id.*

The arrival of "expertise" was worse than the unknown to legalists, though: it was a positive threat. The one thing legalist philosophy could not refute through forensic tactics was actual *knowledge* about banking and finance, the securitization of credit, industrial efficiency, steel and engine technologies, mining, chemical refining, agronomy, ecology, etc. BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* 160-204 (2001); ELLIS W. HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE* 283-379 (1966). But while such "expertise" began as the necessary crutch for the "the public," it would undergo a transformation through its institutionalization to become the entire embodiment of an otherwise faceless, interestless collective. See HOFSTADTER, *supra* note 196, at 257-328.

209. In essence, they argued that the Hamiltonian jurisgenerative model was at war with the separation of powers norms themselves. See, e.g., JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* (Princeton 1973) (1949); LIPPMANN, *supra* note 203, at 91-100; Max Radin, *The Doctrine of the Separation of Powers in Seventeenth Century Controversies*, 86 U. PA. L. REV. 842 (1938). Hand's politics in his years as a behind-the-scenes Progressive (late teens and early twenties) bear special note on this point. See GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 25-90 (1994) (describing Hand's blistering assaults on legalistic conservatives who hampered Progressive regulatory initiatives). Hand's own famous faith in tradition later in life would show the contrast between jurist and political progressive. *Id.* at 300-36.

But the very fact that several high Progressives continued to use the traditional categories of authority shows a basic continuity with the intellectual tradition behind the separation of powers. See generally HERBERT CROLY, *THE PROMISE OF AMERICAN LIFE* (Transaction 1993) (1909). Croly's book was a paean to the "executive power," although it was an executive he sought to deepen and infuse with technique and expertise, stability of cognition, and an institutionalized duty to what he called a "democratic nationalism." *Id.* at 207-64. This form of executive power, while it held no necessary relationship to centralization as such (for it was a kind of organizational innovation that could be of value at the state level as well), was to be the corrective to the shortcomings of legislative and judicial processes which industrialization had put on display. *Id.* at 274-77; *cf. id.* at 328.

Efficient law-making is as much a matter of well-prepared, well-tempered detail as it is of an excellent general principle, and . . . there is a large part of the work of government which must be delegated by the people to select individuals because it can be efficiently exercised only by peculiarly experienced or competent men.

Id.

210. PURCELL, *DEMOCRATIC THEORY*, *supra* note 171, at 47 (noting "[b]y the second decade of the

minds) any lingering doubts that the shift to this expertise-based authority in rulemaking would render it immune to real checks on jurisgenerative power.

Progressivism was thus critical of Federalist political dogma. “Virtue” and citizen participation were not even the half of it, though.²¹¹ Progressives addressed themselves to the very predicate of legislative process and its hostility to public education/deliberation that the Founding generation had ignored.²¹² They perceived the liberty of the powerful individual as a threat to the sovereignty of “the People” and the separation of powers was viewed as a part of that threat. Law-making institutions, if they were ever to reconcile the property and liberty of “the few” with the lives, safety, and economic health of “the many,” *had* to become more knowledgeable, energetic, and inventive.²¹³ Progressives perceived the older ideals of freedom slipping into desuetude: sovereign communities were being jeopardized by the paralyzed national

twentieth century almost all American social scientists and a large number of philosophers shared [a] hostility toward metaphysics and *a priori* reasoning”). The professionalization of the legal academy at roughly the same time led legal scholarship into common orbits with social scientists and led arguments about the separation of powers as a legal concept into a full-throated critique of the traditional, Hamiltonian/Federalist assumptions. *Id.* at 80; see ALEXANDER, *supra* note 19, at 305-10, 352-73; SKLAR, *supra* note 174, at 309-24, 333-430; VILE, *supra* note 16, at 310-22.

211. It was a confluence of conceptual and institutional innovation, political and socioeconomic transformation, and scholarly pluck that ultimately set the stage for the new administrative state as the fruits of Progressivism, the positivization of political analysis, and the technocratic ideal were all finally born. While the legal and political histories of this transformation have tended to highlight the *federal* events and actors, similar events were unfolding at the state level. See KERR, *supra* note 204, at 6-71 (describing railroad regulation at the state level); see also CUSHMAN, *supra* note 179, at 19-36, 479-98; FELIX FRANKFURTER, *THE PUBLIC AND ITS GOVERNMENT* 81-122 (1930); Hovenkamp, *supra* note 197, at 1038-45. Thus, the major instrument of reformers in the earliest stages was the establishment of the “merit system” within (and through that the professionalization of) the civil service, both at the state and federal levels. This began in the states as a campaign against the worst manifestations of patronage, but evolved into the beginnings of expertise in governmental functioning. See CUSHMAN, *supra* note 179, at 497 (describing some efforts to achieve professionalization of staffs of state regulatory bureaucracies). At the federal level, it became the Pendleton Act. SKOWRONEK, *supra* note 177, at 47-84. Later, with the coming of the Federal Trade Commission Act and the Clayton Act, both in 1914, the statutory patchwork constituted at least the skeleton of an administrative apparatus poised for the diversity and breadth of the creations of authority that would follow in the wake of the Depression. Federal Trade Commission Act, 15 U.S.C. § 41 (2003); Clayton Act, 15 U.S.C. § 12 (2003).

212. See *supra* notes 176-77 and accompanying text.

213. See FRIED, *supra* note 208, at 29-107 (describing “empty ideas” of liberty and property). This dimension of Progressivism is often overshadowed by its other more noted dimensions, but it seems to be mounting a comeback. *Id.* Central to Barbara Fried’s recent limning of the Legal Realist Robert Hale’s work, for example, is his attack on the legalist rhetoric of liberty—especially on that of so-called “laissez-faire” theorists. *Id.* Of course, more noted by far has been Progressivism’s attack on what Richard Hofstadter referred to as the “agrarian myth.” HOFSTADTER, *supra* note 196 (tracing myth of virtuous yeoman farmer from eighteenth century republicanism to the twentieth century reactionary opposition to Progressivism). Several Progressives attacked this myth by portraying the Hamiltonian model as being opposed to extra-judicial jurisgenesis of all forms. Lippmann argued that it viewed legislative activity as presumptively arbitrary and that it was therefore an essential cause of the malaise to be replaced by an architecture that empowered the living to “master” their own destiny. LIPPMANN, *supra* note 203, at 93-96. The intensity of this belief varied with different Progressives. Woodrow Wilson is usually credited with having formed the connection first. See KORN, *supra* note 166, at 3-4. Many would ultimately make the traditional separation of powers and its “rule of law” into a kind of hobgoblin. See HOFSTADTER, *supra* note 196, at 215-27, 257-71.

lawmaking process in the industrializing economy.²¹⁴ Their claims with the broadest structural implications went to the necessity of experimentation with new forms and the devising and implementing of affirmative solutions to common problems.²¹⁵

From deep within the Progressives' critique came the synthesis of the technocratic ideal,²¹⁶ signaling the biggest structural shift of the twentieth

214. SANDEL, *supra* note 174, at 211-49. Even if the Federalist synthesis had no truck in local autonomy, the practical realities of Antebellum and early Gilded Age politics did. Thus, as societal exchanges were reinvented and as the forms of private entitlement began to exert radically different influences over life, the Hamiltonian faith in jurisgenerative inactivity began to take on a fundamentally changed significance as well. Yet complexity, corporatization, and legislative deadlock were only some of the causes of Progressivism's rise. The increasing disparity of wealth and its effects on the political and judicial systems was another, one that several left-leaning progressives have continued to argue threatens the very ideals of citizenship and freedom. *Id.* at 225, 329-33; KEVIN PHILLIPS, *WEALTH AND DEMOCRACY: A POLITICAL HISTORY OF THE AMERICAN RICH* (2002).

It was in this light that many high Progressives found the notion of the "minimal state" so conceptually and historically wrong. To them, it was not, nor had it ever been, true that the nation lacked a powerful central government or an economic code. *Cf.* FRIED, *supra* note 208. Fried argues that early work of Robert Hale, who lived from 1884 to 1969, provides an "uncannily close counterpoint" to works defending the "minimal state" up to and including Robert Nozick's *Anarchy, State and Utopia*. *Id.* See generally ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* (1974). The power-center was the judiciary and the code took the form of things like the freedom of contract, i.e., the aggregate of nineteenth century judicial decisions and their assumptions about liberty, property, and economic exchange that were always being woven together to form bodies of law that protected wealthy clients. See CROLY, *supra* note 203, at 128-62 (arguing that the "Constitution has served the American people in the same way that their national monarchies served the peoples of Europe" and it was administered by "judicial aristocracy").

215. See JOHN DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW* 20 (1927). Dickinson noted that there is a "futility" in "trying to classify a particular exercise of administrative power as either wholly legislative or wholly judicial," and found that the "tendency of the administrative procedure is to foreshorten both functions into a continuous governmental act." *Id.* This basic feature of the administrative function was clear right from the beginning. But the positivization of political analysis as a social science was a dimension of experimentalism and it is perhaps best traced across not just Progressivism, but from Progressivism into the New Deal. See KARL, *supra* note 171, at 37-126. The First World War eventually overshadowed the theoretical disputes of figures like Charles Merriam (and his science of politics) and his counterparts (who were more value-oriented). But as academic debates they persisted well into the 1930s and the Depression. The institutionalization of Merriam's theories, on the other hand, came in the following generation. Only with the coming the New Deal would that form of thinking again find its way into the mainstream of governance and organizational thought. *Id.* at 70-81, 97-113. This thread of Progressive thought concerned the authority to construct rule systems governing the primary conduct of economic and political life, taking it from the judiciary and giving it to the professionalized alphabet agencies. Part of that transformation was the authority to generate the rules regulating the interpretation and application of the "primary" rules, i.e., rules governing the work being done "on the street" by the subordinate agents of the bureaucracies. The authority to make what I have called "auxiliary" rules, rules interpreting antecedent rules, was a necessary concomitant of the larger transformation given the institutional nature of the agencies—the indelibly bureaucratic structure of the establishments themselves. See *supra* notes 155-56 and accompanying text (discussing auxiliary rules); JERRY L. MASHAW, *BUREAUCRATIC JUSTICE* 21-23, 41-46, 88-100 (1983); JERRY MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* 1-41 (1985). This double reconstitution consisted not just in the creative processes of state authority, but also in the grounds of that authority and its normative- and argumentative-conceptual structure, which, after the 1920s and 1930s, became increasingly positivistic.

216. See generally NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 210-32 (1994) (attributing to legal realism a general attack on judicial system's commitment to pursuit of truth and initial faith in the

century. “The public” began to diverge from “the People” in a move toward rationality above all things in collective action. Participatory, face-to-face rule by the people had already been supplanted by Federalists convinced of “representative” democracy’s superiority. Through the rhetoric of an ideally expert agency doing the public’s business, it would be removed even from the legitimating myths of the Federalist separation of powers. Progressive regulatory structures were meant to seek, difficult as they were to find, general rules which were “public-regarding” in practice.²¹⁷ Agencies were represented as the further decomposition of political authority, the further specialization of the legislative and adjudicative functions into discrete subject matter spheres. Agencies administered discrete systems of rules and spheres of life wherein an organizationally unified establishment would possess a continuing authority to write and act upon—and thereafter monitor and learn about—the relevant legal rules.²¹⁸ The very permanence and persistent corrigibility of the rule making function itself, its necessary connection to systematic (if not necessarily

superior abilities of bureaucratic institutions); PURCELL, *DEMOCRATIC THEORY*, *supra* note 171 (linking rise of popular beliefs in expertise and centralization to relativist attack on absolute authority of democratic majorities and political or legal participation as such).

217. Progressivism’s technocratic ideal at least began as essentially neutral between the four constructs of the doctrine. It later took issue with the Hamiltonian/rule of law versions as an institutional tradition, but not with the notions of checking power or rationalizing functions themselves. *Cf.* KARL, *supra* note 171, at 184.

[T]he public paradox was this: America’s social inefficiency was rendering the country undemocratic by making possible the usurpation of public authority by unscrupulous individuals. But the cure broadly proposed, an increase in the effective power of government, was itself a violation of what was presumed to be an earlier, more fundamental democratic creed, the freedom of the individual from the coercion of government.

Id.

Indeed, the very kind of intellectual work behind the rationalization of functions of the eighteenth century probably motivated the early Progressives’ technocratic “faith in reason.” See DUXBURY, *supra* note 216, at 224-38. The author describes Lon Fuller’s fidelity to reason and its role in his beliefs in participation as instrumental to a constructivist adjudicative function, and argues that Fuller was influential in the “larger scene” of institutional competence ultimately synthesized in the 1940s and 1950s. *Id.*

Moreover, even in its heyday, Progressivism was far more respectful of what I have called modern liberty, broadly conceived, than of its perversion by certain lawyers bent on the use of legal rights to dominate the political system. See SKLAR, *supra* note 174, at 184-228; *cf.* SMITH, *supra* note 35, at 425. Smith notes that “even centrist progressives like Croly who openly favored American support for large corporations were critical of the power of corporate lawyers and the restrictive interpretations of the Constitution they won from the courts.” *Id.*

218. McCRAW, *supra* note 187, at 80-142. With the explosion of different forms of expertise (each advancing its own means/ends/rationality), the development of this ideal pointed to new modes of political accountability. Whether some rule was an effective means to a given end became a powerful question. DUXBURY, *supra* note 216, at 242-51; PURCELL, *DEMOCRATIC THEORY*, *supra* note 171. It is critical for the moment to distinguish what this thinking began as from what it has produced and/or become. *Cf.* Thomas K. McCRAW, *The New Deal and the Mixed Economy, in FIFTY YEARS LATER: THE NEW DEAL EVALUATED* 37, 48-53 (Harvard Sitkoff ed., 1985). McCRAW describes the projected permanence of governmental intervention in banking, labor markets, and agriculture, and how “[r]egulation, begun in response to different kinds of crises even during the thirties, evolved through years of war and prosperity into unimportant bureaucratic routine.” *Id.*

scientific) discovery and means/ends dialogue, became its innovative edge.²¹⁹ As community problems took shape through the process of agency action, the truly “public” objective(s) and their legal structures would take shape with them. Every norm became as corrigible as every institutional structure, rendered provisional upon experiences with real behaviors.²²⁰ Agencies were only actually constituted as their systems of rules took shape, making their authorities essentially fluid.²²¹ The pragmatism inherent in the concept of expert authority demands that its processes of lawmaking be held open indefinitely.

C. Agencies, Expert Authority, and the Legalist Reaction

Of course, for every political or intellectual action there is a reaction. The Hamiltonian, rule-of-law version of the separation of powers featuring the isolated moments of lawmaking and prioritizing the temporal irreversibility of the process became an opposition tradition. Indeed, it regained a certain allure from the very success of the emerging experimentalist paradigm. Social and cultural adaptation shifted this vision into an agenda for restraint: if administrative agencies were to be the architects-in-chief of the political and economic regulatory structure, they would have their outputs checked by courts.²²² The details of this agenda and its effect on the administrative agency

219. HOFSTADTER, *supra* note 196, at 108-15. Hofstadter draws attention to the gradual decline of nineteenth century populism’s agrarian disdain for technical, formal-education-derived expertise (what Agrarian Populists called “book farming”) throughout the first decades of the twentieth century. *Id.* He then links it to the larger social phenomena of shifting attitudes toward science and experimentation. *Id.*

220. See DEWEY, *supra* note 11, at 110-42. The “public” in this sense was not a society, a jurisdiction, nor even a collection of interested persons. It was a status questions assumed as a result of the “indirect effects” of “private” events and actions, of the information, communication, and inter-subjective consensus and argument comprising these questions as the subjects of politics. *Id.*; cf. WALTER LIPPMANN, *THE PHANTOM PUBLIC* 16-29 (Transaction 1993) (1927). Lippmann’s “modern interconnected world, the Great Society, was far too complex to be comprehended by anyone, even by experts. For expertise was only authoritative in relation to some particular subject or task—and no more.” Wilfred M. McClay, *Introduction to the Transaction Edition*, in LIPPMANN, *supra*, at xxix. This made the publicity of problems and their consequent forfeiture to “any single authority,” but especially to “public opinion,” “extremely ill-advised.” *Id.* at xxx. This particularism toward the addressing of public problems, premised as it was on the “deep pluralism” Lippmann found in society led him and many of his contemporaries to reject the Progressive notion of the public as a durable entity, seeing in its place nothing but its “multivalent constituent elements.” *Id.* at xxxiii-iv. Thus, recent attempts in administrative law scholarship to place in controversy the public/private distinction as to the real “power” in governance are a kind of echo of late Progressivism. See Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 564-74 (2000).

221. Cf. HOFSTADTER, *supra* note 196, at 82-95 (marking Agrarian-Populist “revolt” of 1890s as turning point of political organizational tactics toward modern “vocational” politics, dependent upon bureaucratized organizations, professionalism, and expertise); PETER BREINER, *MAX WEBER AND DEMOCRATIC POLITICS* 134-67 (1996) (describing Weber’s notion of politics and administration as “betrieb,” “enterprise,” or “vocation,” and tracing its rise in late nineteenth and early twentieth centuries).

222. See SKOWRONEK, *supra* note 177, at 150-62; MCCRAW, *supra* note 187, at 20-56. The early decades of the struggle, inaugurated by the judiciary’s incremental erosion of authority from the nascent ICC actually to produce “rules,” pursued inquiries radically different from those it would end up in. Where the initial inquiries

model within the APA will be explored below in Part V. What is important for the moment is the dialectic nature of the various strands of separation of powers thought.

A broader pattern emerges from the two sketches given to this point on our different moments in time. Much as the Country writers had opposed the “new finance” and the House of Commons’ assault on the “Matchless Constitution” in the seventeenth and early eighteenth centuries,²²³ and much as the Anti-Federalists and Jeffersonians had opposed judicial review and the aristocratic Senate and Presidency in the late eighteenth century,²²⁴ the people who opposed the legitimation of expertise as legal authority did so by criticizing agencies’ power. They used another fragment from within the separation of powers doctrine. This twentieth century conflict was waged in two distinct eras: Progressivism’s struggle with the institutions of modern liberty²²⁵ and Legal Realism’s attack on the premise that law’s traditions and procedure were exhaustive of its authority.²²⁶ In each, separation of powers ideals were adapted to shifting sociopolitical realities.

were into whether agencies even could make rules having the force of law, the inquiry would gradually evolve throughout the Gilded Age and Progressive Era into the more familiar forms it took on the eve of the New Deal. See *Wayman v. Southard*, 23 U.S. 1, 42-43 (1825) (intimating that to do so would be to delegate authority that was “strictly and exclusively legislative”); *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892). “There are many things upon which wise and useful legislation must depend which cannot be known to the law making power, and, must, therefore, be a subject of inquiry and determination outside the halls of legislation.” *Id.* at 694. In its waning years, after cases like *A.L.A. Schechter Poultry Corp. v. United States*, and *Panama Refining Co. v. Ryan*, the questions were not at all whether agencies could write legally binding rules, but rather which rules were binding and under what circumstances. See generally *Schechter Poultry*, 295 U.S. 495 (1935); *Panama Refining*, 293 U.S. 388 (1935); KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 11-16 (1951) [hereinafter DAVIS, TREATISE].

223. See *supra* notes 55-57 and accompanying text.

224. See *supra* notes 106-07 and accompanying text.

225. See generally ARNOLD M. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895 (1960); BENJAMIN R. TWISS, LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT (1942); PURCELL, PROGRESSIVE CONSTITUTION, *supra* note 171, at 11-91.

For evidence of how these struggles commingled with one another, see Felix Frankfurter and Nathan Greene, *The Labor Injunction* (Peter Smith 1963) (1930). The authors grapple with the ambiguity of the legal rights at issue in the labor relations cases and repeatedly come to the conclusion that the judiciary had routinely substituted laissez-faire ideology for actual concern for the facts. *Id.* at 24-46, 199-228. They advance this claim by patiently and deftly illustrating how ill-equipped courts were even to “do justice” in the labor disputes given the complexity and contradictions of the available evidence and the mutual hostilities and multi-polarities of the parties. *Id.* at 47-133. Their first-order solution was the proposed reallocation of jurisdiction away from the federal courts, although Frankfurter’s legendary faith in procedure is discernible in several places as well. *Id.* at 126-33; see *id.* at 210-16 (suggesting criminal contempt sanctions for violating injunctions ought not be available without full hearing on merits of underlying injunction).

226. See PURCELL, DEMOCRATIC THEORY, *supra* note 171, at 200-16, 246-68 (discussing rise of expertise as necessarily subject-matter specific, finite, data-oriented, morally relativistic, and rational capacity). As Purcell deftly demonstrated, over the course of a long progression procedure-as-basis-of-authority took a back seat to expertise-as-basis-of-authority throughout the social-scientific professions, the legal academy, the agencies of government, and ultimately the judiciary itself. *Id.*; see PETER H. IRONS, THE NEW DEAL LAWYERS (1982) (describing shift in concept of authority as it gradually evolved within judiciary); DUXBURY, *supra* note 216, at 79-111; EDWARD WHITE, NEW DEAL, *supra* note 155, at 94-116.

The point of Part IV's interpretive sketch of that conflict has been to suggest the existence of two intellectual paradigms that emerged as modes of arranging the separation of powers doctrine's pieces: experimentalism and legalism.²²⁷ Progressivism would go on to complicate legal authority the way that it did in part because of an ideologically reactionary effort by certain influential judges, politicians, and a corporate-legal elite (the "legalists").²²⁸ It was an effort to stem the tide of its counterparts' pragmatic, "experimentalist" institutional innovations. The architectonic shift represented by the arrival of such innovations framed the agenda for the rest of the twentieth century and continues to frame it today.

The politics leading to the adoption of the APA consisted almost exclusively in the checks on the "agency" and what "administrative procedures" would be required to facilitate its function.²²⁹ A proud constitutional history of separating into fractions the authority (and power) in lawmaking emboldened the bench and bar, underwriting their insistence on various guarantees of judicial review and procedures inside the dynamics of agency administration. That insistence, however, would ultimately transform almost imperceptibly into their resignation to agencies' "rational," technocratic superiority.²³⁰ This subtle

227. JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 1-5 (1938) (describing "administrative tribunal" as category defying "compartmentalization of power along triadic lines"). What the experimentalists had originally hoped to create were the institutional capacities for generating laws which had been imperfectly conceptualized—even obscured—by the Hamiltonian temporal portrait of first "legislative," then "executive," then "judicial" functions. We must, though, distinguish between what one faction sought and what was ultimately created. The jurisgenerative system that resulted from the era as a whole was both tractable and innovative. It valued *both* ancient and modern liberties and did so through the means of both rationalized functions and balanced power, all virtues that certain polemical defenses of agencies began to tout on the eve of the APA's creation. *See id.* at 46. "The administrative process is, in essence, our generation's answer to the inadequacy of the judicial and legislative processes. It represents our effort to find an answer to those inadequacies by some other method than merely increasing executive power." *Id.*

228. RONEN SHAMIR, *MANAGING LEGAL UNCERTAINTY: ELITE LAWYERS IN THE NEW DEAL* (1995) (providing fullest accounting for opposition). Shamir's most trenchant analysis is that of the legal elite ambivalence toward the growing administrative practice as a whole in comparison to its unambiguous opposition to the NRA and the National Industrial Recovery Administration (NIRA). Where the administrative system, given the right refinements, was viewed as something that might become a discretely expert form of legal practice, the NRA and NIRA were distinctly "anti-law, anti-lawyer" in philosophy. *Id.* at 15-35. This became a problem for the bar because the NRA's measures were often favorable developments for various business interests, i.e., certain clients of the elite bar. Teasing out the precise distinctions between NRA-like administrative developments and other, more legalistic, administrative programs becomes a terrific illustration of the culture, politics, and economics of expertise, whether in constitutional law, statutory interpretation, or other, extra-legal bodies of knowledge. Ultimately, the master solution was the model of legality and legitimation with which modern administrative lawyers are so familiar: the acknowledgement of extra-legal, technical expertise contingent upon secure rights of judicial review by which client and professional interests can be protected. *See id.* at 93-113, 131-57; *see also* JOEL AUERBACH, *UNEQUAL JUSTICE* 191-230 (1977).

229. The New Deal itself would ultimately be eclipsed as the focal point of partisan strife, and legal and political currents would converge to make the passage of "administrative reform" possible, albeit in a changed political environment where agencies had for years been conceded the "institutional" advantages of expertise and functionality. *See infra* notes 245-76 and accompanying text.

230. *See* HORWITZ, *TRANSFORMATION II*, *supra* note 187, at 230-33; Paul Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 272-78 (1978) (describing legislative politics leading to

transformation took shape in the compromise politics between the third Roosevelt Administration and its conservative opposition in Congress—obscuring the deep conflicts lying at the heart of an apparent consensus on the utility of bureaucracy.²³¹ With this progression in mind, it becomes possible to see the politics underlying the APA in a new light.

V. A NEW LEGISLATIVE HISTORY OF ADMINISTRATIVE AUTHORITY

There was no consensus definition of tyranny in 1930s America because there was no consensus definition of liberty. Even as the Western world witnessed its most perfected variations of tyranny throughout that decade, both conceptions of liberty endured. The coming and going of the New Deal witnessed a massive and creative change in attitudes toward agency governance,²³² but retrospective legalist attacks on the growth of bureaucracy as the “road to serfdom” or an assault on the rule of law²³³ are only part of the story. The partisans, instead of trying to resolve the unresolvable, engaged each other on a more practical level. In essence, Progressives continued their work while conservatives continued theirs, and the story of both is how the “rationalization” of agencies as rulemakers and means/ends engineers actually continued amid such profound conflict. *That* story is an account of the apparently permanent parting of ways between two attitudes toward or philosophies of the separation of powers: legalist and experimentalist. This Part tells some of the story about how this rift opened in the doctrine and how it motivated and framed the creation of the APA.²³⁴ The conceptual and political-

APA’s passage). Professor Horwitz has argued that it was the erosion of the legitimating power of the expertise theory of regulation which allowed the resurgence of “legalism and proceduralism” and thus the passage of the APA. HORWITZ, TRANSFORMATION II, *supra* note 187, at 235.

231. As a process of practical politics rather than conceptual synthesis, it consisted in a series of quite specific compromises that would shape the post-War model of separated authority/power and the rule of law—the model currently absorbing massive criticism from all quarters. It becomes perhaps the greatest challenge of this subject to differentiate the compromise politics involved in producing the APA from the conceptual frameworks comprising the independent stakeholders’ views. Part V highlights one particular political contest for consideration: the issue of SEC “interpretations” and “advice” as opposed to its “rules.”

232. See generally WHITE, NEW DEAL, *supra* note 155 (discussing role of New Deal). I defer on this point to Professor White’s massive study of the New Deal’s role in the much larger jurisprudential shift throughout the first half of the twentieth century. *Id.*

233. See HAYEK, SERFDOM, *supra* note 182. The center of gravity of the legalist vision was the American Bar Association (ABA), which by the middle 1930s had enlisted Roscoe Pound into its reactionary Committee on Administrative Law (formed in 1933 in response to the Agricultural Adjustment Act and the National Industrial Recovery Act, both passed that year). The unifying agenda was to stanch the shift of decision-making power from the courts to the “administrative tribunals.” SHAMIR, *supra* note 228, at 5-15. The Final Report, which the ABA issued in 1939, was driven by the overarching claim that the nation was in descent to an “administrative absolutism.” *Id.*

234. Part VI considers the probability that this doctrinal split remains the most important fissure in administrative jurisprudence today, but before that can be done, its genesis must be clarified. Part V.A. sets up the precise intersection of our separation of powers pieces in the contest between different proponents of administrative reform in the 1930s; and Part V.B. describes the practical politics that animated the arguments for many of the stakeholders then at the table.

economic evolutions we have traced to this point constitute our frame of reference: the pragmatic logic of rules and how it explains the modern separation of powers itself. The keynote of the story is the ending of legislative deliberations in compromise: once a *compromise* was within reach in the legislative process, it ended the development of agency structure, of its means and ends as a public and private normative mechanism.

A. Collision of Agendas in the Making of the APA

In the twilight of the New Deal and in the wake of its substantial augmentation of authority and organizational capacity to the agencies,²³⁵ legislative proposals hostile to the administrative modes and authorities surfaced. The hostility often took the form of procedure: bills requiring individualized hearings in connection with all agency actions like rulemakings.²³⁶ These bills were countered with experimentalist proposals for reform, generating a collision of agendas that would culminate in the APA.

Reform efforts stalled several times in the increasingly fractured Congress. Where early legalist proposals usually saddled certain agencies with unreal requirements of procedure or judicial review,²³⁷ the bill that would become the

235. See ALAN BRINKLEY, *THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR* 107-74 (1995) (discussing lending and credit agencies); HAWLEY, *supra* note 208, at 420-32 (analyzing anti-monopoly bureaus).

236. See George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1568-78 (1996). See generally KARL, *supra* note 171, at 247-65; JAMES T. PATTERSON, *CONGRESSIONAL CONSERVATISM AND THE NEW DEAL: THE GROWTH OF THE CONSERVATIVE COALITION IN CONGRESS, 1933-39* (1984). It is important not to overplay the New Deal as the precipitant of this shift. As Professor White has recently detailed, much of this transformation was underway early in the twentieth century. See WHITE, *NEW DEAL*, *supra* note 155, at 310 (describing significance of New Deal). White states that:

[T]he special importance of the New Deal as the midpoint of a crisis in early twentieth-century American Jurisprudence needs to be appreciated. . . . [T]he crisis was underway by the early 1920s and not fully resolved until after the Second World War, so neither its surfacing nor its resolution can be attributed solely to developments in the New Deal period.

Id.

237. See Louis L. Jaffe, *Invective and Investigation in Administrative Law*, 52 HARV. L. REV. 1201, 1232 (1939). Jaffe mocked the Walter-Logan Bill, later vetoed by Roosevelt in 1940, as a “Bill to Remove the Seat of Government to the Court of Appeals for the District of Columbia.” *Id.*; see James M. Landis, *Crucial Issues in Administrative Law*, 53 HARV. L. REV. 1077 (1940) (critiquing Walter-Logan Bill).

In the waning of the New Deal, it had become clear that one structural principle of technocratic administration was its separation of jurisgenerative authority into subject matter spheres. See ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, FINAL REPORT OF THE COMM. ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 77-8, at 15-16 (1941) [hereinafter FINAL REPORT]; see also BRINKLEY, *supra* note 235, at 21-23. By 1940, “administrative reform” went in search of its compromise, and, while the first bill failed to achieve this, it pointed the way toward a potentially successful one. The Walter-Logan Bill suffered a two-fold defect in this respect. First, it had accumulated so many exceptions in Congress that by the time it reached the President, “almost all of the older established agencies were to be exempted, so that the provisions fell most heavily upon those created [by] the New Deal.” Herbert Kaufman, *The Federal Administrative Procedure Act*, 26 B.U. L. REV. 479, 513 (1946). In all, Walter-Logan exempted almost two dozen agencies, not including those engaged in military or naval operations. See Shepherd, *supra* note 236, at 1618-19 (table 1); see also *Administrative*

APA would be less rigid in such measures but far broader in scope.²³⁸ The bill's only truly comprehensive requirement for agency rulemaking was for the publicity of rules of law, not necessarily in their formulation, adoption, or implementation. But the final bill would apply to *all* "agencies," whatever their authorities, power, or constituencies.²³⁹ That was the key and today it is the APA's greatest strength: its generality.

The price of generality, as is common, was moderation. The APA's separation of powers took shape from an assembly of several compromises between legalists and experimentalists.²⁴⁰ And as with many compromises, its

Law: Hearings on H.R. 4236, H.R. 6198, and H.R. 6324 Before Subcomm. No. 4, 76th Cong., 1st Sess. 68-71, at 1145, 1148 (1939) [hereinafter 1939 Hearings] (statement of John Foster Dulles, Chairman, Comm. on Admin. Law, Bar Assoc. of the City of New York). Dulles stated that:

when the Walter-Logan Bill was [pending] . . . terrific pressures . . . were put to bear on the part of different administrative agencies to get exempted, and you had an exempting clause at the end which gradually grew until it became one of the longest provisions of the whole Walter-Logan [B]ill.

Id. In other words, many subject matter spheres would go virtually unreformed. Secondly, for those agencies to which it did apply, it required that all rule makings include hearings before neutral parties, followed by judicial review, a requirement that all parties recognized would drastically reduce the scope and pace of administrative action—an effect many regulatory spheres could not bear given their own internal volatility. *Administrative Procedures Act, Hearings on S. 674, S. 675, and S. 918 Before a Subcomm. of the Comm. on the Judiciary, 77th Cong., 1st Sess., at §§ 200(c), 211 (1941) [hereinafter 1941 Hearings]*.

238. *1939 Hearings, supra* note 237, at 1145, 1148. Legalist opposition proposals consistently pressed agencies to "prefer and encourage rule making in order to reduce to a minimum the necessity of case-by-case administrative adjudications," while simultaneously requiring that "any rule may be judicially reviewed upon contest of its application to particular persons or subjects." *Id.* This illustrates a sensitivity to the realities of bureaucracy, albeit one driven by hostility. Agencies required to write rules and do so within a set timeframe or not at all would be greatly weakened—deprived of needed time to investigate and explore alternative formulations of means and ends. *Cf. id.* at 1444, 1446-47 (Supplementary Written Statement of Acting Attorney General Francis Biddle) (criticizing certain proposals as running counter to wisdom of common law's case-by-case, evolutive accretion of principles and facts in generating rules, rather than by spurious generalizations at first encounter with given circumstance).

239. *1941 Hearings, supra* note 237, §§ 201-202, at 20. The majority of the Attorney General's Committee supported a bill, S. 675, that regulated rules and rule making by agencies, requiring only that they "make available" the rules and policies they generated and that they "designate one or more units . . . to receive suggestions" on the formulation and revision of rules and policies that were being or had been made. *Id.* The only individuated participatory right with respect to rule making in S. 675 was for the right of "[a]ny person" to "file with an agency a petition requesting the promulgation or amendment of a rule in which the petitioner has an interest." *Id.* § 204. The granting of any such petition, however, was wholly subject to the discretion of the agency, which was further empowered to prescribe requirements even as to the "form" and "content" of such petitions. *Id.* The bottom line of S. 675 was that rule making was to be "subject to the control and supervision of the agency." *Id.* §§ 202, 204. This version of the bill, of course, was designed to change very little about administrative agencies that were then making rules and prospectively operative policies. *Id.* Not surprisingly, S. 675 was favored in the hearings by *every single* agency representative called to testify. *See id.*, at 69-799 (showing over thirty witnesses representing over two dozen agencies supporting S. 675).

240. The shape of the APA eventually owed everything to two very different proposals. Where agencies' champions recognized the need to cabin authorities to actual expertise (as opposed to the rhetorical sweep of various purportedly expert misfires), opponents by the late 1930s had acknowledged the superiority of organized and "rational" inquiry. But both factions on the Attorney General's committee understood and rejected the Walter-Logan Bill's thrust. The minority, for example, took the opportunity to reject that bill's "single and rigid method for the making of rules or regulations regardless of the kinds of rules or the practical needs of the subject." FINAL REPORT OF THE ATT'Y GEN.'S COMM., at 214 [hereinafter ATT'Y GEN.

highest function was probably its adjournment of hostilities that had by then taken on a life of their own, notwithstanding the fact that the precise meaning of its provisions was deeply unclear even as it was being shepherded through the post-war Congress.²⁴¹

In anticipation of a hostile Congress's assault on its "administrative process," the Roosevelt Administration had commissioned a massive study of almost four dozen federal agencies,²⁴² ultimately resulting in the preparation of individual monographs describing their operations and outputs.²⁴³ From this endeavor, and a false start down another road, came a now-famous report, an exhaustive study of administrative modes and norms to that point.²⁴⁴ It did not,

COMMITTEE'S FINAL REPORT] (on file with author). In very basic terms, the real bill was, as one contemporary observer described it,

a compromise between the early efforts to cast the administrative process in a rigid judicial mold and the opinions of the agency officials that the technical and complex field in which they operated can be suitably administered in the interests of the public only if the administrators and their expert staffs are permitted a certain amount of statutory freedom in formulating and enforcing their policies without the unnecessary restrictions of the judicial process.

BUREAU OF NATIONAL AFFAIRS, ADMINISTRATIVE PROCEDURE ACT: SUMMARY AND ANALYSIS BY THE EDITORIAL STAFF 4 (1946).

241. See DAVIS, TREATISE, *supra* note 222, § 1-2, at 9 (describing aftermath of APA). "After the enactment of the APA a period of tranquility set in. The battle over fundamentals had ceased. The federal administrative process was secure." *Id.* Professor Sunstein has called such dynamics the making of "incompletely theorized agreements." But the "tranquility" of the parties and their abilities to cooperate henceforth usually turn on how truly necessary was further theorization of their agreement. See CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 136-47 (1996).

242. See H.R. REP. NO. 1980, at 11-12 (1946).

243. See ADMINISTRATIVE PROCEDURES IN GOVERNMENT AGENCIES, S. DOC. NO. 10 (1941) (containing fourteen parts); ATT'Y GEN. COMMITTEE'S FINAL REPORT, *supra* note 240. It was an enormous endeavor designed to establish just what types of actions and procedures the agencies were engaged in—forms that had by then evolved over significant histories. *Cf.* ATT'Y GEN. COMMITTEE'S FINAL REPORT, *supra* note 240, at 8. "Of the 51 administrative agencies discussed . . . no less than 11 trace their beginnings to statutes enacted prior to the close of the Civil War. The First Session of the First Congress enacted 3 statutes conferring important administrative powers . . ." *Id.* Twenty-seven monographs described in painstaking detail the personnel, routines, budgets, office structures, chains of command, procedures, and statutory authorities of the agencies reviewed. *Id.* The staff of this Attorney General's Committee comprised an ad hoc investigative commission in its own right. See Paul Verkuil, *Present at the Creation: Regulatory Reform Before 1946*, 38 ADMIN. L. REV. 511 (1986) (interviewing Kenneth C. Davis and Walter Gellhorn, key personnel on Committee, and providing retrospective on monographs themselves). The individual monographs were researched and written with the objective of drawing parallels among agency operations and outputs. Yet, mid-way through the work, it was apparent that what was going to emerge from the project was the documented record of a "great diversity in the facts and problems to which particular procedures must be adjusted" in light of the "tremendous diversity of the subject matter and interests entrusted to the[] Federal agencies." Letter of Dean Acheson, Chairman, transmitting Interim Report of the Comm., Jan. 31, 1940, in ATT'Y GEN. COMMITTEE'S FINAL REPORT, *supra* note 240, at 255-56.

244. See KARL, *supra* note 171, at 61-70, 82-126, 218-23. The now infamous President's Committee on Administrative Management, chaired by Louis Brownlow and staffed by people like Charles Merriam, Luther Gulick and Harvey C. Mansfield—a committee's whose proposal would be publicly ridiculed by Congress in 1937 as the beginnings of a "Roosevelt dictatorship"—started out as significantly influenced by experimentalist principles. *Id.* It became an interrelated set of proposals for uniting and consolidating the President's influences over the "sprawling chaos" of the many agencies, commissions, bureaus, and departments which the political system had created in the preceding five decades. *Id.* at 255-63. Neither Merriam nor Brownlow, nor

however, produce a procedural model fit to be imposed on all agencies. Agency functions and responsibilities had grown stunningly more diverse and complex than anything like the Hamiltonian model could conceive,²⁴⁵ too numerous and fluid to admit of standardization beyond but the simplest of requirements.²⁴⁶

Legalist influences were clear. The monographs, integral to the Final Report itself, generally distinguished between agencies' "adjudications" and their making of "rules."²⁴⁷ Yet such distinctions were unceasingly tentative given

any of the others, actually wanted dictatorial consolidation; it was rather that they sought leadership-driven innovation and were willing to do so through compromise. *See generally id.* "Presidential leadership" became their means even while they deferred in several respects to the legalistic impulses of others in their own field of "public administration." *See generally id.*

245. ATT'Y GEN. COMMITTEE'S FINAL REPORT, *supra* note 240, at 255-58. While it was agreed throughout the Committee's investigation that "the utilization in the rule-making process of methods whereby agencies may obtain information, opinions and criticisms from those who may be affected by their rules" should be encouraged, there was little agreement as to how that ideal could be realized without straitjacketing the agencies in light of the diversity and volatility of the problems with which they were charged. *Id.*

246. *See* KARL, *supra* note 171, at 225-55; WHITE, NEW DEAL, *supra* note 155, at 94-125. The realities of bureaucratization and organizational power were increasingly evident to those who collectively shaped the APA. Prominent among them were the pervasiveness and utter unstopability of what we have called rule cascades and the interconnectedness of rules regulating the primary conduct of citizens. Even more vexing were the cascades of rules regulating (and constituting) the administrative organization itself, what Section III.B.2 called "auxiliary rules." Throughout America's era of bureaucratization there have also existed such practices of rule making wholly *internal* to the agencies of government, practices that were and are solely about managerial prerogative. These rules have never been addressed to private persons or behaviors as such. *See* ATT'Y GEN. COMMITTEE'S FINAL REPORT, *supra* note 240, at 97-121; Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 493-509 (2002) (describing diversity of grants of authority to make rules as well as diversity of rulemaking practices).

It is telling that one of the first descriptions given in the Attorney General Committee's Final Report for the administrative agencies studied was that they were "of necessity, large organizations." ATT'Y GEN. COMMITTEE'S FINAL REPORT, *supra* note 240, at 18 (listing personnel sizes of up to 36,000 for Veterans' Administration). "The size of these staffs reflects both the nation-wide jurisdiction of the agencies and the character of the work they are called upon to reform." *Id.* Quite obviously, the sheer demands for coordination and supervision generated within such environments, apart from any "legislative function" being exercised, are substantial. Yet because the form of leverage one exerts over a subordinate is tantamount to Raz's "having an authority," the backing behind many kinds of auxiliary rules is and has always been different from that which is immediately behind the so-called primary rules. *See* Raz, *supra* note 45.

247. *See* ATT'Y GEN. COMMITTEE'S FINAL REPORT, *supra* note 240, at 35-96. Chapters III through VI detailed the "formal" and "informal" adjudication practices in agencies and the judicial treatment these actions had been receiving in the federal courts. *Id.* Chapter VII comprised the Report's findings on rulemaking practices. *Id.* at 97-121. As prologue, the Report noted that "[r]elatively few of the administrative agencies studied by the Committee lack power to prescribe . . . substantive regulations having the force and effect of law." *Id.* at 98. In addition to that power, the Committee noted, "all of them may, if they wish, issue interpretations, rulings, or opinions on the laws they administer, without statutory authorization to do so." *Id.* at 99. Through devices such as "hypothetical facts" and others, agencies would issue "opinions" and the like that would become de facto regulations "indistinguishable from those that have statutory force." *Id.* at 100. And courts, the Committee noted, would often concede legal authority—or something quite like it—to these non-rule rules. *Id.* at 90-91, 100. In the monographs, these practices were, from agency to agency, generally described separately—to the extent separate descriptions were intelligible. *Id.* As is clear from reading the monographs, however, what action fell into which category was not always evident and was often compounded in difficulty by the pervasiveness of different types of hearings in connection with rule makings. *Cf. id.* at 104-05 (describing diversity of rule making practices and types of rules produced).

the agencies' mastery of the pragmatic logic of rulemaking. Where the investigation or adjudication of a question left off and the making of a rule in light of that experience started was recognized as exquisitely ambiguous in a variety of circumstances. In monograph after monograph the Federalist/Hamiltonian template that legalist critics sought to impose upon the agencies broke down when definite descriptions of adjudications versus rule-makings were attempted because bureaucratic behaviors were simply too diverse.²⁴⁸ The political and managerial necessities that had produced so much experimentation and adaptation to changing public demands made the legalists' basically temporal separation of powers virtually imperceptible within the institutions studied.

Even more surprising, though, the Committee noted that agencies had been for several years engaging members of the public in "regularized consultation[s] in connection with their rule-making process," almost wholly on their own initiative.²⁴⁹ These "participatory" conversations were neither adversarial hearings nor mere jawboning sessions. Indeed, their character distinguished them as "administrative" events in terms of the learning produced and the normative efficiency of the outputs ultimately generated.²⁵⁰ Several

248. This conceptual muddle is most evident in the monographs on the SEC, the FCC and the component bureaus of the Department of the Interior. In the Interior Department, for example, it was "not possible to study the procedures utilized by all of the rule-making units" given their diversity and breadth. MONOGRAPH ON DEPT. OF INTERIOR, S. DOC. NO. 10, at 58 (1941) (Part 7). These practices included the making of rules "governing the conduct of adjudicative proceedings," those that were "amendatory rules" of existing regulations, and those that promulgated new regulations for "achieving a maximum use of natural resources consistent with their proper conservation." *Id.* at 57-58. The diversity of procedures employed in the making of these various types of rules reflected "the varying degrees of complexity in the making of legislative judgments, the organizational structure of the divisions, the rule-making experiences of the personnel, the sources of information, and the availability of informed extra-agency opinion." *Id.* at 62.

In the FCC monograph, after an explicit attempt to disclaim any strict categorizing of the rule making practices and even strict differentiations between rule making and adjudicating, the Committee attempted to separate four categories of rules made by the FCC. MONOGRAPH ON FEDERAL COMM. COMM'N, S. DOC. NO. 186, at 61 n.58 (1940) (Part 3) [hereinafter FCC MONOGRAPH]. The first two types were "regulations" addressed to "private parties" of differing substantive impacts, third were rules structuring the FCC's use of its "supervisory and investigatory powers," and fourth were rules "dealing with the internal structure of the Commission and the management of its affairs." *Id.* at 61. The differences between these types were less than crystalline: "[t]he public is still affected by and interested in these [last type of] regulations but obviously to a much lesser degree than in the other types of rules." *Id.* The procedures the FCC had employed in making the rules were no less diverse. *Id.* at 64-80. While "[t]here [wa]s no statutory requirement that a public hearing be held prior to the issuance of rules" and neither was "any single procedure followed by the Commission when it exercise[d] its rule-making powers," the Commission regularly gathered information from a multitude of sources on the radio and telecommunications markets it was regulating, usually through internal searches and other similarly limited investigative techniques, although in certain instances through "[c]irculating postcard questionnaires, from investigations conducted by the field offices . . . and from the records of hearing relating to . . . regulations." *Id.* at 65, 67-69.

249. ATT'Y GEN. COMMITTEE'S FINAL REPORT, *supra* note 240, at 103.

250. *Cf.* ATT'Y GEN. COMMITTEE'S FINAL REPORT, *supra* note 240, at 11-18. The report described the superior institutional capacities of agencies in the collection and organization of information for the making of rule systems and the adjudication of individual rights within those systems as compared to purely "executive action." *Id.* Where executives who convene such "consultations" are left to resort back immediately to

agencies had begun routinely to engage their regulated communities and representatives of their publics in discussions simply because of the information these consultations produced, not because anyone had required them to do so.²⁵¹ Provisional rules and regular reassessments had become something of a norm, more as a result of pragmatic adaptation than anything else.²⁵²

1. The Test of Principle: The Securities and Exchange Commission and the Triumph of Administrative Rulemaking

By far the largest monograph was that on the Securities and Exchange Commission (“SEC”), a mere six years old at the time it was studied.²⁵³ The SEC of the late 1930s was a new breed of agency. It, along with the National Labor Relations Board (“NLRB”), was what spurred the greatest ire of New

political cues (and perhaps take actions that will be judged by political criteria), bureaucrats resort back to the standing, specialized organizations from which they came—ideally to disseminate the knowledge that has been created from the deliberative exchanges. The extending sphere of expertise and communication, when the organization takes up this new information, is what distinguishes the administrative authority from the electoral-political one. See Dorf & Sabel, *Democratic Experimentalism*, *supra* note 3, at 390-418; Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1554-59 (1992).

251. ATT’Y GEN. COMMITTEE’S FINAL REPORT, *supra* note 240, at 104. “Notable instances of the regular use of conferences, to the exclusion wholly or partially of hearings, appear in the procedures of the Board of Governors of the Federal Reserve System, the Securities and Exchange Commission, and the Federal Communications Commission.” *Id.*

252. HOFSTADTER, *supra* note 196, at 316.

The New Deal, and the thinking it engendered, represented the triumph of economic emergency and human needs over inherited notions and inhibitions. It was conceived and executed above all in the spirit of Roosevelt called “bold, persistent experimentation,” and what those more critical of the whole enterprise considered crass “opportunism.”

Id. In this regard, the agencies picked up where pragmatist/progressive political thought about the legal process had left off, often employing the very thinking for which early pragmatists had been attacked. See John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17, 23 (1924).

No lawyer ever thought out the case of a client in terms of the syllogism. . . . [T]hinking actually sets out from a more or less confused situation, which is vague and ambiguous with respect to the conclusion it indicates, and that the formation of both major premise and minor proceed tentatively and correlatively in the course of analysis of this situation and of prior rules.

Id. Of course, “[m]uch of this experimentation seemed to the conservative opponents of the New Deal as not only dangerous but immoral.” HOFSTADTER, *supra* note 196, at 317. Much of this opportunism on the part of alphabet agency principals has since been theorized as a core democratic experimentalist commitment to “rolling rule regimes” as a mechanism of properly valuing individual voice in regulatory decisions. See Michael C. Dorf, *The Domain of Reflexive Law*, 103 COLUM. L. REV. 384, 399 (2003) (reviewing JEAN L. COHEN, *REGULATING INTIMACY: A NEW LEGAL PARADIGM* (2002)). Dorf writes that a “rolling regulatory regime is not simply a mechanism for finding ever-better means of achieving fixed ends. It can also lead to the transformation of ends, because human activity rarely proceeds with a single-minded focus.” *Id.*

253. The SEC was formally created by the Securities and Exchange Act of 1934, a statute written in large part by prominent (second) New Dealers Felix Frankfurter, James Landis, Thomas Corcoran, and Benjamin Cohen. Securities and Exchange Act, 15 U.S.C. § 78d (2003); see MCCRAW, *supra* note 187, at 171; cf. BRINKLEY, *supra* note 235, at 55, 62-64 (describing “liberal network” of Landis, Frankfurter, Corcoran, Cohen, William O. Douglas, Jerome Frank, Thurman Arnold and Robert Jackson and its importance to collaboration that created forms like SEC).

Deal opponents in Congress.²⁵⁴ While a great many of its operations were characterized loosely as one sort of “adjudication” or another,²⁵⁵ many of its operations entailed the creation of policies with prospective effect (of various substantive impacts) yet not triggering any formalized procedure and not resulting in tangible or static “regulations.”²⁵⁶ Its outputs were intractable as “legislative” or “adjudicative” because they ranged across a broad spectrum. Some were thoroughly internal and organizational, some were public and “interpretive,” and some were fully regulative and command-like.²⁵⁷ And much of how those different legal forms related to one another was left unspecified by the agency itself (and designedly so).²⁵⁸ SEC, in its short history, utilized its freedom to experiment with forms to a remarkable degree, several times with extraordinary results.²⁵⁹ More than any other monograph,

254. See JOEL SELIGMAN, *THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE* 39-240 (1982); Shepherd, *supra* note 236, at 1608-11. Each new sector of the financial markets it actually, effectively regulated brought new and powerful enemies (and usually a newly hostile contingent in Congress); MCCRAW, *supra* note 187, at 192-200. See generally MICHAEL E. PARRISH, *SECURITIES REGULATION AND THE NEW DEAL* (1970).

255. *Administrative Procedures in Government Agencies*, S. DOC. NO. 10 (1941) (Securities and Exchange Commission) [hereinafter SEC MONOGRAPH]. As conventional administrative law wisdom holds today, the vast majority of bureaucratic behavior that is characterized as norm-application fits loosely into the category of the APA with virtually no procedural character of its own: that known as “informal adjudication.” Cf. PETER L. STRAUSS ET AL., *GELLHORN & BYSE’S ADMINISTRATIVE LAW: CASES AND COMMENTS* 471 (9th ed. 1994) (noting “the structure of the APA suggests that it does not address ‘informal adjudication’ per se. The framers found it too variable to be captured in a general statute”).

256. See SEC MONOGRAPH, *supra* note 255, at 100-111. The Committee, indeed, recommended against even attempting to formalize a procedure for the agencies utilizing such techniques, noting that

[b]ecause of its successful bringing together of agency knowledge and outside contributions, there seems to be no reason for extending to the [Federal Reserve’s consultative process] the policy of holding rule-making hearings. . . . Consultation cannot be prescribed by legislation. . . . The occasions when consultations and conferences should be employed can scarcely be specified in advance; their use must be left to administrative devising, in the light of a conscious policy of encouraging the participation of those regulated in the process of making the regulations.

ATT’Y GEN. COMMITTEE’S FINAL REPORT, *supra* note 240, at 104-05.

257. Cf. SEC MONOGRAPH, *supra* note 255, at 100. “Roughly, and for purposes of convenience, the regulations may be divided into three general categories: (A) Substantive implementing rules, including exemptions and regulatory rules; (B) adjective implementing rules, prescribing forms, special instructions, and procedures; and (C) interpretative or definitional rules.” *Id.* The investigators linked each of these types of rules and their character to the statutes the SEC administered and the powers conferred thereby. *Id.* at 100-01. The practical effects of any such output within the securities industries was something inherently less describable in the context of the Attorney General’s Committee; for that, other historical evidence must be considered. See generally MCCRAW, *supra* note 187; SELIGMAN, *supra* note 254, at 101-20.

258. The reason I find experimentalism the better explanation of the thinking of the several New Dealers treated here than the nascent fascism many have found (both during and after the fact) is the fact that so many New Dealers adopted the tack they did out of a lack of anything better to try. See KARL, *supra* note 171, at 225. Karl notes that “unlike governments in Europe, the New Deal sought no systematic or ideological justification for its methods, seemed to take little or no pride in them, and, particularly as far as the President seemed to be concerned, insisted on the temporary nature of changes most obviously opposed to past methods.” *Id.*

259. See SELIGMAN, *supra* note 254, at 101-239. Seligman describes in halcyon terms the successive tenures (from 1935-41) of Joseph Kennedy, James Landis, William O. Douglas, and Jerome Frank and

the description of the 1930s SEC illustrates the structure of what would become the APA.

The routinized procedural steps of the political and judicial systems had virtually no application to the SEC's evolutive methods of generating norms.²⁶⁰ The diversity and corrigibility of objectives behind its rules had led SEC to experiment with multiple approaches and routines, necessitating "flexibility . . . in respect of the issuance" of the particular output in question.²⁶¹ This flexibility entailed neither secrecy nor unfairness.²⁶² Indeed, the investigators made prominent note of how thorough was the Commission's use of a "consultative process" involving industry principals, trade associations, outside consultants, and others.²⁶³ As is the case with most real "consultations," in other words, no formal model of how and when "progress" ought to be registered existed.²⁶⁴

The alphabet agencies of the first third of the twentieth century made myriad kinds of rules.²⁶⁵ The most visible and earnest were the "regulations" they

identifies them all with a commitment to experimentation and the willingness to make rules, deals, promises, threats, and almost anything else to register some measurable progress in regulating the largest capital markets of the United States.

260. Cf. SEC MONOGRAPH, *supra* note 255, at 102. The Monograph states that:

The wide variety of the rules and regulations issued, the multitude of particular situations which must be treated, and the technical nature of much of the subject-matter, all combine to necessitate the Commission's following an ad hoc procedure in respect of each regulation, or each type of regulation, which comes before it.

Id.

261. SEC MONOGRAPH, *supra* note 255, at 102. While some rules were "preceded by months and sometimes years of study," others were "drafted and promulgated almost immediately to meet the exigencies of a particular occasion." *Id.*

262. See SEC MONOGRAPH, *supra* note 255, at 107 (noting that "Commission makes every effort to bring to the affected public's attention notice of its rules and regulations"). This included a vast use of the Federal Register. *Id.* at 106. The "policies underlying such publicity" ran wide and deep and motivated the agency to produce periodic compilations of rules generated, fully indexed and distributed free of charge to those on its mailing lists. *Id.* "In the field of rule making, . . . publicity is a vitally important factor, both for the protection of the public affected and for the purpose of keeping any governmental agency in line with democratic principles. . . ." *Id.* (citing opinion of Commission's General Counsel).

263. SEC MONOGRAPH, *supra* note 255, at 103-08. In the exceptional instance in which rules were not vetted with such outside groups, it was generally "because of the danger that certain companies might take advantage of the interim period to effect transactions which the rule [wa]s designed to regulate and thus escape the intended regulation of the conduct altogether." *Id.* at 103.

264. "Consultation" and "collaboration" are inherently unpredictable processes. SIMON, COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT, *supra* note 3, at 41-68; Dorf, *Legal Indeterminacy*, *supra* note 5, at 80-88. While this consultative process gave SEC's ostensible "targets" a certain sense of standing or stature, it likely did not give them any sense of *control*. See ATT'Y GEN. COMMITTEE'S FINAL REPORT, *supra* note 240, at 104. "The practice of holding conferences of interested parties in connection with rule-making introduces an element of give-and-take on the part of those present and affords an assurance to those in attendance that their evidence and points of view are known and will be considered." *Id.* In this respect, their "participation" became instrumental to the public's ends and, not surprisingly, made many of them unhappy with how they were treated by the agency. *Id.*

265. Merrill & Watts, *supra* note 246, at 495-523 (tracing diversity of rulemaking grants and practices through this period). As early as the 1920s, American commentators had cleaved apart several distinct rule making practices of government agencies. *Id.* At the same time, legal scholars were attempting to wrest

wrote to govern—rules that had an immediate, tangible impact upon specific, individuated entitlements in the practical world. In this thinnest sense they were “legislative” or “self-implementing.”²⁶⁶ The real separation of powers problem with this distinction has never been its first-order consequences, but rather its second-order ones: the threat to modern liberty posed when agencies make such rules has often diverted public attention. It has obscured the richness and diversity of what “rulemaking” as an activity actually encompasses in large, bureaucratically organized establishments. And it has obscured the stakes for ancient liberty therein. For there are countless kinds of “auxiliary” rules, decisions that do not directly affect what may be called modern liberty but which determine the course of the enterprise itself, that are wholly ignored by the usual legalist critique of agencies.²⁶⁷ Much about any

administrative law from the sphere of constitutional checks and balances between Congress, the President and courts, and to foot it in its own sphere of study as a “systematic body of law” growing from the statutory and executive authorizations granted to the particular administrative agency considered. See Adolph A. Berle Jr., *The Expansion of American Administrative Law*, 30 HARV. L. REV. 430, 447-48 (1917); see also Felix Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614 (1927).

266. See JOHN PRESTON COMER, LEGISLATIVE FUNCTIONS OF NATIONAL ADMINISTRATIVE AUTHORITIES 26-29 (1927). In his 1927 study of the rulemaking practices of the agencies, Professor Comer constructed two categories of this “administrative legislation” which he linked to legislative powers that had been “delegated” from Congress and were being exercised to establish commands of general, prospective effect: (1) “contingent legislation” which was the subsequent promulgation of rules effectuating a broad or generally worded policy Congress had previously legislated and involved a high degree of discretion on the part of the agencies; and (2) “supplementary legislation” which was essentially gap-filling and involved a comparatively low degree of agency discretion but entailed the same command, force and effect. *Id.*; see *Maryland Cas. Co. v. United States*, 251 U.S. 342, 345 (1920) (drawing similar distinctions in rulemaking process).

In constructing these categories, nomenclature was a problem because various terms were in use to describe the “law-making” actions of agencies of the government. That only deepened the vagueness of agencies’ authority. COMER, *supra*, at 32, 21-49. Another commentator at the time maintained that “executive regulations” were a distinct type of “administrative legislation.” John A. Fairlie, *Administrative Legislation*, 18 MICH. L. REV. 181, 184 (1920). Fairlie noted that “most executive regulations are in fact issued in the name of a department, bureau or commission rather than the of the President,” and linked such rules to the authority of administrators to “prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, [and] the distribution and performance of its business.” *Id.* (citing Housekeeping Act, 28 Stat. 49, 174 (1894)).

267. Merrill & Watts, *supra* note 246, at 493-97. A class of auxiliary rules arising out of the inevitabilities of managing and supervising a bureaucratically extended staff—necessities that never arise in a “collegial” legislature or non-centralized judiciary—must form an important element of any coherent account of “rulemaking” by and within agencies. *Id.* Merrill and Watts trace the lineage of what they call “nonlegislative” rules, rules Congress never explicitly identified as legitimately possessing the “force of law,” and conclude that Congress had by the 1930s inadvertently created a *convention* of providing a certain signal by which such rules could be identified. *Id.* Their signal was the “inclusion of a separate provision in the [subject] statute attaching ‘sanctions’ to the violation of rules and regulations” where the “authority to make ‘rules and regulations’ included the authority to adopt legislative rules having the force of law.” *Id.* at 493, 495-528.

Yet commentators of the time were much less convinced of the *clarity* of any such convention, or as to what it meant for rules outside its ambit. See, e.g., Fairlie, *supra* note 266, at 198-200 (denouncing lack of clarity as to what kinds of authority “Rules, Regulations, Instructions, General Orders, Orders, Circulars, Bulletins, Notices, Memoranda” and other forms were entitled). Moreover, as Professor Lawson suggests, any such category *today* would encompass much more than just the “rules and regulations” agencies have always

particular “rule cascade” is meaningful only if one cares at all about “ancient” liberty—about the rationality (and attainment) of the objectives themselves.²⁶⁸

SEC advanced these ambiguities of form to their fullest maturity in the 1930s. The conceptual distinction between rule types in administrative law has remained basic yet vague ever since. It goes to the authority underlying the rule and to its operation and meaning. Drawing it systematically has never been possible, though.²⁶⁹ Many of the rules about internal managerial

made lacking direct legal, but nonetheless possessing great practical consequences. See LAWSON, *supra* note 118, at 9.

Agencies typically spend most of their energy analyzing, investigating, synthesizing, deliberating, planning, and studying. None of these activities directly affect the legal rights and relations of private parties, though they are often preludes to action that does have legal consequences, and they can have an effect on parties' practical affairs that is as great as the effect of formal legal action.

Id. (footnotes omitted). While indirect, the effects of such outputs on what we have called ancient liberty are real. Whether some “legislative” rule’s generalizations depart from the intuitively true because of the agency’s expertise (and some epistemic priority) or rather because of some normative ambition, thus, becomes hazy but no less pivotal. Cf. MCINTYRE, *supra* note 11, at 79-108 (noting weak predictive power of social-scientific generalizations and how other factors account for successes of expert authority over other forms of authority).

268. See PETER M. BLAU, *THE DYNAMICS OF BUREAUCRACY: A STUDY OF INTERPERSONAL RELATIONSHIPS IN TWO GOVERNMENTAL AGENCIES* 144-82 (2d ed. 1963) (describing complex pattern of authority relationships within two public service delivery bureaus through rules, hierarchies and various informal structures of organizations).

269. A sociological or cognitive-psychological explanation would be necessary, the prescriptive nature of state action of any kind in itself probably accounting for much of it. On the nature of hierarchical authority—the automaticity of “following orders,” see Peter M. Blau and Marshall W. Meyer, *Bureaucracy in Modern Society* (3d ed. 1987). Subordinates who receive valid commands from above, after all, usually obey and do their business accordingly. But there is a very basic behavioral difference between the *actions* of a bureaucracy and its internal/organizational distributions of *authority to act*. Where actions are manifested outwardly and are typically isolable and behaviorally significant, authority to act is a far more subtle condition than the realities of the action itself. Actions are either consistent or inconsistent with a *totality* of authority the agent or organization legitimately claims. Actions may, in other words, be predicated upon a single type of authority or rule, or upon the unified interpretation of an immense complex of authorities and rules. This difference comprises a central structural feature of the APA’s system of judicial review, and is one with which the framers of the Act were quite familiar. See *generally* 5 U.S.C. § 704 (confining review to “final agency action”); *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992) (describing “exhaustion principles” that function in addition to § 704 as serving the “twin purposes of protecting administrative agency authority and promoting judicial efficiency”); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 52 (1938). But as I shall argue in Part VI, its interaction with the conceptual differentiation between the types of bureaucratic rules, while pivotal to a coherent account of the Act as a separation of powers structure, remains vague to most practitioners.

One of the most widely known accounts of the distinct rulemaking practices within the agencies immediately preceding the APA’s creation was by Frederic Lee, a “seasoned Washington operator” who himself helped draft the Agricultural Adjustment Act. IRONS, *supra* note 226, at 115. It distinguished between “interpretive” rules and “legislative” rules, going so far as to propose a *constitutional* conception of the difference where “promulgated” legislation was “too uncertain in its terms.” See Frederic P. Lee, *Legislative and Interpretive Regulations*, 29 GEO. L.J. 1, 1-19 (1940). Much of that met the same fate as the non-delegation doctrine. See *generally* *Am. Power & Light Co. v. SEC*, 329 U.S. 90 (1946). Lee repeatedly confessed that his distinction was difficult to draw in practice. Lee, *supra*, at 19. Lee determined that “[a]n examination of a department regulation frequently leaves one in doubt as to whether the administrative officer considers that he is interpreting what Congress meant by its statutory language or that he is prescribing what the law shall be pursuant to some statutory delegation of power which he construes as authorizing his so to do.” *Id.* Nevertheless, Lee argued that the “intent of Congress,” the “intent of the administrator,” and the “metes and bounds” of the delegated authority at issue were sufficient to make the distinctions practicable in the

prerogative are fully rule-like in structure and fully invoke “the authority of the United States.”²⁷⁰ Many of the “interpretations” made known to the regulated public are essentially legislative in nature. After all, when lawmaking authority is bureaucratized, such auxiliary rules tend to get intertwined with so-called legal rules (or “regulations”).²⁷¹ In fact, they often become enmeshed with the very formation of whatever expertise the agency can claim.²⁷² SEC illustrated

ordinary case. *See id.* 21-24. In those where it became problematic, Lee argued that only where actual *enforcement* took place (and enforceable *duties* were said by the agency to exist) would the matter have to be resolved (by whether the “promulgated” text was sufficiently definite to act as the basis of legally imposed obligations independent of the “interpretation”). *Id.* at 32-35.

270. *Cf.* Fairlie, *supra* note 266, at 196. Fairlie notes that “[t]he Supreme Court has held that executive regulations made in pursuance of express authority of Congress “become a mass of that body of public laws of which the courts take judicial notice; and that regulations issued in accordance with congressional authority have the full force of a statute upon private individuals as well as upon public officials.” *Id.* (citing *Caha v. United States*, 152 U.S. 211 (1890)). As was true then, today many can be equally obvious and earnest in their effects on private persons and the public. *See generally* William Funk, *A Primer on Nonlegislative Rules*, 53 ADMIN. L. REV. 1321 (2001) (discussing interchangeability on this point). This discussion comes with the advantage of sixty years of hindsight in comparison to the authors of the APA, and eighty years worth compared to the commentators of the 1920s. *Id.*

271. An example of the dilemma was actually given by the Committee in its 1941 report. *See* ATT’Y GEN. COMMITTEE’S FINAL REPORT, *supra* note 240, at 97. The report notes that the “Internal Revenue Administrative Act of 1813 directed the Secretary of the Treasury to ‘establish regulations suitable and necessary for carrying this act into effect; which regulations shall be binding upon each assessor in the performance of duties enjoined by or under this act.’” *Id.* (quoting 3 Stat. 22, 26). The example was an early nineteenth century statute authorizing the Secretary of the Treasury to make rules addressed solely to government personnel as such, contemplating an even further layer of rulemaking activity through “interpretation” at still-more local levels. Rule cascades, in short, had been a part of government even during the reign of the Hamiltonian model. Yet throughout the growth of the administrative state, agency administration has continuously reproduced ambiguities in how to segregate different phases of those cascades. Pervasive in the Attorney General’s Final Report is a resignation to the diversity of rulemaking practices across agencies with far flung staffs, multiple responsibilities, technical subject matters, or all of the above. *See Id.* at 100 (finding “[a]dministrative rule-making, in any event, includes the formulation of both legally binding regulations and interpretative regulations”).

On the eve of the APA’s passage in 1946, the Attorney General of the United States testified to Congress on the subject and did not even pause to admit that the traditional scheme had become a fiction within the bureaucratic apparatus. *See 1941 Hearings, supra* note 237, at 1444, 1446 (Supplementary Written Statement of Acting Attorney General Francis Biddle). Acting Attorney General Biddle wrote that

[o]ften we are apt to confuse ourselves by attempting to analyze administrative action and to classify it as either legislative, executive, or judicial. In the case of rule making, however, I think we are pretty safe if we can keep it constantly in mind that rule making is essentially a legislative function.

Id. Notwithstanding all of the realism about legal form today, moreover, in some sense this is still a standard perception. *See* RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS § 6.4.4, at 284 (2d ed. 1992) (noting “[r]ulemaking is analogous to legislating.”); *cf.* LOWI, *supra* note 27, at 303 (arguing “[w]hen an agency formulates a general rule it is without any question committing a legislative act”).

272. Bureaucracies literally construct themselves through such rules and, to whatever extent they ever truly *reconstruct* themselves, do so through these instruments as well. Indeed, from experience we know the forms can be almost impossible to distinguish in modern administrative law. Nevertheless, the nature of the jurisgenerative authority behind the rules is pivotal, marking a cornerstone of legitimacy we have always been impelled to set. *See* PIERCE, TREATISE, *supra* note 136, at 308-15; Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071 (1990). Where the “exempt rules” even fit into the APA as a separation of powers regime today is a basic but deeply contested question. *See supra* notes 221-23 and accompanying text. *Compare* Charles H. Koch, Jr., *Public Procedures for the Promulgation of Interpretative*

this in its utter determination to regulate American capital markets despite massive and unflinching opposition by the wealthy, powerful addressees of its rules.²⁷³ What would become “notice and comment” rulemaking was in many ways pioneered as a result of SEC’s method.

B. Structure and Improvisation in the Notice and Comment Form

The framers of the Act had to finesse such innovative rulemakings, along with the procedural quagmire they created. Though the APA would not be enacted until after the War,²⁷⁴ this new jurisgenerative mode would become the era’s greatest so-called procedural innovation.²⁷⁵ It would be cast as the legitimation of the agencies’ use of “administrative expertise”—the staffs’ technical or expert input behind the scenes and off the record, at the same time “participation” and “transparency” were fostered—all while simultaneously creating a routine allowed to “vary considerably from case to case.”²⁷⁶ Yet

Rules and General Statements of Policy, 64 GEO. L.J. 1047, 1053 (1976) (noting APA’s legislative history “evidences careful consideration of . . . exemptions and leaves no doubt that . . . drafters felt that procedural flexibility for such rules is essential to sound administrative process”), with Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 381 (finding that “adoption of interpretive rules and policy statements is a vital part of the administrative process”).

273. Many have attributed to the New Dealers the “public-regarding” purposes of consumer protection, monopoly prevention, and capital market rationalization. See BRINKLEY, *supra* note 235, at 48-174; HAWLEY, *supra* note 208, at 304-43; WILLIAM LASSER, BENJAMIN V. COHEN: ARCHITECT OF THE NEW DEAL 86-129 (2002); WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL, 1932-40 (1963); JORDAN A. SCHWARZ, LIBERAL: ADOLF A. BERLE AND THE VISION OF AN AMERICAN ERA 37-113 (1987).

274. See H.R. REP. NO. 1980, at 11-14 (1946). Davis describes the interregnum that followed the 1941 issuance of the Attorney General Committee’s Report, as does Horwitz, as a lull with little of substance occurring. See DAVIS, TREATISE, *supra* note 222, at 7-40; HORWITZ, TRANSFORMATION II, *supra* note 187, at 230-33. Shepherd, however, disputes this and suggests that legalism, if anything, gained ground after 1941. See Shepherd, *supra* note 236; *infra* note 283.

275. See KENNETH CULP DAVIS, POLICE DISCRETION 103-07 (1975). While reasons for this superlative vary, it seems the most widely held one has been that notice and comment innovated a mode of integrating agency expertise and judgment (necessarily formed “off the record”) with the regularized and recorded participatory influence of interested parties (necessarily formed “on the record”), thereby combining indicia of both “experimentalist” and “legalist” visions of authority. Cf. DEPARTMENT OF JUSTICE, ATT’Y GEN.’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 15 (1947) [hereinafter ATT’Y GEN.’S MANUAL] (describing Act’s allowance of continued use of “expert staffs” while also allowing consultation of specially affected persons in rule formulation). Whether notice and comment rulemaking actually honors this compromise today is, of course, a different question, but the Manual’s influence with respect to these issues is manifest. See John F. Duffy, Administrative Common Law in Judicial Review, 77 TEX. L. REV. 113, 130-38 & nn.104-11 (1998); *infra* notes 295-304 and accompanying text.

276. ATT’Y GEN.’S MANUAL, *supra* note 275, at 29. The Pound Report drew heavily on Hewart, Dicey and others in the legalist/laissez-faire tradition. See Pound Report, in *1941 Hearings*, *supra* note 237, at 1035-50. Even it admitted that “[a]dministrative rules and orders are required for the orderly exercise of administrative powers and to govern the details and the application of standards when committed to an administrative agency.” *Id.* at 1049. It was, in other words, *conceded* that rules governing the *internal* processes of administration—rules governing the discretionary choices of subordinate bureaucrats—were a necessary part of the “execution” of the law by large, bureaucratically organized establishments. It bears emphasizing that it was also conceded that every act of law-application, “whether by courts or by administrative agencies involves a certain incidental lawmaking,” a concession that ripped an enormous hole in the Hamiltonian theory of the

what structure had actually been synthesized was unclear.²⁷⁷ At least a

separation of powers. *Id.* The Pound Report diverged so radically from the New Dealers in its insistence that the judicial power be the only “authoritative technique” of lawmaking through the interpretation of “authoritative materials.” *Id.* at 1050 (criticizing administration). The report concluded that because “[t]here is no authoritative or traditionally received technique of administrative rule making, nor are there any authoritative or traditionally received materials on which it is to proceed.” *Id.*

277. DUXBURY, *supra* note 216, at 151-52. Precisely how the bureaucracies’ generative processes were to be real improvements upon those of the trinity was a question increasingly relegated to the political background because, for the legalists, it was generally the *source* of the rules to which they were most pointed in their objections to the administrative process. *Id.* The legalist tendency to selectively crop the long, rich fresco of separating rule-writing from rule-enforcing authorities was, thus, something less than a completely creative conflict with experimentalism. While legalists have always focused attention upon the administrative agencies—to the virtual exclusion of *judicial* rulemaking throughout history—that should not be permitted to obscure *our* view of this transformation. The experimentalist reconstitution of rulemaking authority was the reproof and substitution of *judicial*—not legislative—power/authority even while legalist tendencies to obscure this important fact remain pronounced today. See LOWI, *supra* note 27, at 94-107 (assuming that rise of administrative state marked decline of legislature). While other agency functions came under attack, the writing and administration of rules as regulations of primary conduct constituting enforceable rights and duties remained at the core of the legalists’ attack on administration. The most influential account of the Thirties belonged to Lord Hewart, who was at the time the Chief Justice of England and who began by asserting that “[b]etween the rule of law and what is called ‘administrative law’ (happily there is no English name for it) there is the sharpest possible contrast. One is substantially the opposite of the other.” See LORD HEWART, *THE NEW DESPOTISM* 37 (1929). Hewart drew heavily from Dicey, who advanced substantially all of the “rule of law” ideals Hewart defended fourteen years earlier. See DICEY, *supra* note 14, at *lv-lvi*, 107-22, 213-67. Hewart’s account was more incendiary in tone, though (as its title evidences), and it quickly gained a wide audience in the United States. See HORWITZ, *TRANSFORMATION II*, *supra* note 187, at 221-25. See generally HEWART, *supra*.

The central objection was that, whatever the processes of instantiating the rules that were occurring within the administrative agencies, they were occurring before officials who could not “help bringing what may be called an official or departmental mind, which is a very different thing from a judicial mind . . . to bear on the matter he has to decide.” HEWART, *supra*, at 46; *cf. id.* at 46-57 (denouncing absence of judicial procedural requirements in administrative determinations). This was paired with the objection that a “departmental tribunal is . . . in no way bound, as a Court of Law is, to act in conformity with previous decisions.” *Id.* at 48. This objection is clearly rooted in a commitment to the validity of traditional notions like *stare decisis* (though even then his was a rather anachronistic confidence in the disciplinary power of precedent). See *id.* at 107. Hewart commented that “[e]very student of history knows that many of the most significant victories for freedom and justice have been won in the English law courts, and that the liberties of Englishmen are closely bound up with the complete independence of the Judges.” *Id.*

Hewart also devoted a large fraction of his considerable energies to a wider objection to agencies: the idea of strictly *traditional* divisions between institutions that enact rules and institutions that administer or interpret them—what would become the APA’s so-called “separation of functions.” *Cf. id.* at 83-146 (discussing and defending “independence of the judiciary” throughout British constitutional history as contrasted to system of “delegated legislation” then emerging in England). His solution for the dilemma posed by the legislature’s failure to make rules was to subject administrative determinations of all kinds to immediate and searching judicial review. *Id.* at 154-68.

I note that Hewart’s historical claim on the supposed “independence” of British courts since “time out of mind,” is dubious. See John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 27-56 (2001) (describing gradual separation of judicial power from Crown beginning in late Medieval England and continuing throughout Enlightenment); see also VILE, *supra* note 16, at 83-106. “The most important aspect of Montesquieu’s treatment of the functions of government is that he completes the transition from the old usage of ‘executive’ to a new ‘power of judging,’ distinct from the putting of the law into effect, which becomes the new executive function.” VILE, *supra* note 16, at 96. Moreover, his “separation of functions” was essentially the isolation of adjudicators from all substantive bodies of expertise outside the confines of an adversarial process.

minority of the Attorney General's Committee wished to have *every* rule created by agencies like SEC fall within some kind of mandatory routine (either hearings or notice and comment) subject to pre-enforcement judicial review.²⁷⁸ Acknowledging that such a regime was politically ill-fated, the minority accepted a much more flexible structure, one that preserved a realm of rule experimentation immune from judicial review. In the compromise it became clear that not all agency rules were to be treated as what we would call "regulations." Agencies would remain free to reorganize and deliberate internally, to publish what they wanted to and when, and to circulate informal policy cues at their will.²⁷⁹ But this reflects a compromise between two

278. See S. 674, 77th Cong., 1st Sess. (1941), in *1941 Hearings*, *supra* note 237, at 6-9. While the minority bill (S. 674) drew distinctions between types of rules, it did so only to differentiate which rules were to be subject to either (1) formal hearings; or (2) notice-and-comment-like procedures. Both types of rules were to be subject to pre-enforcement judicial review. *Id.*

Their counterparts on the American Bar Association's Special Committee suggested that any kind of rule produced without judicially policed, adversarial hearings should be completely void in judicial proceedings. The ABA bill, based upon the Pound Report (as it came to be known because of the influences of the chair of the committee Roscoe Pound), emerged from a process immensely critical of the "arbitrary rule making for administrative convenience" that it found prevalent in administrative bodies of the times. See *Report of the Special Committee on Administrative Law*, in *1941 Hearings*, *supra* note 237, at 1027, 1041. These "arbitrary rules," often made by resort to a "perfunctory routine," notwithstanding the "differentiation of administrative functions," the Committee argued, should be put through the same "rule making procedure . . . on the basis of . . . publicity and authoritative promulgation" as "legislative" rules directly regulating private persons. *Id.* at 1046, 1050. The authors of the Pound Report confronted what they believed was "administrative absolutism," tantamount to Soviet style governance. *Id.* at 1036 (noting that "ideal of administrative absolutism is a highly centralized administration set up under complete control of the executive . . . relieved of judicial review and making its own rules"). Thus, the only distinction the Pound Report recognized was that between "legislative" or "substantive" rules and "procedural" ones—and that only because the former should be subject to the added requirement of being "brought affirmatively to the attention of the legislative body" prior to promulgation. *Id.*

It is thus something of an irony that one of the features of the APA characteristic of the legalists—their catch-all definition of "rule"—is the very feature that allows experimentalist behavior from agencies. For it means that agencies logically must be free to write certain types of "rules" that are not subject to the strictures of covered "rulemakings" found in § 553. See 5 U.S.C. § 553(b)(A), 553(d) (exempting certain types of "rules" from the requirements of notice and comment); *infra* Part VI.

279. In all of the legalist proposals, agencies were to make judicially-reviewable rules *as soon and as often as possible*. Whatever their type and whether or not they had been adequately investigated or thought out, tested in effect, were merely "interpretive" in nature—or even rule-like in structure at all, each such output was to be subjected to judicial review if an affected individual so wished. *Any* agency output, other than the disposition of a "particular case" regarding a named person or thing would have been subject to the procedural rigors and routines of judicially reviewable "rulemaking" at least as stringent as those that would later be enshrined in the APA for covered rule-makings (and, of course, the disposition of particular cases would be judicially reviewable 'adjudications'). See ATT'Y GEN. COMMITTEE'S FINAL REPORT, *supra* note 240, at 224-25.

Of special note for our purposes is the concept of a rule and its confusing definition in the minority report. It included "rules, regulations, standards, statements of policy, and all other types of statements, issued by any agency of general application and designed to implement, interpret, or make specific the legislation administered by, and the organization and procedure of, any agency; and includes rate-making, price-fixing, or the fixing of standards." *Id.* at 218. The only possible agency output that might have been *excluded* from this definition was that class of outputs that fell into the comparatively minute category of "adjudications," a category defined as the "final disposition . . . of particular cases . . . involving named persons or a named res."

contradictory views of administrative process and administrative authority, views that came to animate sections 2, 4, 5, and 6 of the APA. Rule cascades and the means/ends rationality discoveries to be made from them were well understood by many who took active part in the writing of the Act: there is no other explanation for the basic ambivalence the Act shows toward “rules” and “rulemaking” by agencies. Notice and comment and the scope of its applicability were exemplary of the process and this ambivalence, they took the forms they did from conflicting agendas. That notice and comment’s true utility and basic structure have only descended further into doubt since 1946 should present little mystery.

The discussion in Part III.B. above on the “pragmatic logic of rules” illuminates a pivotal dimension of the Act’s political history in this connection. Where legalist proposals had envisioned a system in which any agency statement of prospective effect would be subject to immediate judicial review according to declaratory judgment standards,²⁸⁰ experimentalists knew it was essential to oppose that vision. Those proposals would have encompassed even the “auxiliary rules” then being made by and within the agencies. Had one of them been enacted, it would have crashed the experimentalists’ whole project.²⁸¹ And the politics of compromise intervened. But the compromise

Id. Proceduralization to this depth, of course, does well by “liberty” so long as the only dimension of liberty is private, individuated, modern liberty.

To the legalist mindset, nothing short of this generality and depth would be effective given the profound diversity and fluidity of agency forms and outputs that had resulted from decades of experimentation. Nothing short of that would be sufficient to check administrative power. By the late 1930s, even where an agency had promulgated nothing more than an interpretation (as opposed to a governing regulation of some kind), some judges had begun to show substantial deference to the agencies in their end-state formulations of a controlling norm. *Cf. id.* at 100. “This distinction between statutory regulations and interpretative regulations is . . . blurred by the fact that the courts pay great deference to the interpretative regulations of administrative agencies, especially where these have been followed for a long time.” *Id.* at 90-91, 100. Thus, agency rules were just those outputs that educed *behavior* which was rule-following in appearance, whether they were rule-like in linguistic structure (or intended authority) or not. If an output was widely circulated and authoritatively regarded by those who encountered it, and thereafter the agency’s position as expressed in that document was deferred to by a court, that output possessed the force of law as far as legalists were concerned. Thus, without a blanket structure requiring *all* agency policy statements be subject to procedural control of some kind, agencies would remain free to proceed against public problems with ferocity without at all involving the bar or its clients (while doing so under a substantially diminished risk of being contradicted in the courts given the changing personnel and philosophy of the judiciary). *Cf. AUERBACH, supra* note 228, at 221-30 (arguing professional elites shared faith in legal expertise cut through most political differences over New Deal and united them in support of new sphere of practice, administrative law, by late 1930s).

280. See ATT’Y GEN.’S MANUAL, *supra* note 275, at 102 (distinguishing APA from S. 674 and S. 918 based on APA’s lack of “direct judicial review of rules by declaratory judgment proceedings”).

281. This historical charette is not meant to endorse the Attorney General’s Committee, the New Dealers, or their conservative opponents. Indeed, my point in using the “legalist” and “experimentalist” nomenclature is that particular individuals and particular agencies often reflected both affects in varying degrees. Even prominent supporters of the S. 675 bill (the Attorney General’s Committee majority) conceded the need for important reforms given how bureaucratically stultified many agencies had become by the late ‘30s. *See, e.g., DAVIS, TREATISE, supra* note 222, at 89-95 (describing imperfections in how New Deal agencies investigated problems). Nicely categorizing individuals as over- or under-legalistic in their view of rulemaking authority

that was reached had internal contradictions which make for extreme difficulties in interpretation today. For example, “regulations” which have the full “force of law” may only be adopted by processes that are at least somewhat protective of individual rights (processes the APA sets out explicitly). Yet as any administrative lawyer will tell, all manner of rules that do some kind of legal work in the real world may be and are routinely generated by whatever process the agency fancies.²⁸² And the choice of form is the agencies’ in the first instance. The problems this makes for separation of powers jurisprudence in the administrative state are legendary. Agencies can make mountains of law with little or no mandatory public process, subject only to the scrutiny of intervening courts and special interests—assuming someone files suit. In many instances, in short, so-called modern liberty is secured by the goodwill of the lawmakers while so-called ancient liberty belongs to the denatured “participation” of technocrats and/or litigants.

This all results from the compromise which produced the APA, a compromise that did not resolve in any way what well-ordered vision of freedom the Act’s allocations of authority were supposed to effectuate. And why should it have? That was a tension no set of partisans had resolved in two centuries. Without a resolution of so large a question, the parties reached a satisfaction on other smaller ones.²⁸³ Each vision utilized the pragmatic logic

invites reductionism.

Laura Kalman commits a subtle error on this point by focusing on too small a group of academics and too small a sample of their concerns. *See generally* LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* (1996). Unsurprisingly, Kalman arrives at the conclusion that they were under the “spell” of legal idealism. In this way, her “legal liberalism” is actually just another cropping of the long fresco sketched here—one that spotlights several prominent left-leaning legalists who have at different times displayed affinities for both legalism and experimentalism. As Shepherd argues, several prominent failures on the part of war-time administrative agencies were probably responsible for the galvanization of popular and elite opinion at the time in question. Shepherd, *supra* note 236, at 1641-43. They changed many minds and mobilized much “public” support for “reform” efforts in the early 1940s, finally producing the popular coalitional mass necessary for a bill’s passage. *Id.*; *cf.* BRINKLEY, *supra* note 235, at 143-200 (describing several public failures by War Production Board, Office of Price Administration, Board of Economic Warfare, War Resources Board, and Office of Production Management). But that is no help to the claim that the APA’s boosters were single-minded legalists.

282. *See* 5 U.S.C. §§ 551, 553(a), 553(b), 706 (2003). While the definition of “rule” is incredibly broad, the Act omits any signal at all of what sort of rule must be made only by way of a “rulemaking” involving notice and comment or a hearing. *Id.* Agencies, thus, were left free to write, rewrite, and interpret at will a class of rules—described as “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice,” and any rule they, “for good cause [find] . . . notice and public procedure thereon [is] impracticable, unnecessary, or contrary to the public interest”—distinct from those subject to the rationality requirements and procedural benchmarks set out in the Act. *Id.*

283. In short, the legalists failed in their attempts to impose their separation of functions template on all agency activity while the experimentalists of the New Deal failed to imagine any real model capable of ensuring continuously adaptive rulemaking within the bureaucratizing agencies. Experimentalists did manage to protect many of the jurisgenerative processes within agencies from legalist procedure (and judicial review), but they failed to synthesize any institutional architecture that would prevent internal-organizational oblivion as a result of then-known forces capable of derailing sustainable experimentalism.

Caution is warranted in treating the Final Report on these points. *See generally* ATT’Y GEN.

of rules and its operation within and around bureaucratic structures to different conclusions. This makes the median points they reached very difficult to establish.²⁸⁴ Much confusion in administrative law today stems from the place of the separation of powers in the APA. The deal reached lay in an historical and ideological middle of the twentieth century's race toward the expert's "rationality." Technocratic jurisgenesis the culmination of a two-century long rejection of participatory self-governance, continuous with the Federalist tradition.²⁸⁵ Administrative law, as a result, has oscillated between the two

COMMITTEE'S FINAL REPORT, *supra*, note 240. While the Committee's minority did distinguish between types of rules, it did so only out of a desire to more perfectly cabin agency discretion by reducing the number of occasions on which it could exercise its "arbitrary will." Its proposal demonstrates as much in the following passage. The minority text required that "[e]ach agency shall, as rapidly as deemed practicable, issue all rules specifically authorized or required by statutes in order to implement, complete or make operative particular legislative provisions," and that each shall "issue, in the form of rules, all necessary or appropriate rules interpreting the statutory provisions under which it operates, and such rules shall reflect the interpretations currently relied upon by such agency and not otherwise published in the form of rules." S. 674, 77th Cong., 1st Sess. (1941), in *1941 Hearings*, *supra* note 237, at 6-7.

Moreover, agencies would have been required to "formulate, issue and publish from time to time, so far as applicable or appropriate in view of the legislation and subject matter with which the agency deals, rules in the following forms or containing . . . the following types of information." *Id.* at 6-7. The types of rules and information listed were: (1) agency organization; (2) statements of policy; (3) rules of substance (defined, circularly, to include rules specifically authorized or required by statute in order to implement, complete, or make operative particular legislative provisions); (4) interpretative rules; (5) rules of practice and procedure; (6) forms; and (7) instructions. *Id.* at 7. A host of sub-requirements went with this catalogue. They were to be "kept current at all times, and care shall be exercised to assure that [they are] complete but not prolix or repetitious." *Id.* at 7. "No agency [could] act upon unpublished rules . . . except that staff instruction in special or individual instructions respecting matters of internal office management or routine need not be published and shall not be included in rules." *Id.* at 7.

284. See Michael Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 COLUM. L. REV. 759, 759 (1981) (finding "issue of separation of functions in federal agencies was intensely controversial long before the Administrative Procedure Act was adopted, and it continues to be hotly debated today"). The APA's conception of agency rulemaking by notice and comment was not its only mystery. *Id.* What its "separation of functions" aspects meant for the role of "hearing examiners" (later "administrative law judges") in the jurisgenerative process was perhaps just as ambiguous. *Id.*

285. Compare NEDELSKY, *supra* note 23, at 169, with MASHAW, GREED, CHAOS, AND GOVERNANCE, *supra* note 167, at 7-8.

[T]he Madisonian . . . extended republic is only fully comprehensible when combined with a confidence that the propertied would run that level of government (the same reason the Anti-Federalists distrusted centralization). Cross-cutting interests neutralizing each other will only promote the public good if the right sort of people are in office to implement it.

NEDELSKY, *supra* note 23, at 169.

Once it had been demonstrated that a government bound by antiquated notions of property rights and beholden to vicious party mechanisms for legislative policy choice could not provide good government, and that direct democracy led straight to irrational policy choice or authoritarianism, it was but a short step to the claim that managerial government was the government desired by the populace. The administrative state became the institutional means for achieving "rational democracy. . . ."

MASHAW, GREED, CHAOS, AND GOVERNANCE, *supra* note 167, at 7-8.

The APA undoubtedly represented several substantial augmentations of "administrative procedure" and therefore was a check on "administrative power." Most of this check stemmed from the APA's rules on disclosure and transparency in agency operation and organization, as well as in the role of administrative hearings officers—its professional fact finders. Indeed, the bulk of the Attorney General Committee's Final

concepts of liberty, and between a concern for the rationality of distributed function and the equilibration of power. Agencies were domesticated without necessarily being checked and courts and litigants were mollified without necessarily being protected. Part VI argues that the system created was one which, paradoxically, actually encourages “something we all love to hate”: bureaucratization.²⁸⁶

VI. ADMINISTRATIVE LAW’S MOST CREATIVE AND DESTRUCTIVE TENSION

Since the APA was created, experimentalists and legalists have constantly confronted one another over its meaning and interpretation. This underlines the modern separation of powers as a whole: two opposing paradigms, wholly independent of political affiliation or sympathy, literally defining one another

Report pertaining to internal agency realities argued for the utility of greater transparency and regularity in the operation of the administrative agencies studied. See ATT’Y GEN. COMMITTEE’S FINAL REPORT, *supra* note 240, at 25-95; *cf. id.* at 127-89 (making agency-specific recommendations of changes, most rooted purely in concerns over publicity of final rule or order).

Importantly, the bill *rejected* any unbending requirement that agencies conform *all* modes of problem-solving to the hearings model. Professor Verkuil once argued that these aspects of the APA more reflect the minority report of the Attorney General’s Committee. See Verkuil, *supra* note 230, at 277 n.97. Professor Horwitz, however, argued that the APA as a whole actually traces the Pound Report. See HORWITZ, TRANSFORMATION II, *supra* note 187, at 231. Neither of these interpretations is obvious. The APA as a whole is actually far more complicated than the Hamiltonian notions of legal structure with which even early administrative law scholars took issue. *Cf.* DICKINSON, *supra* note 215, at 21 (critiquing law/fact distinction and arguing that administrative processes had made it obsolete). The APA’s prominent use of the exceptions in Section 4 of the APA, discussed below, suggest that this complexity was a vital part of the compromise itself. Administrative Procedure Act § 4, 5 U.S.C. § 553 (2003). Indeed, *rejection* of the Hamiltonian structure for a subtler model seems a better explanation of the final text given the massive descriptive project the Attorney General’s Committee undertook regarding the agencies’ multi-faceted lawmaking practices of the time. See *infra* notes 293-309 and accompanying text.

286. DAVID BEETHAM, BUREAUCRACY 1 (1996); *cf.* EPSTEIN & O’HALLORAN, *supra* note 197, at 232-39. Epstein and O’Halloran concluded that creations of administrative authority are most attractive to individual legislators when “issue areas become more informationally intense” and when legislative structures like committees become too influential, but that “Congress gives less discretionary authority to executive agencies controlled by the opposite party.” EPSTEIN & O’HALLORAN, *supra* note 197, at 232-39; WIEBE, *supra* note 175, at 161. Wiebe found that:

The product [of the struggle between Progressivism and its opponents] was the perfect bureaucrat, whose flawlessly wired inner box guaranteed precisely accurate responses within his speciality. The latitude he enjoyed in administration existed only because no one could predict the course of a fluid society and the expert would require a freedom sufficient to follow it. At this level, the theory [of technocracy] purported to describe government by science, not by men.

WIEBE, *supra* note 175, at 161. Wiebe described bureaucratization of the corporation as first happening in “[a]n age that assumed an automatic connection between accurate data and rational action” which “emphasized a few leaders linked by simple lines to the staff below.” *Cf. id.* at 181. For different reasons, bureaucracies comprised of clear lines of accountability and massive information-ministering capacities appealed to structuralists of different stripes. *Id.* “Information would flow upward through the corporate structure, decisions downward. A scheme guaranteed to produce ulcerous executives and evasive underlings, it still represented an important advance in marshalling the corporation’s resources for long-range, nationwide policy.” *Id.* This article concludes with a hypothesis that the emerging democratic experimentalist agenda may actually just reinforce this tendency, further fortifying the anti-democratic inclinations of the administrative state. See *infra* notes 307-12 and accompanying text.

rhetorically, historiographically, and morally by their uses of the doctrine's constructs and internal logic. It is not that these two are especially tangible in the dust and struggle of everyday administrative law. Rather, it is that, in opposition to each other, they explain more of the defining characteristics of administrative authority than any other conceptualization available today. The complex orchestrations of one usually include means of sabotaging those of the other, often through the commandeering of public and private reactions to contemporary structural innovation.²⁸⁷ The instruments of this competition are the eclectic logic, principles, and precedents of "the separation of powers," an eclecticism identified in this article, with John Adams as constitutional advocate.

This frames the basic historical point about the separation of powers which today's democratic experimentalists ignore: the tradition is at its most potent as a mechanism of opposition. The doctrine has been a means of securing leverage against the powerful *of the moment* with the architectonic myth that "authority" is least threatening to "liberty," whatever those things come to, when authority is fractured into many different pieces.²⁸⁸ Whether in the hands of Country pamphleteers of the early eighteenth-century, American Revolutionaries of the 1760s and 1770s, Anti-federalists and Jeffersonians of the 1780s and 1790s, legalist opponents of Progressivism and the New Deal in the first half of the twentieth century, or administrative lawyers today, the tradition has been plastic, euphonious, and handy for a wide array of legal and constitutional objectives.

This article has argued that legalism and experimentalism represent a rift opened in the separation of powers by the creation of the APA. It is worth clarifying a bit more what that means. By seeking validation of their interpretations of the Act in court, by ploys for popular and elite sympathy, and through endeavors for academic legitimacy, the two basically seek to commandeer the compromised rules and definitions of the Act—and beyond that the mantle of the tradition itself—to their own ends. Of course their struggles with each other are of less general interest than the questions posed by the conceptual tension they represent. Diagramming some particular separation of powers controversy through this lens will shed light on several of administrative law's most eduring puzzles. Parts VI.A. and VI.B. end the study with some examples.

A. *Contested Ideals and the Unstable Doctrines of Administrative Law*

The last half century of administrative law, the battleground of structural constitutional theory, has swung several arcs between legalist and

287. See *supra* notes 224-29 and accompanying text.

288. See *supra* note 37 (clarifying that term myth encompasses all three senses of doctrine treated throughout—philosophical, social-scientific, and legal).

experimentalist interpretations of the separation of powers and of the APA. It has done so by means of the two concepts of liberty and an alternating fascination with the equilibration of power and the rationalization of distributed functions. All of the basic facets of administrative law intersect in one way or another through these four components of the APA and the separation of powers.

Begin with the nature of rights to participate. Legalists insist that some foundational constants such as the inherent significance of individuated context, rule-oriented parameters of adjudication, decisionmaker “neutrality,” and moral judgment must comprise “due process in the administrative state.” Experimentalists, on the other hand (including democratic experimentalists today) see so many trade-offs among powerful stakeholders, economies of information in policymaking, the virtues of provisionality and learning-by-doing, and continuous monitoring and reassessment.²⁸⁹ If process can only be due according to the “weight” of the entitlement at issue and entitlements in the administrative state are inherently anti-foundational, interpretive, and redistributable by rule, what is to keep an agency from distributing them in the manner that is most “rational” for its public?²⁹⁰ On that, the inchoate definitions of the APA provide no definitive answers.²⁹¹

289. Compare Richard B. Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111 (1978) (arguing courts should use history and philosophy to arbitrate nature of dignitary interests of affected parties in administrative processes, and thereby determine what process is due), with Colin Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 71-80 (1983) (proposing “precision calculus” to evaluate administrative rule specificity and its utility to fairness, rationality, and efficiency). See generally Jerry L. Mashaw, *Administrative Due Process As Social-Cost Accounting*, 9 HOFSTRA L. REV. 1423 (1981) (arguing information requirements of any rigorous utilitarian calculus are too great to implement widely).

290. See HENRY J. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS* 141-77 (1962). Friendly pressed and encouraged agencies to generate regulations and codify as many of their value judgments into form as could possibly be used to predict bureaucratic behavior. *Id.* A decade later, Friendly argued that fair adjudicatory procedures required virtually nothing less than the judicial model of decisionmaking. *Id.* See generally Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975).

Judge Friendly is not alone in his legalist tendencies, though. See KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE* 97-139 (1969) (calling for more frequent promulgation of rules by agencies to reduce as far as possible occasions on which agencies exercise arbitrary will). Indeed, it is quite common in administrative law scholarship to portray the basic problems not as issues in the pragmatic logic of rules, but rather as issues in the formal logic of rules. See CHRISTOPHER F. EDLEY, JR., *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY* 215-36 (1990) (setting forth so-called “anti-discretion” account of agency authority advocating more rulemaking and finding it shared by several theorists and judges).

291. Liberty’s security is intimately related through these trade-offs to questions of legal/bureaucratic form. Consider for a moment how vulnerable individuated hearing rights become without some set of foundational norms to be applied therein. They might be wholly circumvented should an agency make an internal or “procedural” rule directing or structuring to great enough extent the “discretionary” functions open to those who preside at the hearings. *Cf.* ATT’Y GEN. COMMITTEE’S FINAL REPORT, *supra* note 240, at 68-73, 98-101 (describing various forms of “rules” and their roles in adjudications). To no one’s surprise, this remains the defining paradox of due process in administrative law today. See *Am. Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1057 (D.C. Cir. 1987) (dismissing challenge to use of regulations, exempt rules, and ad hoc directives to

That brings us to the role of rules as a wedge. Where democratic experimentalists see opportunity for a uniquely authoritative “rolling rule regime” in which collaborative participation and sophisticated collective rationality are actually realized, legalists see the absence of anything resembling “law.”²⁹² Consider the changing shape of notice and comment. Its domain has been as open to interpretation as its utility and procedural character.²⁹³ What a court should expect of an agency in the form of rationalization between its stated means and ends,²⁹⁴ explanations regarding means not taken,²⁹⁵ and an openness of mind to the arguments of affected

curtail party rights to influence policy judgments in formal hearings).

292. Compare Dorf & Sabel, *Democratic Experimentalism*, *supra* note 3, at 374, with William T. Mayton, *A Concept of a Rule and the “Substantial Impact” Test in Rulemaking*, 33 EMORY L.J. 889, 893 (1984). Dorf and Sabel note the “recent spread of forms of self-, state, and federal environmental regulation whose experimentalist features may be cohering into a system of learning by monitoring by a peer inspectorate” instead of a governmental regulator given the inherent inability of the latter to actually execute an experimentalist rule regime. Dorf & Sabel, *Democratic Experimentalism*, *supra* note 3, at 374. Mayton argues that

no formal statement of a rule and of the sanction necessary to make that rule effective is necessary in agency lawmaking. Instead, the agency can, as it is said, regulated by means of “a raised eyebrow.”

For instance, since an agency, unlike Congress, possesses judicial power, it can informally suggest the “policy” that it is likely to apply in an adjudication. At that point the regulated sector understands the likely result should it be so imprudent as to act contrary to that policy.

Mayton, *supra*, at 893 (internal citations omitted). In different terms, democratic experimentalists take the publicity ideal as the one true basis for the authority of administrative rules constructed through expertise, even going so far as to invoke the ancient, humanist theories of political personhood as trumps of the total absence of participation. Cf. Seidenfeld, *supra* note 250, at 1554-59. Legalists, inspired by the structure of judicial authority itself, find themselves having to subordinate the publicity ideal (and ancient liberty) to the fair handling of individuated entitlements, sometimes even going so far as to invoke the teachings of natural rights foundationalism. See Ronald J. Krotoszynski, Jr., *On the Danger of Wearing Two Hats: Mistretta and Morrison Revisited*, 38 WM. & MARY L. REV. 417, 429-35 (1997).

293. Prior to 1967, rulemakings were not generally subject to challenge as such unless and until some form of enforcement action was begun. See *Abbott Labs. v. Gardner*, 387 U.S. 136, 156 (1967).

294. Compare *Independent U.S. Tanker Owners Comm. v. Dole*, 809 F.2d 847 (D.C. Cir. 1987) (invalidating rulemaking), with *Automotive Parts & Accessories Ass’n v. Boyd*, 407 F.2d 330 (D.C. Cir. 1968) (reviewing agency’s statement of basis and purpose). The *Dole* court noted five stated objectives of the statute and reasoned that the “statement of basis and purpose fails to give an adequate account of how the . . . rule serves these objectives and why alternative measures were rejected in light of them.” *Dole*, 809 F.2d at 852. The *Boyd* court, however, stated that “[t]he paramount objective is to see whether the agency, given an essentially legislative task to perform, has carried it out in a manner calculated to negate the dangers of arbitrariness and irrationality in the formulation of rules for general application in the future.” *Boyd*, 407 F.2d at 338. Indeed, different answers have been given even as to the role and purpose of comments to these ends. Compare *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 266 (2d Cir. 1977) (invalidating notice and comment rule as applied by reasoning that “[t]o suppress meaningful comment by failure to disclose the basic data relied upon is akin to rejecting comment altogether”), with *Rybachek v. EPA*, 904 F.2d 1276, 1281 (9th Cir. 1990). The *Rybachek* court held that

[n]othing prohibits the Agency from adding supporting documentation for a final rule in response to public comments. In fact, adherence to [that] view might result in the [Agency’s] never being able to issue a final rule capable of standing up to review: every time [it] responded to public comment . . . it would trigger a new comment period.

Rybachek, 904 F.2d at 1281.

295. Compare *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 56 (1983)

factions or individuals,²⁹⁶ have all been given deeply conflicted answers over the years.²⁹⁷ Why to expect all of it has been given just as many conflicting answers. To the legalist, court-driven “ossification” of the administrative process is righteous; it protects liberty because it holds up legal change and breaks it into definite phases.²⁹⁸ To the experimentalist, it shames the Act itself.²⁹⁹ SEC’s consultative processes of the late 1930s³⁰⁰ share nothing in

(holding agency erred in failing to analyze adequately obvious alternatives to proposed rule), *with Id.* at 59 (Rehnquist, J., concurring in part and dissenting in part) (arguing “change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency’s reappraisal of the costs and benefits of its programs and regulations”).

296. *Compare* *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 54 (D.C. Cir. 1977) (invalidating a rulemaking in which off-the-record conversations pivotal to outcome took place), *with* *C & W Fish Co. v. Fox*, 931 F.2d 1556, 1565 (D.C. Cir. 1991) (finding that political predisposition toward position prior to serving in agency engaged in rulemaking thereon does not necessarily reflect “unalterably closed mind”). The *Home Box Office* Court reasoned that “[e]ven the possibility that there is here one administrative record for the public and another for the [agency] and those ‘in the know’ is intolerable.” *Home Box Office*, 567 F.2d at 54. The *Fox* court, on the other hand, held that “[a]n administrator’s presence within an agency reflects the political judgment of the President and the Senate. . . . A Commission’s view of what is best in the public interest may change from time to time. Commissions themselves change, underlying philosophies differ, and experience often dictates change.” *Fox*, 931 F.2d at 1565.

297. *Compare* *Am. Med. Ass’n v. United States*, 887 F.2d 760, 768 (7th Cir. 1989) (placing importance on open rule-making process), *with* *Action Alliance of Senior Citizens v. Brown*, 846 F.2d 1449, 1455-56 (D.C. Cir. 1988) (stressing need to balance interests involved). The *American Medical Association* court held that “[t]he adequacy of notice [in § 553(c)] must be determined by a close examination of the facts of the particular proceeding which produced a challenged rule. . . . The crucial issue . . . is whether parties affected by a final rule were put on notice that ‘their interests [were] at stake.’” *Am. Med. Ass’n*, 887 F.2d at 768. The *Brown* court found that “[t]he task is essentially one of balancing the advantages of additional comment—improvement in the quality of rules, fairness for affected parties and facilitation of judicial review—against the burden on ‘the public interest in expedition and finality.’” *Brown*, 846 F.2d at 1455-56. Clearly each rulemaking is different and clearly agencies make mistakes that must, from time to time, be corrected. *See* *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1045 (D.C. Cir. 1978) (reviewing extensive rulemaking record). The court found several erroneous calculations to be at the heart of a rule-making decision and therefore rejected the “usual assumption that the Agency, when relying on supportable facts and permissible policy concerns and when obligated to explain itself, will rationally exercise the duties delegated to it by Congress.” *Id.* The model, however, has yet to arise that establishes definitively (1) what priority of ends exists in the notice and comment process generally; (2) how sophisticated a model of rationality ought to be adopted by courts engaging in the review of a rulemaking after the fact; or (3) what ends agencies’ analytical duties are to serve in rulemaking. *See supra* note 149; Phillip M. Kannan, *The Logical Outgrowth Doctrine in Rulemaking*, 48 ADMIN. L. REV. 213 (1996) (arguing no formula can capture all variables comprising well-ordered rulemaking under controlling precedents); Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 1992 DUKE L.J. 1385, 1396-1436 (noting several different causes of and tensions within analytical burdens placed upon agencies engaged in rulemakings).

298. *See generally* Robert A. Anthony & David A. Codevilla, *Pro-Ossification: A Harder Look at Agency Policy Statements*, 31 WAKE FOREST L. REV. 667 (1996); Antonin Scalia, *Vermont Yankee: The APA, The D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345.

299. *See* E. Donald Elliott, *Reinventing Rulemaking*, 41 DUKE L.J. 1490, 1492 (1992).

What was once (perhaps) a means for securing public input into agency decisions has become today primarily a method for compiling a record for judicial review. No administrator in Washington turns to full-scale notice-and-comment rulemaking when she is genuinely interested in obtaining input from interested parties. Notice-and-comment rulemaking is to public participation as Japanese Kabuki theatre is to human passions

Id.

common with notice and comment today, and yet share everything in common with bold experimental hybrids like the EPA's "Project XL."³⁰¹ The two advocates construe the notice and comment provisions as a reflection of one arrangement of the separation of powers or the other, usually ignoring the troublesome ambiguities of the APA's compromised text structuring the procedure.³⁰²

As late as the mid-1970s, however, judicial review of "informal rulemakings" that had not been structured by agencies to resemble a "process," i.e., not reduced to a determinate "proposal" eliciting "comment" comprising an exclusive "record," was still in need of significant conceptual maturation. See William F. Pederson, *Formal Records and Informal Rulemakings*, 85 YALE L.J. 38 (1975). But cf. LAWSON, *supra* note 118, at 268. "The APA originally contemplated that judges would overturn agency rules only when those rules were patently absurd—a determination that could be made simply by examining the rules. No elaborate 'record' for review was needed, because judges were not expected to look very closely at the agencies' work product." *Id.* As agencies shifted more of their resources and policymaking capital into these informal rulemakings (away from formal adjudications), legalists sought and obtained adapted, fuller doctrines for the control of notice and comment as a procedure. All of the prongs of Section 553 were enhanced, made more exacting and fully enforceable. Cf. *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 252 (2d Cir. 1977).

It is not in keeping with the rational process to leave vital questions, raised by comments which are of cogent materiality, completely unanswered. The agencies certainly have a good deal of discretion in expressing the basis of a rule, but the agencies do not have quite the prerogative of obscurantism reserved to legislatures.

Id.

300. See *supra* notes 253-73 and accompanying text.

301. Project XL was directly influenced by the pragmatic and collaborative spirit within the EPA during the Clinton Administration. Many experimentalists, among them several democratic experimentalists, now regard it as a failure. See Dorf & Sabel, *Democratic Experimentalism*, *supra* note 3, at 382-88. See generally Rena Steinzor, *Reinventing Regulation: The Dangerous Journey from Command to Self-Regulation*, 22 HARV. ENV. L. REV. 103 (1998); Carol Weissner, *Regulatory Innovation: Lessons Learned from EPA's Project XL and Three Minnesota Project XL Pilots*, 32 ENV. L. REP. 10075 (2002) (discussing substance of Project XL and providing post-mortem). Truly "consultative" or "adaptive" regulatory regimes can never be planned *ex ante* and probably will not seem rational if viewed piecemeal. Thus, to the extent that any particular "rulemaking" is collaborative in this sense, it will not necessarily be rationalizable in terms of generalizations employed, objectives set, or facts found. Either agencies will be free to generate provisional rules through genuinely collaborative processes—processes that value individual input without being immobilized by it—or they will be subject to judicial review that prioritizes formal starting points (in "Notices of Proposed Rulemaking"), pre-existing entitlements, procedural linearity, and antecedent objectives. But they will not be both.

The more contemporary institutional theorists learn about truly "adaptive management" of the sort that experimentalists advocate, the more they find it at odds with traditional concepts of "the rule of law." "Adaptive management" refers to the growing body of theory on governance and institutions now routinely invoked by democratic experimentalists in support of the commitments described in Part I. See generally CARL WALTERS, *ADAPTIVE MANAGEMENT OF RENEWABLE RESOURCES* (2001) (providing introduction to field as science).

302. See *supra* notes 279-86 and accompanying text. On this the work of Professor Robert Anthony bears special note. His concept of APA rules—a category that ought to be subject to notice and comment procedures or not be vested with any validity at all—is the lineal descendant of Hewart, Dicey, Pound, and the ABA of the 1930s. It encompasses many if not all of what we have called "auxiliary" rules ("interpretive" and "procedural" rules' and "general statements of policy"). See, e.g., Robert A. Anthony, "Interpretive" Rules, "Legislative" Rules and "Spurious" Rules: *Lifting the Smog*, 8 ADMIN. L.J. AM. U. 1 (1994); Robert A. Anthony, "Well You Want the Permit, Don't You?" *Agency Efforts to Make Nonlegislative Documents Bind the Public*, 44 ADMIN. L. REV. 31 (1992); Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 13-20 (1990) (criticizing EPA specifically as circumventing § 553(c)).

Most especially, controversy surrounds notice and comment's domain, its intended target. Which rules may only be made through notice and comment? Scores of administrative lawyers have tackled and ultimately walked away from that question, from the problematic theorization of covered "regulations" (which are to be set in stone) as distinct from that "spectrum" of all other kinds of rules (which are not).³⁰³

And there is still one further aspect of administrative law defined by the legalist/experimentalist conflict. The deference doctrine's cluttered tenets have come to define APA practice as a whole. What renders an agency norm authoritative and why—what distinguishes it as one the judiciary must in essence obey—is today the pivotal question surrounding agencies' rulemaking authority.³⁰⁴ Yet what doctrinal structure or clause of the APA that applies to

We need not isolate Professor Anthony, as the Administrative Law Review boasts a frequent "rethinking" of the notion of notice and comment. See *Interpretive Rules Symposium*, 53 ADMIN. L. REV. 1303-52 (2001) (betraying difficulties posed to administrative lawyers by compromise described in Part V); cf. Scalia, *supra* note 298, at 382-86 (characterizing this "natal defect" of APA).

303. While a comprehensive bibliography would be absurdly long, the theme has remained generally steady among academics. It is the thirty year old deduction that more and tougher procedural "checks" on agencies making "regulations" (those subject to APA requirements and judicial review) provide incentives for fewer such regulations and more "exempt rules." Cf. Robert W. Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 CAL. L. REV. 1276, 1312-13 (1972). "In practice . . . the principal effect of imposing rulemaking on a record has often been the dilution of the regulatory process rather than the protection of persons from arbitrary action." *Id.* What has changed has been the recommended response. See, e.g. Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381 (discussing greater publicity through various enhanced "notice" doctrines); Michael Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 MICH. L. REV. 520 (1977) (commenting on hybrid procedures); Charles Koch, *Public Procedures for the Promulgation of Interpretive Rules and General Statements of Policy*, 64 GEO. L.J. 1047 (1976) (dealing with hybrid procedures); Mayton, *supra* note 292, at 895-901 (considering increased scope of judicial review); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995) (detailing retrenchment of doctrines of judicial review to encourage agency experimentation with different rule and policy formulations before finalizing either of them); Kevin W. Saunders, *Interpretive Rules With Legislative Effect: An Analysis and A Proposal for Public Participation*, 1986 DUKE L.J. 346 (discussing increased scope of judicial review); Peter L. Strauss, *Rules, Adjudications, and Other Sources of Law in an Executive Department: Reflections on the Interior Department's Administration of the Mining Law*, 74 COLUM. L. REV. 1231, 1245-46 (1974) (discussing legislative updating). Some commentators have focused exclusively upon particular agencies and particular types of exempt rules. See Anthony, *infra* note 309 (discussing EPA rules); Boer, *supra* note 136 (considering EPA rules); Linda Galler, *Emerging Standard for Judicial Review of IRS Revenue Rulings*, 72 B.U. L. REV. 841 (1992); Donna M. Nagy, *Judicial Reliance on Regulatory Interpretations in SEC No-Action Letters: Current Problems and a Proposed Framework*, 83 CORNELL L. REV. 921 (1998).

304. Indeed, the question administrative lawyers have concerned themselves with the most in the last two decades goes to the reasons that courts have (and do not have) for deferring to agencies in the making of administrative rules. Justice Stevens's opinion in *Chevron* has acted like a flame for a generation of administrative law moths. This, of course, is not to imply it is without its puzzles (or importance to the lower courts). See E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984; Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1 (1998); Merrill & Watts, *supra* note 246, at 587-90. But it is an extremely under-determinative analysis of administrative authority—and was the day it was written. See Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093 (1987). Yet, with some exceptions,

the different parts of an agency's rule cascade, and why, simply cannot be definitively answered. May a particularly creative "interpretation" of a regulation come only through notice and comment? While some courts have weighed in, the real answer is deeply unclear.³⁰⁵ The Supreme Court remains as cryptic as it can possibly be on such questions because too much rides on their answers. The only way in which such structurally enormous questions ever are addressed is where the answers have no legal significance.³⁰⁶ But of course "deference" is rather meaningless without some specification of the *point* of deferring—a matter on which the courts have proven profoundly divided. Next to that, the mechanics of *Chevron*'s steps themselves seem trite. What concept of liberty and whether it is power or authority at stake are the real questions dividing jurists in the deference debates.

B. Can Democratic Experimentalism Thrive?

The broad-based reform agenda introduced at the outset of this study fractures when the specifics of administrative power are brought in. For example, today's democratic experimentalists acknowledge and seek to shape rule cascades within the agencies.³⁰⁷ Legalists, by contrast, find most rule

most considerations of its puzzles take for granted that Justice Stevens's opinion is as full a theory as it purports to be. *But see* Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role*, 53 STAN. L. REV. 1 (2000).

305. *Cf.* Croley, *supra* note 198, at 121. The ancient concept of liberty and the political-scientific premises that implicate its destruction in the hands of technocrats confront the modern concept and its premises on this very question. *Id.* Croley argues that "[m]eaningful, ongoing participation in especially complicated rulemakings is very likely to be more expensive. . . . Rules that undergo repeated rounds of notice-and-comment require interested parties to stay abreast of a rule's development, and to respond to the agency's responses to comments it receives from other participants." *Id.*; Roger C. Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525, 526-27 (1972). Cramton contended that "[e]ffective participation in the administrative process, it is all too evident, is an enormously expensive undertaking. The persistent presence of skilled lawyers and experts in a wide variety of administrative contexts calls on scarce human resources and requires financial support of great magnitude." Cramton, *supra*, at 526-27. In short, the more costly "participation" in administration becomes, the less likely it will be the function of humanist or "ancient" motives and the more likely it will be that of self-regarding, "modern" ones. Peter H. Schuck, *Public Interest Groups and the Policy Process*, 37 PUB. ADMIN. REV. 132, 137-39 (1977).

306. For example, other than the debate as to the nature of administrative jurisgenerative authority, there was simply no reason for Justice Stevens' special concurrence in *Whitman v. American Trucking Ass'ns*, 531 U.S. 457 (2001). The unanimous holding reversing the D.C. Circuit's approach to the question of the EPA as a "delegated legislative authority" prompted Justice Stevens to register his disagreement with Justice Scalia's vocabulary on the matter. *See id.* at 488-90 (Stevens, J., concurring, joined by Souter, J.). While nomenclature was the overt disagreement, however, deeper divides were obviously just below the surface. One of the Court's most recent *Chevron* opinions, *Barnhart v. Walton*, illustrates this in how the application of *Chevron* divided the Court. *Barnhart v. Walton*, 122 S. Ct. 1265, 1270-72 (2002) (applying *Chevron* but emphasizing that agency's long-standing interpretation gives Court more reason to defer).

307. *See* Dorf & Sabel, *Democratic Experimentalism*, *supra* note 3, at 443-44 (noting experimentalists' attempts at shaping rule cascades in general terms). Most of the scholarship to this point has assumed the intractability of many of the dilemmas of bureaucratization. *Id.* at 444 (arguing that experimentalist agency coordinates expertise of others). The authors argue that agencies coordinates expertise "instead of attempting

cascades illegitimate, the deviant exception by which bureaucracy subverts “the rule of law” in the administrative state.³⁰⁸ However that dispute may be, real progress in the constructive interpretation of the APA will not come in any of the debates described here unless and until administrative lawyers come to grips with the essentially compromised nature of the Act. Its definitions, its precepts of administrative authority, and its overall structure all stem from a particularly opaque compromise. The broad-based reform coalition that today’s democratic experimentalists seek will remain a partisan agenda with legalist opponents unless and until the history of separating power traced here is injected into the debate.

Arguments between the two paradigms now routinely bracket the definitive concepts of liberty, power, and public-regarding functionality by moving directly to second-order questions like who must be afforded more “trust,” which APA channels must be made more “collaborative,” and what particular *use* of the pragmatic logic of rules should be made.³⁰⁹ On the other hand, the simplistic positing of a lineal heritage linking the institutions of Hamilton’s era and our own is pure artifice (as it was during the 1930s). Our institutions have all evolved from rich and complicated dialectical processes, not some timeless cultural ether called “the separation of powers.”³¹⁰ It has been the claim of this

to constitute themselves as a substitute for it, and their success reinforces rather than saps the democratic efficacy of the other institutions of government.” *Id.* But see Jody Freeman, *Collaborative Governance in the Administrative State*, 45 U.C.L.A. L. REV. 1 (1997).

308. See John Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. REV. 612, 645-49 (1996).

309. See, Karkkainen, *supra* note 3, at 263 (noting pragmatism of rules and rulemaking as indispensable part of agencies’ rational pursuit of public-regarding law). The author argues that “[c]onventional approaches to environmental regulation [by rulemaking] are nearing a dead end, limited by the capacity of regulators to acquire the information necessary to set regulatory standards and keep pace with rapid changes in knowledge, technology, and environmental conditions.” *Id.*; LEE, *supra* note 3, at 51-86 (arguing scientific knowledge of ecosystems conceptually inadequate in public policy where definitive objectives set and systematically pursued). Legalism, on the other hand, relies heavily on the pragmatic account of rules and rulemaking when it comes to the judiciary’s role in protecting modern liberty amid the seas of bureaucratic outputs. See Robert A. Anthony, *Interpretive Rules, Policies Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1355-59 (1992) (proposing adaptive standard for identifying “rules” that courts should prescriptively divert into § 553(c) processes upon petition for review); Charles H. Koch, Jr., *Public Procedures For the Promulgation of Interpretative Rules and General Statements of Policy*, 64 GEO. L.J. 1047 (1976) (proposing similar standard).

310. But cf. VILE, *supra* note 16, at 385-420. Professor Vile argues that “the reason the theory of the separation of powers remains significant . . . is because the problem it addresses is as salient now as it was in the seventeenth or eighteenth century.” *Id.* at 387. I have argued, however, that that problem—“how to control the power of government,”—is best viewed as something of an “essentially contested concept.” *Id.*; see W.B. GALLIE, *PHILOSOPHY AND THE HISTORICAL UNDERSTANDING* 157-91 (1964) (describing essentially contested concept as focal point for dialogue stretching across time through use of appraisive concepts). Indeed, much of what separates the present generation of legalists from experimentalists is one sense of the doctrine in particular: its political-scientific sense. See *supra* note 37. Experimentalism internalized and, today, subscribes to the essential veracity of the political-scientific critique that laid out the Federalist tradition’s cause-and-effect relationships. See *supra* notes 185-99 and accompanying text. Legalism, however, continued to regard Federalist political science as innately authoritative—immune from revision for essentially historicist

article that the competitive tension between legalism and experimentalism has been the signature dialectic of the post-APA separation of powers. I submit here that that dialectic is coming to the end of its usefulness.

What casts doubt on the viability of the democratic experimentalism of today is the current state of regulation a half-century after the APA's internal conflict was institutionalized. It has become almost too rich for "the People." At the very point that civic engagement has become the watchword of reform, regulatory technique has gotten to be extremely complicated. That is one of the side-effects of its being so incredibly well-studied by the academy (and the judiciary). Paradoxically, the values underlying knowledgeable rulemaking, specialization and functionality, and expert proficiency in law, all seem to undermine the civic humanist intentions of democratic experimentalism.³¹¹ They make it seem as though it demands too much of a harried citizen who has since taken on full time employment as consumer. Basically, democratic experimentalism's more rigorous (at times unrealistic) possibility conditions make it perhaps weaker as a paradigm in the face of strategic behavior by individuals and the enduring simplicity of its adversary: legalism.³¹²

reasons (all while ignoring evidence that Locke's "temporal" model of generality as a security to liberty is actually more than temporal, i.e., that it straitjackets the public in critical ways). See LOWI, *supra* note 27, at 298-313 (arguing legislatures would legislate more rules if lacking authority to create agencies); HORWITZ, TRANSFORMATION II, *supra* note 187, at 224. Horwitz argues that "[l]egalists from Dicey to Pound have been reluctant to confront th[e] difficulty that traditional rule of law ideas were dependent on a conception of legal generality that could flourish only in relatively simple and homogenous societies." HORWITZ, TRANSFORMATION II, *supra* note 187, at 224.

311. See LOUIS MENAND, THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA 440 (2001) (noting American pragmatism probably forged in this condition). Menand argued that the "pragmatists wanted a social organism that permitted a greater (though by no means unrestricted) margin for difference, but not just for the sake of difference. . . . They wanted to create more social room for error because they thought this would give good outcomes a better chance to emerge." *Id.* Later pragmatists' faith in the transformative potential of participatory deliberation comes to look naïve in the face of decayed conceptions of "virtue" and "community," though, especially when those are caused by pervasive dogmas, strategic individualism, and humanism's modern face, "toleration." *Cf. id.* Menand wrote that:

Holmes, James, and Dewey—along with, it is important to remember, many people who did not share their philosophical views—helped to make tolerance an official virtue in modern America.

But the intellectual grounds for that virtue changed after 1945. Pragmatism was designed to make it harder for people to be driven to violence by their beliefs. This sounds unexceptionable, and in many ways it is. But it is important to see that the idea is a compromise.

Id.; BURTT, *supra* note 60; see WIEBE, *supra* note 175, at 151-54 (arguing Dewey and James' pragmatism unwittingly encouraged bureaucratization throughout 1900s and 1910s because it was co-opted by participants in larger debates).

312. Thus, while each of the accounts noted in footnotes 3 and 4 concentrate on their own "case studies" and find much to applaud, the *generalizability* of democratic experimentalism hinges not just on the phenomenology of those cases, but also on the essential veracity of the connections the authors draw between them. It is these connections that I find highly tenuous.

While legalism has perennially failed to construct any viable alternative model of agencies' jurisgenerative function, it has consistently disparaged their power—and not just their "hard," coercive power, but their "soft," persuasive power as well. See *supra* note 48. Of course, that has been a leverage with a shifting fulcrum. For as technocratic rationality amassed substantial legitimacy, judicial review turned increasingly on whether or not an agency had gotten it "wrong" as a rational matter. *Cf. DUXBURY, supra* note

VII. CONCLUSION

The most basic distinction in “the separation of powers” today is one of affect, probably psychological at root. It divides juridical and pragmatic attitudes toward jurisgenesis, attitudes that influence beliefs about citizenship, participation, community, and collective rationality at the same time they shape our society’s concepts of rules, legality, and authority. The fragments of the separation of powers doctrine articulated here have provided the tools for those affects. The APA is a testament of their conflict. Unwittingly, legalists and experimentalists have actually both contributed to the bureaucratization of the American state through their creation of and subsequent contests over the APA. That is a condition neither would have chosen in the absence of the other. But then those are the politics of a Hobbesian age.

216, at 93-97, 149-58, 165-76; SHAMIR, *supra* note 228, at 76-81, 99-129. Because this required courts to decide whether the agency’s beliefs were rational—a matter for which courts had *always* been peculiarly ill-suited to judge independently—it became increasingly difficult to find any particular agency output “arbitrary.” See *supra* notes 228-34 and accompanying text. Nonetheless, the legalist impetus has kept vital the adversarial model of fact-finding, the Hamiltonian ideal of temporally definite jurisgenesis, and the equilibration of power among the (constantly changing) elements of government.

Lead Industries Ass’n v. EPA is an especially good example of how the ideal of *complex* rationality ultimately outran the judiciary’s actual ability to use it as a critical-analytical tool. *Lead Indus. Ass’n v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980); see *supra* note 149. There, the review of EPA’s setting of a National Ambient Air Quality Standard under the Clean Air Act—a rulemaking of immense complexity and significance—produced a doctrinal leap forward, indeed one slightly ahead of its time. *Lead Industries*, 647 F.2d at 1146. Anticipating by four years the strong deference to agency choices outlined in *Chevron*, the *Lead Industries* court made clear its pronounced reticence toward a review function that had as its ostensible purpose verifying the means/ends rationality of the rules at issue. See *id.*; *Chevron, USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). As the *Lead Industries* court explained, “we would be less than candid if we failed to acknowledge that we approach the task of examining some of the complex scientific issues presented in cases of this sort with some diffidence.” *Lead Industries*, 647 F.2d at 1146. Quite obviously, if it is expertise that grounds the “rationality” of beliefs leading to a rule’s formulation, and not the “fairness” of the procedures used to construct its generalizations, the rationality ideal easily becomes inaccessible to the generalists who are Article III judges. The costs of that inaccessibility were high: the rationality ideal became a dwindling source of power in judicial review of agency outputs because it simply became too rigorous for the judiciary’s own good. Not surprisingly, with cases such as *MCI Telecommunications Corp. v. American Telegraph & Telephone Co.* and *United States v. Mead Corp.*, the Court has rehabilitated the analysis back toward questions of congressional intent—a matter on which courts speak with more authority. *MCI Telecomm. Corp. v. Am. Telegraph & Telephone Co.*, 512 U.S. 218 (1994); *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).